



UNIVERSIDADE CATÓLICA PORTUGUESA

RETHINKING ACCESS BY PRIVATE PARTIES
TO THE COURT OF JUSTICE OF THE EUROPEAN UNION:
JUDICIAL REVIEW OF UNION ACTS
BEFORE AND AFTER THE LISBON TREATY

Tese apresentada à Universidade Católica Portuguesa para a obtenção do grau de doutor em
Direito - Ciências Jurídico-Comunitárias

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PREFACE

The present dissertation corresponds to the final stage of the *Programa de Mestrado e Doutoramento em Ciência Jurídico-Públicas - Vertente Direito da União Europeia*, initiated at *Faculdade de Direito da Universidade Católica Portuguesa*, in Lisbon, 2003. It is submitted as a PhD. in Public Law - European Union Law, within the recently therein created Católica Global School of Law.

Before reading the text, attention is drawn to the following “editorial” and methodological options:

- a) The dissertation includes apart from the main text, one table of cases, one table of legislation, one table of abbreviations, two annexes, the abstract and the list of bibliographic references;
- b) Apart from the introduction and conclusion, the dissertation is divided in two main parts, each of them divided in three chapters;
- c) The numbering of the chapters is autonomous in each part;
- d) Footnotes are numbered sequentially, but due to their substantial number, re-counting starts in part II;
- e) For the sake of simplification, clarity and consistency, all bibliographic references included in footnotes follow the same pattern: AUTHOR(S)’ LAST NAME, *Title* (for books) or “Title” (for articles/working papers), year of publication, relevant page(s);
- f) Bibliographic references in the same footnote are indicated by chronological order (starting with the oldest), and in case of references of the same year by alphabetical order of the author(s)’ name;
- g) Full bibliographic references may be found in the final list of references attached to the dissertation;
- h) Cases are referred to in the main text according to their short designation, and are identified in footnotes only the first time they are mentioned in the text;
- i) In footnotes, references to cases are included in full, and said references may also be found in the table of cases;
- j) Cases are indicated in footnotes by chronological order following the corresponding number of process regardless of the court where they were decided and the date of the final decision;
- k) All the cases cited are available in the CJEU’s website (www.curia.eu) and some of them are still pending publication in the European Court Reports;
- l) Legal acts are referred to in short and full reference is included in the table of legislation;

- m) The use of italics is restricted to words, sentences or quotations in foreign languages and/or to highlight concepts or ideas, and are therefore of the sole responsibility of the author;
- n) Quotations are made in the original language and identified in quotation marks;
- o) For the sake of simplification the correspondence between the old and current numbering of the Treaty provisions is not made in the text. The reader should be aware of the Tables of Correspondence annexed to the Amsterdam and Lisbon Treaties. Annex II to the dissertation includes a table with the most cited provisions throughout the text.
- p) The academic research which grounds this dissertation was concluded around the end of the first semester of 2012.

This dissertation is the result of several years of committed academic research, some travelling – I will always remember the time spent in Germany, New York and London, as well as the trips to Madrid and Luxembourg –, hard working days and sleepless nights. Such work would not have been possible without the love and friendship of many people amongst family, friends and colleagues. Despite the impossibility of naming every one of them – they know who they are! – a “collective” (but sincere) acknowledgment for their support is nonetheless due. Furthermore, I would like to thank in particular Professor Rui Medeiros from *Faculdade de Direito da Universidade Católica Portuguesa*, Professor Piet Eeckhout from University College London, and Professor Miguel Poiars Maduro from *Instituto Universitario Europeo* for their contribution, support and patience during all these years. A special thank you is also due to my parents for many years of hard parenting work and not enough recognition. Lastly, my final word is for my husband, Miguel, for brightening up my days and making my life so much better.

Lisbon, September 28, 2012

Patrícia Fragoso Martins

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Council Decision 2010/232/CFSP, of 26 April 2010, renewing restrictive measures against Burma/Myanmar, OJ L 105, 27/4/2010, p. 22-108.

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The Stockholm Programme: An Open And Secure Europe Serving And Protecting Citizens, 2010/C 115/01, OJ C 115, 4/5/2010, p. 1-38.

TABLE OF ABBREVIATIONS

AG	Advocate General
AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CJ	Court of Justice
CT	Constitutional Treaty
IGC	Intergovernmental Conference
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EctHR	European Court of Human Rights
EPC	European Political Cooperation
EU	European Union
GG	General Court
ICCPR	International Covenant on Civil and Political Rights
JHA	Justice and Home Affairs
PJCCM	Police and Judicial Cooperation in Criminal Matters
TEAEC	Treaty establishing the European Atomic Energy Community
TEC	Treaty establishing the European Community
TECSC	Treaty establishing the European Coal and Steel Community
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU -	Treaty on the Functioning of the European Union
UDHR	Universal Declaration on Human Rights
UN	United Nations

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Nulli vendemus, nulli negabimus aut differemus rectum aut justitiam.

Magna Charta Libertatum, 1215, Clause 40

“Be never so high, the Law is above you.”

Dr. Thomas Fuller, *Gnomologia: Adagies and Proverbs*, 1733, Sentence no. 943

INTRODUCTION

1. From the “Complete System of Legal Remedies and Procedures” to the Need to Ensure Effective Judicial Protection of Private Parties

I. The spring of 1986 – the year of the Portuguese accession to the European Communities – turned out to be a decisive season for the legal integration of the European Union (EU), with the Court of Justice of the European Union (CJEU) delivering two key verdicts. Firstly, in April of said year, the CJEU rendered one of its most cited and important decisions in the case which opposed the *Parti écologiste* “*Les Verts*” to the European Parliament regarding two budgetary decisions of Parliament concerning the financing of information campaigns within the context of the European Parliament’s elections of 1984. The CJEU’s ruling in the case is said to constitute “both a cornerstone and a milestone”¹ in the European case-law and became known simply as *Les Verts*.² As is well known, the action presented the Court with several issues which would continue to “filter down through the case law.”³ Among them, there were two central questions regarding the admissibility of actions for annulment brought by private parties before the Union courts: on the one hand, the recognition of the passive *locus standi* of the European Parliament, and on the other hand, the obstacles posed by the notion of direct and individual concern of private parties, currently set forth in Article 263(4) of the Treaty on the Functioning of the European Union (TFEU).

Regarding the first question, the ruling of the CJEU included a famous statement according to which the European Community/Union is:

“[a] Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the *basic constitutional charter*, the Treaty (emphasis added).”⁴

Les Verts stands thus as the first time that the CJEU expressly drew attention to the constitutional nature of the Treaty.⁵ This famous statement would later be repeated in subsequent judgments⁶ and Opinions of the Court⁷, as well as Opinions of several Advocate Generals (AGs)⁸,

¹ LENAERTS, “The Basic Constitutional Charter of a Community Based on the Rule of Law”, 2010, at 295, noting that the significance of *Les Verts* is multi-faceted and that it is striking that so many points of European law can be found in one case. JACOBS referred to it as a “judgment of great constitutional significance.” See JACOBS, “Constitutional Control of European Elections”, 1994, at 1054.

² Case 294/83, *Les Verts/Parliament*, [1986] ECR I-1339. For an overview of the historical context of the decision see ALEMANNO, “What Has Been, and What Could Be, Thirty Years after *Les Verts/European Parliament*”, 2010, at 324 *et seq.*

³ LENAERTS, “The Basic Constitutional Charter of a Community Based on the Rule of Law”, 2010, at 296, mentioning the (i) legal capacity of the applicant to pursue action despite its dissolution and subsequent merger into a new political association, (ii) the Court’s power to review conditions for admissibility of an action for annulment on its own motion, and the (iii) scope of budgetary powers wielded by the European Parliament.

⁴ Para. 23.

⁵ Considering that the use of the small “c” was not probably unintended and would make a big difference in the doctrinal understanding of the process of legal integration see WALKER, “Opening or Closure?”, 2010, at 333. Noting the parallel with the term “*charte octroyée*” used in the nineteenth century see JACQUÉ, “*Les Verts v The European Parliament*”, 2010, at 319. The author considers that this constitutional approach constitutes until today the essential contribution of *Les Verts*. *Ibid.*, at 323.

⁶ E.g., Case 2/88, *Criminal proceedings against Zwartveld and others*, [1990] ECR I-3365, para. 16; Case C-314/91, *Weber/Parliament*, [1993] ECR I-1093, para. 8; Case C-15/00, *Commission/EIB*, [2003] ECR I-7281, para. 75; Case T-306/01, *Yusuf and Al Barakat International Foundation/Council and Commission*, [2005] ECR II-3533, para. 260; Case T-

and would prove to be one of the most controversial ideas regarding the nature of European integration.⁹ For purposes of the present study, it is important to highlight that the constitutional nature of the Union was associated with the proclamation of the principle of the rule of law – well before its inclusion in Article 6 of Treaty on European Union (TEU) in Maastricht – and the latter set down the corresponding requirements of judicial protection in the Community.¹⁰ In fact, in light of the assumption that *the Community is based on the rule of law*, the CJEU considered that the Treaty established a “complete system of legal remedies and procedures”¹¹ designed to allow it to review the legality of the measures adopted by the European institutions and the Member States. Within this *complete system of legal remedies and procedures*, the Court clarified that, pursuant to what is currently Article 263(4) TFEU, where the Union institutions were responsible for the implementation of Union measures, natural or legal persons could bring a *direct action* before the CJEU against implementing measures which were addressed to them or which were of direct and individual concern to them and, in support of such an action, *plead the illegality* of the general measure on which they were based. In contrast, if implementation was a matter for the national authorities, such persons might *plead the invalidity* of general measures *before the national courts* and lead the latter to request the CJEU for a *preliminary ruling*.

On the basis of these considerations and in parallel with what would be later decided in *Chernobyl*¹², the CJEU filled in a *legal vacuum* and acknowledged the possibility of the European Parliament to figure as a defendant in an action for annulment brought against a measure clearly “intended to have legal effects *vis-à-vis* third parties.”¹³ In fact, the Court added:

“[a]n interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a *result contrary*

315/01, *Kadi/Council and Commission*, [2005] ECR II-3649, para. 209.

⁹ See Opinion 1/91, [1991] ECR I-6079, paras. 20-21. See also Opinion 1/76, [1977] ECR 741, although one can say that the specific nature of the integration process determined the adoption of a special notion of *constitution* not identical to the modern states constitutions. For further developments see WALKER, “Opening or Closure?”, 2010, at 336 *et seq.*

⁸ See Opinions of AG RUIZ-JARABO COLOMER in Case C-315/99 P, *Ismieri Europa/Court of Auditors*, [2001] ECR I-5281, para. 39 and Case C-249/02, *Portugal/Commission*, [2004] ECR I-10717, para. 40; and Opinion of AG MADURO in Case C-160/03, *Spain/Eurojust*, [2005] ECR I-2077, para. 15.

⁹ See e.g., WEILER, *The Constitution of Europe*, 1999, at 10-101; CRAIG, “Constitutions, Constitutionalism and the European Union”, 2001, 125-150; DASHWOOD, “The Relationship between the Member States and the European Community/European Union”, 2004, at 355-381; JACOBS, “The Evolution of the European Legal Order”, 2004, 303-316; LENAERTS; GERARD, “The Structure of the Union According to the Constitution for Europe”, 2004, 289-322.

¹⁰ LENAERTS, “The Basic Constitutional Charter of a Community Based on the Rule of Law”, 2010 at 303. The author notes that by stating that the Treaties were the basic constitutional charter of the Community the CJEU came close to the idea of Chief Justice Marshall of the U.S. Supreme Court in *McCulloch v. Maryland* in which he proclaimed that “we must never forget that it is a constitution we are expounding” (*McCulloch v. Maryland*, 17 US (4 Wheat.) 316, 407 (1819). *Ibid.*, at 298.

¹¹ Noting that this was the first unequivocal mention in the CJEU’s case-law to the “complete nature of the system of remedies and procedures” in the EU see BERROD; MARIATTE, “Le pourvoi dans l’affaire *Unión de Pequeños Agricultores* c/Conseil”, 2002, at 9.

¹² Case 70/88, *Parliament/Council (Chernobyl)*, [1991] ECR I-4529. Noting that the European Parliament did not insist on the inadmissibility of the action surely convinced that a positive decision in *Les Verts* would pave the way for the recognition of its standing to sue in a subsequent case see JACQUÉ, “*Les Verts v The European Parliament*”, 2010, at 317. However, the *Chernobyl* decision does not seem to have been equally obvious to the Court, as in the so-called *Comitology* case, the CJEU refused the Parliament’s standing just one year after the pronouncement in *Les Verts* (Case 302/87, *Parliament/Council (Comitology)*, [1988] ECR 5615). JACQUÉ noted that acknowledging the passive *locus standi* of Parliament would be less problematic from the point of view of Member States and would not encounter resistance from Parliament. See JACQUÉ, “Arrêt du 13 de avril 1986, *Parti écologiste ‘Les Verts’ c. Parlement européen*”, 1986, at 503.

¹³ Para. 27.

both to the spirit of the Treaty as expressed in Article 164 and to its system” (emphasis added).¹⁴

Furthermore, the *Les Verts* decision was noteworthy because of the interpretation of the notions of direct and individual concern established in Article 263(4) TFEU. In fact, had the CJEU adhered strictly to its previous case-law on this matter, the applicants would have not qualified as *individually concerned*.¹⁵ However, the Court considered that if only the represented political groups were considered as such, this “would give rise to inequality in the protection afforded by the Court to the various groupings competing in the same elections”¹⁶, and therefore admitted the action. By doing this the CJEU “penetrated into the heart of the constitutional organization of democratic life”¹⁷ of the EU.

Although questioning the legitimacy of the Court’s decision from a political and legal point of view¹⁸, scholars generally welcomed the *Les Verts* jurisprudence and considered that through the combination of the competences of national and Union courts, the Treaties established a system of courts and remedies *extremely effective*, which ensured private parties a *high level* of protection of the rights granted by the Union legal order.¹⁹ This idea has been considered the “jurisprudential and doctrinal heart”²⁰ of the *Les Verts* decision. Thus, the Court considered that the European judicial system was both complete and coherent. It was *complete* in the sense that the combination of legal remedies and procedures operating before the Union courts and national courts ensured review of legality *in all circumstances*. And it was coherent because the competences of both judiciaries were defined according to the allocation of powers established in the Treaties.²¹ This holds true for both the Union institutions and the Member States.²²

II. The year of 1986 would, nonetheless, bring along one other landmark decision of the CJEU, whose impact on the construction of said *complete system of legal remedies and procedures* should not be underestimated. In fact, in May of said year, faced with a batch of questions relating to the discriminatory treatment between men and women in a situation involving the hiring of police-women, the CJEU considered in the *Johnston*²³ case that Article 6 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women²⁴ required Member States “to introduce into their internal legal systems such

¹⁴ Para. 25.

¹⁵ LENAERTS, “The Basic Constitutional Charter of a Community Based on the Rule of Law”, 2010, at 296. See also Joined Cases T-222, 327 and 329/99, *Martinez and others/Parliament*, [2001] ECR II-2823, paras. 64-75.

¹⁶ Paras. 35-36. AG MANCINI had reached the opposite conclusion in the case, i.e. that *Les Verts* were not individually concerned by the challenged acts.

¹⁷ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 18.

¹⁸ One should note that *Les Verts* was delivered a few months after the signing of the Single European Act in which Member States did not agree on providing the European Parliament with standing before the CJEU, which was only introduced in the Treaties later on with the Maastricht Treaty. In Nice, Parliament was upgraded to the level of privileged applicant. See JACOBS, “Constitutional Control of European Elections”, 2004, at 1056; ARNULL, *The European Union and its Court of Justice*, 2006, at 63-69.

¹⁹ VILAÇA “O sistema judicial comunitário e a protecção dos particulares”, 1990, at 50.

²⁰ LENAERTS, “The Basic Constitutional Charter of a Community Based on the Rule of Law”, 2010, at 297.

²¹ *Ibid.*, at 304.

²² Thus, it is not surprising that regarding the challenge of Member State action the subsequent case-law of the Court on infringement proceedings and preliminary references is still considered a legacy from *Les Verts*.

²³ Case 222/84, *Johnston/Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651.

²⁴ OJ L 39, 14/2/1976, p. 40-42.

measures as are needed to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process'.²⁵ Consequently, it followed from that provision that:

“[M]ember States must take measures which are *sufficiently effective to achieve the aim of the directive* and that they must ensure that the rights thus conferred *may be effectively relied upon before the national courts by the persons concerned* (emphasis added).”²⁶

Moreover, the Court added that the requirement of judicial control reflected a *general principle of law* which underlied the common constitutional traditions of Member States, and was also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR). The principles on which that Convention was based must be taken into consideration by Union law.²⁷ Taking into account these considerations, the CJEU considered that Article 6 of said directive should be interpreted in light of such general principle – that of *effective judicial protection* –, which meant that any violation of the principle of equal treatment should give rise to an *effective remedy* obtained in a competent court. *In casu*, this affirmation implied that a provision which required a certificate to be treated as conclusive evidence that the conditions for derogating from the principle of equal treatment were fulfilled, barring the possibility of an individual of asserting by judicial process the rights conferred by the directive, was contrary to the principle of effective judicial control.

The *Johnston* ruling constitutes until today a milestone in the CJEU’s case-law²⁸ not so much due to the interpretation of the provisions of the directive on sex discrimination, or the success of Marguerite Johnston’s cause – who only partially won the case –, but because of the importance given, in the economy of the decision, to the right to effective judicial protection of private parties, reflected in the Article 6 of said directive, which was also considered to produce direct effect.²⁹ This judgment – which associated for the future the principle of *effectiveness* of EU law with the principle of *judicial protection*³⁰ – clearly stated that Union law confers rights on individuals not only at a *substantive* level but at a *procedural* level as well. The CJEU stated that the right to effective judicial protection should not be considered a rhetoric formula but constituted the expression of a general principle of law fully integrated into the European Union legal order as a *principle* based on the common constitutional traditions of Member States, and as a *fundamental right* protected by Articles 6 and 13 ECHR. Although not expressly established in the Treaties, such principle should be considered at the same normative level as the Treaties themselves and, thus, as an essential part of the European Union *constitution*.³¹

²⁵ Para. 17.

²⁶ *Ibid.*

²⁷ Para. 18. In Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891 the CJEU held that under Article 6 of said directive “Member States are required to adopt measures which are *sufficiently effective* to achieve the objective of the directive and to ensure that those measures may in fact *be relied on before the national courts* by the persons concerned (para. 14).”

²⁸ TRIDIMAS, *The General Principles of EU law*, 2006, at 444, noting that the ruling was particularly notable because the rule excluding access to the courts at stake pertained to matters of national security, an area not easily susceptible to judicial scrutiny. See *infra*, Part II, Chapter 1, Section 1.2.2 and Chapter 2, Section 2.2.4.

²⁹ Para. 58.

³⁰ Noting that the Court does not always distinguish the two principles see DOUGAN, *National Remedies before the Court of Justice*, 2004, at 5, note 18. See *infra*, Part II, Chapter 1, Section 1.2.2.

³¹ TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1193, 1194.

III. The idea that Member States are under an obligation to provide for access to courts or tribunals and for the existence of *effective judicial remedies* to protect the rights conferred to individuals by the Union legal order³² would be reiterated in several other rulings of the Union courts.³³ In *Borelli*³⁴, the Court adopted a formulation which would become thereafter *obiter dictum* in its judgments, stating that:

“(...) the requirement of *judicial control* of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms” (emphasis added).³⁵

Hence, the fundamental right to effective judicial protection emerged in the Union legal order within the framework of the *decentralized application* of Union law by national authorities.³⁶ It is, in fact, not surprising that the original version of the Treaties did not include any reference to the *right* or *principle* of effective judicial protection: justice was mainly a Member States’ competence. As the Union is based on what has been qualified as a “system of executive federalism”³⁷, and Union law is implemented and applied by and large directly by national authorities, judicial protection issues mainly occur before Member States courts.³⁸ It is not surprising that such right has been “forged” in the context of the *national* application of Union law. As it is commonly mentioned in scholarship, the principles of direct effect and supremacy turned national authorities – and mostly national courts – into the primary enforcers of Union law. This dependence of national authorities constitutes one of the differentiating features of the Union legal order.³⁹

Hence, although the “founding fathers” created a new and specialized judicial system – the CJEU, comprising nowadays several courts⁴⁰ – they did not establish a European procedural legal order which ensures the protection of individual rights under EU law. The European judicial system entrusts national judges with such task and is based on the so-called *procedural autonomy* of Member States.⁴¹ In this framework, national courts became *ordinary Union courts*, fully integrated into the judicial architecture of the European Union and guarantors of the *full effectiveness* of

³² The CJEU does not differentiate between *rights* and *interests* of private parties under EU law. The term “rights” seems to include all subjective legal positions including, therefore, what in national legal orders is commonly identified as legitimate interests. All of them deserve an adequate effective judicial protection. See *ibid.*, at 1227 *et seq.* See also Case 13/68, *Salgoil/Ministero del Commercio con l’Estero*, [1968] ECR 453, where the CJEU mentioned the existence of *interests* of individuals. Hence, following AG GAND’s Opinion in the case “it is for the legal system of each Member State to determine which court has jurisdiction, and for this purpose to *classify those rights according to the criteria of national law.*” Later, in Case 179/84, *Bozzetti/Invernizzi*, [1985] ECR 2301, the CJEU would state that: “[t]he way in which the co-responsibility levy is defined under Community law is not without significance as regards national law. There is therefore some purpose in informing the national court of the rules of Community law which may help to solve the problem of jurisdiction with which it is faced (para. 18).”

³³ Case 222/86, *UNECTEF/Heylens*, [1987] ECR 4097.

³⁴ Case C-97/91, *Oleificio Borelli/Commission*, [1992] ECR I-6313.

³⁵ Para. 14.

³⁶ LANG, “The Duties of National Authorities under Community Constitutional Law”, 1998, at 109 *et seq.*

³⁷ TÜRK, *Judicial Review in EU Law*, 2009, at 46. See also CUNHA, “The Constitutional Treaty”, 2005, at 241-252.

³⁸ BELJIN, “Rights in EU Law”, 2008, at 91.

³⁹ LANG, “The Principle of Effective Protection of Community Law Rights”, 2000, at 235.

⁴⁰ See Article 19 TEU.

⁴¹ TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002 at 1176, 1177.

Union law.⁴² Accordingly, the right to effective judicial protection was proclaimed in situations where individuals contested the legality of Member State action by invoking Union rights. In this context, such proclamation was generous and flexible, imposing wide-ranging and strict obligations on national authorities, notably on national courts.

However, the issue of effective judicial protection of private parties cannot evidently be limited to this *state* or *national* dimension. It is undisputed that private parties should also be able to invoke rights granted under EU law against an illegal action taken by the Union institutions. Hence, the CJEU would later acknowledge that individuals are entitled to the “right to effective judicial protection in the event of a breach of Community law by the institutions.”⁴³ Notwithstanding, twenty six years after the *Les Verts* and *Johnston* judgments, the existence of a *complete system of legal remedies and procedures* in the European Union’s judicial system which ensures *effective judicial protection* of the rights of private parties under EU law against the Union itself is not without dispute.

2. The European Union as a *Rechtsgemeinschaft* and the Deficits of Judicial Protection

I. Judicial review of Union acts at the initiative of individuals has been one of the most complex and controversial issues of European Union law.⁴⁴ This is due to a number of reasons that range from the limitations established in the Treaties to the jurisdiction of the CJEU within the fields of the so-called intergovernmental pillars to the restrictive approach adopted by the Court regarding the standing of private parties to challenge Union acts directly before Union courts. The latter – which was already qualified as a “denial of justice”⁴⁵ – is probably one of the most disputed subjects in EU law, and has caused heated argument since the very beginnings of European integration.⁴⁶ In fact, scholars have long considered that the CJEU’s restrictive approach regarding current Article 263(4) TFEU is at odds with one of the most basic principles on which the Union is based, *i.e.* the rule of law.⁴⁷

⁴² See MAHER, “National Courts as European Community Courts”, 1994, at 226 *et seq.*; LANG, “The Duties of National Courts under Community Constitutional Law”, 1997, at 3-18; LANG, “The Duties of Cooperation of National Authorities and Courts under Article 10 E.C.”, 2001, at 84-93; CLAES, *The National Courts’ Mandate in the European Constitution*, 2006, at 58 *et seq.*; GOMES, *O Juiz Nacional e o Direito Comunitário*, 2006, at 65 *et seq.*

⁴³ C-212/94, *FMC and others*, [1996] ECR I-389, para. 62; Case C-228/92, *Roquette Frères/Hauptzollamt Geldern*, [1994] ECR I-1445, para. 27.

⁴⁴ See NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 17. For comprehensive studies on this issue see *e.g.*, ALLKEMPER, *Des Rechtsschutz des einzelne nas dem EG-Vertrage*, 1995; ALBORS-LLORENS, *Private Parties in European Community Law*, 1996; BONI, “Il ricorso di annullamento delle persone fisiche e giuridiche”, 1998, 53-108; ORTEGA, *El acceso de los particulares a la justicia comunitaria*, 1999; CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002; GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 381-445; BERROD, *La systématique des voies de droit communautaires*, 2003; SCHWENSFEIER, *Individuals’ Access to Justice under Community Law*, 2009.

⁴⁵ KOVAR, “Chronique de la jurisprudence de la Cour de justice des Communautés européennes”, 1966, at 710.

⁴⁶ See *e.g.*, LOUIS, “Le droit pour les pour les particuliers d’agir en annulation selon le traité du marché commun”, 1964, 213-235; TOTH, *Legal Protection of Individuals in the European Communities*, 1978, at 54 *et seq.*; RASMUSSEN, “Why is Article 173 Interpreted against Private Plaintiffs?”, 1980, at 113, note 6 for earlier references.

⁴⁷ See *e.g.*, BARAV, “Direct and Individual Concern”, 1974, 191-198; TOTH, “The Individual and European Law”, 1975, 659-678; VAN GERVEN, “The Legal Protection of Private Parties in the Law of the European Economic Community”, 1976, 1-17; VANDERSANDEN; BARAV, *Contentieux Communautaire*, 1977, at 163; HARDING, “The Private Interest in Challenging Community Action”, 1980, 354-361; RASMUSSEN, “Why is Article 173 Interpreted against Private Plaintiffs?”, 1980, 112-127; VANDERSANDEN, “Article 173”, 1992, 1048-1050; VON DANWITZ, “Die Garantie effektiven Rechtsschutzes im Recht der Europäischen Gemeinschaft”, 1993, 1108-1115; ALLKEMPER, *Des Rechtsschutz des einzelnen nach dem EG-Vertrag*, 1995, at 39-40; ARNULL, “Private Applications and the Action for

The idea that the European Union is a *Rechtsgemeinschaft*, i.e. a Union based on the rule of law, was firstly referred by HALLSTEIN in 1969.⁴⁸ Since then, the principle of the rule of law has consistently been considered a “backbone”⁴⁹ of the Union’s judicial system. With the growing importance of law as an integrating force in the European Union, the principle of the rule of law “fleshed out”⁵⁰ in the CJEU’s case-law. As a matter of fact, following the *Les Verts* decision, it became almost a “self evident truth” to say that the European Union is based on the rule of law⁵¹: “[c]onstituées par le droit, les Communautés se sont consolidées et développées principalement au moyen du droit.”⁵² The rule of law is currently to be found in the opening of the Treaties which base the Union along with the principles of respect for human rights, freedom, equality and democracy.⁵³ It is also implied in current Articles 6 and 19 TEU on which it is said to lay the democratic foundation of the Union.

Nonetheless, the recognition of the rule of law as an EU constitutional principle has raised several questions regarding the nature, scope and meaning of such principle under the Treaties, both at Union and national levels.⁵⁴ Scholars have considered that the rule of law involves an objective and a subjective dimension.⁵⁵ From an *objective* perspective, the rule of law is mainly associated with the principles of institutional balance and separation of powers. Since a strict

Annulment under Article 173 of the EC Treaty”, 1995, 749; VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, 535-552; WAELBROECK; VERHEYDEN, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires”, 1995, 399-441; NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, 17-31; COOKE, “Locus Standi of Private Parties under Article 173(4)”, 1997, 4-23; KAPTEYN; VAN THEMAAT, *Introduction to the Law of the European Communities*, 1998, at 471; ARNULL, “Private Applicants and the Action for Annulment since *Codominu*”, 2001, 7-52; DELLIS, G., “Le droit au juge comme élément de la problématique sur la protection des droits fondamentaux au sein de l’ordre juridique communautaire”, 2001, at 279 *et seq.*; CASSIA, “Continuité et rupture dans le contentieux de la recevabilité du recours en annulation des particuliers”, 2002, 547-559; CALLIESS, “Kohärenz und Konvergenz beim europäischen Individualrechtsschutz”, 2002, 3577-3582; ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 72; CYGAN, “Protecting the Interests of Civil Society in Community Decision-Making”, 2003, 995-1012; CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, 493-508; JACOBS, “Effective Judicial Protection of Individuals in the European Union”, 2003, 335-344; RAGOLLE, “Access to Justice for Private Applicants in the Community Legal Order”, 2003, 72-92; USHER, “Direct and Individual Concern”, 2003, 575-600; LEWIS, “Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures”, 2006/2007, 1496-1544; GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 501; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 263. In contrast, insisting on a strict rule on admissibility see e.g., DUFFY, “Quelles réformes pour le recours en annulation?”, 1995, 553-560; VAN DEN BROEK, “A Long Hot Summer for Individual Concern?”, 2003, 61-79.

⁴⁸ This concept was firstly developed by WALTER HALLSTEIN, in *Der unvollendete Bundesstaat*, 1969, at 33. See also MAYER, “Europa als Rechtsgemeinschaft”, 2005, at 429; PERNICE, “*Costa v ENEL* and *Simmenthal*”, 2010, at 49.

⁴⁹ EDITORIAL COMMENTS, “The Rule of Law as the Backbone of the EU”, 2007, at 875.

⁵⁰ HARLOW, “Access to Justice as a Human Right”, 1999 at 188.

⁵¹ See e.g., Case C-314/91, *Weber/Parliament*, [1993] ECR I-1093. In the CJEU’s early decisions, the principle of the rule of law did not play an important role. Only with the development of the CJEU’s self-understanding of its own mission, the constitutionalization of the Treaties, and the need to find a solid basis to justify some of the most controversial decisions, did the rule of law become an important tool in the legitimization of the Court’s rulings.

⁵² PICOD, “Le droit au juge en droit communautaire”, 1998 at 141.

⁵³ See Article 2 TEU. It was firstly acknowledged in the Preamble of the Rome Treaty and later mentioned in Article F.2 TEU.

⁵⁴ As a general principle of law, closely linked with the construction of modern states, it may be difficult to draw a correct parallel for the rule of law in other European languages. One could argue that, strictly speaking, this principles does not have an exact *simile* in other languages as, for example, the French *principe de la légalité, suprémacie de la règle de droit, règne souverain de la loi*, or the German *Rechtsstaat*, should be considered merely imperfect translations that tend to focus on different aspects of the respective legal orders. Moreover, the imprecision surrounding the concept in different languages relates essentially with the lack of statehood of the European Union. Hence, for a comprehensive view of these concepts, it is necessary to take into account their historical evolution as they correspond to different circumstances and concepts surrounding the birth of the modern democratic State. For further developments, see FERNANDEZ ESTEBAN, *The Rule of Law in the European Constitution*, 1999, at 66 *seq.*; PALOMBELLA, “The Rule of Law beyond the State”, 2009, at 450, *et seq.*

⁵⁵ FERNANDEZ ESTEBAN, *The Rule of Law in the European Constitution*, 1999, at 66.

separation of powers is missing in the European Union, the principle of institutional balance has played a key function in the interaction between the Union institutions and in the control of the horizontal distribution of powers among them.⁵⁶ In this respect, the duty of sincere cooperation – which may currently be found in Article 4(3) TEU – has also been pivotal in the assessment of the vertical distribution of powers between the Union and the Member States. From a *subjective* perspective, the principle of the rule of law applied to the individuals' legal position, translates into the notion of effective judicial protection of private parties, notably into the right of access to justice.⁵⁷ Here, the need for a complete and coherent system of judicial review, as well as for the respect of the procedural guarantees established in Articles 6 and 13 ECHR and Article 47 of the EU Charter of Fundamental Rights plays a central role. A *Union of Law* is indeed inconceivable without judicial protection of private parties.⁵⁸ Thus, “procedural rights feature as central to the principle of the rule of law, and the link between the rule of law principle and human rights is well established.”⁵⁹

However, notwithstanding its solemn proclamation in the Treaties and in the case-law of the Union courts, it has been considered that the Union's judicial system does ensure the respect for the rule of law at all times, with the underlying justification for such gaps of protection remaining somewhat obscure in the case-law of the courts and in the literature. The issue is particularly problematic regarding the judicial protection of private parties, notably when acts adopted by the European institutions are at stake. Scholars have identified here the existence of a “*defizite des Individualrechtsschutzes*”⁶⁰ in EU law.

II. *Prima facie*, one may be led to the conclusion that private parties benefit from a broad access to the Union courts. Indeed, individuals may litigate before the CJEU in four different contexts. Firstly, individuals can challenge Union acts *directly* through an action for annulment (Article 263 TFEU); secondly, they can challenge a failure to act by the Union institutions (Article 265 TFEU); thirdly, private parties may challenge Union law *indirectly* through the preliminary references procedure (Article 267 TFEU); and, last but not least, individuals can bring an action for damages against an illegal conduct by the Union institutions (Article 340 TFEU). Nonetheless, the image of a broad access to the CJEU has little correspondence with reality. To borrow HARLOW's expression the “toolkit set out in the Treaty is [in reality] fairly limited.”⁶¹ In practice, access of private parties to the Union courts seems to be virtually impossible. Scholars have figuratively described it as a “mirage in the desert, ever receding and never capable of being

⁵⁶ See JACQUÉ, “The Principle of Institutional Balance”, 2004, at 383-391.

⁵⁷ Noting that “*l'accès au juge est un donné fondamental du système communautaire, un élément de la Communauté de droit*” see GRÉVISSE; BONICHOT, “Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle des États Membres”, 1991, at 304.

⁵⁸ According to ZULEEG: “*ohne gerichtlichen Rechtsschutz ist eine Rechtsgemeinschaft nicht denkbar.*” See ZULEEG, “Die Europäische Gemeinschaft als Rechtsgemeinschaft”, 1994, at 547.

⁵⁹ HARLOW, “Access to Justice as a Human Right”, 1999, at 188.

⁶⁰ VON DANWITZ, “Die Garantien effektiven Rechtsschutzes im Recht der Europäischen Gemeinschaft”, 1993, at 1111.

⁶¹ HARLOW, “A Common European Law of Remedies”, 2000, at 77.

grasped.”⁶²

The case-law of the CJEU has provided some examples of judicial *vacuums* in the protection of private parties in the EU. In *UPA*⁶³, AG JACOBS considered that the fact that an individual could not in most cases directly challenge a Union measure of general application which adversely affected him was “unacceptable.”⁶⁴ The AG argued that the case-law of the CJEU that encouraged individual applicants to bring questions of validity of Union measures indirectly before the CJEU *via* national courts through the preliminary references mechanism did not ensure adequate and effective judicial protection. The AG added that the Court's restrictive attitude towards the standing of private parties before Union courts was anomalous “in the light of its case-law on other aspects of judicial review and recent developments in the administrative laws of the Member States.”⁶⁵

The fact that there is indeed a clear gap of judicial protection *vis-à-vis* certain Union actions became clearer in the case of *Jégo-Quéré*⁶⁶, where both the General Court (GC) and the Court of Justice (CJ) acknowledged the existence of a *lacuna* in cases where Union measures of general application applied directly to individuals without the need for any implementing measures. However, in contrast with the GC, the CJ did not consider itself competent to fill in such gap of protection or to adopt a more flexible approach to the standing of private parties before Union courts, leaving the necessary *adjustment* of the system in the hands of national courts and Member States.⁶⁷

More significantly, the CJ has considered that even if an individual shows that he/she could not enforce a given right before national courts, that is not enough to acknowledge him/her standing to challenge directly the validity of a measure of general application.⁶⁸ In fact, in the CJEU's reasoning, in accordance with the principle of sincere cooperation it is for national courts to interpret and apply national procedural rules governing the exercise of rights of action, as far as possible, “in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.”⁶⁹ Hence, according to the CJEU's case-law the *degree* of judicial protection available to individuals is made dependent on the ability of national courts to provide for the appropriate legal remedies.⁷⁰ This “alternative remedies” approach based on national courts has, nonetheless, raised difficulties in the construction and interpretation of the complete system of legal remedies and procedures within the EU.⁷¹ In fact, it

⁶² CRAIG; BÚRCA, *EU Law*, 2011, at 495.

⁶³ Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677.

⁶⁴ Opinion of AG JACOBS in *UPA*, para. 37.

⁶⁵ *Ibid.*

⁶⁶ Case T-177/01, *Jégo-Quéré/Commission*, [2002] ECR II-2365 and subsequent CJ's ruling in Case C-263/02 P, *Commission/Jégo-Quéré*, [2004] ECR I-3425.

⁶⁷ Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 41; Case C-263/02 P, *Commission/Jégo-Quéré*, [2004] ECR I-3425, para. 31.

⁶⁸ Case T-585/93, *Greenpeace and others/Commission*, [1995] ECR II-2205, upheld on appeal Case C-321/95 P, *Greenpeace and others/Commission*, [1998] ECR I-1651.

⁶⁹ Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 42.

⁷⁰ LENAERTS, “The Basic Constitutional Charter of a Community Based on the Rule of Law”, 2010, at 305.

⁷¹ See e.g., KAKOURIS, “Do the Member States Possess Judicial Procedural Autonomy”, 1997, 1389-1412; PRECHAL, “Community Law in National Courts”, 1998, 681-706; BIONDI, “The European Court of Justice and

is far from clear, how far the duties of national courts go in this regard and which remedies have to be available *as a matter of Union law* in national legal orders, in order for a challenge to the validity of a Union act to be made possible. Moreover, some decisions of the CJEU have highlighted the difficulties inherent to the articulation of Articles 263 and 267 TFEU.⁷² In particular, the preclusive effect of the time limit established in Article 263(6) TFEU has been said to leave room for ambiguity and *lacunae*.⁷³

The existence of procedural *lacunae* becomes more notorious when entering the world of the intergovernmental pillars of the Union. In fact, judicial review of Union acts is particularly problematic in the areas where the CJEU lacks jurisdiction. Here, the CJ started by stating in *Pupino*⁷⁴, that there was no complete system of actions and procedures designed to ensure the legality of acts of the institutions in the context of former Title VI TEU.⁷⁵ Such gap became obvious in *Spain/Eurojust*⁷⁶ where the CJ refused to apply the *Les Verts* reasoning to the challenge of acts adopted by a European agency. Later, the GC expressly stated in the *Segi*⁷⁷ case that “concerning the absence of an effective remedy invoked by the applicants, it must be noted *that indeed probably no effective judicial remedy is available to them*”⁷⁸, and the CJ considered in the same case that the judicial system established under the former TEU was “less extensive” than the one created under the former Treaty establishing the European Community (TEC), but that it was for the Member States, should the case arise, to reform the system in force.⁷⁹

III. Certainly, due to the principle of conferred powers – now established in Article 5 TEU – the CJEU can only exercise its jurisdiction pursuant to the provisions of the Treaties. However, there is an uneasy relationship between this principle and the recognition of the rule of law at the Union level.

The purpose of this dissertation is to reflect on the shortcomings of the system of judicial review of Union acts at the initiative of individuals established in the EU, notably in light of the novelties introduced by the Treaty of Lisbon. Scholars have long drawn attention to some important dimensions of this problem. Commentators have dwelled on the search for solutions which while not compromising the *complete* and *coherent* nature of the Union’s system of judicial review are capable of reconciling the contradictory outcomes arising from the principles of supremacy and judicial review with the limits inherent to the principle of national procedural autonomy.⁸⁰ The legitimacy of the CJEU’s case-law putting national courts under wide-ranging

Certain National Procedural Limitations”, 1999, 1271-1287; VAN GERVEN, “Of Rights, Remedies and Procedures”, 2000, 501-536; EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, 1199-1246.

⁷² Case C-188/92, *TWD Textilwerke Deggendorf*, [1994] ECR I-833; Case C-239/99, *Nachi Europe*, [2001] ECR I-1197.

⁷³ See e.g., AMBANELLI, “La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Tud Textilwerke* e *Wiljo*”, 1998, at 123-152.

⁷⁴ Case C-105/03, *Pupino*, [2005] ECR I-5285.

⁷⁵ Para. 35.

⁷⁶ Case C-160/03, *Spain/Eurojust*, [2005] ECR I-2077.

⁷⁷ Case T-338/02, *Segi and others/Council*, [2004] ECR II-1647.

⁷⁸ Para. 38.

⁷⁹ Case C-355/04 P, *Segi and others/Council*, [2007] ECR I-1657, para. 50.

⁸⁰ See e.g., LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 34 *et seq.*

obligations to do their utmost to avoid and “plug” the possible gaps of judicial protection has also been greatly contested. It has been noted that the CJEU does not hesitate to adopt a double standards approach in the construction of the Union’s system of judicial protection by imposing extensive duties on Member States under the “umbrella” of the principle of effective judicial protection from which it “graciously” escapes.⁸¹

Notwithstanding, it seems that the most significant – and perhaps ignored – dimension of this problem lies with the CJEU’s conceptual approach regarding the principle of effective judicial protection of individuals. It is submitted that the views of the CJEU on the Union’s judicial system are mainly dominated by *objectivist*, *institutional* and *systemic* concerns. NEUWHAL stated that “the question of *locus standi* is a matter of *policy* as well as *law*, and it is as necessary to protect the individual against illegal acts of the Union institutions as well as it is to safeguard the efficiency of decision-making.”⁸² It is submitted that while attempting to balance those concerns the CJEU has relegated judicial protection of private parties to a secondary level. This approach has been both the cause of gaps of judicial protection and the reason why the CJEU has failed to build and enforce a *truly* “complete system of legal remedies and procedures”⁸³ which ensures “with certainty and in all circumstances”⁸⁴ effective judicial protection of private parties. Hence, the main research question underlying the present study is why has the so-called “*ensemble des voies de droits*”⁸⁵ established in the Treaties proved insufficient to ensure an effective and adequate protection of individuals *vis-à-vis* the European institutions. The issue is thus primarily and mainly conceptual, and it involves an analysis of the CJEU’s views on the Union’s judicial system.

Surely some of the reforms introduced by the Lisbon Treaty – and duly celebrated in the literature – correspond to an improvement of the level of judicial protection in the European Union.⁸⁶ Scholars have noted that the unification of the CJEU’s jurisdiction represents a step in the right direction when compared to the solution included in former Article 46 TEU that fully excluded the jurisdiction of the CJEU on second pillar measures, and substantially limited such jurisdiction over the third pillar. In fact, the collapse of the former third pillar determined that a significant number of Union acts became subject to the jurisdiction of the Court.⁸⁷ Also, the extension of jurisdiction included in Article 275 TFEU so as to allow for judicial control of certain

⁸¹ See VON, “Die Garantien effektiven Rechtsschutzes im Recht der Europäischen Gemeinschaft”, 1993, at 1114; CARANTA, “Judicial Protection against Member States”, 1995, at 724; ARNULL, “The Action for Annulment”, 2000, at 177 *et seq.*; BIERNAT, “The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community”, 2003, at 22 *et seq.*; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 283 *et seq.*; PAIS, “A protecção dos particulares no âmbito do recurso de anulação depois de Lisboa”, 2012, at 103.

⁸² NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 19.

⁸³ Case 294/83, *Les Verts/Parliament*, [1986] I-1339, para. 23.

⁸⁴ Case 70/88, *Parliament/Council (Chernobyl)*, [1991] ECR I-4529, para. 20.

⁸⁵ SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 1.

⁸⁶ ENGSTRÖM, “Recent and Potential Future Developments in Judicial Protection in the European Area of Freedom, Security and Justice”, 2009, at 487; LECZYKIEWICZ, “‘Effective Judicial Protection’ of Human Rights After Lisbon”, 2010, at 326. For an analysis of the main changes introduced by the Lisbon Treaty see PERNICE, “Salvaging the Constitution for Europe”, 2007; CORTHAUT, “Plus Ça Change, Plus C’est La Même Chose?”, 2008, 21-34. CRAIG, “The Treaty of Lisbon, Process, Architecture and Substance”, 2008, 137-166; DOUGAN, “The Treaty of Lisbon 2007”, 2008, 617-703; JACQUÉ, “Le traité de Lisbonne”, 2008, 439-493; MAGANZA, “The Lisbon Treaty”, 2008, 1603-1613.

⁸⁷ Article 19(1) TUE.

second pillar acts is to be welcomed. Moreover, in the context of the CJEU's general jurisdiction, the changes introduced to Article 263(4) TFEU allegedly broadening direct access of individuals to the Union courts, combined with the new wording of Article 19 TEU, may compel the CJEU to interpret more generously the standing requirements of private parties before Union courts.

However, the Lisbon reforms did not remedy all the existing limitations to Union's system of judicial protection, having in addition given rise to new questions still missing a clear and adequate answer. Hence, the remaining limitations to full judicial control over measures adopted under the Common Foreign and Security Policy (CFSP) and the Police and Judicial Cooperation in Criminal Matters (PJCCM) policy continue to jeopardize the need to ensure effective judicial protection of the individuals affected by those measures. In fact, notwithstanding the submission of the former third pillar to the logic of the so-called *Community method*⁸⁸ operated by the Lisbon Treaty there are still some restrictions to the Union courts' jurisdiction in this respect.⁸⁹ Moreover, regarding the CFSP the jurisdiction of the CJEU established in Article 19(1) TEU continues to face important limitations.⁹⁰ Furthermore, it is yet unclear how the CJEU will interpret the new rules on standing of private parties to bring an action for annulment pursuant to the newly drafted Article 263(4) TFEU. The extension of the obligations imposed on national courts under current Articles 4(3) and 19(1) § 2 TEU is anything but straightforward. Hence, notwithstanding the entry into force of the Lisbon Treaty, it is doubtful that the system of judicial protection established in the Treaties should be considered *complete* and *coherent*.⁹¹ What is more, if the *deficit* of judicial protection of individuals seems to a certain extent to be *inherent* to the Treaties, the refusal of the CJEU to mitigate such *insufficiencies* constitutes the most disturbing factor. It is not certain whether the Lisbon reform will influence the CJEU's views on the Union's system of judicial protection. Thus, if the discussion about the lack of legal protection of private parties against Union measures "is as old as the Court of Justice itself"⁹², it will surely continue to take place after Lisbon.

3. Plan and Terminology

I. In light of the foregoing, this dissertation is divided in two parts, which are based on the CJEU's two landmark judgements mentioned above. The division is both logical and chronological. In the first part, I will analyze the CJEU's case-law regarding the right of access to judicial review by private parties within the Union's judicial system, in light of the *Les Verts* decision, which established the so-called complete system of legal remedies and procedures in the European Union. Thus, the first part of the dissertation deals mostly with pre-Lisbon jurisprudence. Here, I will avoid repeating notions and ideas well established in the case-law and specialized literature. The purpose of the first part of the dissertation is to highlight the *objectivist*,

⁸⁸ Which should now probably be referred to as the general "Union method".

⁸⁹ See Article 276 TFEU and Article 10 of Protocol 36 to the Lisbon Treaty.

⁹⁰ See Article 40 TEU and Article 275 TFEU.

⁹¹ LENAERTS, "The Rule of Law and the Coherence of the Judicial System of the European Union", 2007, at 1625-1659; LECZYKIEWICZ, "Effective Judicial Protection' of Human Rights After Lisbon", 2010, at 327 *et seq.*

⁹² SCHWARZE, "The Legal Protection of the Individual against Regulations in European Union Law", 2004, at 287.

institutional and *systemic* approach underlying to the case-law of the CJEU in this respect, which has in practical terms significantly curtailed access by individuals to judicial review of Union acts. In the second part of the dissertation I will look for an alternative approach to the CJEU's case-law, which emerges as a consequence of the Lisbon Treaty and the renewed system of fundamental rights protection established therein.⁹³ In fact, it seems inevitable to rethink the right of access to justice in light of current Article 6 TEU, which involves both the formal recognition of the binding legal value of the Charter of Fundamental Rights and the mandatory accession by the European Union to the ECHR. Thus, based on the *Johnston* principle – that of effective judicial protection –, I will propose the adoption of a new approach to the issue of judicial protection of individuals within the European Union under the Lisbon Treaty.

II. Before proceeding, it is important to clarify some preliminary issues. Firstly, it is settled that the principle of effective judicial protection is not limited to the notion of access to a court, or access to judicial review. It is indeed an emblematic example of what has been called a “cluster right”⁹⁴, encompassing a batch of fundamental rights and guarantees.⁹⁵ The Union's judicial system raises concerns from the perspective of other judicial guarantees besides the right of access to court protection, such as the rights to a due process of law, to an appeal, to a decision in a reasonable time, to the enforcement of judgments, or to interim relief. These dimensions are all provided for in Articles 6 and 13 ECHR and 47 of the Charter of Fundamental Rights. However, the present dissertation is limited to the analysis of the *right to a judicial proceeding* and does not extend to the other *rights within such proceedings*. The latter dimensions will only be considered incidentally if the analysis so requires.

Secondly, the principle of effective judicial protection involves both a *substantive* and *procedural* dimension which are, in some instances, inextricably linked. The focus of the present study is, however, mainly procedural. Hence, it focuses mostly on issues of competence, standing and procedural time limits. The so-called substantive dimension of effective judicial protection will only be referred to incidentally if the study so requires.

Thirdly, the following analysis is limited to the restrictions and difficulties surrounding the challenge of *Union acts*. This means that challenges against acts adopted under the Treaty establishing the European Atomic Energy Community (TEAEC) are not addressed here. Furthermore, challenges against omissions by the Union institutions are also excluded. As the action for failure to act is much less frequent, and constitutes mainly a mirror of the action for annulment – in the case-law of the CJEU “both provisions merely prescribe one and the same method of recourse”⁹⁶ –, it will not be analyzed here in detail.⁹⁷

⁹³ Considering that there has been an improvement in the “status of human rights” under EU law see LECZYKIEWICZ, “‘Effective Judicial Protection’ of Human Rights After Lisbon”, 2010, at 330.

⁹⁴ THOMSON, *The Realm of Rights*, 1990, at 54-55.

⁹⁵ Noting that the right to effective judicial protection has a very rich content “*que se desdobra em diversos subprincípios e em vários direitos fundamentais*” see MEDEIROS, “Anotação ao artigo 20.º”, 2010, at 437.

⁹⁶ Case 15/70, *Chevalley/Commission*, [1970] ECR 975, para. 6. Noting that regarding private parties the action for failure to act has “*portée limitée*” see BARAV, “Le droit au juge devant le Tribunal de première instance et la Cour de justice des Communautés européennes”, 1998, at 203.

III. Furthermore, attention is drawn to the following terminology issues. Firstly, considering the abolition of the pillar system operated by the Lisbon Treaty⁹⁸ I will mainly refer to the European Union as a whole and as a sole entity. I will, however, mention the Communities when the accurateness of the analysis so requires.

Secondly, following the re-denomination of the Union courts and the changes introduced by the Lisbon Treaty to the Union's judicial architecture⁹⁹, I will use the traditional short designation of the Court of Justice (CJ) to identify the upper *echelon* of the hierarchy of the Union courts – the General Court (GC) and the specialized courts being considered as separate bodies within such judicial framework. The long expression – CJEU – will be used to designate the Union courts taken together, independently of the three judicial bodies that integrate the institution considered as a whole.

Thirdly, the reference to the “pillars” on which the EU is based deserves a brief explanation. Surely, one of the most significant changes introduced by the Lisbon Treaty relates to the abandonment of the distinction between pillars: the Communities and the Union are brought within one single legal order, although organized under a two-set Treaty framework, and not one single set of constitutional provisions as would have happened under the Constitutional Treaty (CT).¹⁰⁰ The formal abolition of the pillars has a clear substantive impact regarding the development of the PJCCM. Also, one may argue that although less pronounced a shift of perspective took place in the realm of the second pillar, a change that shows the willingness of Member States to integrate all three pillars in the *same unitary structure*.¹⁰¹ Nonetheless, it is hard to envisage that the CFSP attains the same level of integration as other Union policies given its proximity to the core of Member States sovereignty and national identity which work as a limit to integration in this area. Accordingly, despite the “collapsing of the pillars” and the succession of the Union to the former Communities, the Lisbon Treaty separates with a great degree of clarity the CFSP from all other Union external policy areas.¹⁰² The current CFSP features clearly point to

⁹⁷ Notwithstanding, it is known that there is no necessary link between the two forms of action. See LENAERTS; ARTS; MASELIS, *Procedural law of the European Union*, 2006, at 332. The alignment of standing requirements under both types of action also reinforces the lack of necessity to consider the action for failure to act autonomously.

⁹⁸ See Articles 1 TEU and 1 TFEU.

⁹⁹ Article 19(1) TEU. For a comprehensive analysis of the changes undergone by the Union courts as a consequence of the Lisbon Treaty see TIZZANO, “The Court of Justice in the Draft Treaty Establishing a Constitution for Europe”, 2003, at 41 *et seq.*; TRIDIMAS, “The European Court of Justice and the Draft Constitution”, 2004, 113-142; ARNULL, “From Bit Part to Starring Role” 2005, 1-25; DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 672-679; BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, 709-728; CRAIG, *The Lisbon Treaty*, 2010, at 122-154; JACOBS, “The Lisbon Treaty and the Court of Justice”, 2012, 197-212.

¹⁰⁰ See CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 41 *et seq.*

¹⁰¹ HINAREJOS, *Judicial Control in the European Union*, 2009, at 123.

¹⁰² ROQUE, “A derrocada do sistema de três pilares”, 2005, at 897 *et seq.*; CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 49-50. The CFSP is included in the TEU by opposition to all other EU's competences which can be found in the TFEU. It is therein included in a separate chapter on “External Action” of the Union and, although referred in Article 2 TFEU, it is not mentioned in Articles 3 to 6 TFEU which list the types of EU's competences. One may argue that, strictly speaking, the CFSP is not considered a competence of the Union, once more in contrast with what happened under the CT (See Articles 1-12(4) and Article 1-16(1) CT). See EECKHOUT, “The EU's Common Foreign and Security Policy after Lisbon”, 2012, at 268 considering that CFSP is not a shared competence and consequently does not have a preemptive effect. Moreover, Article 11 TEU states that the CFSP “is subject to specific rules and procedures” which continue to justify its autonomy within the framework of the Treaties. In fact, (i) the CFSP will continue to be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise; (ii) the adoption of legislative acts is herein excluded; (iii) it will be put into effect

its different legal nature within the framework of the Treaties, so that one can say that the second pillar of the Union still stands.¹⁰³ Hence, in a certain sense the “pillar talk”¹⁰⁴ cannot be avoided after Lisbon.

Lastly, in the following pages I will use the words “*objectivism/objectivist/objective*” to identify the features of a system of judicial review mostly focused on the need to ensure objective and institutional legality review and the effectiveness of the system as a whole, favouring a systemic approach to judicial review issues. By opposition I will refer to “*subjectivism/subjectivist/subjective*” to identify an alternative view of the legal system centred in the individual and which focuses mainly on the need to ensure the effective judicial protection of private parties, regardless of other systemic, institutional or objectivist considerations. This distinction echoes an ancient distinction between objective law and subjective rights.¹⁰⁵ It also mirrors the distinction between the *contentieux objectif* and the *contentieux subjectif*. However, it does not necessarily match up with such notions. As we shall see below, some solutions adopted within the French model of the *contentieux objectif* have proved more generous regarding the protection of private parties than the notions adopted within the German *contentieux subjectif*. Notwithstanding, I will try to demonstrate that it is precisely the *objectivist, institutional and systemic* approach underlying the to CJEU’s case-law on the Union’s judicial system that has given rise to gaps in the judicial protection of individuals in the EU and has not enabled the CJEU to fill in those *lacunae*. This approach has resulted in a significant “*déficit communautaire quant au droit d’accès à la justice*.”¹⁰⁶ It is further submitted that the changes introduced by the Lisbon Treaty provide for a solid basis for a *paradigm shift* in the Court’s case-law in this respect, which should lead to the adoption of a more *subjectivist*-oriented approach to the issue of judicial review of Union acts at the initiative of individuals.

by the High Representative of the Union for Foreign Affairs and Security Policy and by the Member States; (iv) the role of both the European Parliament and of the Commission is restrictively defined by the Treaties; and finally (v) the jurisdiction of the CJEU is limited. For a comprehensive study of the institutional changes introduced by the Lisbon Treaty regarding the CFSP see WHITMAN; JUNCOS, “The Lisbon Treaty and the Foreign, Security and Defence Policy”, 2009, at 28 *et seq.*

¹⁰³ Considering that in a certain way the second pillar still exists see VAN VOOREN, “The Small Arms Judgment in an Age of Constitutional Turmoil”, 2009, at 231-238. In contrast, considering that in practice the pillar structure was of limited relevance already before the entry into force of the Lisbon Treaty see PUISOCHET, “The Court of Justice and International Action by the European Community”, 1997, at 1557-1576; WESSEL, “The Constitutional Unity of the European Union”, 2009, at 283 *et seq.*

¹⁰⁴ ECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 265.

¹⁰⁵ Noting that in common law systems the distinction between *droit subjectif* or *subjektives Recht* and *droit objectif* or *objektives Recht* does not play an important role as there as two different words available in English, see VAN GERVEN, “Of Rights, Remedies and Procedures”, 2000, at 502; BELJIN, “Rights in EU Law”, 2008, at 95.

¹⁰⁶ WACHSMANN, “Les droits de l’homme”, 1997, at 889.

PART I – A CONCEPTUAL ANALYSIS: THE *LES VERTS* APPROACH TO THE UNION'S SYSTEM OF JUDICIAL PROTECTION

1. JUDICIAL REVIEW OF UNION ACTS UNDER THE CJEU'S GENERAL JURISDICTION

1.1. Direct Access of Private Parties to the Union Courts: the Objectivist, Institutional and Systemic Approach to Judicial Review in the European Union

1.1.1 The Action for Annulment Established in the Treaties

I. The rules governing direct access of individuals to the CJEU through actions for annulment are surely one of the most controversial issues of EU law. This is so mostly because of the restrictive interpretation adopted by the CJEU regarding current Article 263(4) TFEU which has long been criticized by scholars.¹⁰⁷ Notably, commentators have considered that the CJEU's case-law in that respect does not ensure the right to a *comprehensive* and *effective* judicial protection.¹⁰⁸ ARNULL considered this case-law of the CJEU to be a "blot in the landscape of Community law."¹⁰⁹

The existence of a judicial review mechanism for testing the procedural and substantive legality of measures adopted by its bodies and institutions is uncontested in any developed legal system based on the rule of law.¹¹⁰ It is commonly accepted that judicial review "contributes to the accountability of government and the protection of individuals."¹¹¹ Nonetheless, each legal system adopts a different conception "as to the extent to which courts are involved in the review of acts adopted by the other branches of government."¹¹² In the European Union the existence of a form of action which ensures judicial review at the initiative of individuals is without dispute.¹¹³ The so-called action for annulment – currently established in Article 263 TFEU – constitutes the core of the system of judicial protection established in the European Union and is the "main channel of

¹⁰⁷ See *supra* note 47. See also ALMEIDA, "Le recours en annulation des particuliers", 1995, at 857; BOULOIS, *Droit institutionnel de l'Union européenne*, 1997, at 352; BERROD, *La systématique des voies de droit communautaires*, 2003, at 609 *et seq.*; MEHDI, "La recevabilité des recours formés par les personnes physiques et morales à l'encontre d'un acte de portée générale", 2003, at 37 *et seq.*

¹⁰⁸ See e.g., CALLIESS, "Kohärenz und Konvergenz beim europäischen Individualrechtsschutz", 2002, at 3581-3582; GINTER, "Access to Justice in the European Court of Justice in Luxembourg", 2002, at 385; JACOBS, "Effective Judicial Protection of Individuals in the European Union", 2003, at 337-340; RAGOLLE, "Access to Justice for Private Applicants in the Community Legal Order", 2003, at 101; USHER, "Direct and Individual Concern", 2003, at 595. The institutions have also called attention to this point. See Suggestions of the Court of Justice on European Union, Bulletin of the ECs, Supp. 9/75, at 18; Report on the European Union by the Commission, Supp. 5/75, at 37; Parliaments Proposal on Article 43 of the Project of the Treaty of EU (OJ C 77, 19/3/1984); the Tindemans Report on the EU, Chapter V E; Report of the CJEU on Certain Aspects of the Application of the Treaty on the European Union, of 1995 and Contribution of the Court of First Instance for the purposes of the 1996 ICG, dated 17/5/1995.

¹⁰⁹ ARNULL, "Private Applications and the Action for Annulment under Article 173 of the EC Treaty", 1995, at 52.

¹¹⁰ BIERNAT, "The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community", 2003, at 1.

¹¹¹ TÜRK, *Judicial Review in EU Law*, 2009, at 1.

¹¹² *Ibid.*

¹¹³ More particularly, it has been considered that such remedy should be offered in cases where the powers of the European Parliament – which is deemed to represent the citizens of the Union (Article 10(2) TEU) – are fairly limited either participating in the legislative process or supervising the Executive. See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 6; BIERNAT, "The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community", 2003, at 1.

judicial review open to individuals”¹¹⁴ within the Union’s judicial system. In fact, in what has been described as “a bold new experiment in transnational justice”¹¹⁵ the drafters of the Treaties granted individuals the possibility of challenging Union measures directly before the CJEU. This possibility is perfectly in line with two main ideas involved the integration process: (i) the statement that individuals are subjects of Union law and (ii) the fact that EU law penetrates and affects deeply and directly the interests of private parties, who should therefore be provided with the adequate means of redress.¹¹⁶ At a very early stage, the CJEU created a direct link between individuals in Member States and the Union legal order, long before such a link was formally laid down with the creation of European citizenship.¹¹⁷ In fact, the CJEU stated in *Van Gend en Loos*¹¹⁸ that:

“[t]he Community constitutes a new legal order of International law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, *and the subjects of which comprise not only Member States but also their nationals*. Such new legal order *not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage* (emphasis added).”¹¹⁹

If this was true back in 1962, the creation of the European citizenship in 1990s has unquestionably reinforced these considerations. Furthermore, it is also indisputable that “private parties have, ever increasingly, understandable motives for wishing to ‘knock out’ EU legislation that impacts adversely on their interests.”¹²⁰ As a matter of fact, “such measures bite deeply into national law, and can thus have considerable effects for private sector actors.”¹²¹ Indeed, “European law is no longer confined to the realm of trade and commerce, but reaches into the nooks and crannies of national life.”¹²²

However, individuals have not been granted unlimited access to the CJEU. Someone noted that “in accordance with the spirit of the age”¹²³ the Treaties were conceived by elites to be implemented by elites: “[t]he people were expected to be duly grateful.”¹²⁴ There was, therefore, little concern in involving individuals in the project of European integration.¹²⁵ Hence, under the original version of the Treaties, pursuant to Article 173(2) of the Treaty establishing the European

¹¹⁴ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 8.

¹¹⁵ PARKINSON, “Admissibility of Direct Actions by Natural or Legal Persons in the European Court of Justice”, 1989, at 433.

¹¹⁶ TOTH, “The Individual and European Law”, 1975, at 659; ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 9.

¹¹⁷ PRECHAL, “Protection of Rights”, 2008, at 155. Considering that “*tale emergere del cittadino dovrebbe ugualmente tradursi in un rafforzamento del suo diritto a godere di una protezione giurisdizionale completa, il riconoscimento della giustiziabilità essendo, sul piano della protezione dei diritti e degli interesse, il prolungamento e il completamento logico della concessione di nuove prerogative politiche*” see BONI, “Il ricorso di annullamento delle persone fisiche e giuridiche”, 1998, at 108.

¹¹⁸ Case 26/62, *Van Gend en Loos/Administratie der Belastingen*, [1963] ECR 1. On *Van Gend en Loos* the literature is extensive. For recent commentaries see e.g., WITTE, “Direct Effect, Supremacy, and the Nature of the Legal Order”, 1999, 177 *et seq.*; HALBERSTAM, “Pluralism in *Marbury* and *Van Gend*”, 2010, at 26-36; MAYER, “*Van Gend en Loos*”, 2010, at 16-25; PESCATORE, “A View From Within”, 2010, at 3-8; WITTE, “The Continuous Significance of *Van Gend en Loos*”, 2010, at 9-15; PAIS, “Comentário ao Acórdão do Tribunal de Justiça de 5 de Fevereiro de 1963, Proc. 26/62, *Van Gend & Loos*”, 2011, at 11-35.

¹¹⁹ Para. 12.

¹²⁰ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 259.

¹²¹ *Ibid.*

¹²² ARNULL, “Judicial Architecture or Judicial Folly?”, 1999, at 516.

¹²³ ARNULL, “The Action for Annulment”, 2000, at 177.

¹²⁴ *Ibid.*

¹²⁵ One should recall that the European Parliament was not even directly elected by the people (Article 137 TEEC).

Economic Community (TEEC), individuals were only allowed to initiate annulment proceedings against (i) decisions addressed to them; (ii) decisions addressed to third parties which were of direct and individual concern to them and (iii) decisions, which although adopted under the form of regulations, were of direct and individual concern to them. To borrow AG COSMAS' words, Article 173(2) TEEC imposed "a significant procedural limitation on the right of action before the Community judicature."¹²⁶

The wording of this provision remained essentially unaltered from its inclusion in the Rome Treaty until the Lisbon reform. The main change introduced along the years to Article 173 TEEC – which would become Article 230 TEC in Amsterdam, and later Article 263 TFEU in Lisbon – concerned the *locus standi* of the European Parliament, which having been firstly acknowledged by the CJEU in its case-law, was later imported to the Treaties themselves.¹²⁷ However, regarding the protection of private parties, and regardless of the critique of scholars and AGs, one had to wait for the Lisbon Treaty to introduce important changes to the standing of individuals. Hence, pursuant to the newly drafted Article 263(4) TFEU private parties may challenge (i) an act of the Union which is addressed to them, (ii) an act which is of direct and individual concern to them, and (iii) regulatory acts which do not entail implementing measures and are of direct concern to them. Moreover, the Lisbon Treaty extended judicial review by the CJEU to acts adopted by the European Council – which became one of the Union institutions capable of adopting acts intended to produce legal effects – and to acts adopted by bodies or agencies of the Union.

Nonetheless, under both versions of current Article 263(4) TFEU individuals face(d) limitations regarding not only the type of acts which they are allowed to challenge but also the so-called *locus standi* requirements. Moreover, such challenge can only be brought within a two months time limit set forth in the Treaty.¹²⁸ Notwithstanding, the CJEU's restrictive interpretation with regard to such provision has proved to be the main cause of the limitations to the direct access by private parties to the Union courts. Commentators have generally noted that the right of action of individuals against acts other than those addressed specifically to them is subject to *strict conditions* which are only acknowledged in *exceptional circumstances*.¹²⁹

II. SCHWARZE affirmed that the European Union is "primarily made up of rules of administrative law."¹³⁰ In this context, the action for annulment is "the linchpin"¹³¹ of the Union's system of administrative law. *Elsewhere* the same author pointed to the dilemma which every legal order which is based on the rule of law encounters:

"[o]n the one hand, it is essential in the public interest to grant the necessary freedom to

¹²⁶ See Opinion of AG COSMAS in Case C-321/95 P, *Greenpeace and others/Commission*, [1998] ECR I-1651, para. 47.

¹²⁷ See *infra* Section 1.1.5.

¹²⁸ Article 263(6) TFEU.

¹²⁹ VANDERSANDEN, "Pour un élargissement du droit des particuliers d'agir en annulation contre les actes autres que les décisions qui leur sont adressées", 1995, at 537.

¹³⁰ SCHWARZE, *European Administrative Law*, 1992, at 4. Stressing the administrative dimension of European integration see AZOULAY, "The Court of Justice and the Administrative Governance", 2001, 425-441.

¹³¹ ARNULL, "Private Applications and the Action for Annulment under Article 173 of the EC Treaty", 1995, at 12.

the European institutions responsible for legislation and administration in constituting and shaping this economic order by legislation and administration; on the other hand, the rule of law generates the need to grant appropriate judicial protection to those citizens and enterprises that are concerned by those measures.”¹³²

These concerns are well known and are common to every system of judicial review. However, there is something in SCHWARZE’s words that until the entry into force of the Treaty of Lisbon was not known to European Union legal order, which is the formal distinction between *legislation* and *administration*. In fact, until the Lisbon Treaty, “*faute d’un véritable législateur*”¹³³ at the EU level, there was no differentiation in the Treaties between legislative and administrative acts. Accordingly, there was no separation between constitutionality and legality review.¹³⁴ Thus, the issue of the avenues opened to individuals to challenge Union action involved those two types of measures – a situation which could justify the restrictive approach adopted by the CJEU regarding direct challenges against measures of general application brought by individuals.¹³⁵

Nonetheless, although having introduced a formal distinction between legislative and administrative acts of general application¹³⁶, the Lisbon Treaty did not create different annulment proceedings within the system of judicial review. Hence, the challenge to legislative and administrative acts continues to take place through the *same form of action*.¹³⁷ This solution is not in line with the Member States constitutional traditions.¹³⁸ In fact, as a general rule, national legal orders differentiate *legislation* from *administration* and provide for extensive review of individual administrative acts and often of those of general application. On the contrary, constitutional review of parliamentary acts is the exception in the Member States, and where it exists it is entrusted to constitutional courts mainly to control constitutional entrenched values and principles.¹³⁹

The action for annulment established in the EU Treaties seems to have been mostly inspired in annulment proceedings against illegal *administrative* action, known to all Member States legal orders.¹⁴⁰ Furthermore, it is safe to affirm that such form of action was a product of an unsolved “French-German dialogue”, which has probably originated most of its shortcomings and inconsistencies. Indeed, as is well known, in Europe, there have been historically two models of systems of administrative justice: (i) the model of “general judicial control of legality”, i.e. the so-called objectivist model or the French model, (ii) and the model of the “protection of individual

¹³² SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 285, 286.

¹³³ RIDEAU, “Le rôle de la Cour de Justice des Communautés européennes”, 1982, at 423.

¹³⁴ See also BROWN; JACOBS, *The Court of Justice of the European Communities*, 1989, at 96.

¹³⁵ The legislative nature of the act is also in principle irrelevant for purposes of the action for damages (see Case 5/71, *Zuckerfabrik Schoepfstedt/Council*, [1971] ECR 975). For a recent overview of the issues surrounding the action for damages see GUTMAN, “The Evolution of the Action for Damages”, 2011, at 695-750. See *infra* Section 1.2.1(c).

¹³⁶ See current Article 288 TFEU.

¹³⁷ Considering that the intention behind Article 173(2) TEEC was to allow the challenge *only* to administrative acts see PARFOURU, “*Locus Standi* of Private Applicants under the Article 230 EC Action for Annulment”, 2007, at 370.

¹³⁸ See *infra*, Part II, Chapter 2, Section 2.1.4.

¹³⁹ SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 6; TÜRK, *Judicial Review in EU Law*, 2009, at 1.

¹⁴⁰ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 7.

rights”, i.e. the so-called subjectivist model or the German model.¹⁴¹

In France, the *contentieux administratif* has a distinct *objectivist* nature. This means that the central purpose of the *recours en annulation* is to review objective legality of an action, i.e. to allow the judge to control the conformity of an *act administratif* with the law.¹⁴² Here, the judges’ main function is to control the administration. The possibility of individuals to defend their personal interests and rights is secondary in this construction. The system is centred mostly in the notion of reviewable act and focuses primarily on ensuring objective and institutional mechanisms of legality review.¹⁴³ In contrast, in Germany, the *Verwaltungsprozess* presents a deep *subjectivist* nature, i.e. it focuses on the protection of the plaintiff’s rights.¹⁴⁴ Since the beginning of the twentieth century individual rights have become a central concept in German administrative law.¹⁴⁵ Here, the purpose of the system of administrative justice is to solve disputes between private parties and the administration.¹⁴⁶ The main function of German judges is to decide controversies.¹⁴⁷ Thus, the German system focuses primarily on the harm inflicted by the administration in the individuals’ legal position and it aims mainly to ensure judicial protection of individuals’ rights.¹⁴⁸

This conceptual difference has important legal and practical consequences.¹⁴⁹ Hence, whereas in Germany administrative courts are part of the judiciary, in France they integrate the executive branch. Whereas in France the *recours en annulation* does not suspend as a rule the contested act,¹⁵⁰ in Germany the contested measures are suspended during the course of judicial proceedings.¹⁵¹ Whereas in the *objectivist* model the courts are not usually bound by the plaintiff’s application and judgments must be effective *erga omnes*, in the *subjectivist* model, courts are bound by such application and the judgment is effective merely *inter partes*.¹⁵² More important, regarding the type of reviewable acts and the standing requirements of private parties, the differences between the two systems are notorious. In France, individuals may freely challenge regulations, i.e., administrative acts of general application. In fact, as the *recours pour excès de pouvoir* – the centrepiece of French administrative justice¹⁵³ – is not so much focused on solving a dispute

¹⁴¹ BELJIN, “Rights in EU Law”, 2008, at 97. For a comparative overview see CROSSLAND, “Rights of the Individual to Challenge Administrative Action before Administrative Courts in France and Germany”, 1975, at 707-747.

¹⁴² DUGUIT, *Traité de Droit Constitutionnel*, 1923, at 35 et seq. See also MACHETE, “A relevância processual dos vícios procedimentais”, 2006, at 854. Nonetheless the French system also incorporates a *contentieux subjectif* which allows for the defence of individual rights.

¹⁴³ ANDRADE, *A Justiça Administrativa*, 2011, at 12; FROMONT, “L’influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes”, 1966, at 48.

¹⁴⁴ BELJIN, “Rights in EU Law”, 2008, at 97.

¹⁴⁵ *Ibid.*, at 95.

¹⁴⁶ FROMONT, “L’influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes”, 1966, at 48.

¹⁴⁷ This allows for an approximation to civil law.

¹⁴⁸ ANDRADE, *A Justiça Administrativa*, 2011, at 13.

¹⁴⁹ See CROSSLAND, “Rights of the Individual to Challenge Administrative Action before Administrative Courts in France and Germany”, 1975, at 707-747.

¹⁵⁰ FROMONT, “L’influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes”, 1966, at 48. See Article L4 of the *Code de Justice Administratif*, 20/6/2012.

¹⁵¹ *Ibid.* See Section 80 of the *Verwaltungsgerichtsordnung*, of 21/1/1960.

¹⁵² BELJIN, “Rights in EU Law”, 2008, at 97.

¹⁵³ AUBY and FROMONT noted that “ce recours a rempli une sorte de fonction doctrinale en donnant à la doctrine et à la jurisprudence l’occasion de dégager quelques unes des solutions de fond essentielles du droit administratif.” See AUBY; FROMONT,

between two parties, but in controlling the legality of administrative action, it is not surprising that an individual may challenge the validity of *any* administrative act even it exceeds the limits of its relationship with the administration, as it is typically the case of regulations. Hence, traditionally, actions brought against regulations are deemed admissible in the French system, with a few minor exceptions.¹⁵⁴ On the contrary, in Germany, *as a rule*, challenges against acts of general application are inadmissible. *Rechtsverordnungen* are not *Verwaltungsakte*.¹⁵⁵ The reason for that can be anticipated: as the action for annulment has the purpose of solving a concrete dispute between the administration and certain individuals, only individual measures can be challenged by private parties.¹⁵⁶ In principle, regulations do not affect individuals directly. In this context, the suspensory effect of the action for annulment is a determinant element, as it enables that measures implementing regulations are suspended during the course of litigation, avoiding possible damages. Nonetheless, in Germany, regulations can be challenged within the system of constitutional review, notably on the grounds of a breach to fundamental rights.

III. Although the European Union's system of administrative justice has been mostly considered to be a "*conquête du droit français*"¹⁵⁷, truth is that it has suffered influences from other Member States legal systems as well. The combination of elements coming from different legal orders led to a system of judicial review which is, in my opinion, mostly determined by objectivist, institutional and systemic concerns. This may be demonstrated by five main ideas, which will be explored below in further detail. Firstly, the CJEU has adopted a predominantly *objectivist* approach to judicial review by private parties in so far as the centrepiece of the possibilities opened to individuals are determined by the type of reviewable acts (1.1.2). Secondly, the CJEU's highly restrictive approach to standing requirements of private parties has effectively prevented individuals from having access to the Union courts and has limited judicial review at the initiative of those harmed by Union measures (1.1.3). Thirdly, and more significantly, the case-law on the admissibility of action for annulment brought by private parties has been immune to the finding of a breach of the right to effective judicial protection at the Union level (1.1.4). Fourthly, and in contrast, the CJEU has not hesitated to adopt a generous view to other *objective* and *institutional* dimensions of the Union's system of judicial review (1.1.5). Lastly, the case-law of the CJEU seems to be inspired by *systemic* concerns regarding its docket control combined with a *certain view* of the Union's judicial architecture, fundamentally anchored in national judiciaries (1.1.6). It seems that

Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne, 1971, at 226.

¹⁵⁴ FROMONT, "L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes", 1966, at 49.

¹⁵⁵ CROSSLAND, "Rights of the Individual to Challenge Administrative Action before Administrative Courts in France and Germany", 1975, at 740.

¹⁵⁶ FROMONT, "L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes", 1966, at 49, mentioning minor exceptions, for instance, the possibility established in some *Länder* of former American sector of challenging some regulations (although federal regulations are excluded).

¹⁵⁷ *Ibid.*, at 47; CROSSLAND, "Rights of the Individual to Challenge Administrative Action before Administrative Courts in France and Germany", 1975, at 746. See also BROWN, "The Influence of the *Conseil d'Etat* on English Administrative Law and the European Court of Justice", 2000, at 297-299. For a comparative analysis see CLASSEN, "Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle", 1996, at 39-88.

it has been precisely this *objectivist, institutional and systemic* approach – which flows directly from the idea set forth in *Les Verts* that the Treaties established a “complete system of legal remedies and procedures” – that has led to the existence of gaps of judicial protection in the EU legal order and underlies the inability of the CJEU to fill in such *lacunae*.

Before proceeding, one should again note that it is not the purpose of this dissertation to analyse in detail the case-law of the CJEU on the possibilities afforded to individuals to challenge Union measures. Such work has been extensively done in the past.¹⁵⁸ Hence, I will focus on those elements in the case-law which support the idea that the approach favoured by the CJEU has been primarily focused on ensuring the *immunization* of Union acts from judicial review at the initiative of individuals and the *effectiveness* of Union’s judicial system as *a whole*, at the detriment of the protection of individuals’ rights and interests.

1.1.2 An Approach Mostly Focused on the Type of Reviewable Act: a *Recours Donn   Contre un Act  *¹⁵⁹

The first illustration of the existence of an *objectivist* trend in the case-law of the CJEU on the admissibility of actions for annulment is the fact that such case-law starts by focusing mainly on the *type of act* that individuals are allowed to challenge.¹⁶⁰ In fact, within the objectivist model the action for annulment is considered to be a procedure brought against an *acte administratif*.¹⁶¹ The centre of the system of administrative justice is the act being challenged and not the position of the individual and its relationship with the administration. Hence, in France the *recours* is an action *in rem*, i.e. against an administrative act. By contrast, in Germany, the action is seen as a “battle between two parties.”¹⁶² It is submitted that the CJEU’s case-law regarding the (i) notion of reviewable acts and (ii) the distinction between measures of individual and general application reflects an *objectivist* approach, in so far as it focuses on an objective element of judicial review, i.e., the nature and type of reviewable act, and restricts the possibilities of successful individual challenges to the validity of Union measures. In fact, contrary to what happens traditionally in objectivist systems which allow for a broad access by individuals to judicial review, the outcomes produced by the CJEU’s case-law have been precisely the opposite, effectively limiting direct access

¹⁵⁸ See e.g., WAELBROECK, “Examen de Jurisprudence (1955    1971), Communaut  s Europ  ennes”, 1971, at 517-547; VANDERSANDEN; BARAV, *Contentieux Communautaire*, 1977, at 161-187; BEBR, *Development of Judicial Control in the European Communities*, 1981, at 65-85; MEGRET [et al.], *Le droit de la Communaut     conomique Europ  enne*, 1983, at 103-124; KAPTEYN; VAN THEMAAT, *Introduction to the Law of the European Communities*, 1998, at 471-488; SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 414 et seq.; AMALFITANO, “La protezione giurisdizionale dei ricorrenti non privilegiati nel sistema comunitario”, 2003, at 13 et seq.; LASOK; MILLET, *Judicial Control in the EU*, 2004, at 47-54; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 203-287; QUADROS; MARTINS, *Contencioso da Uni  o Europeia*, 2007, at 152-167; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 258-366; T  RK, *Judicial Review in EU Law*, 2009, at 12-105 and 203-238; and references included in *supra* note 47.

¹⁵⁹ The expression is attributed to LAFERRI  RE, in *Trait   de la Jurisdiction Administrative et des Recours Contentieux*, 1896, at 561.

¹⁶⁰ Noting that in EU law there is no procedure equivalent to the English action for a declaration (injunction) which allows for an abstract review of the legal position of the applicant see HARTLEY, *The Foundations of European Union Law*, 2010, at 353.

¹⁶¹ CROSSLAND, “Rights of the Individual to Challenge Administrative Action before Administrative Courts in France and Germany”, 1975, at 718.

¹⁶² *Ibid.*, at 731.

by private parties to the Union courts. Thus, in practical terms, the CJEU's conceptual approach focused on the legal nature of the contested acts has sacrificed *subjective* judicial review.

a) From the *ERTA* Principle to the Notion of *Actes Faisant Grief*

I. The CJEU considered in *ERTA*¹⁶³ that an action for annulment must be available against “all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.”¹⁶⁴ The *ERTA* definition places emphasis on the *substance* of the act and not its form¹⁶⁵ and consequently, the type of acts against which an action for annulment may be brought is not confined to the ones indicated in current Article 288 TFEU.¹⁶⁶ Hence, this decision has been considered as an example of a liberal and flexible interpretation of the Treaties which favours judicial review.¹⁶⁷ AG JACOBS considered in *UPA* that the CJEU has adopted a *broad* notion of reviewable act.¹⁶⁸ However, one should note that from the individuals' point of view the enthusiasm that the *ERTA* formula may inspire must be refrained. At the outset, the case involved an *institutional* conflict between the Council and the Commission and the decision of the CJEU was mostly based on *institutional* concerns and arguments.¹⁶⁹ It is not surprising therefore that from the perspective of the judicial protection of private parties such case-law has not always produced adequate outcomes. In fact, the notion of reviewable act adopted in the CJEU's case-law has in some instances represented a significant *obstacle* to access to justice by private parties.¹⁷⁰

Hence, according to the CJEU, only acts which are capable of producing legal effects *vis-à-vis* third parties can be challenged through an action for annulment.¹⁷¹ In *IBM*¹⁷² the CJEU added that such legal effects occur when the measure is “*binding on* and capable of *affecting* the interests of the applicant by bringing about a distinct change in his *legal position*.”¹⁷³ In other words, “to have legal effects, an act must produce *a change* in somebody's *rights and obligations*.”¹⁷⁴ The idea that such acts must be able to produce legal effects *in relation to third parties* arose in *Les Verts*.¹⁷⁵

¹⁶³ Case 22/70, *Commission/Council (ERTA)*, [1971] ECR 263.

¹⁶⁴ Para. 42.

¹⁶⁵ TÜRK, *Judicial Review in EU Law*, 2009, at 12.

¹⁶⁶ An action for annulment can be brought against conclusions by the Member States in the Council (Case 22/70, *Commission/Council (ERTA)*, [1971] ECR 263); letters written by Commission staff (Case T-84/97, *BEUC/Commission*, [1998] ECR II-795, para. 48); and even oral decisions (Joined Cases 316/82 and 40/83, *Kohler/Court of Auditors*, [1984] ECR 641) paras. 9-13; Case T-3/93, *Air France/Commission*, [1994] ECR II-121, paras. 57-59).

¹⁶⁷ See e.g., MEGRET [et al.], *Le droit de la Communauté Économique Européenne*, 1983, at 89; ARNULL, “The Action for Annulment”, 2000, at 180; BERROD, *La systématique des voies de droit communautaires*, 2003, at 1054; USHER, “Direct and Individual Concern”, 2003, at 576;

¹⁶⁸ See Opinion of AG JACOBS in *UPA*, para 68.

¹⁶⁹ One should draw the attention to paras. 37 to 42 of the decision. Particularly, the decision is taken taking into account the fact that “a dispute between the institutions admissibility has to be appraised with particular rigour.”

¹⁷⁰ See SILVA, *Em Busca do Acto Administrativo Perdido*, 2003, at 573 *et seq.*

¹⁷¹ Case C-57/95, *France/Commission*, [1997] ECR I-1627; Case C-370/07, *Commission/Council*, [2009] ECR I-8917.

¹⁷² Case 60/81, *IBM/Commission*, [1981] ECR 2639.

¹⁷³ Para. 9. Joined Cases 8 to 11/66, *Cimenteries and others/Commission of the EEC*, [1967] ECR 75, at 91.

¹⁷⁴ HARTLEY, *The Foundations of European Union Law*, 2010, at 354. For a good illustration of this principle see Joined Cases 8 to 11/66, *Cimenteries and others/Commission of the EEC*, [1967] ECR 75. Noting that in considering that also recommendations (Case 322/88, *Grimaldi/Fonds des maladies professionnelles*, [1989] ECR 4407) and Opinions (Case 187/87, *Saarländ/Minister for Industry*, [1988] ECR at 5013) may be reviewable, the CJEU was truly re-drafting the Treaty see ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 20.

¹⁷⁵ Some authors suggested that this requirement applied only to Parliament's acts. See HARTLEY, *The Foundations of European Community Law*, 2007, at 326.

Thus, according to the CJEU's case-law the contested act *must be binding*.¹⁷⁶ The binding nature of an act is assessed only from its content, and not its form.¹⁷⁷ Binding acts are the outcome of an "exercise, upon the conclusion of an internal procedure laid down by law, of a power provided for by law which is intended to produce legal effects of such a nature as to affect adversely the interests of the applicant by modifying its legal position."¹⁷⁸ Such act must thus "have a legitimate legal basis, reflect the *definitive position* of the Community institution or body and be intended to have legal effects."¹⁷⁹ Hence, for instance, mere contractual acts cannot be regarded as acts exercising prerogatives of a public authority and cannot be the subject of an action for annulment.¹⁸⁰

II. Thus, the ERTA case-law had both a positive and a negative effect. The main positive effect was that it established the individual's right to initiate actions against any acts of the institutions beyond the ones listed in current Article 288 TFEU.¹⁸¹ The negative effective was that it stressed that they would *only* be capable to challenge measures which were *intended* to have legal effects.¹⁸² Accordingly, in *IBM* the action was considered inadmissible as some of the effects of the contested measure did not adversely affect the interests of the applicants, while others were "no more than the ordinary effects of any procedural step and, *apart from the procedural aspect*, do not affect the legal position of the undertaking concerned."¹⁸³ Later, in *Coca-Cola Company*¹⁸⁴ the GC considered the action to be inadmissible as none of the findings included in the Commission's decision which the applicants contested had binding legal effects. It has been noted that in this case the GC seems to have made the challenge to a Commission's decision even more difficult, in so far as such act had unquestionably *effects* on the interests of the applicants.¹⁸⁵

¹⁷⁶ Also under the action for failure to act the duty to take a decision must give rise to an act which is capable of having legal effects (See Opinion of AG MISCHO, in case Case 377/87, *Parliament/Council*, [1988] ECR 4017, at 4029) and when brought by a private applicant such act must be binding (Case 15/70, *Chevalley/Commission*, [1970] ECR 975). Hence, individuals may not bring actions for failure to adopt recommendations or Opinions. See Article 265 TFEU.

¹⁷⁷ See e.g., Case C-57/95, *France/Commission*, [1997] ECR I-1627 para. 9; Joined Cases T-125 and 127/97, *Coca-Cola/Commission*, [2000] ECR II-1733, para. 26; Case T-113/00, *DuPont Teijin Films Luxembourg and others/Commission*, [2002] ECR II-3681, para. 45; Case T-216/01, *Reisebank/Commission*, [2001] ECR II-3481, para. 45. For further indication of relevant case-law see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 207.

¹⁷⁸ Case 182/80, *Gauff/Commission*, [1982] ECR 799, para. 18. Noting that the institutions do not have to inform the private applicant if the notifying act is binding, or not see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 206, note 16.

¹⁷⁹ *Ibid.* The fact that a binding act must have a legitimate legal basis in the Treaties, often leads the CJEU to assess together the substance of the case and the admissibility of the action. See e.g., Case C-233/02, *France/Commission*, [2004] ECR I-2759, para. 26.

¹⁸⁰ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 207. See also Case T-186/96, *Mutual Aid Administration Services/Commission*, [1997] ECR II-1633, paras. 50-51; Case T-149/00, *Zapf Creation/OHIM (New Born Baby)*, [2001] ECR II-2927, para. 28; Case T-85/01, *IAMA Consulting/Commission*, [2003] ECR II-4973, paras. 51-53; Joined Cases T-314 and 378/03, *Musée Grévin/Commission*, [2004] ECR II-1421, paras. 80-85. National courts will have jurisdiction though.

¹⁸¹ However, the preamble of an act is not reviewable since it merely supports the operative part and does not in itself produce legal effects. See Case T-138/89, *NBV and NVB/Commission*, [1992] ECR II-2181.

¹⁸² Case C-308/95, *Netherlands/Commission*, [1999] ECR I-6513; Case C-443/97, *Spain/Commission*, [2000] ECR I-2415.

¹⁸³ Paras. 17-21.

¹⁸⁴ Joined Cases T-125 and 127/97, *Coca-Cola/Commission*, [2000] ECR II-1733.

¹⁸⁵ Noting that in *Coca Cola Company*, by not applying the *NBV* case-law (Case T-138/89, *NBV and NVB/Commission*, [1992] ECR II-2181, para. 31) which had established that the operative part was the only capable of producing legal effects, the GC suggested that the grounds of an act are now effectively open to challenge in the same terms as the operative part, see ARNULL, "Private Applicants and the Action for Annulment since *Codomiu*", 2001, at

Hence, despite the *broad* notion adopted in ERTA, scholars note that the CJEU's views on the nature of the reviewable acts are not "unlimited in scope."¹⁸⁶ In fact, the requirement that an act must affect the applicants' legal position "often constitutes a considerable hurdle"¹⁸⁷ to access Union courts. This case-law has in fact limited access of individuals in so far as certain types of acts have been excluded from the CJEU's competence under Article 263 TFEU.¹⁸⁸ Hence, as a rule, preparatory acts¹⁸⁹, provisions of information¹⁹⁰, internal rules and guidelines¹⁹¹, confirmatory acts¹⁹², acts which express a future conduct¹⁹³, and non-existent acts¹⁹⁴ cannot be object of an action for annulment.¹⁹⁵ Moreover, the requirement regarding the existence of an "impact on the legal position of the individual" has not been consistently applied by the CJEU, which has sometimes crossed the notion of reviewable act with the requirement of direct concern.¹⁹⁶

Additionally, the case-law has not proved unproblematic in borderline cases. Hence, while an act which merely confirms a previous act is not reviewable, that will not be the case if the later act goes beyond the first one and creates new rights and obligations¹⁹⁷, or if after the adoption of the first act there has been a fundamental change in the circumstances which modifies the effects of such act.¹⁹⁸ Furthermore, the CJEU has also stated that an act with mere internal effects is not reviewable, a case-law which was developed mainly regarding the European Parliament acts.¹⁹⁹ It

19. ¹⁸⁶ ARNULL, "Private Applications and the Action for Annulment under Article 173 of the EC Treaty", 1995, at 18.

¹⁸⁷ TÜRK, *Judicial Review in EU Law*, 2009, at 12.

¹⁸⁸ For further developments see SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 332 *et seq.*; TÜRK, *Judicial Review in EU Law*, 2009, at 13 *et seq.*

¹⁸⁹ E.g., Case 346/87, *Bossi/Commission*, [1989] ECR 303, para. 23; Case T-64/89, *Automec/Commission*, [1990] ECR II-367, para. 42; Case T-47/01, *Co-Frutta/Commission*, [2003] ECR II-4441, paras. 28-33.

¹⁹⁰ E.g., Case 133/79, *Sucrimes/Commission*, [1980] ECR 1299; Case 151/88, *Italy/Commission*, [1989] ECR 1255; Joined Cases T-3/00 and 337/04, *Pitsiorlas/Council and ECB*, [2007] ECR II-4779, para. 61; Case C-521/04 P, *Tillack/Commission*, [2005] ECR I-3103.

¹⁹¹ E.g., Case 114/86, *United Kingdom/Commission*, [1988] ECR 5289; Case C-443/97, *Spain/Commission*, [2000] ECR I-2415, para. 34; Case C-233/02, *France/Commission*, [2004] ECR I-2759. In contrast, see e.g. Case T-35/99, *Keller and Keller Meccanica/Commission*, [2002] ECR II-261, para. 77.

¹⁹² E.g., Case 56/72, *Van der Schueren/Commission*, [1973] ECR 181, para. 15; Case 1/76, *Wack/Commission*, [1976] ECR 1017, para. 7; Case C-12/90, *Infortec/Commission*, [1990] ECR I-4265, para. 10; Case T-514/93, *Cobrecap and others/Commission*, [1995] ECR II-621, para. 44; Case T-188/95, *Waterleiding Maatschappij "Noord-West Brabant"/Commission*, [1998] ECR II-3713, paras. 88-141; However, the act has to be a genuine confirmatory act, which means that the earlier act had to be amenable to appeal (Joined Cases 193 and 194/87, *Maurissen and Union syndicale/Court of Auditors*, [1989] ECR 1045, para. 23).

¹⁹³ If they do not embody binding commitments and do not produce legal effects. See Joined Cases 90 and 91/63, *Commission of the EEC/Luxembourg and Belgium*, [1964] ECR 625, at 631; Case 9/73, *Schlüter/Hauptzollamt Lörach*, [1973] ECR 1135, para. 40; Case 114/86, *United Kingdom/Commission*, [1988] ECR 5289.

¹⁹⁴ E.g., Cases 248/86, *Brüggemann/ESC*, [1987] ECR 3963; Case T-64/89, *Automec/Commission*, [1990] ECR II-367, para. 41; Case T-16/91, *Rendo and others/Commission*, [1992] ECR II-2417, para. 39. See also Joined Cases 1 and 14/57, *Usines à tubes de la Sarre/ECSC High Authority*, [1957-1958] ECR 105; Joined Cases T-79, 84 to 86, 89, 91, 92, 94, 96, 98, 102 and 104/89, *BASF and others/Commission*, [1992] ECR II-315; Case C-137/92 P, *Commission/BASF and others*, [1994] ECR I-2555. See also LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 205; HARTLEY, *The Foundations of European Union Law*, 2010, at 364; QUADROS, "A relevância para o contencioso administrativo nacional do acto administrativo comunitário e do acto administrativo nacional contrário ao Direito da União Europeia", 2010, at 1034 *et seq.*; CRAIG; BURCA, *EU Law*, 2011, at 489.

¹⁹⁵ For further developments see TÜRK, *Judicial Review in EU Law*, 2009, at 13 *seq.*

¹⁹⁶ TÜRK, *Judicial Review in EU Law*, 2009, at 37. See Case 126/83, *STS/Commission*, [1984] ECR 2769 and Case T-185/94, *Geotronics/Commission*, [1995] ECR II-2795. For an analysis of sector-specific case-law regarding the notion of reviewable act see CRAIG, "Legality, Standing and Substantive Review in Community Law", 1994, at 516-519; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 216 *et seq.*

¹⁹⁷ See Case C-321/95 P, *Greenpeace and others/Commission*, [1998] ECR I-1651; Case C-303/90, *France/Commission*, [1991] ECR I-5315; Case C-57/95, *France/Commission*, [1997] ECR I-1627.

¹⁹⁸ Case 22/70, *Commission/Council (ERTA)*, [1971] ECR 263, para. 66.

¹⁹⁹ Case 78/85, *Groupe des Droites européennes/Parliament*, [1986] ECR 1753; Joined Cases 358/85 and 51/86,

may not be, however, easy to draw the line between purely internal and external effects of an act.²⁰⁰ Also, problems arise when an institution adopts an act which binds it as to future action.²⁰¹ Here, it can be hard to determine if such self-limitation is binding *per se* and if it affects the rights of third parties. Hence, the CJEU has in some cases considered that a statement of future intention can be a reviewable act, even if it is not, strictly speaking, *binding on* the institution.²⁰² The case-law is not, however, clear-cut.

Regarding procedures which take place with several stages, the impossibility to challenge preparatory acts has also proved problematic. The CJEU has held that:

“[i]n the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure *definitively laying down* the position of the Commission or the Council on the conclusion of that procedure, and *not a provisional measure* intended to pave the way for the final decision (emphasis added).”²⁰³

However, in cases where preliminary decisions are binding on the final deciding body, it is hard to see how such decisions cannot be reviewed immediately. According to the CJEU’s case-law a preparatory act will only be deemed a reviewable act if it can be separated from the final decision.²⁰⁴ If not, such act can only be challenged in the course of the proceedings to annul the final decision. The leading case here is still *IBM* mentioned above, where the Court justified its approach on the ground that the consequences of the decision to bring proceedings were either wholly favourable to IBM or merely paved the way for later steps in the procedure.²⁰⁵ Nonetheless, it is undeniable that IBM had to incur a great expense of arguing the cases on the merits before it could raise its preliminary objections.²⁰⁶

France/Parliament, [1988] ECR 4821.

²⁰⁰ HARTLEY, *The Foundations of European Union Law*, 2010, at 357. See Case 366/88, *France/Commission*, [1990] ECR I-3571.

²⁰¹ Case 15/63, *Lasalle/Parliament*, [1964] ECR 57; Case 79/74, *Küster/Parliament*, [1975] ECR 725; Case 25/77, *De Roubaix/Commission*, [1978] ECR 1081.

²⁰² Joined Cases 7/56 and 3 to 7/57, *Algera and others/Common Assembly*, [1957-1958] ECR 39. See also Case 8/55, *Fédération charbonnière de Belgique/ECSC High Authority*, [1954-1956] ECR 245. Welcoming such orientation, and questioning a later decision in Case 114/86, *United Kingdom/Commission*, [1988] ECR 5289, see HARTLEY, *The Foundations of European Union Law*, 2010, at 359.

²⁰³ Case 60/81, *IBM/Commission*, [1981] ECR 2639, para. 10. An action for annulment is only admissible against an act which lays down definitively the position of the adopting institution (see Case 23, 24 and 52/63, *Usines Emile Henricot and others/ECSC High Authority*, [1963] ECR 217, at 223, 224; Case 60/81, *IBM/Commission*, [1981] ECR 263, para. 10; Case C-64/93, *Donatab and others/Commission*, [1993] ECR I-3595, paras. 13-14; Case T-123/99, *JT’s Corporation/Commission*, [2000] ECR II-3269, para. 25; Case T-123/03, *Pfizer/Commission*, [2004] ECR II-1631, paras. 25-27). In contrast, see Case T-87/96, *Assicurazioni Generali and Unicredito/Commission*, [1999] ECR II-203 where a decision of the Commission laying down the criteria for assessing the lawfulness of an operation as well as its procedure was considered to affect the individual’s legal position (para. 43). Nonetheless, when an action is brought against an act concluding a procedure comprising different stages any irregularities in preparatory acts may be challenged together with the final act (see Joined Cases 12 and 29/64, *Ley/Commission of the EEC*, [1965] ECR 107, para. 118; Joined Cases T-10 to 12, 14 and 15/92, *Cimenteries CBR and others/Commission*, [1992] ECR II-1571, para. 24).

²⁰⁴ Case 78/63, *Huber/Commission of the EEC*, [1964] ECR 367.

²⁰⁵ BERROD, *La systématique des voies de droit communautaires*, 2003, at 589 *et seq.*; HARTLEY, *The Foundations of European Union Law*, 2010, at 361. For further case-law see TÜRK, *Judicial Review in EU Law*, 2009, at 17-23.

²⁰⁶ HARTLEY, *The Foundations of European Union Law*, 2010, at 362. See also Case 5/85, *AKZO Chemie/Commission*, [1986] ECR 2585, where the Court considered that the decision directly affected AKZO’s right to confidentiality, independently of the final decision, and the right to challenge such decision later on would not constitute an adequate remedy as the damage would already have been done.

Lastly, the circumstances where a refusal by an institution to accede to a request can be reviewable are also not entirely clear.²⁰⁷ In principle, if the act which has been refused is not reviewable the refusal will not be reviewable. However, there have been cases where the requested act was reviewable and the refusal was not.²⁰⁸

III. Scholars have considered that “whilst it is possible to rationalise the decisions of the Court, the case law is confusing and arbitrary.”²⁰⁹ There have been cases where the contested acts are in practice part and package of the same thing, and it makes little sense to look at them separately.²¹⁰ Furthermore, the distinction between the decisions to start or not to start competition proceedings is “economic nonsense.”²¹¹

ARNULL noted that the CJEU established the notion of reviewable act based on the way the act *affects* individuals.²¹² However, in establishing the relevant criteria of such *affectability* the Court has adopted a mainly *legal*-oriented approach, which does not always reflect the reality of the market. This is clear regarding the statement that the act has to be “binding in” and “produce legal effects”²¹³, and in the idea that the act must bring about a distinct change in the individuals “legal position”²¹⁴ or adversely affect it by restricting his “rights and obligations.”²¹⁵ If this is not the case, the act will not be considered binding, and the action will be held inadmissible.²¹⁶ Hence, the case-law of the CJEU has focused more on the *legal nature* and *features* of the contested measure, than on the *effects* the act produces in the individual’s situation.

Besides the fact that scholars have questioned the adequacy of a system of administrative justice which reserves reviewability to *final* and *binding* administrative acts²¹⁷, it is submitted that the

²⁰⁷ TÜRK, *Judicial Review in EU Law*, 2009, at 13.

²⁰⁸ See e.g., Case T-54/99, *max.mobil/Commission*, [2002] ECR II-313, overturned on appeal (Case C-141/02, *Commission/max-mobil*, [2005] ECR I-1283).

²⁰⁹ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 401.

²¹⁰ See e.g., Case C-27/04, *Commission/Council*, [2004] ECR I-6649.

²¹¹ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 401.

²¹² ARNULL, “Private Applicants and the Action for Annulment since *Codomiu*”, 2001, at 16.

²¹³ Joined Cases 8 to 11/66, *Cimenteries and others/Commission of the EEC*, [1967] ECR 75, para. 91; Case 22/70, *Commission/Council (ERTA)*, [1971] ECR 263, para. 39; Case C-312/90, *Spain/Commission*, [1992] ECR I-4117, para. 11-26; Case C-327/91, *France/Commission*, [1994] ECR I-3641, paras. 14-15; Case T-154/94, *CSF and CSME/Commission*, [1996] ECR II-1377, para. 37 *et seq.*

²¹⁴ Case 60/81, *IBM/Commission*, [1981] ECR 2639, para. 9; Case 53/85, *AKZO Chemie/Commission*, [1986] ECR 1965, para. 16; Case T-112/99, *M6 and others/Commission*, [2001] ECR II-2459, para. 40-41; Case C-242/00, *Germany/Commission*, [2002] ECR I-5603, paras. 39-46. Whether an act is considered to produce legal effects is determined firstly by its operative part, although explanations and recitals may be taken into account (see e.g., Case T-138/89, *NBV and NVB/Commission*, [1992] ECR II-2181; Case C-355/95, *TWD/Commission*, [1997] ECR I-2549, para. 21; and Joined Cases T-213/95 and T-18/96, *SCK and FNK/Commission*, [1997] ECR II-1739, para. 104).

²¹⁵ This was not the case in Case T-541/93, *Coughlin and others/Council*, [1994] ECR II-1235; Case T-554/93, *Abbott Trust/Council and Commission*, [1994] ECR II-1.

²¹⁶ Case 151/88, *Italy/Commission*, [1989] ECR 1255, paras. 22-23; Case T-113/89, *Nefarma and others/Commission*, [1990] ECR II-797, para. 66-99; Case C-117/91, *Bosman/Commission*, [1991] ECR I-3353, para. 14; Joined Cases T-10 to 12 and 15/92, *Cimenteries CBR and others/Commission*, [1992] ECR II-2667, para. 28; Case C-476/93, *Nutril/Commission*, [1995] ECR I-4125, paras. 30-31; Case C-58/94, *Netherlands/Council*, [1996] ECR I-2169, para. 27; Case T-271/94, *Branco/Commission*, [1996] ECR II-749, para. 32; Case T-277/94, *AITEC/Commission*, [1996] ECR II-351, paras. 49-56; Case T-54/96, *Oleifici Italiani and Fratelli Rubino Industrie Olearie/Commission*, [1998] ECR II-3377, paras. 50-51; Case C-180/96, *United Kingdom/Commission*, [1996] ECR I-3903, para. 29; Joined Cases T-377, 379 and 380/00, and 260 and 272/01, *Philip Morris International/Commission*, [2003] ECR II-1, para. 79; Case C-301/03, *Italy/Commission*, [2005] ECR I-10217, paras. 21-24. Noting that the concept of reviewable act in the CJEU’s case-law is still mainly restrictive ANTUNES, “O acto no contencioso administrativo”, 2005, at 98. See also ALONSO GARCÍA, “El acto administrativo comunitario”, 2005, at 47 *et seq.*

²¹⁷ See SILVA, *Em Busca do Acto Administrativo Perdido*, 2003, at 599 *et seq.*, analysing the evolution in France and

notion of reviewable act should be determined by the *effects* that a measure produces either in the legal or factual situation of the individual.²¹⁸ To allow challenges to harmful acts – *actes faisant grief* – would shift the focus of the system of judicial review to the protection of individuals, instead of privileging the freedom of the administration. Thus, in so far as a Union act *fait grief* to a private applicant, said act should be deemed reviewable.²¹⁹ Accordingly, as BERROD has put it:

“[l]e caractère d’acte attaquant est alors presque indissociable d’un autre obstacle traditionnel à la recevabilité des actions individuelles, à savoir le lien individuel entre le requérant et l’acte.”²²⁰

b) The Sophistication of the CJEU’s Case-Law on “Disguised Decisions” and “True Regulations”

I. AG ROEMER pointed out in the *Plaumann*²²¹ case that the Rome Treaties took into account “the legal nature of the measures in the definition of the right of action by contrasting regulations and decisions.”²²² In fact, the original version of the Treaties “contained an invitation to look behind the form of the measure to its substance”²²³, in so far as the CJEU could decide that a measure adopted in form of a regulation was in reality a decision that was of direct and individual concern to the applicant. This invitation paved the way for a case-law mainly focused on the *legal nature* of the contested acts, which while aiming to determine if such measures were “disguised decisions” or “true regulations” effectively deprived most individuals of direct access to the Union courts and of the right to judicial review of Union acts.

In fact, under the original version of Article 263(4) TFEU it was not clear if private parties could challenge acts of general application. By referring to decisions taken *in the form of a regulation*, one could assume that it was the framers’ intention not to allow the challenge of acts of general application, especially *legislative* acts.²²⁴ However, it is also possible to argue the contrary: *i.e.*, that by referring specifically to regulations Member States did not want to exclude *in principle* such challenge.²²⁵ Hence, the question of knowing if the drafters of the European Communities Treaties wanted to allow the challenge of general acts has been long debated among scholars.²²⁶

The preparatory works of the Treaties are not particularly conclusive on the reasons why

Germany.

²¹⁸ This is supported by the current wording of Article 263(1) TFEU which mentions simply acts “intended to produce legal effects *vis-à-vis* third parties.” See *infra* Part II, Chapter 2, Section 2.1.1.

²¹⁹ It is not surprising that in French law the *intérêt pour agir* is assessed also in view of the effects of the decision regarding the applicant. See AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 226.

²²⁰ BERROD, *La systématique des voies de droit communautaires*, 2003, at 1055.

²²¹ Case 25/62, *Plaumann/Commission of the EEC*, [1963] ECR 126.

²²² Opinion AG ROEMER, at 116.

²²³ CRAIG; BÚRCA, *EU Law*, 2011, at 493.

²²⁴ TÜRK, *Judicial Review in EU Law*, 2009, at 46. AG COSMAS in *Greenpeace* considered that “the purpose of Article 173, which is designed to enable persons to challenge measures having a particular impact on them, while limiting the right to challenge regulations so that there is no risk of their annulment being sought by an unlimited class of applicants (para. 88).” Considering that regulations may have a direct impact on citizens’ interests and that the fact they fall outside the possibilities of review by private applicants amounts to a serious limitation in the system of judicial protection, which is particularly serious considering the lack of democracy still informing Union legislation see ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 109.

²²⁵ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 15, 16.

²²⁶ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 350.

direct challenges against acts of general application were generally excluded.²²⁷ Scholars have pointed out two main reasons: (i) on the one hand, the drastic consequences of the annulment of regulations, especially those adopted by unanimity after years of laborious negotiations²²⁸; and (ii) on the other hand, the *quasi*-legislative nature of such acts which were considered to constitute the laws of the Union.²²⁹ Surely these arguments can be rebutted. Qualified majority voting applies currently to most Union policies, and the majority of EU regulations are in fact acts of an administrative nature. CATALANO early suggested, in 1965, that a difference should be made between challenges against *administrative* and *legislative* regulations, although the wording of the Treaty did not allow for such differentiation.²³⁰ In fact, in Member States' legal orders challenges against administrative measures are usually made much easier than against legislative acts.²³¹ Furthermore, there is in fact a *substantive* difference between Commission regulations and those adopted by the Council and Parliament within the legislative process.²³² Such a difference is currently acknowledged in the Treaties.²³³ The CJEU also implicitly recognized such distinction in the famous *Köster*²³⁴ case. However, somehow surprisingly the difference between administrative and legislative acts did not permeate the CJEU's case-law in the context of the admissibility of actions for annulment.²³⁵ Most probably because there is no formal difference between constitutionality and legality review in the European Union – as both take place within the context of the action for annulment – the Court did not feel compelled to introduce such distinction in the case-law.

Notwithstanding, it seems that in the original version of the Treaties it was the drafters' intentions to forbid challenges brought by private parties against any acts of general application.²³⁶

²²⁷ For further analysis on the *travaux préparatoires* of the Treaties see CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 163 *et seq.*

²²⁸ See Opinion of AG LAGRANGE in *Producteurs* at 486.

²²⁹ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 110. In Case 8/55, *Fédération charbonnière de Belgique/ECSC High Authority*, [1954-1956] ECR 245 when applicants argued that they should be able to challenge general decisions on any ground of illegality, beyond the misuse of powers, the CJ explained the reason behind the limited possibilities to challenge normative acts.

²³⁰ Intervention regarding "*La Fusion des Communautés Européennes*", in *Colloquium organised in Liège on the 28, 29 and 30 April 1965*, The Hague, 1965, at 285, 285, *apud* ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 110. RASQUIN and CHEVALLIER noted that the wording of Article 173 opposed such view and alerted for the danger of allowing the Court to determine its own jurisdiction. See RASQUIN; CHEVALLIER, "L'article 173, alinéa 2 du Traité C.E.E.", 1966, at 42.

²³¹ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 111, 112.

²³² For further developments see TÜRCK, *The Concept of Legislation in European Community Law* 2006, at 187 *et seq.* CRAIG noted that all depends upon the manner in which one classifies Union norms. Hence, it is possible to contend that the Treaty itself is akin to a constitutional document, and that regulations made there under are akin to primary legislation and hence that they are difficult to challenge. It is, however, also possible to argue that this characterization is imperfect, and that in reality the Union modes of making further norms should be regarded as *sui generis*. Nonetheless, at the very least it is evident that many of the regulations which are made by the Union are more closely analogous in nature and content to secondary legislative norms, to rules made by the administration, or to administrative decisions than they are to primary legislation. However, the availability of standing in national legal systems with respect to such norms is, in many instances, more liberal than that which prevails in the Union. See CRAIG, "Legality, Standing and Substantive Review in Community Law", 1994, at 524.

²³³ See Articles 288 to 291 TFEU.

²³⁴ Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel/Köster*, [1970] ECR 1161, para. 6.

²³⁵ The argument was put forward by the applicant in Case 40/64, *Sgarlata and others/Commission of the EEC*, [1965] ECR 215 and was rejected by the AG and implicitly by the CJEU.

²³⁶ See also ALMEIDA, "Le recours en annulation des particuliers", 1995, at 849; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 334. Considering that the challenge against a decision taken in form of a regulation "*devait rester exceptionnelle*" see SCHOCKWEILER, "L'accès à la justice dans l'ordre juridique communautaire", 1996, at 2. Affirming that only decisions were susceptible of challenge by private persons and "actions to test the legality of other forms of binding act are clearly excluded", see HARDING, "Decisions

In fact, given the indefinite nature of the powers exercised by the European institutions — “*mi-législatif, mi-réglementaire*”²³⁷, — the control of legality of EU acts was much akin to constitutionality review of *quasi-legislative* acts. It seems that allowing individuals to initiate proceedings against such acts would, on the one hand, imply an intrusion in the exercise of public power that Member States wanted to avoid, and on the other hand, did not meet the constitutional traditions of most Member States. As a consequence, the CJEU held that:

“[t]here is *nothing in the Treaty* from which it may be concluded that private undertakings have been granted such a right to review the ‘constitutionality’ of general decisions, that is, their conformity with the Treaty, since they are *quasi-legislative* measures adopted by a public authority with legislative effect ‘*erga omnes*’ (emphasis added).”²³⁸

Hence, even under the Treaty establishing the European Coal and Steel Community (TECSC) the possibility established in Article 33 of challenging “general decisions” which individuals deemed to involve a misuse of powers affecting them could have been seen as limited to those cases where the institutions had adopted an individual act *in form of a general act*.²³⁹ Thus, Article 33(2) TECSC would only allow the challenge of “disguised individual decisions.”²⁴⁰ This intention would have become clearer under the wording of Article 173 TEEC, and would have been later confirmed in the case of *Producteurs*.²⁴¹ However, such view was discarded by the CJEU. In *Fédération Charbonnière de Belgique*²⁴², the CJEU rejected the defendants claim under the TECSC that the applicant could only challenge the decision if it could prove that it was an individual decision disguised as a general decision.²⁴³ Thus, under the TECSC the Court adopted a non-formalistic approach to the nature of measures subject to annulment proceedings.²⁴⁴ This was especially relevant in the context of the ECSC as the Treaty did not include a provision

Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 18.

²³⁷ FROMONT, “L’influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes”, 1966, at 50.

²³⁸ Case 8/55, *Fédération charbonnière de Belgique/ECSC High Authority*, [1954-1956] ECR 245, at 258.

²³⁹ SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 416. Noting the differences between the French *détournement de pouvoir* and the German *Ermessensmissbrauch*, and considering that AG ROEMER proposed in Case 18/57, *Nold KG/ECSC High Authority*, [1959] ECR 41 to adopt a mixed notion of misuse of powers which was accepted by the Court, see FROMONT, “L’influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes”, 1966, at 51-52.

²⁴⁰ See FROMONT, “L’influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes”, 1966, at 50-51, noting that the Luxembourgish law ratifying the Treaty included a sentence confirming such approach: “[s]eules les décisions individuelles de la Haute Autorité ou celles qui sont générales, mais que la notion de détournement de pouvoir permet d’assimiler à une décision individuelle, peuvent être directement attaquées par les entreprises ou les associations contre lesquelles sont dirigées.” Moreover, it took the CJEU thirty years to annul a general decision on grounds of misuse of power. See Joined Cases 140, 146, 221 and 226/82, *Walzstahl-Vereinigung and Thyssen/Commission*, [1984] ECR 951.

²⁴¹ Joined Cases 16 and 17/62, *Confédération nationale des producteurs de fruits et légumes and others/Council of the EEC*, [1962] ECR 471.

²⁴² Case 8/55, *Fédération charbonnière de Belgique/ECSC High Authority*, [1954-1956] ECR 245. For further developments see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 153 et seq.

²⁴³ Case 8/55, *Fédération charbonnière de Belgique/ECSC High Authority*, [1954-1956] ECR 245, at 257. Considering that in light of these cases, it is clear that Member States made a deliberate choice to favour a more restrictive system within the TEC, possibly discontent with the liberal approach of the CJEU in this regard, see HARTLEY, *The Foundations of European Union Law*, 2010, at 368, 369.

²⁴⁴ ALBORS-LORENS, *Private Parties in European Community Law*, 1996, at 10, noting that the point had already been raised in AG ROEMER’s Opinion in Joined Cases 7 and 9/54, *Groupement des industries sidérurgiques Luxembourgeoises/ECSC High Authority*, [1954-1956] ECR 175.

safeguarding the possibility of a true individual decision appearing *in form of* a general decision. The Court could not rely on the Treaty to establish a criterion which allowed for the differentiation between individual and general decisions. Hence, in *Wirtschaftsvereinigung Eisen- und Stahlindustrie*²⁴⁵, the Court would explain that a “decision is general when it establishes a legislative principle, imposes abstract conditions for its implementation and sets out the legal consequences entailed thereby.”²⁴⁶

It has been considered that under the TECSC the CJEU used the German concepts to distinguish a general decision from an individual one. Hence, the CJEU considered that if an act mentions the individual by name, even if it is drafted in abstract terms, it is considered to be a decision.²⁴⁷ However, if individuals are not mentioned by name, the nature of the act depends on its abstract or concrete content. AG LAGRANGE had suggested a more nuanced approach in *Fédération charbonnière de Belgique*. According to the AG, a single act could be considered as a general decision regarding most individuals and of an individual nature regarding a certain group of individuals.²⁴⁸ This would have allowed the introduction of the French concept of *intérêt pour agir* into the admissibility criteria – by taking into account the particular situation of certain individuals – which the CJEU firmly refused. The CJEU’s views would later have reflexes under the TEEC. Nevertheless, the CJEU acknowledged in *Producteurs* that it was adopting a stricter view under the TEC than it had adopted under the TECSC, which was also recognized by several AGs.²⁴⁹

II. Contrary to what happened with the TECSC, the original version of the TEEC provided for a definition of regulations and decisions²⁵⁰ and the CJEU confirmed the distinction between the two types of acts in *Producteurs*. As is well known, in said case, the CJEU dismissed an action brought by a French association against a provision included in a Council regulation on the progressive establishment of the common organization of the market of fruit and vegetables that eliminated the restrictions on the freedom of traders to export or import within the Community. The CJEU started by clarifying that the designation of an instrument as a regulation (or directive) will not be accepted *per se*, and if in reality such act amounts to a decision it will be contestable:

²⁴⁵ Case 27/84, *Wirtschaftsvereinigung Eisen- und Stahlindustrie/Commission*, [1985] ECR 2385.

²⁴⁶ Para. 5. The Court adopted the same view in Joined Cases 36 to 38, 40, 41/58, *Simet and others/ECSC High Authority*, [1959] ECR 157. Under TECSC the CJEU had held that “the question whether a decision is individual or general in nature must be decided on the basis of objective criteria.” See Case 8/55, *Fédération charbonnière de Belgique/ECSC High Authority*, [1954-1956] ECR 245.

²⁴⁷ Case 30/59, *De gezamenlijke Steenkolenmijnen in Limburg/ECSC High Authority*, [1961] ECR 1; Case 18/57, *Nold KG/ECSC High Authority*, [1959] ECR 41.

²⁴⁸ The CJEU rejected suggestions made by its AGs, some to the advantage of associations, others to the disadvantage of undertakings, that it would be possible to recognize that one and the same decision was a mixed act, either by adopting a comparative criterion – a decision may, for example, be individual as far as an association is concerned and general in the case of an undertaking – or by separating different parts of the decision, in the case, for example, of an enabling decision and the commercial regulations which it authorizes. See, in respect of the first example, the judgment in Case 8/55, *Fédération charbonnière de Belgique/ECSC High Authority*, [1954-1956] ECR 245; and, in respect of the second, the judgment in Case 18/57, *Nold KG/ECSC High Authority*, [1959] ECR 41.

²⁴⁹ See Opinions of AGs in Case 30/59, *De gezamenlijke Steenkolenmijnen in Limburg/ECSC High Authority*, [1961] ECR 1; Case 43/72, *Merkur/Commission*, [1973] ECR 1055. See also GORMLEY, “The Procedural Status of the Individual before Supranational Judicial Tribunals”, 1964, at 282 *et seq.*; HARDING, “The Private Interest in Challenging Community Action”, 1980, at 354.

²⁵⁰ See Article 189 TEEC.

“[i]n examining this question, the Court cannot restrict itself to considering the *official title* of the measure, but must first take into account its *object and content* (emphasis added).”²⁵¹

Hence, “neither the form in which an act is adopted nor the designation which it gives itself is conclusive as to its essential nature.”²⁵² By adopting this approach, the Court “jettisoned opportunities in the hands of EC institutions to evade Article 230(4) by reference to the label accorded to a Community instrument.”²⁵³

Furthermore, it seemed clear that the term “decision” included in previous Article 230(4) TEC was to be understood as having a “substantive meaning”²⁵⁴, which meant that, *as a rule*, normative acts were excluded from direct challenge by private parties.²⁵⁵ This gap of protection was to be filled through previous Article 177 TEEC – later Article 234 TEC and currently Article 267 TFEU – which allowed individuals to challenge Union legislation incidentally by contesting the correspondent implementing national act in Member States’ courts. Within the so-called system of *Vollzugsföderalismus*²⁵⁶ in which Union law is applied by and large by national authorities, preliminary rulings seemed to have been envisaged as the main procedural vehicle for private parties to challenge Union acts, with actions for annulment being mostly a complementary procedure where Union law was exceptionally applied by Union institutions.²⁵⁷ In this view, the drafters’ intention would have been to *push* challenges against Union acts to the closest *forum* possible to individuals, *i.e.*, national judiciaries.²⁵⁸

Notwithstanding, this option left the CJEU with the task of clarifying what should be understood as a “decision” for purposes of Article 230(4) TEC and under what circumstances a decision could be “hidden” in a regulation.²⁵⁹ In *Producteurs* the Court considered that the term “decision” in Article 173(2) TEEC should have the same meaning as the term used in Article 189 TEEC.²⁶⁰ In addressing the argument of one of the applicants according to which the term “decision” could also cover regulations, the CJEU firmly dismissed such affirmation by stating that “it is inconceivable that the term ‘decision’ would be used in Article 173 in a different sense from

²⁵¹ Joined Cases 16 and 17/62, *Confédération nationale des producteurs de fruits et légumes and others/Council of the EEC*, [1962] ECR 471, at 478.

²⁵² HARTLEY, *The Foundations of European Community Law*, 2007, at 343.

²⁵³ SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 2; HARTLEY, *The Foundations of European Community Law*, 2007, at 345; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 285.

²⁵⁴ HARTLEY, *The Foundations of European Community Law*, 2007, at 344-345; TÜRK, *Judicial Review in EU Law*, 2009, at 46.

²⁵⁵ Regarding the action for failure to act the expression “address to” precludes individuals from bringing such action against acts of general application (Case 15/71, *Mackprang/Commission*, [1971] ECR 797, para. 4; Case 134/73, *Holtz & Willemsen GmbH/Council*, [1974] ECR I, para. 5; Case 90/78, *Granaria/Council and Commission*, [1979] ECR 1081, paras. 12-15; Case 60/79, *Producteurs de vins de table et vins de pays/Commission*, [1979] ECR 2429, at 243; Case T-167/95, *Kuchlenz-Winter/Council*, [1996] ECR II-1607, para. 21). However, despite the different wording of the provisions, the CJEU has held that a private applicant has only to prove that it is directly and individually concerned by the act the institution failed to adopt. The idea behind such parallel is to avoid that the possibility for individuals to assert their rights is dependent upon whether the institution has acted or failed to act. See LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 335.

²⁵⁶ LENAERTS, “Regulating the Regulatory Process”, 1993, at 28.

²⁵⁷ TÜRK, *Judicial Review in EU Law*, 2009, at 46, 47.

²⁵⁸ See *infra* Section 1.1.6.

²⁵⁹ Noting that Article 173(2) TEEC seemed to indicate a “*camouflage, plus précisément un certain détournement de procédure*”, see KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 75.

²⁶⁰ Former Article 289 TEC.

the technical sense as defined in Article 189.”²⁶¹ The term “decision” should be understood in a technical sense.²⁶² Hence, in contrast with regulations, decisions could not be of general application. In the CJEU’s own words:

“[t]he essential characteristics of a decision arise from the *limitation of the persons to whom it is addressed*, whereas a regulation, *being essentially of a legislative nature*, is applicable not to a limited number of persons, defined or identifiable, but to *categories of persons viewed abstractly and in their entirety*. (...)

(...) [a] measure which is applicable to *objectively determined situations* and which involves immediate legal consequences in all Member States for *categories of persons viewed in a general and abstract manner* cannot be considered as constituting a decision, *unless it can be proved that it is of individual concern to certain persons* within the meaning of the second paragraph of Article 173 (emphasis added).”²⁶³

Thus, whereas regulations are said to be essentially *legislative acts* applied to categories of persons viewed abstractly and in their entirety, decisions concern specific persons. Hence, in order to determine the scope of a measure, the CJEU assesses the “nature of the contested [measure] (...) and in particular the legal effects which it is intended or does actually produce.”²⁶⁴ Put simply, one could say that “a regulation lays down general rules; a decision is concerned with individual cases.”²⁶⁵ Regulations are aimed at categories of persons viewed abstractly²⁶⁶; decisions are aimed at a limited number of people defined or identifiable. On this account, “whereas a Decision binds a specific set or class of people, a Regulation is potentially binding on everyone.”²⁶⁷ Accordingly, the challenge to normative acts was firmly denied.²⁶⁸

The CJEU based this distinction on a substantive analysis.²⁶⁹ Measures laying down generally applicable principles, applying to objectively defined situations and producing legal effects for categories of persons determined in an abstract manner, will be considered regulations.²⁷⁰

²⁶¹ Para. 1.

²⁶² ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 20. Noting that whereas the Court adopted a restrictive interpretation of the term “decision”, it adopted a broad notion of the term “regulations” see CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 338 *et seq.*

²⁶³ Paras. 2-3.

²⁶⁴ Case 101/76, *Koninklijke Scholten Honig/Council and Commission*, [1977] ECR 797, para 10.

²⁶⁵ HARTLEY, *The Foundations of European Community Law*, 2007, at 347. See also QUADROS, “A relevância para o contencioso administrativo nacional do acto administrativo comunitário e do acto administrativo nacional contrário ao Direito da União Europeia”, 2010, at 1029 *et seq.*

²⁶⁶ In Case 307/81, *Alusuisse/Council and Commission*, [1982] ECR 3463, the CJEU mentioned “a regulation *having general application*” which could have meant that some regulations could be of individual application. See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 335.

²⁶⁷ NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 19.

²⁶⁸ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 113; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 349 *et seq.*, speaking of an “*immunité juridictionnelle*” of regulations.

²⁶⁹ Joined Cases 789 and 790/79, *Calpak SpA and Societa Emiliana Lavorazione Frutta SpA/Commission*, [1980] ECR 1949, para. 7. See also Case 231/82, *Spijker/Commission*, [1983] ECR 2559, para. 9; Joined Cases T480 and 483/93, *Antillean Rice Mills and others/Commission*, [1995] ECR II-2305, para. 65.

²⁷⁰ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 246. See Joined Cases 36 to 38, 40, 41/58, *Simet and others/ECSC High Authority*, [1959] ECR 157, paras. 11-15; Case 229/88, *Cargill/Commission*, [1990] ECR I-1303, para. 13-19; Case 244/88, *Usines coopératives de déshydratation du Vexin and others/Commission*, [1989] ECR 3811, para. 12; Case T-107/94, *Kik/Council and Commission*, [1995] ECR II-1717, para. 35; Case T-116/94, *Cassa nazionale di previdenza ed assistenza a favore degli avvocati e procuratori/Council*, [1995] ECR II-1, paras. 21-25; Case T47/95, *Terres Rouges and others/Commission*, [1997] ECR II-481, paras. 40-41. Noting that in the CJEU’s case-law the nature of

Decisions “in the sense of Article 189 should be regarded as an essentially non-normative or individual act and should therefore be defined as a measure designed to produce legal consequences for a specific number of persons with reference to a specific case.”²⁷¹ However, it is not clear from *Producteurs* how the relevant persons should be defined. It seems uncontroversial to say that the *addressees* of a legal act are those persons whose legal position is *directly* modified by a Union act, i.e. to which the act *grants rights* or *imposes obligations*. The existence of a right can be identified where a Union act defines with sufficient clarity the beneficiary and content of the right or it imposes obligations on a third party provided that the act was adopted with the *intention of protecting* an individual interest on which the beneficiary of the right can rely.²⁷² Scholars have also considered that in order to determine if a measure is in fact a decision and not a regulation, one has to show the existence of a *causal link* between the measure and the situation of the applicants, which although very difficult to prove, may work as a barometer for the incorrect use of powers and procedures by the EU institutions.²⁷³ SCHERMERS and WAELEBROECK considered that the individual or general nature of an act was made dependent not on the number of the persons affected but on the *intention* of the author of the act. It must be assessed whether the latter’s intention was to regulate globally a given activity in the general interest or to decide a specific situation.²⁷⁴ Based on the CJEU’s case-law it is possible to affirm that the act will be considered as a decision only when “it has been adopted on the basis of and with *exclusive application* to the situation of a *closed class of addressees*.”²⁷⁵ This assumption requires an examination of the *purpose* and *scope* of the act.²⁷⁶ However, having such examination become too strict the CJEU was inevitably criticized by not taking into consideration the reality of the market and by impeding equality through legislation.²⁷⁷

III. One other controversial issue that arose from the CJEU’s case-law was to know if the fact that a given measure applied to a limited number of persons who can be defined or identified automatically determined the qualification of the act as a decision. Such understanding was rejected in *Zuckerfabrik Watenstedt*²⁷⁸, a case involving a challenge against a Council regulation on the common organization of the market in sugar. Here, the CJEU clarified the abstract nature of

the act is determined by reference to the legal effects on persons who may be affected by it – its addressees – and not in relation to the products that fall within its scope of application, see TÜRK, *Judicial Review in EU Law*, 2009, at 49. According to this author, the CJEU rejected the position of German courts who consider that an act that concerns a specific product is a decision albeit of a general nature (*Allgemeinverfügung*), even though it affects an indeterminate number of persons. This position had been suggested by AG ROEMER in Case 6/68, *Zuckerfabrik Watenstedt GmbH/Council*, [1968] ECR 409, at 418-419.

²⁷¹ HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, a20.

²⁷² TÜRK, *Judicial Review in EU Law*, 2009, at 50.

²⁷³ ALBORS-LORENS, *Private Parties in European Community Law*, 1996, at 122, 123.

²⁷⁴ SCHERMERS; WAELEBROECK, *Judicial Protection in the European Union*, 2001, at 322.

²⁷⁵ TÜRK, *Judicial Review in EU Law*, 2009, at 51.

²⁷⁶ See GREAVES, “The Nature and Binding Effect of Decisions under Article 189 EC”, 1996, at 3-16, noting that with a few notable exceptions, where the purpose has been general the Court has declared the action inadmissible therefore confirming the measure to be a regulation. However, where the challenge is made against a quasi-judicial administrative act, the CJEU is concerned with legal effects of the act on the person challenging it. The author noted that the test applied in these cases is not concerned with *substance* but with *effect*.

²⁷⁷ TÜRK, *The Concept of Legislation in European Community Law*, 2006, at 162; TÜRK, *Judicial Review in EU Law*, 2009, at 51.

²⁷⁸ Case 6/68, *Zuckerfabrik Watenstedt GmbH/Council*, [1968] ECR 409.

regulations, which were defined as measures which apply to *objectively determined* situations.²⁷⁹ By applying the *Producteurs* formula the CJEU could have reached the conclusion that the regulation at stake was reviewable as the class of people affected was easily *ascertainable*. However, the CJEU stated that:

“[a] measure does not lose its character as a regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which it applies at any given time *as long as there is no doubt that the measure is applicable as a result of an objective situation of law or of fact* which it specifies and which is in harmony with its ultimate objective.

Furthermore, the fact that a legal provision may have different practical effects on the different persons to whom it applies in no way contradicts its nature as a regulation provided *that the situation to which it refers is objectively determined* (emphasis added).²⁸⁰

Hence, the view pursuant to which “it is the object of a regulation that determines its abstract character, not the circle of people affected by it”²⁸¹ was welcomed by legal writers and became settled in future case-law. Moreover, the fact that a regulation affects private applicants in different ways – albeit differently from the public in general – does not compromise its nature as a general act. This case-law applies also to decisions addressed to Member States as confirmed in *Spijker*.²⁸²

Therefore, the so-called closed category approach became non definitive: even if applicants are individually concerned the measure may still be considered a regulation.²⁸³ In fact, if this is invariably the case of members of an open class²⁸⁴, it can also be the case of individuals pertaining to a closed class – defined, as a group of people which is fixed at the time an act is adopted and cannot be extended after its adoption. In these cases a more careful analysis is needed. Based on the Court’s case-law CRAIG and DE BÚRCA consider that there are essentially two criteria used by the CJEU to allow the challenge of normative acts: (i) the closed category test and the (ii) abstract terminology test.²⁸⁵ The latter test was stricter than the former, and became the general test applied

²⁷⁹ Noting that this criteria is also used in Member States legal orders see CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 343.

²⁸⁰ Case 6/68, *Zuckerfabrik Watenstedt GmbH/Council*, [1968] ECR 409, at 415. See also Case 64/69, *Compagnie française commerciale et financière/Commission*, [1970] ECR 221, para. 11; Joined Cases 789 and 790/79, *Calpak/Commission*, [1980] 1949, para. 9; Case 242/81, *Roquette Frères/Council*, [1982] ECR 3213.242/81, para. 7; Case 307/81, *Alusuisse/Council and Commission*, [1982] ECR 3463, para. 11; Case 231/82, *Spijker/Commission*, [1983] ECR 2559, para. 10; Case 26/86, *Deutz und Geldermann/Council*, [1987] ECR 941, para. 8; Joined Cases C-15 and 108/91, *Buckl and others/Commission*, [1992] ECR I-6061, para. 25; Case C-213/91, *Abertal/Commission*, [1991] ECR I-5109, para. 17; Case C-264/91, *Abertal/Council*, [1993] ECR I-3265, para. 16; Case T-476/93, *FRSEA and FNSEA/Council*, [1993] ECR II-1187, para. 19; Case T-489/93, *Unifruit Hellas/Commission*, [1994] ECR II-1201; Case T-197/95, *Sveriges Betodlare and Henrikson/Commission*, [1996] ECR II-1283, para. 28; Case T-139/01, *Comafrika and Dole Fresh Fruit Europe/Commission*, [2002] ECR II-799, para. 100.

²⁸¹ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 118.

²⁸² Case 231/82, *Spijker/Commission*, [1983] ECR 2559, para. 9.

²⁸³ Although the issue of individual concern was not assessed in *Zuckerfabrik*, in later cases the CJEU would dismiss actions where the applicants were individually concerned on the grounds that the measure was a true regulation. See e.g., Joined Cases 103 to 109/78, *Usines de Beaufort*, [1979] ECR 17.

²⁸⁴ Noting that the language of open categories has been used to rule out standing for applicants on the grounds that other individuals might undertake the trade thereafter see CRAIG; BÚRCA, *EU Law*, 2011, at 495, 496: “[t]he matter can be put quite simply. The fact that I may wish to become a striker for England, a great pianist, or a Clementine importer does not mean that I currently have the attributes associated with any of these roles in life.”

²⁸⁵ CRAIG; BÚRCA, *EU Law*, 2011, at 496.

by the Court.²⁸⁶

IV. The CJEU would also dwell on the question of knowing if a *singular provision* could be considered a decision and a regulation, *at the same time*, depending on the applicants – the so-called hybrid measures. In *Producteurs* the CJEU stated that:

“[i]f a measure, entitled by its author a regulation, contains provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons, it must be admitted, *without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation*, that in any case those provisions do not have the character of a regulation and may therefore be impugned by those persons under the terms of the second paragraph of Article 173 (emphasis added).”²⁸⁷

However, this affirmation only meant that some provisions could have the nature of a decision without affecting the overall classification of the measure as a regulation.²⁸⁸ The Court did not clarify whether the *same provision* could have *at the same time* two different legal natures. After the negative approach adopted in *Moksel*²⁸⁹, the CJEU would come to admit that, in some cases, some provisions of certain acts, which are to be regarded as regulations, may be considered decisions regarding certain applicants provided that they are separable, *i.e.* they can be separated from the rest of the regulation, as they do not form a indissoluble whole together with the remaining provisions.²⁹⁰ Thus, scholars have noted that, in some cases, the same provisions have been deemed to constitute a decision *vis-à-vis* certain applicants and a regulation regarding others.²⁹¹ The reason for that is that it appears from the case-law that the fact that an act is of a legislative nature does not prevent it from affecting certain market operators individually.²⁹²

V. Another complication arose from the *dicta* in *Producteurs* according to which:

“[i]n *doubtful cases* whether one is concerned with a decision or a regulation, it is necessary to ascertain whether the measure in question is of *individual concern* to specific individuals

²⁸⁶ *Ibid.* See *infra* Section 1.1.3(c)(i).

²⁸⁷ Joined Cases 16 and 17/62, *Confédération nationale des producteurs de fruits et légumes and others/Council of the EEC*, [1962] ECR 471, at 479.

²⁸⁸ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 115.

²⁸⁹ Case 45/81, *Moksel/Commission*, [1982] ECR 1129. Under the TECSC the Court adopted the same approach in Case 18/57, *Nold KG/ECSC High Authority*, [1959] ECR 41.

²⁹⁰ This will be the case where the intended aim of the regulation can be equally attained after the provisions deemed to constitute a decision are severed. See LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 248, mentioning Case 64/80, *Giuffrida and others/Council*, [1981] ECR 693, paras. 4-7; Case 45/81, *Moksel/Commission*, [1982] ECR 1129, paras. 16-19; Case 276/82, *De beste Boter*, [1983] ECR 3331, paras. 12-17. See also Opinions of AG WARNER's in the *Japanese Ball Bearings* cases (Case 113/77, *NTN Toyo Bearing/Council*, [1979] ECR 1185; Case 118/77, *ISO/Council*, [1979] ECR 1277; Case 119/77, *Nippon Seiko/Council and Commission*, [1979] ECR 1303; Case 120/77, *Koyo Seiko/Council and Commission*, [1979] ECR 1337; Case 121/77, *Nachi Fujikoshi/Council*, [1979] ECR 1363) and Joined Cases 789 and 790/79, *Calpak SpA and Societa Emiliana Lavorazione Frutta SpA/Commission*, [1980] ECR 1949.

²⁹¹ Case 264/82, *Timex/Council and Commission*, [1985] ECR 849, paras. 8-17; Joined Cases T-481 and 484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee/Commission*, [1995] ECR II-2941, para. 50.

²⁹² LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 248, noting that according to this case-law, the regulation remains a measure of a general application regarding all individuals which it does not concern individually. See *infra* Section 1.1.3(c)(i).

(emphasis added).²⁹³

As ALBORS-LLORENS noted, “it could have been concluded from this case that once the test of individual concern is fulfilled, the measure automatically becomes a decision.”²⁹⁴ Hence, “whether a regulation was in substance a decision and the question whether there is individual concern could often be established only by reference to the same set of criteria.”²⁹⁵ This statement introduced confusion in the Court’s case-law as the test for deciding whether an act was a regulation or a decision and the test for individual concern could be the same.²⁹⁶ This was particularly problematic as the Court “applied the notion of individual concern so restrictively that, even where the contested act was a decision addressed to a third party, it was extremely difficult for an applicant to establish standing.”²⁹⁷ This confusion “dogged the Court for over forty years”²⁹⁸ and was only to be clarified much later. It is possible to identify two lines in the case-law of the CJEU.

In some cases the CJEU considered that *in addition* to proving that a regulation was of direct an individual concern, individuals had to demonstrate that such act was in fact of an individual nature, i.e. a true decision.²⁹⁹ Here the CJEU treated separately the question of knowing if an act is indeed a decision and the fact that it individually concerns the applicant, although in early case-law the criteria applied under both tests in practice overlapped.³⁰⁰ In what some authors identified as

²⁹³ Joined Cases 16 and 17/62, *Confédération nationale des producteurs de fruits et légumes and others/Council of the EEC*, [1962] ECR 471, at 478.

²⁹⁴ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 114, noting that this case-law influenced the Court’s approach under the TECSC. See Joined Cases 55 to 59 and 61 to 63/63, *Acciaierie Fonderie Ferriere di Modena/ECSC High Authority*, [1964] ECR 211.

²⁹⁵ NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 20, mentioning Case 100/74, *CAM/Commission*, [1975] ECR 1393 as a good example.

²⁹⁶ HARTLEY, *The Foundations of European Community Law*, 2007, at 347. In Case 250/81, *Greek Cannery/Commission*, [1982] ECR 3535, AG SLYNN said that the two tests were “analogous.” AG WARNER in the *Japanese Ball Bearings* cases held that the tests were separate and independent, a view endorsed also in *Calpak*. For a detailed overview of the CJEU’s case-law in this respect see Opinion of AG JACOBS in Case C-358/89, *Extramet/Council*, [1991] ECR I-2501, at 2515-2519. For a comprehensive analysis of inconsistent decisions see TÜRK, *Judicial Review in EU Law*, 2009, at 52. Noting that the questions of knowing if an act is a decision or if it is of individual concern to the applicant are directed towards the legal effects produced by the act in question and imply a similar investigation of the content of the act see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 249.

²⁹⁷ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 19. *Infra*

²⁹⁸ HARTLEY, *The Foundations of European Community Law*, 2007, at 348.

²⁹⁹ Case 162/78, *Wagner/Commission*, [1979] ECR 3467. ALBORS-LLORENS notes that the existence of this conflicting judicial trend has been acknowledged by the majority of scholars and by AGs, but has not been fully explained. See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 103. Following this author there is certain logic in the CJEU’s case-law in this regard. In fact, the CJEU adopted the double admissibility test mostly in instances where the contested regulations affected in their entirety closed categories of people and where it was not clear whether there was a causal link between the aim of the regulation and the situation of the applicants. In these cases, had the Court applied the test of legal nature, the action would have been inadmissible. *Ibid.*, at 103, 104.

³⁰⁰ See also SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 425. ALBORS-LLORENS analysis the Court’s case-law applying the three tests, based on the distinction between open and closed categories, distinguishing a first group of cases, where applicants were members of large open groups of people affected by the measures, and which followed mostly the approach in *Producteurs* (e.g., Case 40/84, *Casteels/Commission*, [1985] ECR 667; Case 117/86, *UFADE/Council and Commission*, [1986] ECR 3255; Case 191/87, *Covale/Commission*, [1988] ECR 515); a second group of cases where regulations affected small categories of people easily ascertainable, but which were not fixed when the measures were enacted, and which followed the *Zuckerfabrik* case-law (Case 101/76, *Koninklijke Scholten Honig/Council and Commission*, [1977] ECR 797; Case 147/83, *Binderer/Commission*, [1985] ECR 257; Case 26/86, *Deutz und Geldermann/Council*, [1987] ECR 941; Joined Cases 97, 193, 199 and 215/86, *Asteris/Commission*, [1988] ECR 2181; Joined Cases C-15 and 108/91, *Buckl and others/Commission*, [1992] ECR I-6061); a third group of cases where applicants belonged to entirely or partially closed categories of people, and which followed the guidelines set forth in *Compagnie* (Joined Cases 103 to 109/78, *Usines de Beaufort*, [1979] ECR 17; Joined Cases 4, 19 and 28/78, *Salerno and others/Commission*, [1978] ECR 2403; Case 162/78, *Wagner/Commission*, [1979] ECR 3467; Case 45/81, *Moksel/Commission*, [1982] ECR 1129); and finally, a group of cases where regulations applied exclusively to those closed

the *Calpak*³⁰¹ test, the CJEU required the non-privileged applicant to show that the measure in question was not a real regulation, but that it was in reality a decision that was of individual concern to him. The purpose of this case-law was to prevent Union institutions from “immunizing matters from attack by the form of their classification”³⁰² and was in line with the decision in *Producteurs*. This approach required that the CJEU looked behind the form and into the substance of the challenged act, in order to determine whether or not it was a decision. As a consequence, it became “extremely difficult for natural or legal persons to show that a measure carrying that a title [regulation] was in fact a decision.”³⁰³

As a matter of fact, this was not easy because of the abstract terminology test set out by the Court, who considered that a real regulation was a measure that applied to *objectively* determined situations and produced legal effects with regard to *categories* of persons described in a *generalized* and *abstract* manner. The nature of the measure as a regulation was not called in question by the mere fact that it was possible to determine the number or even identity of those affected. Scholars noted that the problem with the abstract terminology test is that, rather than looking behind “form to substance”, it came very close to looking behind “form to form.”³⁰⁴ This was because it was always possible to draft norms in the manner specified by the abstract terminology test, and thus to immunize them from attack. And this was especially so since the CJEU made it clear that the knowledge of the number or identity of those affected would not prevent the norm from being regarded as a true regulation.³⁰⁵ It is true that the Court expanded on the abstract terminology test in *Moksel*, and made reference to the *purpose* of the challenged norm as well as to the *framework* within which it was adopted as factors which were of relevance in determining whether the measure was a real regulation or not.³⁰⁶ These criteria could be used to look behind the form of a measure to its substance. However, this can also reinforce the conclusions reached from the *language* in which the measure is expressed: “[i]f the contested norm is expressed in abstract and generalized norm creating language, this in itself creates the *assumption* that the purpose of the measure is to regulate a general sphere of activity.”³⁰⁷ Thus, in this case-law the distinction between regulations and decisions became decisive.³⁰⁸ On the basis of the *Plaumann* ruling some scholars made a distinction between “being affected” by a measure and “being bound” by it. A true decision binds and affects its addressees. A regulation binds potentially everyone, but can affect a limited group of persons.³⁰⁹ This case-law made the challenge to regulations almost *impossible*. Private

categories and there was a causal link between the situation of the applicants and the contested act, which followed the *International Fruit Company* solution (Case 138/79, *Roquette Frères/Council*, [1980] ECR 3333; Case 139/79, *Maizena/Council*, [1980] ECR 3393; Case 354/87, *Weddel/Commission*, [1990] ECR I-3847). See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 124-138.

³⁰¹ Joined Cases 789 and 790/79, *Calpak SpA and Societa Emiliana Lavorazione Frutta SpA/Commission*, [1980] ECR 1949.

³⁰² CRAIG; BÚRCA, *EU Law*, 2011, at 497.

³⁰³ ARNULL, “The Action for Annulment”, 2000, at 179.

³⁰⁴ CRAIG, “Legality, Standing and Substantive Review”, 1994, at 515; CRAIG; BÚRCA, *EU Law*, 2011, at 497.

³⁰⁵ CRAIG; BÚRCA, *EU Law*, 2011, at 497.

³⁰⁶ CRAIG, “Legality, Standing and Substantive Review”, 1994, at 515.

³⁰⁷ *Ibid.*

³⁰⁸ See AG’s LAGRANGE Opinion in Case 8/55, *Fédération charbonnière de Belgique/ECSC High Authority*, [1954-1956] ECR 245.

³⁰⁹ HARTLEY notes that a decision is binding only on its addressee (actual or de facto) and a regulation is binding

parties had to demonstrate that the act was adopted not to regulate a certain objective market situation but to decide the situation of certain addressees.³¹⁰ As a consequence, most actions were considered inadmissible.³¹¹

Another line in the case-law of the CJEU went straight to the requirements of direct and individual concern, despite the normative nature of the contested measure³¹², essentially following the closed category approach.³¹³ In fact, the “blurring of the distinction evidently intended by the authors of the Treaty between the way in which regulations were to be distinguished from decisions and the way in which individual concern was to be established effectively resulted in a reduction of the conditions which had to be satisfied by private applicants wishing to challenge regulations from three to two: direct and individual concern.”³¹⁴ Here, the CJEU’s determination of individual concern automatically meant that a measure was in substance a decision, even if in a form of a regulation.³¹⁵

Following HARTLEY, prior to the early 1990s, the CJEU when faced with a regulation applied these two approaches in a “seemingly arbitrary and unpredictable manner.”³¹⁶ Sometimes it decided firstly whether the measure was a true regulation, by applying generally the abstract terminology test and almost invariably finding that the measure was in substance a regulation. The application would be automatically held inadmissible without the need to consider individual

generally. See HARTLEY, *The Foundations of European Community Law*, 2007, at 346. The case of *Calpak* is emblematic of this difficulty (Joined Cases 789 and 790/79, *Calpak SpA and Societa Emiliana Lavorazione Frutta SpA/Commission*, [1980] ECR 1949). For further developments see ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 21 *et seq.* The author notes that the strictness of the CJEU’s approach was mitigated by the acceptance that where the annulment of only some provisions of an act was sought, it was de proper classification of those provisions and not the act as a whole that was considered relevant. However, this approach seems to be dependent on the severability of those provisions from the whole of the measure. See also Opinion of AG WARNER in *Calpak*. AG WARNER also suggested in the *First Ball Bearings* case (Case 113/77, *NTN Toyo Bearing/Council*, [1979] ECR 1185) that a provision could constitute a regulations in respect of some people and a decision in respect of others. The CJEU refused such an approach in Case 45/81, *Moksel/Commission*, [1982] ECR 1129.

³¹⁰ See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 103.

³¹¹ This case-law was analysed in detail by AG JACOBS in his Opinion in Case C-358/89, *Extramet/Council*, [1992] ECR I-2501. The Court implicitly accepted the AG’s Opinion in the case.

³¹² ENCHELMAIER, “No One Slips Through the Net”, 2005, at 176. Welcoming such orientation see VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 546.

³¹³ Joined Cases 41 to 44/70, *International Fruit Company and others/Commission*, [1971] ECR 411. See ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 26. ALBORS-LLORENS divides this case-law in four main groups also: firstly, cases where the regulations at issue affected very wide categories of people (e.g., Case 40/64, *Sgarlata and others/Commission of the EEC*, [1965] ECR 215; Case C-276/93, *Chiquita Banana and others/Council*, [1993] ECR I-3345; Case C-107/93, *AEFMA/Commission*, [1993] ECR I-3999); secondly, cases where the regulations affected small ascertainable groups but nonetheless not fixed (Case 123/77, *UNICME/Council*, [1978] ECR 845; Case C-213/91, *Abertal/Commission*, [1991] ECR I-5109; Joined 232 and 233/91, *Petridi and Kapnemporon Makedonias/Commission* [1991] ECR I-5351; Case C-131/92, *Arnaud and others/Council*, [1993] ECR I-2573; Case T-472/93, *Campo Ebro and others/Council*, [1995] ECR II-421); thirdly, regulations which affected exclusively closed categories of people (Case 100/74, *CAM/Commission*, [1975] ECR 1393; Case 88/76, *Exportation des Sucres/Commission*, [1977] ECR 709; Case 232/81, *Agricola Commerciale Olio/Commission*, [1984] ECR 3881; Case 264/81, *Savma/Commission*, [1984] ECR 3915; Case 55/86, *Arposol/Council*, [1988] ECR 13); and fourthly cases where regulations affected partially closed ad partially open categories of people (Case 152/88, *Sofrimport/Commission*, [1990] ECR I-2477; Case C-309/89, *Codomiu/Council*, [1994] ECR I-1853). See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 138-150. Noting that there were fewer cases applying this approach see USHER, “Direct and Individual Concern”, 2003, at 577.

³¹⁴ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 36. See Opinion of AG LENZ in Case C-309/89, *Codomiu/Council*, [1994] ECR I-1853 and AG VAN GERVEN’s Opinion in Case C-264/91, *Abertal/Council*, [1993] ECR I-3265, note 19.

³¹⁵ HARTLEY, *The Foundations of European Community Law*, 2007, at 348.

³¹⁶ *Ibid.*

concern.³¹⁷ In other cases, it skipped over the test regarding the nature of the act and proceeded directly to the question of individual concern, by applying the *Plaumann* formula.³¹⁸ ALBORS-LLORENS submits that, prior to 1990, actions involving regulations affecting open categories, either large or small, were decided on the basis of a triple admissibility test. In none of the cases were individuals found directly and individually concerned, which means that the application of the two tests would have determined the same outcome. However, in those cases where regulations affected categories of people which were partially open and partially closed, the application of a triple admissibility test implied that individuals who were directly and individually concerned saw their action dismissed.³¹⁹

The ambiguities in the case-law of the Court regarding the nature of the contested act seemed to have ceased with the ruling in *Codorniu*³²⁰, which indicated that even if a measure is considered to be a *genuine* regulation it could be of individual concern to the applicant.³²¹ Hence, if an individual can demonstrate individual concern it does not have to prove that the measure under attack is a *true* decision.³²² In famous para. 19 of said decision the CJEU stated that:

“[a]lthough it is true that according to the criteria in the second paragraph of Article 173 of the Treaty the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them (emphasis added).”³²³

Notwithstanding the fact that *Codorniu* went down in history as the leading case on this matter,³²⁴ one should note that the approach endorsed therein had been growing in the Court from the very beginning of the integration process. Already in 1964, in the case of *Sgarlata*³²⁵, which involved a challenge to a batch of Commission’s regulations and one Council regulation, the CJEU held that:

“[w]ithout it being necessary to examine the nature of the contested measure it is in this instance sufficient to decide whether this measure is of direct and individual concern to the applicants within the meaning of the second paragraph of Article 173 of the EEC Treaty.”³²⁶

³¹⁷ *Ibid.*, at 349. See Case 64/69, *Compagnie française commerciale et financière/Commission*, [1970] ECR 221.

³¹⁸ See Case 100/74, *CAM/Commission*, [1975] ECR 1393; Case 138/79, *Roquette Frères/Council*, [1980] ECR 3333; Case 232/81, *Agricola Commerciale Olio/Commission*, [1984] ECR 3881.

³¹⁹ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 224. Nonetheless, according to this author the division in the case-law suggests that the CJEU is willing to move towards a more liberal construction of *locus standi* requirements, which was later confirmed by the decisions in Case 152/88, *Sofrimport/Commission*, [1990] ECR I-2477 and Case C-309/89, *Codorniu/Council*, [1994] ECR I-1853.

³²⁰ Case C-309/89, *Codorniu/Council*, [1994] ECR I-1853.

³²¹ See AG’s LENZ Opinion in the case. CASSIA notes that regulations only benefited from a presumption of “unchallengeability” but such presumption was not definitive. See CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 336.

³²² HARTLEY notes that *Codorniu* also suggests that individual concern does not automatically mean that a measure is a decision. See HARTLEY, *The Foundations of European Union Law*, 2010, at 379.

³²³ Para. 19.

³²⁴ For an overview of the antecessors see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 372 *et seq.* Comparing the decision in *Codorniu* with Case 26/86, *Deutz und Geldermann/Council*, [1987] ECR 941 which was very similar on the facts but was considered inadmissible see SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 4.

³²⁵ Case 40/64, *Sgarlata and others/Commission of the EEC*, [1965] ECR 215.

³²⁶ Case 40/64, *Sgarlata and others/Commission of the EEC*, [1965] ECR 215, at 226.

Moreover, in the particular field of anti-dumping the Court had already considered that although anti-dumping regulations “were as regards their nature and their scope, of a legislative character, inasmuch as they apply to all the traders concerned, taken as a whole”³²⁷ their provisions could be of direct and individual concern to certain market operators. In *Extramet*³²⁸, applying this very same reasoning, the Court deemed the action admissible.³²⁹ Notwithstanding, *Codorniu* had the added value of making clear that such reasoning was to be applied to all Union policies.³³⁰

One should note that both *Extramet* and *Codorniu* seem to have been intended to “give authoritative guidance”³³¹ on the interpretation of Article 173(2) TEEC.³³² In addition, they allowed for some liberalization of the admissibility criteria³³³, which was later confirmed in a batch of cases. For instance, in *Antillean Rice Mills*³³⁴, the GC stated that “the fact that the contested measures are legislative by nature does not prevent them from being of individual concern to some of the traders concerned.”³³⁵ Notwithstanding, one should note that despite the more liberal decision reached in *Codorniu*, the issue must have been controversial within the CJEU.³³⁶ For starters, the CJEU failed to affirm that it was departing from its previous case-law.³³⁷ Furthermore, the Court restated its traditional approach in this respect.³³⁸ Thus, the ruling mentioned both the nature of the act test and the abstract terminology test. In contrast, it made no consideration regarding the closed category test. Surely, one can say that the final decision in the case did not fully comply with these principles. There seems to be a certain degree of contradiction between the

³²⁷ Joined Cases 239 and 275/82, *Allied Corporation and others/Commission*, [1984] ECR 1005, para. 11. The Court held later in *AlJubail* (Case 49/88, *AlJubail Fertilizer Company and others/Council*, [1991] ECR I-3187) that anti-dumping regulations “despite their general scope, may directly and individually affect the undertakings concerned an entail adverse consequences from them.”

³²⁸ Case C-358/89, *Extramet/Council*, [1991] ECR I-2501, para. 13.

³²⁹ See ARNULL, “Challenging EC Anti-Dumping Regulations”, 1992, at 78 *et seq.*, considering however that this decision is difficult to reconcile with both the general body of the Court’s decisions and with sector-specific case-law. See also BELLIS, “Judicial Review of EEC Anti-dumping and Anti-subsidy Determinations after *FEDIOL*”, 1984, at 539 *et seq.*

³³⁰ See also HEDEMANN-ROBINSON, “Article 173 EC, General Community Measures and *Locus Standi* for Private Persons”, 1996, at 127-156. Considering that after *Codorniu* the two tests became alternative rather than cumulative see NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 22, 23. Hence, following this author given the fact that the CJEU became more generous in widening the category of Community acts which could be challenged, Article 173(4) could be read as granting *locus standi* to individuals in actions against “any Community measure having legal effect addressed to him or by which he is directly and individually concerned.”

³³¹ ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 8.

³³² Both were decided in plenary formation of the CJEU which may justify the brief reasons indicated by the Court to support its conclusions. See ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 8. Also analysing the decision in *Codorniu* see e.g., NIHOUL, “La recevabilité des recours en annulation introduits par un particulier à l’encontre d’un acte communautaire de portée générale”, 1994, at 185 *et seq.*; VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 543.

³³³ Case 97/85, *Deutsche Lebensmittelwerke/Commission*, [1985] ECR 1331. See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 104; CRAIG; BÚRCA, *EU Law*, 2011, at 498.

³³⁴ Joined Cases T480/93 and T483/93, *Antillean Rice Mills and others/Commission*, [1995] ECR II-2305, para. 65-66; Joined Cases T481 and 484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee/Commission*, [1995] ECR II-2941.

³³⁵ Para. 66, quoting the relevant case-law. For an analysis of the case see VANDERSANDEN, “Contentieux communautaire”, 1996, at 172.

³³⁶ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 39.

³³⁷ Noting that it is unfortunate that the reasoning underlying such an important decision was never clearly expounded by the CJEU see ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 74.

³³⁸ See paras. 17-18.

reasoning of the Court and the decision itself.³³⁹ Nevertheless, one should note that these considerations left the door open to allow for more restrictive interpretations in the future. In fact, if the intention of the Court was to “give green light”³⁴⁰ to the GC – shortly created thereafter – to subject decisions and regulations to a more strict judicial scrutiny, in practice the *Codorniu* approach would become restricted to fairly limited cases.³⁴¹ Scholars have considered that the cases where the Court showed a more liberal approach to the notion of individual concern were “characterized by a variety of special features which therefore cast doubt on their wider application”.³⁴²

Just after the turning of the millennium, the CJEU seems to have swung back to its pre-*Codorniu* case-law in the case of *UPA*.³⁴³ Here, the Court seems to have made clear *again* that private applicants cannot challenge acts which are *substantively* regulations³⁴⁴, when holding that:

“[a] measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain natural or legal persons *and is thus in the nature of a decision in their regard* (emphasis added).”³⁴⁵

This affirmation suggests that according to the CJEU’s case-law the fact that a measure is of individual concern automatically means that it is a decision regarding the applicant. Hence, individuals may exclusively challenge acts of individual application, *i.e.* decisions. HARTLEY noted that a measure should be considered a decision only with regard to those applicants individually concerned by it, remaining a regulation regarding all other persons.³⁴⁶ Accordingly, a measure could be *at the same time* a regulation and a decision. The adoption of the “hybridity theory” is, nonetheless, not consensual among scholars.³⁴⁷ In fact, after *UPA*, the CJEU has indicated in several rulings that *true* legislative acts can be challenged by private parties without losing their normative nature.

VI. Regardless of the impact of *Extramet* and *Codorniu* on the liberalization of standing requirements of private parties to challenge Union acts of general application, one should note that for a long time there was at least one type of Union act whose validity could not be directly

³³⁹ One should compare paras. 17 and 18 with paras. 19 to 23.

³⁴⁰ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 40.

³⁴¹ ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 31 *et seq.* This was the last case decided by the CJ before jurisdiction in actions brought by private applicants was transferred to the GC.

³⁴² *Ibid.*, at 27, 28.

³⁴³ Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677. The case involved the challenge to a Council regulation on the establishment of a common organisation of the market in oils and fats which abolished previous schemes of intervention prices, production aid, consumption aid and storage, as well as imports and exports and replaced them by a system of aid for private storage contracts.

³⁴⁴ Considering that in *UPA* the CJEU went back to its original approach by applying the “hybridity theory” see CASSIA, “Quelles perspectives pour la recevabilité du recours en annulation des particuliers?”, 2002, at 2828; PAIS, “A protecção dos particulares no âmbito do recurso de anulação depois de Lisboa”, 2012 at 107. PAIS notes that in *Jégo-Quéré* the CJEU again clarified that challenges against true normative acts are possible (*Ibid.* at 109). See Case C-263/02 P, *Commission/Jégo-Quéré*, [2004] ECR I-3425, paras. 44-45.

³⁴⁵ Para. 36.

³⁴⁶ HARTLEY, *The Foundations of European Union Law*, 2010, at 381.

³⁴⁷ ARNULL, “Plus Ça Change...”, 2002, at 510; PARFOURU, “*Locus Standi* of Private Applicants under the Article 230 EC Action for Annulment”, 2007, at 375. See *e.g.*, Case C-142/00 P, *Commission/Nederlandse Antillen*, [2003] ECR I-3483, paras. 63-64. The CJEU did not mention the special circumstances of the case, thereby suggesting that such challenge was not exceptional.

challenged by individuals. In fact, direct challenges against directives by private parties seemed to be excluded under the previous version of the Treaties. Article 173(2) TEEC referred only decisions taken in the form of regulations, and not in form of directives. Moreover, due to their very own special features it would seem unlikely that directives could be of direct and individual concern to private parties. In the words of AG TESAURO, a directive is “a measure which could not conceivably be challenged by applicants under fourth paragraph of Article 173.”³⁴⁸ Accordingly, the CJ dismissed several challenges brought against directives applying its traditional standing formula.³⁴⁹ The GC seems to have adopted an even more restrictive approach in the case of *Asocame*³⁵⁰ where it stated that:

“[t]he fourth paragraph of Article 173 of the Treaty makes no provision for the benefit of individuals for a direct action before the Community judicature against directives or against decisions adopted in the form of directives.

The justification for that exclusion lies in the fact that, in the case of directives, the judicial protection of individuals is duly and sufficiently assured by the national courts, which review the transposition of directives into the domestic law of the various Member States. (...)

(...) the fact that the directive at issue replaced a decision does not in any way affect the general and abstract nature of its content (...) (emphasis added).”³⁵¹

However, directives could include provisions which left Member States without any discretion on implementation and which worked at the disadvantage of individuals, as those establishing prohibitions not allowing for any exceptions, banning of substances, products or activities of any kind.³⁵² Thus, in time, the CJEU’s case-law regarding directives would change. Initially, the possibility of directly challenging directives was subtly suggested by some of the Court’s rulings, until it was openly admitted just before the entry into force of the Lisbon Treaty.³⁵³ Hence, in *Gibraltar*³⁵⁴ the CJ considered that the contested provisions included in a directive could not be regarded as constituting a decision within the meaning of Article 173 “but on the contrary is of the same general nature as that directive.”³⁵⁵ This statement could be read as implying that an applicant could challenge a directive if he/her could establish that it constitutes a decision of direct

³⁴⁸ See Opinion of AG TESAURO in Case C-63/89, *Assurances du Crédit/Council and Commission*, [1991] ECR I-1799, para. 6.

³⁴⁹ See also Case 138/88, *Flourez/Council*, [1988] ECR 6393; Case 160/88, *Fédération européenne de la santé animale and others/Council*, [1988] ECR 6399, (where the CJEU considered that the applicant was not individually concerned); Case C-298/89, *Gibraltar/Council*, [1993] ECR I-3605; Joined Cases T-172, 175 to 177/98, *Salamander and others/Parliament and Council*, [2000] ECR II-2487.

³⁵⁰ Case T-99/94, *Asocame/Council*, [1994] II-871. See also Case T-135/96, *UEAPME/Council*, [1998] ECR II-2335; Joined Cases T-172, 175 to 177/98, *Salamander and others/Parliament and Council*, [2000] II-2487.

³⁵¹ Paras. 17-18.

³⁵² ENCHELMAIER, “No One Slips Through the Net?”, 2005, at 192.

³⁵³ The first case where individuals tried to challenge a directive was the *Fedesa* case (Case 160/88, *Fédération européenne de la santé animale and others/Council*, [1988] ECR 6399). The action was dismissed on the lack of individual concern, which could have meant that had the applicant been directly and individually concerned the action would be admissible. See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 171.

³⁵⁴ Case C-298/89, *Gibraltar/Council*, [1993] ECR I-3605.

³⁵⁵ Para. 23. See also Opinion of AG LENZ on the case who had considered that the contested measures should have been treated as if they had been included in a decision addressed to the Member States, and therefore the mere fact that they were included in a directive should not render *per se* the action inadmissible.

and individual concern to him.³⁵⁶ This was later confirmed with the decisions in *Asocame* and *Eurotunnel*.³⁵⁷ In fact, as mentioned above, the GC had concluded in *Asocame*³⁵⁸ that no such challenge was possible by applying the test of legal nature. Notwithstanding, on appeal, the CJ left the question expressly open.³⁵⁹ After reiterating the *Producteurs'* dicta according to which the term “decision” must have a technical meaning, the CJ stated that,

“[e]ven though a directive is *in principle* binding only on its addressees, the Member States, a directive *normally* constitutes an indirect mode of legislating or regulating. Indeed, the Court has repeatedly classified a directive as a measure having general scope (...) (emphasis added).”³⁶⁰

Later, in *Salamander*³⁶¹, the GC observed that “in *certain circumstances* (...) even a legislative measure which applies to economic operators generally may be of direct and individual concern to some of them.”³⁶² The same approach was adopted in *UEAPME*³⁶³ where the GC after finding that the measure had a legislative nature proceeded notwithstanding with the analysis of whether it was of direct and individual concern to the applicant.³⁶⁴ Lastly, just two months before the entry into force of the Lisbon Treaty, the GC admitted an action for annulment brought against a directive in the case of *Vischim*.³⁶⁵ The Court considered that the contested directive affected the applicant’s legal situation in an individual manner, based on the fact that the applicant was involved in the procedure leading to the adoption of the measure, and in a direct manner since, by adopting said directive, the Commission left no discretion to the Member States whose decisions were purely automatic.³⁶⁶ This decision is thus fully in line with the dicta in *Alcan*³⁶⁷, according to which the aim of allowing individuals to bring an action for annulment is

“[t]o ensure the legal protection of individuals in all cases in which they are directly and individually concerned by a Community measure – *in whatever form it appears* – which is not addressed to them” (emphasis added).³⁶⁸

³⁵⁶ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 47, noting also that an exclusion of such challenge would run counter the profound effect on rights and duties of individuals through the principle of consistent interpretation set out in Case C-106/89, *Marleasing*, [1990] ECR I4135. See also NIHOUL, “La recevabilité des recours en annulation introduits par un particulier à l’encontre d’un acte communautaire de portée générale”, 1994, at 174, considering that one should analyse if there is a *lien direct* between the individual and the directive at stake.

³⁵⁷ Case C-408/95, *Eurotunnel and others/SeaFrance*, [1997] ECR I6315, para 16.

³⁵⁸ Case T-99/94, *Asocame/Council*, [1994] II871.

³⁵⁹ Noting that the CJ examined the nature of the directive, implying that an action could have been admissible see TÜRK, *Judicial Review in EU Law*, 2009, at 53, 54.

³⁶⁰ Case C-10/95 P, *Asocame/Council*, [1995] ECR I4149, para. 29.

³⁶¹ Joined Cases T-172, 175 to 177/98, *Salamander and others/Parliament and Council*, [2000] ECR II-2487.

³⁶² Para. 30.

³⁶³ Case T-135/96, *UEAPME/Council*, [1998] ECR II-2335, para 67-68. See also ADINOLFI, “Admissibility of Actions for Annulment by Social Partners”, 2000, at 165-177.

³⁶⁴ See also Case T-16/04, *Arcelor/Parliament and Council*, [2010] II-211.

³⁶⁵ Case T-420/05, *Vischim/Commission*, [2009] ECR II-3841.

³⁶⁶ Paras. 67-79.

³⁶⁷ Case 69/69, *Alcan/Commission*, [1970] ECR 385, para. 4.

³⁶⁸ Para 4. However, one should note that there seems to be no relationship between the notion of direct effect and the test for direct concern. Even if a directive satisfied the criteria for direct effect that does not mean that individuals were directly concerned by such measure. In fact, if direct effect ensures enforcement of EU law against Member States, direct concern ensures legality review against the Union itself. This may well explain the differences between the two notions. See NIHOUL, “La recevabilité des recours en annulation introduits par un particulier à l’encontre d’un acte communautaire de portée générale”, 1994, at 175; CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 493. Notwithstanding, some AGs have used the terms “direct effects” within the

VII. In light of the foregoing, it is possible to draw some conclusions regarding the conceptual approach underlying the CJEU's case-law regarding challenges to Union measures brought by private parties. At the outset, it is clear that the distinction between acts of individual or general application is mostly favoured by subjectivist models.³⁶⁹ Indeed, such distinction is pivotal in the German system as it determines the decision on the admissibility of the actions initiated by individuals. In Germany, two criteria seemed to have been adopted. An act is considered to be a regulation (*Rechtsverordnung*) in so far as it is *abstrakt* and *generell*. Both of these characteristics have to be met. An act lacking one of them is considered a decision.³⁷⁰ Lawyers and judges long debated on the boundaries of such notions. If an act is to be considered a regulation, individuals should challenge its implementing measures, as long as such challenge is sufficient to protect them effectively.³⁷¹ In contrast, this distinction does not occupy the same central place in the French objectivist legal system where challenges to *règlements* may be, in principle, brought by private parties.

The case-law of the CJEU in this respect does not seem to have imported directly the solutions from either the objectivist or subjectivist model. In fact, whereas the CJEU confirmed that *in principle* regulations are not challengeable by individuals, over the years, it allowed individuals to bring actions for annulment against *true* regulations.³⁷² Moreover, the application of a three or two-set admissibility criteria has not been entirely consistent. Over the years, the decisions would vary. The majority of scholars considered that it was settled before the entry into force of the Lisbon Treaty that normative acts could be challenged under Article 263(4) TFEU.³⁷³ Nonetheless, the Court was not clear on whether it was necessary to first show if a measure of general application was in reality a decision before it could be challenged. The *UPA* decision resuscitated an old debate and brought additional confusion to the case-law. Hence, what could have been considered initially a more *subjectivist*-oriented approach became a more *objectivist* one with the evolution of the case-law. However, more significant is the fact that the CJEU's approach to the direct challenge of Union measures by private parties has produced highly restrictive results,

context of standing requirements under the action for annulment. See e.g., Opinion of AG TESAURIO in Case C408/95, *Eurotunnel and others/SeaFrance*, [1997] ECR I-6315, para. 21.

³⁶⁹ Thus MOITINHO DE ALMEIDA considered that the solution included in Article 173(2) TEEC reflected the German solution. See ALMEIDA, "Le recours en annulation des particuliers", 1995, at 849.

³⁷⁰ See AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 65. Noting that in Germany the (in)determinate number of people affected by a measure and their respective individualization is not a criterion to take into account in the qualification of an act as a decision or regulation, as the difference is essentially based on the object which the act intends to regulate see WAELBROECK; VERHEYDEN, "Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires", 1995, at 414-415: "[e]n conséquence (...) en droit administrative allemande, un particulier est recevable à attaquer une mesure administrative, même si celle s'adresse à des personnes en nombre indéterminé, pour peu que celles-ci soient définies selon des critères généraux aux fins de régler une ou plusieurs situations concrètes."

³⁷¹ FROMONT, "L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes", 1966, at 53.

³⁷² Hence, noting that the case-law of the CJEU on reviewable acts is comparable to French administrative law rather than to the German approach as the term "decision" in Article 230(4) TEC cannot be moulded to fit within a form of administrative action (*Rechtsformen*) see RÖHL, "Die anfechtbare Entscheidung nach Art. 230 Abs 4 EGV als Rechtsschutzreform", 2005, at 319-351.

³⁷³ See e.g., BARAV, "Le droit au juge devant le Tribunal de première instance et la Cour de justice des Communautés européennes", 1998, at 199.

and has made challenges against acts of general application virtually impossible. In fact, the outcomes of such case-law have proved even more restrictive than the ones verified in purely subjectivist systems. Here, the right to effective judicial protection has served to mitigate the limitations imposed on judicial review at the initiative of individuals which derive from a *subjective rights-oriented* approach. Hence, in Germany, not only the notion of subjective public rights has been construed broadly, but also challenges to regulations are admissible within the framework of constitutional review.³⁷⁴ AG ROEMER'S analysis in *Zuckerfabrik Watenstedt* is particularly emblematic. The AG, while dealing with the subject of "intermediate or hybrid forms", looked at national law and in particular at German law "in which the dividing line between individual and legislative measures plays a similar part to that under the EEC Treaty", and concluded that:

"[i]t is impossible to take sufficient account of the existence of such intermediate action on the basis of concepts of pure legal theory, for example by concentrating solely on the class of persons addressed and regarding as individual acts only those measures in respect of which, at the time of their issue, the number of the persons to whom they are addressed is established objectively, whilst regarding as legal norms or rules of law all those measures in respect of which, at the time of their issue, the class of persons to whom they are addressed is not ascertainable because it is liable to alter during the period of validity of the measure where there is, as Fuß once expressed it, 'a potential for fluctuation in the class of persons concerned'.

In the case-law of the *Bundesverwaltungsgericht* (Federal Administrative Court), in particular, but also in the case-law of other German courts, we find a series of cases which were decided without any reference to the undoubtedly clear and unequivocal criteria of delimitation which I have just outlined. Instead, these courts have also considered as decisive, where hybrid forms of administrative action are concerned, the question whether what is at issue is *an individual case*, in other words a '*specific case*'. Where this was so, and it was the sole decisive criterion according to the wording of the Rules of Administrative Procedure (Military Government Ordinance No 165) which formerly applied in the British Zone of Control, one spoke of a 'general provision' (*Allgemeinverfügung*), that is to say, an administrative measure which could be contested even where an indeterminate number of persons was concerned. This applied, for example, to an order for the merging of one *Gemeinde* with another, to the erection of traffic signs, to the closure of a public right of way, to a police prohibition for reasons of public health against dealing in certain goods in certain areas, to a refusal to approve the rules on membership fees of a Chamber of Crafts (*Handwerkskammer*), or to a refusal to approve the electoral rules of a Chamber of Commerce and Industry.

On occasion we find this justified expressly on the basis that the concept of an administrative measure (*Verwaltungsakt*) is also a concept of procedural law and *should be 'given a broad definition' in the interests of the basic idea in constitutional law of comprehensive legal*

³⁷⁴ CLASSEN, "Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle", 1996, at 40 and 57.

protection (emphasis added).³⁷⁵

Accordingly, AG ROEMER suggested a “similarly wide interpretation of the concept of a decision, that is to say, a solution of the problem of classification raised by the second paragraph of Article 173 which does not follow the lines of strict legal theory.”³⁷⁶

HARDING has noted that in Member States the admissibility of the actions for annulment is often made dependent on the *extent to which the plaintiff's interest is affected* rather than the legal characterisation of the action in question. This is very clear in the French system where the *recours pour excès de pouvoir* is available to attack most forms of administrative action, and its admissibility is mainly dependent on proof of the *plaintiff's interest*.³⁷⁷ In the sphere of Union law, however, despite the need for novel forms of administrative action, the close relation between the legal character of the impugned act and the admissibility of an action to have it annulled is underlined in judicial statements.³⁷⁸ Hence, there is *confusion* in the CJEU's case-law between the *legal nature* of the act and the *interests affected*.

In light of these considerations, it is submitted that the CJEU's approach in this regard has been fairly *objectivist*, in the sense that from a conceptual point of view it has focused mainly on the type and legal nature of the contested act, and from a practical point of view it has immunized Union acts from challenges brought by individuals – all in all favouring the effectiveness of Union law. In so far as the case-law focuses on the *legal nature* of the contested act it deals mostly with an *objective* element of the system of judicial review. The wording of Article 173(2) TEEC, which mentioned “decisions taken in form of regulations”, certainly *encouraged* such an approach. It was only natural that the Court had firstly to solve this *riddle* before proceeding to the analysis of the requirements of direct and individual concern. Notwithstanding, another approach would have been possible, notably to read Article 173(2) TEEC as a *whole*, and focus mainly on the harm caused to individuals by the contested measure. As a matter of fact, if in the CJEU's view, the mention included in the Treaties to regulations intended “to prevent 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”³⁷⁹, such reference should be interpreted as “permitting a private applicant to challenge a regulation which *affects him in the same way* as a decision which is of direct and individual concern to him but which is addressed to somebody else.”³⁸⁰ Accordingly, “the standing of individuals to challenge a regulation should be viewed as dependent “not on the nature of the act, but on the *immediacy of the effects* it produces on him.”³⁸¹ In fact, one “must rather inquire *whose legal situation is altered* and *who is affected by the legal*

³⁷⁵ Opinion of AG ROEMER, in *Zuckerfabrik Watenstedt* at 418-419.

³⁷⁶ *Ibid.*

³⁷⁷ AUBY and FROMONT stated that: “[s]elon la formule employée en général par la jurisprudence, il faut que la décision soit de nature à faire grief, c'est-à-dire qu'elle entraîne ou soit susceptible avec certitude d'entraîner des effets juridiques à l'égard du requérant.” See AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 226.

³⁷⁸ HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 16, 17.

³⁷⁹ Case 162/78, *Wagner/Commission*, [1979] ECR 3467, para. 16; Joined Cases 789 and 790/79, *Calpak SpA and Societa Emiliana Lavorazione Frutta SpA/Commission*, [1980] ECR 1949, para. 7.

³⁸⁰ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 16.

³⁸¹ *Ibid.*

effects of the measure.”³⁸² Hence, in order to ensure adequate legal protection of private parties the decision on the admissibility of an action for annulment should focus primarily on the *impact* of the contested measure on the legal or factual situation of the applicant regardless of its legal nature. This corresponds to a more *individual*-centred approach. The evolution of the CJEU’s case-law from a view centred in the test of legal nature to an approach more focused on the standing requirements of private parties could have constituted a step in the right direction. Unfortunately, the extremely restrictive approach regarding the notions of “direct and individual concern” did not contribute to change the CJEU’s conservative views regarding the direct access of individuals to the Union courts.

1.1.3 The Restrictive Case-Law Regarding the *Locus Standi* Requirements of Private Parties

a) General Remarks

I. As is well known, the Treaties differentiate the rights of private parties to challenge EU law and the position of the “key players”³⁸³ in EU government, by introducing standing requirements to allow the challenge by the former of EU measures.³⁸⁴ As a matter of fact, the Treaty embodies two different types of control of Union acts. On the one hand, an *objective* control of legality, which is pursued by privileged applicants, where the CJEU disregards the subjective reasons of the applicants, who are deemed to be *always* concerned by the contested act, who are invested with a *public interest* in the legality of Union measures, and with regard to whom *no* standing requirements are established; and on the other hand, a *subjective* control of legality, regarding semi-privileged, but more particularly non-privileged applicants, who may sue the Union in so far as the latter has harmed their prerogatives, interests, or rights.³⁸⁵

II. The notion of standing or *locus standi* is common to Member States legal orders and relates with the idea of access to a court.³⁸⁶ Some scholars distinguish between the existence of a special capacity of the applicant to sue (*qualité* or *Prozessführungsbefugnis* or *Klagbefugnis*), and the existence of an interest to sue (*intérêt pour agir* or *Rechtsschutzinteresse*). In EU law, the notion of *locus*

³⁸² Opinion of AG ROEMER in *Zuckerfabrik Watenstedt*, at 418419.

³⁸³ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 284. Noting that the justification for giving privileged applicants unlimited *locus standi* is that every Union act concerns them see HARTLEY, *The Foundations of European Union Law*, 2010, at 371.

³⁸⁴ Regarding the *status* as private applicant, in principle it is for national law to determine if an applicant has legal personality (Case 18/57, *Nold KG/ECSC High Authority*, [1959] ECR 41, at 48-49; Case 294/83, *Les Verts/Parliament*, [1986] I-1339, paras. 13-18; Case 50/84, *Bensider and others/Commission*, [1984] ECR 3991, para. 7; Case T-174/95, *Svenska Journalistförbundet/Council*, [1998] ECR II-2289, para. 43). The lack of legal personality may preclude access to the CJEU. However, in certain instances there have been actions brought by entities without legal personality which were deemed admissible (Case 175/73, *Union Syndicale and others/Council*, [1974] ECR 917, paras. 7-17; Case 18/74, *Syndicat général du personnel des organismes européens/Commission*, [1974] ECR 933, paras. 3-11). Consequently, the notion of applicant has received an EU dimension which may not coincide with the national concept. See ARNULL, “Private Applicants and the Action for Annulment since *Codomiu*”, 2001, at 10 *et seq.*; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 245.

³⁸⁵ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 18.

³⁸⁶ Noting that standing is defined as a position from which one may validly make a legal claim or seek to enforce a right or duty and that one is said to have standing when one’s arguments on the merits of a case are able to be heard by an adjudicator, see *ibid.*, at 19.

standi is commonly referred to as embracing the two concepts, although some case-law of the CJEU has in the past distinguished them.³⁸⁷

The CJEU's case-law on standing requirements of individuals seems to be the product of a combination of the French and German approaches.³⁸⁸ Regarding the *locus standi* of private parties, the French system is said to be mostly objectivist in so far as French courts only require a *mere interest* to sue in order to admit an action for annulment.³⁸⁹ Such interest does not have to be founded on an individual right of the applicant, but may be grounded on the need to ensure *objective* control of legality. Thus, the *Conseil d'État* has been quite liberal in defining the circle of persons who can bring actions for annulment, by applying the notion of *intérêt pour agir*.³⁹⁰ The latter is highly an *empiric* notion, mostly based on the *factual* situation of the applicant and close to the notion of *reparable damage*.³⁹¹ In fact, in order to have an *intérêt pour agir* it is enough to demonstrate the existence of an act *faisant grief*. The damage may occur because the individual is in a particular situation *vis-à-vis* such act. Mostly, the French *locus standi* requirements are based on simple "*liens de faits*"³⁹², which allows for a very generous approach to the admissibility of actions brought by private parties.

In contrast, in Germany, individuals are granted *locus standi* in administrative procedural law if their *rights* have been infringed: *in seinen Rechten verletzt*. *Locus standi* is built on the notion of *subjektive Rechten*.³⁹³ Section 42(2) of the *Verwaltungsgerichtsordnung* states that "unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission."³⁹⁴ The purpose of this provision

³⁸⁷ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 285. Making the distinction regarding the CJEU's case-law see CANEDO, "L'intérêt à agir dans le recours en annulation du droit communautaire", 2000, at 465 *et seq.*; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 410 *et seq.*; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 280.

³⁸⁸ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 19. For a comprehensive analysis of the Member State's legal regimes see *ibid.*, at 29 *et seq.* There is in fact some influence of Member States' law in the case-law of the CJEU. See, e.g., AGs' Opinions in Case 3/54, *Assider/High Authority*, [1954-1956] ECR 63; and Joined Cases 7/56 and 3 to 7/57, *Algeria and others/Common Assembly*, [1957-1958] ECR 39. See *infra* Part II, Chapter 2, Section 2.1.4.

³⁸⁹ This is true especially regarding the *recours pour excès de pouvoir* which is the main form of action in French administrative procedural law. Nonetheless, although the *recours de plein contentieux* aims to ensure subjective rights, the case-law on admissibility is also fairly liberal and requires a mere sufficient *intérêt légitime*. See CLASSEN, "Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle", 1996, at 64.

³⁹⁰ FROMONT, "L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes", 1966, at 55-56. The main precedent is the decision delivered in the *Dame Lamothe* case where the *Conseil d'État* held that "*le recours pour excès de pouvoir... est ouverte même sans texte*." Noting that the French case-law requires a mere *intérêt froissé* in order to grant standing within the *recours pour excès de pouvoir* see MACHETE, "A relevância processual dos vícios procedimentais no novo paradigma da justiça administrativa portuguesa", 2006, at 854. Hence, the author notes that French courts have been liberal regarding standing requirements, although avoiding the *actio popularis*. Here, the *actio* is granted by the creative judicial decision and does not derive from the substantive right. For further developments see CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 91 *et seq.*; PACTEAU, *Contentieux Administratif*, 2005, at 148 *et seq.*; CHAPUS, *Droit du contentieux administratif*, 2008, at 470 *et seq.* See *infra* Part II, Chapter 2, Section 2.1.4.

³⁹¹ FROMONT, "L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes", 1966, at 56.

³⁹² *Ibid.*

³⁹³ CLASSEN, "Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle", 1996, at 39; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 102 *et seq.*

³⁹⁴ Administrative courts apply this provision to all types of legal claims. Article 113 also mentions the plaintiff's rights. Hence "insofar as the administrative act is unlawful and the *plaintiff's rights* have been violated, the court shall rescind the administrative act and any ruling on an objection" (§ 1) and "insofar as the rejection or omission of the administrative act is unlawful and the *plaintiff's rights* are violated thereby, the court shall announce the obligation incumbent on the administrative authority to effect the requested official act if the case is mature for adjudication" (§ 5). One should note, however, that in actions for a declaratory judgment Article 43(1) of the *VuGO* only requires the

is to avoid a *Popularklage*. This so-called subjectivist approach led to a restrictive conception of the relationships between the individual and the administration.³⁹⁵ In fact, at an early stage, the notion of subjective public rights was construed narrowly, mostly in order to avoid the *threat* of the *actio popularis*. Such rights were only acknowledged in situations where the administration had *no discretion* and the provisions had been adopted to *protect the interests of individuals*. Today, such notion has gained a broader meaning.³⁹⁶ The influence of the *Grundgesetz* – notably of Article 19(4) GG – and the recognition that most acts protect both general and individual interests led to a new definition of subjective public rights which tends to coincide with the *rechtlich geschützte Interesse*.³⁹⁷ Thus, the finding of subjective public rights based on the *Schutznormtheorie* – which determined whether the norm is meant to serve not only the public interest but also private interests – has become more flexible, and now includes legally protected interests that “need only be differentiated from economical, political, aesthetic, or miscellaneous other interests.”³⁹⁸ Hence, such notion is still insufficient to ground actions for annulment on mere reflex or indirect protected interests, which are particularly relevant in certain areas.³⁹⁹ Consequently, the German system produces more restrictive outcomes than the French one⁴⁰⁰, as mere factual interests or legally protected expectations or opportunities are not enough to ground an action for annulment. In Germany, the *normative* approach is decisive, whereas in France, the normative connection is not a precondition of the existence of an *intérêt*. The latter needs not to be protected by law as long as it is *factually* concerned.⁴⁰¹

The French-German dialogue regarding standing requirements under ex-Article 173(2) TEEC presented the CJEU with a new difficulty as the “founding fathers” established two wholly

existence of a *justified interest*. Under Article 47, the challenge to municipal normative acts may be initiated “by any natural person or body corporate claiming to *have been aggrieved* by the legal provision or its application, or that he/she will be aggrieved within the foreseeable future.” CLASSEN notes that Article 43 merely requires an *interest* which taking into account the circumstances of the case is worthy of protection regardless of its legal, economic or moral nature. Furthermore, Article 47 provides for judicial review regardless of the granting of individual rights although it does not allow for an *actio popularis*. Nonetheless, the author considers that Article 19(4) GG implies a duty to foresee judicial review of regulations at the federal level beyond the limits of Article 47, as the constitutional complaint is only available regarding the violation of fundamental rights and not all subjective rights. See CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 55-57. See also AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 85, 86. See *infra* Part II, Chapter 2, Section 2.1.4.

³⁹⁵ The issue is particularly relevant regarding the protection of third parties (e.g., neighbours and competitors) as the addressees of the administrative act are presumed to have been affected in their rights. See AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 69, 70; CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 44 *et seq.*

³⁹⁶ AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 68, noting that there is a trend to acknowledge individual rights in certain acts which protect both the public and private interests. Considering that the *Bundesverfassungsgericht* has considered that in doubtful cases the norm must be considered as granting individual rights, although the case-law has not always been straightforward see CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 40. Noting that the “theory of protective norms” is applied casuistically and that development is ongoing, showing that the notion of rights cannot be understood as a fixed institution see BELJIN, “Rights in EU Law”, 2008, at 101.

³⁹⁷ See HUFEN, *Verwaltungsprozessrecht*, 2011, at 221-225; WÜRTENBERGER, *Verwaltungsprozessrecht*, 2011, at 222, and 301.

³⁹⁸ BELJIN, “Rights in EU Law”, 2008, at 105.

³⁹⁹ MACHETE, “A relevância processual dos vícios procedimentais no novo paradigma da justiça administrativa portuguesa”, 2006, at 866. The author mentions the areas of urbanism, competition and state aids. One should note that the latter are core areas in the EU legal order.

⁴⁰⁰ CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 59 *et seq.*

⁴⁰¹ Hence, whereas in the case of rights the method lies in interpretation of norms, in the case of interests it lies in the assessment of facts. See BELJIN, “Rights in EU Law”, 2008, at 106, 107. For an analysis of the CJEU’s methods to identify the existence of EU rights see *ibid.*, at 114 *et seq.*; PRECHAL, “Protection of Rights”, 2008, at 155-182.

new concepts – the ones of “direct and individual concern” – which did not find an exact *simile* in neither of the Member States legal orders. These notions deeply troubled the CJEU who in many instances could not establish a consistent and clear orientation. More significantly, with a few minor exceptions, the CJEU managed to construe these notions so narrowly that the probability of success of the majority of private challenges to Union measures became almost null. The main critics directed at the CJEU’s case-law in this respect are on the one hand (i) the *lack of foreseeability* that this case-law has inspired along the years, often forcing individuals to incur in the costs of litigation with a very low degree of certainty and expectation regarding the success of their challenges; and on the other hand (ii) the *highly restrictive* approach regarding standing of private parties, which although made more flexible in certain fields, continues to produce very limited outcomes. Individuals were thus considered to have a “*statut marginalisé*”⁴⁰² regarding the control of legality of Union measures.

b) The Fluctuations Surrounding the Test of Direct Concern

I. The test of direct concern has traditionally had a *lower profile* than the test of individual concern and played a “much less decisive role”⁴⁰³ in the dismissal of actions for annulment brought by private parties. This is largely due to the fact that the CJEU has been comparatively less rigid and more consistent in the interpretation of this notion.⁴⁰⁴ Furthermore, and since the two admissibility tests are cumulative, the Court has frequently denied standing to natural and legal persons on the basis that they were not individually concerned, without having to consider also whether they were directly concerned.

II. The requirement of direct concern “raises issues of cause and effect”⁴⁰⁵, and expresses the idea that an individual may bring an action for annulment against Union measures which have legal effects on him/her.⁴⁰⁶ In the words of the CJEU itself:

⁴⁰² BERROD, *La systématique des voies de droit communautaires*, 2003, at 213.

⁴⁰³ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 75. See also HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 26, 27; GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 390.

⁴⁰⁴ See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 64. According to ALBORS-LLORENS this approach reflects the fact that the test for individual concern is more difficult to satisfy than the test for direct concern, and so the CJEU dealt with the former first for reasons of procedural expediency. In contrast, where actions were held admissible the CJEU change its approach and considered first the issue of direct concern. Also considering that the test for direct concern is easier to satisfy see KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 79.

⁴⁰⁵ See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 474 et seq., noting that the test operates in two stages: firstly, determining the existence of a “*lien de causalité*” and secondly, assessing “*l'intensité de ce lien*”; and HARTLEY, *The Foundations of European Union Law*, 2010, at 388. Considering that the act must be capable of producing directly effects on the applicant’s legal position see Opinion of AG GRAND in Case 69/69, *Alcan/Commission*, [1970] ECR 385; Case C486/01, *Front national/Parliament*, [2004] ECR I-6289, paras. 34-43.

⁴⁰⁶ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 251. Noting that an individual should not challenge an act which does not violate his or her rights see GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 388. See also Opinion of AG ROEMER in Case 25/62, *Plaumann/Commission of the EEC*, [1963] ECR 126, at 114-115, where the AG adopted a formalistic approach to direct concern; Case 294/83, *Les Verts/Parliament*, [1986] I-1339, para. 31. *Per contra*, see AG GAND in Case 38/64, *Getreide-Import Gesellschaft/Commission of the EEC*, [1965] ECR 203. CASSIA notes that the existence of an intermediate act does not determine the inadmissibility of an action if “*le sens de la mesure interne est commandé par l'acte communautaire*.” See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 482.

“[f]or an individual applicant to be directly concerned, for the purposes of the fourth paragraph of Article 173 of the Treaty, by a Community measure, that measure *must directly affect the legal situation of the person concerned and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules* (emphasis added).”⁴⁰⁷

One should note that there are different elements in this case-law. Firstly, to be of direct concern to the applicant, a measure must firstly *directly affect* the legal situation of the person concerned. Secondly, its implementation must be purely automatic. And thirdly, the act must constitute a complete set of rules which are *sufficient* in themselves. The use of the word “and” in the case-law shows the autonomy of the three requirements. Scholars have reduced these elements to two conceptual dimensions: the first, involving *causation* – there must be a direct link between the measure and the damage inflicted on the applicant – and the second, involving the nature and degree of *affectability* of the interest affected by the Union act, which must be a legal, rather than a factual interest.⁴⁰⁸

Hence, the act must affect the applicant directly. This means that the act must be the *cause* of the change in the individual’s legal position. This will not happen if those entrusted with the implementation of the measure are left with discretion in said implementation. In fact, the existence of discretion will break the chain of causation.⁴⁰⁹ Or as the CJEU has put it in *Les Verts* measures are of direct concern to the applicant when “they constitute a complete set of rules which are sufficient in themselves and which require no implementing provisions.”⁴¹⁰ Hence, the interposition of an *autonomous will* between the measure and the effect on the applicant means that the latter is not directly concerned.⁴¹¹ Hence, in *Alcan*, the AG and the CJ considered the individual not to be directly concerned because the Belgian Government could have decided not to use the Commission’s authorization to open a tariff quota for unwrought aluminium.⁴¹² However, if the power at issue is not discretionary or it has been exercised first and confirmed afterwards, those affected by it will be directly concerned.⁴¹³ Hence “in order to establish direct concern, it must be shown that, at the time the contested measure was adopted, it was *substantially certain* that it would affect the applicant.”⁴¹⁴ The case-law is not, however, always clear-cut.

⁴⁰⁷ Case T-69/99, *DSTV/Commission*, [2000] ECR II-4039, para. 24. See also Case 117/77, *Bestuur van het algemeen Ziekenfonds Drenthe-Platteland/Pierik*, [1978] ECR 825; Case 69/79, *Jordens-Vosters*, [1980] ECR 75; Case 11/82, *Piraiiki-Patraiki/Commission*, [1985] ECR 207; Case T-223/01, *Japan Tobacco and JT International/Parliament and Council*, [2002] ECR II-3259; Case C-417/04, *Regione Siciliana/Commission*, [2006] ECR I-3881, paras. 26-32.

⁴⁰⁸ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 416.

⁴⁰⁹ KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 95; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 317. When such discretion exists – and such discretion must be genuine – individuals are to wait for the implementing measures, which they can challenge before national courts. This structure of legal protection reflects the structure of Union law making. See LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 251. See e.g., Case 222/83, *Commune de Differdange/Commission*, [1984] ECR 2889. See Case T-70/94, *Comafira and Dole Fresh Fruit Europe/Commission*, [1996] ECR II-1741, para. 42.

⁴¹⁰ Para. 31.

⁴¹¹ HARTLEY, *The Foundations of European Union Law*, 2010, at 388.

⁴¹² See also Case 333/85, *Mannesmannröhren-Werke/Council*, [1987] ECR 1381; Joined Cases 89 and 91/86, *Étoile commerciale and CNTA/Commission*, [1987] ECR 3005.

⁴¹³ HARTLEY, *The Foundations of European Union Law*, 2010, at 389.

⁴¹⁴ ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 25. In Case C-386/96 P, *Dreyfus/Commission*, [1998] ECR I-2309 the CJEU held that: “[f]or a person to be directly concerned by a Community measure, the latter must *directly affect* the legal situation of the individual and leave *no discretion* to the addressees of that

In earlier cases, although the CJEU was silent on this matter, several AGs considered that direct concern should be understood as the absence of intermediate acts. Hence, a measure which did not require *any implementing action* or which left *no discretion* on its implementation was of direct concern.⁴¹⁵ In *Bock*⁴¹⁶, the CJEU seems to have adopted a more liberal reading of the notion of direct concern. In fact, if according to previous decisions in *Alcan* and *Eridania*⁴¹⁷ it seemed that an individual would only be directly affected by an act if the addressee of such act was left with *no discretion*, in *Bock*, the CJEU considered that even if the state enjoyed a certain margin of discretion the measure would still be considered to be of direct concern if the state had *previously made clear* how it was going to exercise such discretion.⁴¹⁸ AG DUTHEILLET DE LAMOTHE had argued in the case that it would have been excessive formalism to have held that the decision did not affect *Bock*.⁴¹⁹ Surely one can question the consistency of *Bock* in light of *Alcan*.⁴²⁰ HARTLEY notes, however, that there were two distinctive features between these cases. Firstly, in *Bock*, the German authorities had expressly told the applicant that if they obtained the authorization it would be used to reject its application. Secondly, in *Bock*, the German state was acting against the interests of the importer. In contrast, in *Alcan*, the Belgian government was acting in the interest of the applicants. Since importers and Member States were on the “same side”, it would have not been unreasonable to think that the individuals’ interests could be protected in an action brought by the Member State, who did not have to prove any standing requirements. On the contrary, *Bock* could not rely on such possibility to have the legality of the decision reviewed by the CJEU.⁴²¹

Later, in *Piraiki-Patraiki*⁴²², the CJEU went a step further, and considered that although the act required implementing measures it directly concerned the applicant as it was clear *from the circumstances of the case* how the Member State would apply such act. Hence, the Member State’s position does not have to be express.⁴²³ This was probably the most liberal decision on this subject.⁴²⁴ In fact, it appeared that “a third party non addressee of a given measure may be directly concerned by a decision even if the Member State addressee enjoys some discretion, *when it is clear, either from the declaration of the latter or from the circumstances of the adoption of the decision*, how the

measure who are entrusted with the task of implementing it, such implementation being *purely automatic* and resulting from Community rules without the application of other intermediate rules (...). The same applies where the possibility for addressees not to give effect to the Community measure is *purely theoretical* and their intention to act in conformity with it is *not in doubt* (paras. 43-44).”

⁴¹⁵ See Opinions of AG ROEMER in *Plaumann* and Case 1/64, *Glucoseries réunies/Commission de la EEC*, [1964] ECR 811 (some degree of discretion) and Opinion of AG GAND in Case 38/64, *Getreide-Import Gesellschaft/Commission of the EEC*, [1965] ECR 203 (no discretion).

⁴¹⁶ Case 62/70, *Bock/Commission*, [1971] ECR 897.

⁴¹⁷ Joined Cases 10 and 18/68, *Eridania Zuccherifici and others/Commission*, [1969] ECR 459.

⁴¹⁸ Case 62/70, *Bock/Commission*, [1971] ECR 897, paras. 6-8. See also Case T-435/93, *ASPEC and others/Commission*, [1995] ECR II-1281, para. 60.

⁴¹⁹ Opinion of AG DUTHEILLET DE LAMOTHE in *Bock*, at 916. See also HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 29.

⁴²⁰ See HARTLEY, *The Foundations of European Union Law*, 2010, at 390.

⁴²¹ ALBORS-LLORENS notes, however, that it can never be completely certain that the Member State in question will bring annulment proceedings no matter how likely it is that it may do so. Thus, the only possible explanation for *Bock* is that the CJEU advanced a step towards a more liberal construction of the test of direct concern. See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 68.

⁴²² Case 11/82, *Piraiki-Patraiki/Commission*, [1985] ECR 207.

⁴²³ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 254, also mentioning specific case-law on aid programmes financed by the Commission.

⁴²⁴ HARTLEY, *The Foundations of European Union Law*, 2010, at 391.

discretion will be used.”⁴²⁵

These cases concerned prior authorizations which were considered to be of direct concern as Member States had made it *expressly* or *implicitly* clear how to use the authorization. Notwithstanding, the CJEU had also to decide on the admissibility of annulment actions brought against Union acts which merely confirmed or rejected national acts already adopted by Member States. In these cases, direct concern depends on the effects of such *ex post* acts. Hence, in *Toeffer*⁴²⁶ the CJEU decided to admit the action, as the Union act rendered the national measures valid.⁴²⁷ In contrast, in *DSTV*⁴²⁸, the CJEU decided that the act was not of direct concern, making clear that *ex post* authorizations will only be considered of direct concern if they have retroactive effect.⁴²⁹

In light of this case-law, scholars consider that the emphasis regarding the notion of direct concern should be put on the existence of a *direct causal link* between the decision at issue and the damage or harm inflicted on the rights of the applicants.⁴³⁰ This is especially relevant regarding the CJEU’s case-law on decisions addressed to private parties which are not in the same position as Member States, and to whom the notion of discretion cannot be applicable in the same terms.⁴³¹ In fact, the *raison d’être* of the case-law on direct concern is to “ensure that the prejudice sustained by the applicant derives directly”⁴³² from the Union act, *i.e.* to “ensure that the chain of causation is not broken by the intervention of an intermediary whose choice may direct in one way or another”⁴³³ the course of the Union’s decision. Thus, the “causal link” theory allows treating decisions addressed to Member States and third parties under the same principles, and explains

⁴²⁵ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 70. However, according to this author, the existence of direct concern is not dependent on the exercise and existence of discretion but on the presence or absence of a causal link in establishing whether the applicants were directly concerned. This position is supported by the CJEU’s decisions in Joined Cases 89 and 91/86, *Étoile commerciale and CNTA/Commission*, [1987] ECR 3005, where the addressee did not enjoy any discretion and notwithstanding the CJEU dismissed the action on ground of lack of direct concern, considering that the decision did not affect the legal situation of the applicants (para. 14); and Case 126/83, *STS/Commission*, [1984] ECR 2769, where the CJEU held that the undertakings had legal relations only with the ACP state which was responsible for the contract, and measures adopted by the representatives of the Commission could not substitute in relation to them a Community decision for the decision of the ACP state, which had sole power to conclude and sign that contract (para. 18).

⁴²⁶ Joined Cases 106 and 107/63, *Toeffer/Commission of the EEC*, [1965] ECR 405.

⁴²⁷ AG ROEMER interpreted the Commission’s act as an authorization rather than a confirmation and doubted that a direct legal relationship existed. Noting the progressive adoption of a material criterion on direct concern see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 482 *et seq.*

⁴²⁸ See Case T-69/99, *DSTV/Commission*, [2000] ECR II-4039.

⁴²⁹ TÜRK, *Judicial Review in EU Law*, 2009, at 59. See also Case T-33/01, *Infront WM/Commission*, [2005] ECR II-5897; and Case C-125/06, *Commission/Infront WM*, [2008] ECR I-1451. Noting that it appears that the decisive obstacle to establishing direct concern would be an award of discretion by the Commission decision to the Member State in question as to how it should act in the particular situation, and that therefore much would turn upon the function of the decision (an authorisation allows an exercise of discretion, whereas a confirmation does not) see HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 33.

⁴³⁰ KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 109: “[l]e préjudice subi doit être un effet direct de la décision attaquée. Autrement dit, la décision doit avoir une répercussion directe sur les intérêts du requérant.” See also ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 63 *et seq.*; BARAV, “Le droit au juge devant le Tribunal de première instance et la Cour de justice des Communautés européennes”, 1998, at 201; ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 75. The GC stated in Joined Cases T-528, 542, 543 and 546/93, *Métropole Télévision/Commission*, [1996] ECR II-649 that: “[s]uffice it to say on this point that there is a *direct causal link* between the Decision, which requires no implementing measure, and effects on Antena 3’s competitive position (para. 64).”

⁴³¹ See also KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 100 *et seq.*; BROWN; JACOBS, *The Court of Justice of the European Communities*, 1989, at 113; and SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 458, analysing the similarities and differences between the notion of direct concern and direct effect.

⁴³² ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 73.

⁴³³ *Ibid.*

why the existence of discretion has not proved definitive in the CJEU's case-law.⁴³⁴

The second dimension of direct concern is usually ignored in the literature. Nonetheless, it is worth considering it since it restricts direct concern to those cases where the applicants were entitled to a certain individual *right*. Thus in *Front National*⁴³⁵, the CJ held that the applicants were not directly concerned as they had no right to form a political group in the European Parliament or to become members of the existing groups.⁴³⁶ In *Regione Siciliana*⁴³⁷, the CJ held that there was no right to receive Union financial assistance, notwithstanding the financial impact of its cancellation. In both cases the GC had come to different conclusions applying a more *factual*-oriented test.⁴³⁸ However, the CJ's approach to direct concern requires a *legal entitlement*, although it should be said that this test is highly uncertain and difficult to apply.⁴³⁹ This *legally*-oriented approach contrasts with the factual considerations underlying the first dimension of the test of direct concern. In fact, from a conceptual point of view, it is unclear whether the test is based on both factual and legal elements or should be deemed limited to the protection of subjective rights.

III. Surely, the requirement of direct concern has posed fewer problems than that of individual concern. Nonetheless, scholars note a trend over the years to tighten the Court's initial approach.⁴⁴⁰ Also, certain inconsistencies have been noted. In fact, in light of the decision in *Eridania*, for instance, private parties may face difficulties in establishing beforehand whether the act will be considered to be of direct concern.⁴⁴¹ Furthermore, in some cases, there seems to be confusion between the notion of reviewable act and direct concern. Hence, in *France/Commission*⁴⁴² the Court held that:

“[e]ven if, therefore, the part of the contested decision which relates to K+S's commitment concerning Potacan is legally binding on K+S, it cannot in any event produce binding legal effects of such a kind as to affect the interests of EMC/SCPA by bringing about a distinct change in that entity's legal position. The legal position of EMC/SCPA cannot be affected in the present case except of its own volition. That amounts in this case essentially to a

⁴³⁴ ALBORS-LLORENS dwells, however, on the lack of relevant case-law regarding decisions addressed to third parties that could confirm this approach. The case of *Les Verts*, which could have served as an example, also mentions the absence of discretion of the addressees. Furthermore, the author draws attention to the fact that in state aids and competition the case-law does not mention the existence of discretion. See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 71, note 269 and 74, note 286.

⁴³⁵ Case C-486/01 P, *Front national/Parliament*, [2004] ECR I-6289.

⁴³⁶ Para. 36.

⁴³⁷ Case C-15/06 P, *Regione Siciliana/Commission*, [2007] ECR I-2591.

⁴³⁸ Joined Cases T-222, 327 and 329/99, *Martinez and others/Parliament*, [2001] ECR II-2823, para. 65; Case T-60/03, *Regione Siciliana/Commission*, [2005] II-4139, paras. 53-55.

⁴³⁹ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 418.

⁴⁴⁰ Considering that the test of direct concern is “equally difficult to satisfy” see TOTH, “The Individual and European Law”, 1975, at 678. See also VANDERSANDEN, “Pour un élargissement du droit des particuliers d'agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 539; ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 25 *seq.*, discussing and criticizing the GC's decisions in Case T-96/92, *CCE de la Société générale des grandes sources and others/Commission (Nestlé/Perrier)*, [1995] ECR II-1213; Case T-485/93, *Dreyfus/Commission*, [1996] ECR II-1101; and Joined Cases T-172, 175 to 177/98, *Salamander and others/Parliament and Council*, [2000] ECR II-2487; VILAÇA, “A protecção jurisdicional dos particulares na Ordem Jurídica Comunitária”, 2010, at 494.

⁴⁴¹ GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 390.

⁴⁴² Joined Cases C-68/94 and 30/95, *France and Société commerciale des potasses et de l'azote and Entreprise minière et chimique/Commission*, [1998] ECR I-1375.

finding that the part of the contested decision which concerns the commitment relating to Potacan *does not directly affect* EMC/SCPA (emphasis added).⁴⁴³

Moreover, regarding challenges brought against directives, direct concern has worked as a “more tenacious barrier”⁴⁴⁴ to the granting of standing than individual concern. This would be justifiable taking into account that directives which are truly normative acts should be in the view of the CJEU object of collateral challenge through the preliminary rulings procedure. In addition to the fact that the abovementioned mechanism may not always constitute a good and viable alternative to direct actions⁴⁴⁵, scholars increasingly drew the attention to the fact that directives have a significant impact on the interests of private parties, who should probably be allowed to challenge them directly.⁴⁴⁶ The argument was largely explored in the case of *Salamander*⁴⁴⁷ without, however, having persuaded the Court. Furthermore, scholars have noted that, for reasons of coherence, Union courts should follow the approach mentioned above in cases “where the exercise of discretion by the addressee of a directive is purely theoretical.”⁴⁴⁸ Nonetheless, as stated above, just before the entry into force of the Lisbon Treaty, the GC admitted an action for annulment against a directive considering that such measure was of direct concern because the Commission left no discretion to the Member States when implementing the act.⁴⁴⁹ As we shall see below, the Lisbon Treaty separated the notion of direct concern from the existence of intermediate measures, which may bring additional confusion to the case-law on direct concern.⁴⁵⁰

c) The “Draconian” Approach to the Test of Individual Concern⁴⁵¹

(i) A Restrictive Test of Variable Geometry

I. By far the greatest obstacle to the direct access of individuals to the Union courts lies with the requirement of individual concern which has been described as one of the “thorniest legal problems”⁴⁵² of judicial review in the EU and an “insurmountable obstacle”⁴⁵³ – “*barrière quasi*

⁴⁴³ Para. 67. See also Case T-54/96, *Oleifici Italiani and Fratelli Rubino Industrie Olearie/Commission*, [1998] ECR II-3377, para. 57.

⁴⁴⁴ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 319.

⁴⁴⁵ See *infra* Section 1.2.2.

⁴⁴⁶ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 320.

⁴⁴⁷ Joined Cases T-172, 175 to 177/98, *Salamander and others/Parliament and Council*, [2000] ECR II-2487, para. 54. Regarding challenges against directives, see Case 160/88, *Fédération européenne de la santé animale and others/Council*, [1988] ECR 6399, paras. 12-14; Case C-298/89, *Gibraltar/Council*, [1993] I-3605, paras. 14-24; Case T-463/93, *Guna/Council*, [1993] ECR II-1205, paras. 13-14; Case T-99/94, *Asocame/Council*, [1994] II-871, para. 17-19; Case C-10/95 P, *Asocame/Council*, [1995] ECR I-4149, para. 29-24; Case T-135/96, *UEAPME/Council*, [1998] ECR II-2335, para. 90; Case T-223/01, *Japan Tobacco and JT International/Parliament and Council*, [2002] ECR II-3259, paras. 45-50; Case T-45/02, *DOW AgroSciences/Parliament and Council*, [2003] ECR II-1973, paras. 35-40; Case 138/88, *Flourez/Council*, [1988] ECR 6393, paras. 10-12, suggesting *a contrario* that a directive may be of direct and individual concern if the applicant can prove that it has a right which the Union institutions should have taken into account when they adopted the directive.

⁴⁴⁸ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 76.

⁴⁴⁹ Case T-420/05, *Vischim/Commission*, [2009] ECR II-3841, paras. 74-78. See *supra* Section 1.2.2(b).

⁴⁵⁰ See *infra* Part II, Chapter 2, Section 2.1.3.

⁴⁵¹ The term “draconian” is used by at least three authors: ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 8 and ALBORS-LLORENS, “Edging Towards Closer Scrutiny?”, 2011, at 257; CANEDO, “L’intérêt à agir dans le recours en annulation du droit communautaire”, 2000, at 455; WARD, “*Locus Standi* under Article 230(4) of the EC Treaty”, 2003, at 75.

⁴⁵² BEBR, *Development of Judicial Control*, 1981, at 65; WARD, “*Locus standi* under Article 230(4) of the EC Treaty”, 2003, at 48.

⁴⁵³ GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of

infranchissable à l'accès du prétoire de la Cour."⁴⁵⁴ The test of individual concern has not been changed by the Lisbon reform, and the difficulties surrounding its application continue to trouble the legal community. Hence, according to the seminal *Plaumann* ruling:

"[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (emphasis added)."⁴⁵⁵

The test is both restrictive and cryptic.⁴⁵⁶ It means that an applicant has to show that the contested act affects him/her substantively as if it was addressed to him/her.⁴⁵⁷ According to the *Plaumann* formula, an applicant must be individualized from all other persons to such a degree as to turn him into a *de facto* addressee.⁴⁵⁸ This may happen by way of two forms. One should note the use of the conjunctions "or" and "and" in the *Plaumann* formula. The applicants will be deemed to be individually concerned if a decision affects them (i) by reason of certain attributes which are peculiar to them and by virtue of this factor the act distinguishes them individually just as in the case of the person addressed (ii) or by reason of circumstances in which they are differentiated from all other persons and by virtue of this factor the act distinguishes them individually just as in the case of the person addressed.⁴⁵⁹

Hence, the requirement of individual concern is relevant only with regard to the so-called substantive addressees of the act – the formal addressees of an act do not have to prove individual concern. In light of this understanding, individual concern "operates as a functional substitute for determining the formal addressees of an action."⁴⁶⁰ This also makes clear that under EU law the individual "merely pursues his or her own 'private' interest as opposed to public interest in legal review and can thus only challenge decisions that are of direct and individual concern to him or her."⁴⁶¹

Scholars have considered that in applying the *Plaumann* formula, the CJEU mainly requires that the applicant is part of a *closed group* of individuals, defined as "one where the membership is

Community Acts", 2003, at 124.

⁴⁵⁴ VANDERSANDEN; BARAV, *Contentieux Communautaire*, 1977, at 163.

⁴⁵⁵ Para. 9. Highlighting the "categorical" nature of the *Plaumann* formula, and considering that there is a subjective element underlying the test of individual concern which contrasts with the *objective* approach adopted by the Court when defining an act of general application see KOVAR; BARAV, "Variations nouvelles sur un thème ancien", 1976, at 85, 86. Noting that this formula requires the applicant to be a "*quasi-déstinataire*" of the contested act, see CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 521.

⁴⁵⁶ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 418.

⁴⁵⁷ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 256.

⁴⁵⁸ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 46.

⁴⁵⁹ I do not follow CASSIA's approach who considers that in the second part of the *Plaumann* formula no analogy with the addressee of the act is required. It seems to me that such condition is common to both parts. See CASSIA, "Continuité et rupture dans le contentieux de la recevabilité du recours en annulation des particuliers", 2002, at 556. This author further implies that *Plaumann* formula should be read as cumulative, and not alternative, i.e. an act will be of individual concern if it affects the applicants "by reason of certain attributes which are peculiar to them and by reason of circumstances in which they are differentiated from all other persons." See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 548.

⁴⁶⁰ TÜRK, *Judicial Review in EU Law*, 2009, at 66.

⁴⁶¹ SCHWARZE, "The Legal Protection of the Individual against Regulations in European Union Law", 2004, at 288, 289.

fixed and determined at the time the measure comes into force”⁴⁶², i.e. which cannot be enlarged after the measure is adopted. This is known as the “closed class” test, and has attracted much criticism, in particular because of its formalistic and retroactive nature.⁴⁶³ In fact, this test has been applied in a large number of cases and it has produced some unfortunate results.⁴⁶⁴ It seems that the only time the test has been satisfied is where an applicant pursued a course of action *before* the enactment of a measure and, by reason of that conduct, was *specifically affected* by the Union act at stake.⁴⁶⁵ Hence, in *Toepfer*, the CJEU considered that the applicants were individually concerned given that (i) only that group of persons was affected by the decision, (ii) the group had become fixed and determined when the Commission adopted the decision and (iii) the Commission was in a position to know whom the decision would affect.⁴⁶⁶ In *Bock*, the decision affected a category of persons which was partially opened (potential importers) and partially closed (traders who had already asked for the issuing of their licenses). The CJEU considered that the applicant was individually concerned as it was a member of a closed category and the Commission could have known of its existence and that the act would affect him. In *Piraiiki-Patraiki* the CJEU considered that the Commission had been in a position to discover the existence of contracts to be performed during the period of application of the contested decision. The applicants were deemed individually concerned “as members of a limited class of traders identified or identifiable by the Commission and by reason of those contracts particularly affected by the decision at issue.”⁴⁶⁷

On the contrary, in the case of *Getreide-Import Gesellschaft*⁴⁶⁸ where only one importer of cereals had applied for a license during the period of validity of a Commission decision fixing rates of levy for the importation of cereals, the CJEU held that the importer was not individually concerned by the decision because, at the time the decision was enacted, *any* importer *could* have decided to apply for a license. The case made it clear that as it was impossible to determine to which persons the measure would apply the applicant could not be deemed to be individually affected. The fact that the individual was distinguished after the measure entered into force was irrelevant. Accordingly, later, in *Deutsche Lebensmittelwerke*⁴⁶⁹ the CJEU considered that the contested decision did not apply to “a closed circle of persons who were known at the time of its

⁴⁶² CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 665 *et seq.* Noting that according to the test underlying individual concern the group has to be limited to “its current size” and that the contested measures affect “existing legal positions” only see GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 393.

⁴⁶³ See, e.g., BARAV, “Direct and Individual Concern”, 1974, at 191, 192, and 198; ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 44-49; GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 400 *et seq.*; CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 509.

⁴⁶⁴ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 77.

⁴⁶⁵ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 420, considering that the test applies in practice only to those parties who are limited in number and have some special pre-existing legal relationship disrupted by a Union measure.

⁴⁶⁶ Noting that the CJEU made clear in *Toepfer* that the aim of then Article 173(2) TEEC is to protect private applicants against situations of misuse of power see ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 49. See also VANDERSANDEN; BARAV, *Contentieux Communautaire*, 1977, at 173.

⁴⁶⁷ Para. 31.

⁴⁶⁸ Case 38/64, *Getreide-Import Gesellschaft/Commission of the EEC*, [1965] ECR 203.

⁴⁶⁹ Case 97/85, *Deutsche Lebensmittelwerke/Commission*, [1985] ECR 1331. See also Case 1/64, *Glucoseries réunies/Commission de la EEC*, [1964] ECR 811.

adoption and whose rights the Commission intended to regulate”⁴⁷⁰, and therefore held the action inadmissible. The CJEU acknowledged that the contested decision affected the applicants. However that was only because of the effects it produces on their position on the market:

“[i]n that regard, the decision is of concern to the applicants just as it was to any other person supplying margarine on the West Berlin market while the contested operation was in progress, and it is not therefore of individual concern to them for the purposes of the second paragraph of Article 173 of the EEC Treaty.”⁴⁷¹

The same approach has been followed in cases where the possibility of new members joining a certain category of people after the enactment of a measure could be considered entirely theoretical, as occurred in the case of *Glucoseries réunies*.⁴⁷² Also competitors of undertakings favoured by Union measures have not succeeded any better as their applications for the annulment of these measures have been dismissed as inadmissible because they belonged to open categories, as the case of *Eridania* exemplifies.⁴⁷³ The test has even been extended to environmental cases where, given the general and collective nature of environmental rights, it would be almost impossible for private applicants to show that they belong to a closed group of people. The case of *Greenpeace*⁴⁷⁴ is emblematic in this respect.

Greenpeace further illustrates another instance where the *Plaumann* test has produced particularly damaging effects, which is the standing of associations. In this case, the GC, the AG and the CJ agreed that it was settled case-law that associations should not be treated as special cases.⁴⁷⁵ In fact, the *locus standi* of associations is made dependent on the *locus standi* of its members.⁴⁷⁶ As a consequence, actions brought by associations are only admissible in three cases: (i) when a legal provision grants procedural rights to these associations; (ii) where every single member of the association is directly and individually concerned, and (iii) where the association’s position as a negotiator is affected by the measure which it seeks to annul.⁴⁷⁷ Scholars note that

⁴⁷⁰ Para. 11.

⁴⁷¹ Para. 11. Noting that in this case it was particularly clear that it was unlikely that other operators would enter the market see GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 394. Moreover, noting that this understanding led the CJEU to rule that associations, as representatives of their members, are not in principle individually concerned by measures which affect the general interests of those members (Case 117/86, *UFADE/Council and Commission*, [1986] ECR 3255), see ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 27.

⁴⁷² Case 1/64, *Glucoseries réunies/Commission de la EEC*, [1964] ECR 811.

⁴⁷³ See e.g., Joined Cases 10 and 18/68, *Eridania Zuccherifici and others/Commission*, [1969] ECR 459.

⁴⁷⁴ Case C-321/95 P, *Greenpeace and others/Commission*, [1998] ECR I-1651. For a case comment see SCHIKHOF, “Direct and Individual Concern in Environmental Cases”, 1998, at 276-281.

⁴⁷⁵ AG COSMAS noted that: “[a] relaxation by the Court, to the extent sought, of the criteria of admissibility could be abused and lead to aberrant consequences. Natural persons without *locus standi* under the fourth paragraph of Article 173 of the Treaty could circumvent that procedural impediment by setting up an environmental association. Moreover, whilst the number of natural persons, that is to say citizens of the European Union, however high it may be, none the less remains limited, the number of environmental associations capable of being created is, at least in theory, infinite. (para. 117).”

⁴⁷⁶ Joined Cases 19 to 22/62, *Fédération Nationale de la Boucherie en Gros and others/Council*, [1962] ECR 491; Case 72/74, *Union syndicale and others/Council*, [1975] ECR 401; Case 282/85, *DEFI/Commission*, [1986] ECR 2469.

⁴⁷⁷ On standing of associations see Joined Cases 67, 68 and 70/85, *Van der Kooy/Commission*, [1988] ECR 219; Case C-313/90, *CIRFS and others/Commission*, [1993] ECR I-1125; Case T-435/93, *ASPEC and others/Commission*, [1995] ECR II-1281; Joined Cases T-447, 448, and 449/93, *AITEC and others/Commission*, [1995] ECR II-1971; Joined Cases T-481 and 484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee/Commission*, [1995] ECR II-2941; Case T-380/94, *AIUFASS and AKT/Commission*, [1996] ECR II-2169; Case C-122/96, *Federolio/Commission*, [1997] ECR II-1559, para. 61. See also BARAV, “Le droit au juge devant le Tribunal de première instance et la Cour de justice des Communautés européennes”, 1998, at 202-203; GORMLEY, “Public

these criteria have proved almost impossible to satisfy in practice and their severity is striking when compared with the approach followed in the national legal systems regarding the standing of associations.⁴⁷⁸

Scholars have noted that private parties will be considered individually concerned where it can be demonstrated that they belong to a *closed class* and have pursued a *particular course of action* creating a *causal link* between the measure and their situation.⁴⁷⁹ As a consequence, only a few applicants have succeeded in showing individual concern on the basis that they belonged to a closed class. In CAM⁴⁸⁰ as the applicants were identified “by reason of the individual course of action which they pursued or [were] regarded as having pursued during a particular period”⁴⁸¹, and were members of a closed category, they were deemed to be individually concerned. The decision in CAM foreshadowed a more liberal approach to the notion of individual concern.⁴⁸² However, one should not conclude that belonging to a closed class is sufficient to be considered individually concerned.⁴⁸³ There must be a *specific connection* between the applicant’s situation and the contested measure.⁴⁸⁴ ALBORS-LLORENS has noted that there have been cases where membership of a closed class alone has not sufficed to satisfy the *Plaumann* formula. These cases have significantly enhanced the *per se* limiting nature of the “closed class” test. Hence, in some cases, the CJEU found that some of the applicants were individually concerned “because they belonged to closed classes *and* because the Commission was in a position to know who would be affected by the measure.”⁴⁸⁵ This construction of the test of individual concern adopted in the early case-law has re-emerged in some of the most notoriously restrictive decisions on standing.⁴⁸⁶ In other cases, the test was based not only on the membership of a closed group but also on the fact that the enacting institution failed to observe a *legal duty* to take account of the impact of the measure on those belonging to that group.⁴⁸⁷ Here, “the Court seemed to be asking applicants belonging to closed

Interest Litigation in Community Law”, 2001, at 54-56; SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 422.

⁴⁷⁸ See ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 78, note 31; CHALMERS; DAVIES; MONTI, *European Union Law*, 2012, at 427. Hence, for example, under English law see *Case R. v. Her Majesty’s Inspectorate of Pollution, Ex p. Greenpeace Ltd. (no. 2)* [1994] 4 All E.R. 329. See also MILES, “Standing in a Multi-Layered Constitution”, 2003, at 391-419.

⁴⁷⁹ TURK, *Judicial Review in EU Law*, 2009, at 74. BERROD noted that there is an objective and a subjective element underlying the test. See BERROD, *La systématique des voies de droit communautaires*, 2003, at 630 *et seq.*

⁴⁸⁰ Case 100/74, *CAM/Commission*, [1975] ECR 1393.

⁴⁸¹ Para. 18.

⁴⁸² Noting that CAM foreshadows an approach that allows for a challenge to true regulations, in so far as some of their provisions may individually concern the applicants but the act itself does not lose its character as an act of general application see KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 92.

⁴⁸³ Case 26/86, *Deutz und Geldermann/Council*, [1987] ECR 941; Joined Cases 97, 193, 199 and 215/86, *Asteris/Commission*, [1988] ECR 2181; Case T-139/01, *Comafra and Dole Fresh Fruit Europe/Commission*, [2002] ECR II-799. See GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 402 *et seq.*, with further references.

⁴⁸⁴ See Opinion AG LENZ in Case C-309/89, *Codomiu/Council*, [1994] ECR I-1853.

⁴⁸⁵ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 78. See Joined Cases 106 and 107/63, *Toepfer/Commission of the EEC*, [1965] ECR 405. See also BARAV, “Le droit au juge devant le Tribunal de première instance et la Cour de justice des Communautés européennes”, 1998, at 200; GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2007, at 127.

⁴⁸⁶ See Case T-100/94, *Michailidis and others/Commission*, [1998] ECR II-3115, para. 59; Case C-321/95 P, *Greenpeace and others/Commission*, [1998] ECR I-1651, para. 28.

⁴⁸⁷ See Case 11/82, *Praiki-Patraiki/Commission*, [1985] ECR 207; Case 152/88, *Sofrimport/Commission*, [1990] ECR I-2477; Joined Cases T-480 and 483/93, *Antillean Rice Mills and others/Commission*, [1995] ECR II-2305. For a comprehensive analysis see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*,

classes to show, as *an additional element*, the breach of a procedural equivalent to the principle of legitimate expectations in order to gain standing.”⁴⁸⁸ In some of these cases the applicants did belong to closed categories, but their applications were dismissed as inadmissible because they failed to prove that the Community institution in question had a legal duty to take their situation into account.⁴⁸⁹

Notwithstanding, it is possible to identify variations in the case-law depending on the type of the contested acts. On the one hand, if the contested act is a *decision addressed to a third party*, individuals will only have to demonstrate that they are part of a *closed class* of persons concerned by the act, either large or small. This happens clearly with retroactive decisions as the number of persons affected can no longer change: that group of people was known when the act was adopted.⁴⁹⁰ When drafted in general terms, the CJEU has never considered whether the contested decision might be a “disguised regulation”: it has taken for granted that it is correctly designated and proceeded to examine if the applicant is directly and individually concerned.⁴⁹¹ In this context, HARDING has explained well the mixed nature of decisions addressed to Member States. In fact, as the author states, “the function of a decision addressed to a Member State is to determine the conduct of that State in a particular situation.”⁴⁹² However, this kind of decision must be seen to operate in a further way, since “it is necessarily going to affect a class of private persons.” Thus, these decisions “will always operate on two levels (...) and relate to two kinds of interest.” Moreover, “a private individual is never, in terms of strict logic, going to be directly affected by such a decision: only the addressee of the decision, the Member State, can be so affected.”⁴⁹³ The question which follows from this analysis is whether or not a person *affected* by a decision which has been addressed to a Member State at the *secondary level* of its application should be allowed to contest the legality of such a decision and, if so, what kind of *interest* such person must show in order to bring such an action.⁴⁹⁴

On the other hand, if the contested act is a *regulation*, it will not be enough for the applicant to show that it belongs to a closed class in order to show individual concern.⁴⁹⁵ Hence, the CJEU dismissed a batch of cases where it could be said that the Commission knew or could easily have known the exact number and even the identities of those affected by the measure at the time it was adopted.⁴⁹⁶ In *Compagnie Française Commerciale et Financière*⁴⁹⁷, the CJEU, deciding against the

2002, at 569 *et seq.*

⁴⁸⁸ It became very clear in a series of cases that the two requirements were, indeed, cumulative. See Case T-489/93, *Unifruit Hellas/Commission*, [1994] ECR II-1201; Case C-209/94 P, *Buralux and others/Council*, [1996] ECR I-615; Case T-60/96, *Merck/Commission*, [1997] ECR II-849; Case C-451/98, *Antillean Rice Mills/Council*, [2001] ECR I-8949.

⁴⁸⁹ Noting that this demanding benchmark has the effect of precluding nearly all challenges by non-privileged applicants, see ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 78-79.

⁴⁹⁰ Joined Cases 106 and 107/63, *Toepfer/Commission of the EEC*, [1965] ECR 405, at 411-412.

⁴⁹¹ HARTLEY, *The Foundations of European Community Law*, 2007, at 351, analysing decisions in *Toepfer* (which regarded a decision affecting an open class of individuals, but contained within that open class a closed category of members of which were affected in a significantly different way); *Bock and Piraiiki-Patraiki* (where the Commission had a duty to take into account the applicants’ interests when adopting the decision).

⁴⁹² HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 21.

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.*

⁴⁹⁵ See e.g., Case T-482/95, *Weber/Commission*, [1996] ECR II-609, paras. 64, 65.

⁴⁹⁶ GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 413 *et seq.*, with further

Opinion of AG ROEMER, considered that the applicant lacked *locus standi* because the measure was a true regulation, despite the fact that the applicants were members of a closed category and their identity could have been ascertained by the Commission when it adopted the regulation. *Per contra*, in CAM, where the facts were very similar to *Compagnie*, the Court applied firstly the test of individual concern and having found this requirement satisfied, by applying the closed category test, decided to admit the action.⁴⁹⁸ There was no finding that the act was *in fact* a decision.⁴⁹⁹ The same approach was adopted in *Exportation des Sucres*⁵⁰⁰ and *UNICME*.⁵⁰¹ However, this did not mean the triumph of the closed category test.⁵⁰² In later proceedings, the CJEU swung back to the approach in *Compagnie*.⁵⁰³ HARTLEY has argued that the case-law on the challenge of regulations has changed over time.⁵⁰⁴ Up until 1979, it was settled case-law that once the applicant showed it belonged to a closed category of persons which was particularly affected by the measure, it would be deemed to be individually concerned.⁵⁰⁵ After 1979, and throughout the 1980s, a new trend emerged in the case-law. The new approach firstly appeared in *Beaufort*.⁵⁰⁶ Here, the Court applied the abstract terminology test regardless of the fact the applicant was a member of a closed class, and consequently dismissed the action. In time, the application of the abstract terminology test would, with a few exceptions⁵⁰⁷, become the norm in the CJEU's case-law, which did not proceed to the question of individual concern.

II. Hence, in order to be deemed individually concerned it will not be enough to demonstrate that the applicants are part of a small group of persons affected by the measure. On the one hand, if the measure is drafted in general terms but the persons affected, although members of a theoretically *open class*, in fact consist of a small and easily identifiable group, the CJEU will nonetheless deny standing.⁵⁰⁸ Hence, the fact that the persons to whom a regulation is applicable are identifiable⁵⁰⁹, that an act of general application is only applicable to a small number

references.

⁴⁹⁷ Case 64/69, *Compagnie française commerciale et financière/Commission*, [1970] ECR 221.

⁴⁹⁸ For a closer analysis of this case see KOVAR; BARAV, "Variations nouvelles sur un thème ancien", 1976, at 73 *et seq.*

⁴⁹⁹ HARTLEY suggests that the CJEU must have assumed that this conclusion followed from its finding of individual concern. See HARTLEY, *The Foundations of European Union Law*, 2010, at 377.

⁵⁰⁰ Case 88/76, *Exportation des Sucres/Commission*, [1977] ECR 709.

⁵⁰¹ Case 123/77, *UNICME/Council*, [1978] ECR 845.

⁵⁰² HARTLEY, *The Foundations of European Community Law*, 2007, at 353.

⁵⁰³ Case 64/69, *Compagnie française commerciale et financière/Commission*, [1970] ECR 221.

⁵⁰⁴ HARTLEY, *The Foundations of European Union Law*, 2010, at 377, 378.

⁵⁰⁵ Case 100/74, *CAM/Commission*, [1975] ECR 1393.

⁵⁰⁶ Joined Cases 103 to 109/78, *Usines de Beaufort/Commission*, [1979] ECR 17.

⁵⁰⁷ Two cases are particularly relevant, as they seem to have been decided on the special circumstances involved. In Case 138/79, *Roquette Frères/Council*, [1980] ECR 3333 (where the applicants were listed *by name* in the annex of the contested act) and Case 232/81, *Agricola Commerciale Olio/Commission*, [1984] ECR 3881 (where the Court suggested that the applicants had *vested rights*). See HARTLEY, *The Foundations of European Community Law*, 2007, at 353, 354.

⁵⁰⁸ HARTLEY, *The Foundations of European Union Law*, 2010, at 374. See Case 101/76, *Koninklijke Scholten Honig/Council and Commission*, [1977] ECR 797. Noting that the Court adopted the same approach regarding decisions addressed to third parties, see *ibid.* mentioning Case 231/82, *Spijker/Commission*, [1983] ECR 2559.

⁵⁰⁹ See e.g., Case 6/68, *Zuckerfabrik Watenstedt GmbH/Council*, [1968] ECR 409; Case 64/69, *Compagnie française commerciale et financière/Commission*, [1970] ECR 205, para. 11; Case 123/77, *UNICME/Council*, [1978] ECR 845, para. 16; Case 242/81, *Roquette Frères/Council*, [1982] ECR 3213, para. 7; Case 26/86, *Deutz und Geldermann/Council*, [1987] ECR 941, para. 8; Joined Cases 97, 193, 199 and 215/86, *Asteris/Commission*, [1988] ECR 2181, para. 13; Case 160/88, *Fédération européenne de la santé animale and others/Council*, [1988] ECR 6399, para. 29; Joined Cases C-15 and 108/91, *Buckl and others/Commission*, [1992] ECR I-6061, para. 25; Case C-213/91, *Abertal/Commission*, [1991] ECR I-5109,

of individuals⁵¹⁰, that certain market participants are more affected than others⁵¹¹, that different specific circumstances may ensue for the various persons to whom the measure applies⁵¹², that it has retroactive effects⁵¹³, are not definitive in determining that the regulation affects such applicants individually.⁵¹⁴ The criterion used to refuse individual concern to members of an open class is the same used to establish the general nature of the act in the case of an open class: that of *objectively determined situations*. Rather “than looking at the specific *effect* of the act, the Court chose to look at the specific *object* or *purpose* of the act to exclude any action against an act of which the applicant was not *de jure* or at least *de facto* the *true addressee* in mind of the author of the act.”⁵¹⁵

On the other hand, not all individuals that find themselves to be part of a *closed category* will be deemed to be individually concerned, as the decision in *Compagnie* clearly shows. According to the CJEU’s case-law “the fact that the number and identity of the persons affected can be ascertained does not mean that they are individually concerned” as long as the measures applies “by virtue of an *objective* legal or factual situation defined by the measure in question”.⁵¹⁶ This means that an applicant will not be deemed to be *individually* affected if the economic circumstances and/or temporal limitation of the act make it unlikely that the class of those affected at the time the act is adopted will change later on.⁵¹⁷ AG COSMAS’ words in *Greenpeace* are emblematic:

“[i]n other cases actions brought by individuals frequently run up against the Court’s settled case-law to the effect that a measure cannot concern applicants individually when it applies to objectively defined situations and produces legal effects on categories of persons determined in a general and abstract manner. It should also be noted that *whether a measure challenged is objective in nature must not be confused with the number of persons affected by it*. A single person may be affected by a decision, but that does not mean that such person is ‘individually’ affected by it for the purposes of the fourth paragraph of Article 173 of the Treaty. Again, ‘(...) the possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies by no mean implies that it must be regarded as being of individual concern to them as long as it is established that such application takes effect *by virtue of an objective legal or factual situation defined by the measure in question (...)*’ (emphasis added).”⁵¹⁸

Thus, scholars have noted that the *leitmotiv* of the *Plaumann* test is not so much the

paras. 17-24; Case C-131/92, *Arnaud and others/Council*, [1993] ECR I-2573, paras. 13-17.

⁵¹⁰ Case C-263/02 P, *Commission/Jégo-Quéré*, [2004] ECR I-3425, para. 46.

⁵¹¹ Case T-11/99, *Van Parys and others/Commission*, [1999] ECR II-2653, para. 50; Case C-312/00 P, *Commission/Camar and Tico*, [2002] ECR I-11355, paras. 69-83; Case T-338/03, *Eridania Sadam and others/Commission*, unpublished, para. 35.

⁵¹² Case C-409/96 P, *Sveriges Betodlares Centralförning and Henrikson/Commission*, [1997] ECR I-7531, para. 37; Case T-1/00, *Hözl and others/Commission*, [2000] ECR II-251, para. 23; Case T-370/02, *Alpenhain-Camembert-Werk and others/Commission*, [2004] ECR II-2097, para. 62.

⁵¹³ Case 229/88, *Cargill/Commission*, [1990] ECR I-1303, paras. 13-18; Case 244/88, *Usines coopératives de déshydratation du Vexin and others/Commission*, [1989] ECR 3811, paras. 11-14.

⁵¹⁴ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 257, 258.

⁵¹⁵ SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 429.

⁵¹⁶ Case C-213/91, *Abertal/Commission*, [1991] ECR I-5109, para. 17.

⁵¹⁷ CRAIG; BURCA, *EU Law*, 2011, at 499. See Case 123/77, *UNICME/Council*, [1978] ECR 845.

⁵¹⁸ Para. 75 of the Opinion.

distinction between open and closed classes but the idea of preventing individuals from challenging regulations *in substance*, i.e. acts of general application.⁵¹⁹ Accordingly, in those cases in which the CJEU came to the conclusion that the act constituted a decision *in substance* the Court considered that it was of individual concern. The idea that individual concern should be acknowledged almost automatically once proven that the act was in fact a batch of decisions resulted from the case of *Producteurs*, but was clearly confirmed in *International Fruit Company*.⁵²⁰ Hence, the test of legal nature allowed for the determination of the *true* addressees of the act. The case of *International Fruit Company* was particularly emblematic as when the regulation was adopted the number of applications which could be affected was fixed and no new applications could be added. Such regulation was thus considered to constitute a *conglomerate* of individual decisions.⁵²¹ Here, the test for individual concern was almost automatically fulfilled, which is only logic as no one can be more individually concerned than the addressee of a given measure.⁵²² In *Producteurs* the CJEU had suggested that *in cases of doubt* an act would be a decision if it was of individual concern. In *Zuckerfabrik Watenstedt* the CJEU seems to have indicated that a measure could be of individual concern and still be a true regulation. *International Fruit Company* confirmed that “things go the other way around”: the fulfilment of the test of legal nature will always mean the fulfilment of the test of direct and individual concern. Hence the test of legal nature is more stringent than the combined effect of the tests of direct and individual concern, as it aims to determine the *real addressees* of a given measure, which will always have *locus standi*, and not the people affected by such measure.⁵²³

III. Briefly put, two main requirements seem to lie behind the *Plaumann* criteria: *determinability* and *individualization*. Hence, it has only been where the plaintiff has demonstrated to belong to a group of affected persons whose number was determinable at the time when the decision was adopted that the CJEU has recognized individual concern.⁵²⁴ Furthermore, it is clear

⁵¹⁹ See e.g., BERROD, *La systématique des voies de droit communautaires*, 2003, at 569. In Case T-100/94, *Michailidis and others/Commission*, [1998] ECR II-3115 and Case T-298/94, *Roquette Frères/Council*, [1996] ECR II-1531 the GC dismissed actions brought by private applicants which might have seemed to belong to a closed class. In Case C-73/97, *France/Comafra and others*, [1999] ECR I-185, the CJ, reversing the GC decision, considered that it was not sufficient for an applicant to be part of a closed class. ARNULL suggests based on this case-law that it seems that “membership of a closed class will only be treated as distinguishing an applicant individually if the defendant institution was obliged to take into account the effect of the disputed act on members of the class concerned.” See ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 34. This is confirmed by the CJEU’s rulings in *Piraiiki-Patraiki and Sofrimport*.

⁵²⁰ Joined Cases 41 to 44/70, *International Fruit Company and others/Commission*, [1971] ECR 411. Notwithstanding in *Calpak* the Court would apparently reject such approach, by applying the objective terminology test. See also Case 354/87, *Weddel/Commission*, [1990] ECR I-3847; Case 138/79, *Roquette Frères/Council*, [1980] ECR 3333.

⁵²¹ Paras. 21-22. The Court applied the earliest reasoning adopted in Case 30/67, *Industria Molatoria Imolese e.a./Council*, [1968] 115. The same approach was adopted regarding decisions addressed to third parties, where the CJEU considered that as such acts constituted a bundle of individual decisions, they were of direct and individual concern to the applicant. See Case 92/78, *Simmenthal/Commission*, [1979] ECR 777; Case 283/82, *Schoellershammer/Commission*, [1983] ECR 4219; Case 207/86, *Apesco/Commission*, [1988] ECR 2151; Case T-465/93, *Consorzio gruppo di azione locale “Murgia Messapica”/Commission*, [1994] ECR II-361; Case T-478/93, *Wafer Zoo/Commission*, [1995] ECR II-1479. Considering that it appears from *International Fruit Company* that in order to find the test of legal nature fulfilled a causal link must exist between the measure at issue and the situation of the applicants see ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 122.

⁵²² ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 123.

⁵²³ *Ibid*, at 124.

⁵²⁴ HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 31.

that the simple fact that an act called a regulation only applies to a small number of economic operators is not enough to make it of individual concern to them. There must be something “which picks the applicant out differently from everybody else.”⁵²⁵

In pragmatic terms, the *Plaumann* formula has been criticized for being “economically unrealistic”⁵²⁶ and by not taking into account the reality of the market.⁵²⁷ As CRAIG and DE BÚRCA have put it, if there are a limited number of firms operating in a given market “that is not fortuitous, but the result of the ordinary principles of supply and demand.”⁵²⁸ The number is unlikely to alter significantly if at all. The argument that a private party is not individually concerned because its activity can be pursued at *any time* by other companies is therefore unconvincing. In conceptual terms, the test is criticized for rendering almost impossible a challenge to a Union act of general application, except for a very limited number of cases of retrospective measures.⁵²⁹ In fact, it has been considered that the test for standing must be judged when the application for review was lodged.⁵³⁰ However, the application will be received only if the activity could not be pursued by any other operator *at any time in the future*. It can always “be argued that others may engage in the trade at some juncture.”⁵³¹ AG ROEMER stated in *Eridania* that it must be wrong to take such account of the *future effect* of a decision, since otherwise it would never be possible to claim individual concern in relation to a measure which had a permanent effect, even though at the time it was made the decision only affected one firm.⁵³² Furthermore, “[t]he fact that a measure adversely affects a large number of individuals, causing wide-spread rather than limited harm, provides (...) a positive reason for accepting a direct challenge by one or more of those individuals.”⁵³³

Regarding specifically the case of decisions addressed to Member States, HARDING notes that the *Plaumann* formulation entails “confusion between the plaintiff’s necessary interest and the legal nature of the decision as a measure which is addressed to specific, determinate persons.”⁵³⁴ In fact, a decision addressed to a Member State is a decision because it is addressed to a specific person, *i.e.* the Member State. Here, private parties exist only at the secondary level of application of the decision, and it is not necessary for those of them who are actually affected by it to be determinate at the time when it is adopted for the measure to be a decision. Hence, it is unnecessary to import the criterion of determinability into the test of individual concern:

“[t]he requirement of determinability would seem to have been a defence invoked by those who thought that they had their backs to the wall facing the argument that, if a decision

⁵²⁵ USHER, “Direct and Individual Concern”, 2003, at 577. In Case C-213/91, *Abertal/Commission*, [1991] ECR I-5109 the CJEU held that “there is no concrete indication in the contested regulation that the measures in question were adopted *specifically* taking account of the applicants’ plans (para. 25).”

⁵²⁶ CRAIG; BÚRCA, *EU Law*, 2011, at 495.

⁵²⁷ GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 415.

⁵²⁸ CRAIG; BÚRCA, *EU Law*, 2011, at 495.

⁵²⁹ CRAIG, “Legality, Standing and Substantive Review in Community Law”, 1994, at 509.

⁵³⁰ See CRAIG; BÚRCA, *EU Law*, 2011, at 495.

⁵³¹ *Ibid.*

⁵³² Opinion of AG ROEMER in *Eridania*, at 492.

⁵³³ Opinion of AG JACOBS in *UPA*, para. 59.

⁵³⁴ HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 31. Noting that the case-law of the CJEU has in fact effectively prevented virtually all direct actions brought by private parties to challenge decisions addressed to others see also CRAIG; BÚRCA, *EU Law*, 2011, at 495.

addressed to a Member State could be of concern to an indeterminate number of private persons, then it was a normative measure and should not be susceptible of attack by such persons in any case.”⁵³⁵

As the author puts it, a better answer would have been to consider that a decision addressed to a Member State is a specific measure, but of a unique kind since, while operating at a secondary level, it may be of concern to an indeterminate number of private actors.⁵³⁶

IV. Over the years, the CJEU came to admit a more flexible interpretation of the *Plaumann* test by considering that an act could affect its addressees in different ways.⁵³⁷ This development took place through at least five different approaches in the case-law.

First, as seen above, following the *Codorniu*-line the Court acknowledged that normative acts can be of individual concern, i.e., that applicants do not have to demonstrate that the measure is a “disguised decision.”⁵³⁸ The CJEU moved to the application of a two tier admissibility test, skipping the test of legal nature which was particularly difficult to satisfy.⁵³⁹ As seen above, such movement took place firstly in the field of anti-dumping. In *Alusuisse*⁵⁴⁰ the Court considered that a measure could be a regulation and a decision *at the same time*, even though it previously had expressly said that that was not possible.⁵⁴¹ In *Allied Corporation*⁵⁴², the CJEU considered the anti-dumping regulation to be of a *legislative nature* but nonetheless allowed the challenge. For ten years it was however unclear if such case-law applied outside the field of antidumping, which the Court clarified in *Codorniu*.

Secondly, an applicant will be deemed individually concerned when the contested act mentions him by his name and a situation specific to him is governed by such act.⁵⁴³ That was the case, for instance, in *Roquette Frères*⁵⁴⁴, *Maizena*⁵⁴⁵, and *Allied Corporation*.⁵⁴⁶

Thirdly, in some sector-specific case-law, the CJEU acknowledged standing to individuals

⁵³⁵ HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 31.

⁵³⁶ *Ibid.*

⁵³⁷ One should also note that in *Plaumann* the CJEU started by adopting a more liberal approach to Article 173(2) (paras. 106, 107), although it would lay down a very restrictive substantive test. See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 177. AG COSMAS stated in *Greenpeace* that “notwithstanding the apparent homogeneity of its judgments, at least in their formulation, the Court does not profess to adhere to an entirely immutable point of view (para. 78).” Noting that a certain leniency in the factual assessment whether *Plaumann*’s criteria are fulfilled could make a huge difference see LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 39.

⁵³⁸ The decision in *Unifruit Hellas* confirmed that the GC was also willing to grant *locus standi* to individuals who had been affected by a regulation. See also Case T-13/99, *Pfizer Animal Health/Council*, [2002] ECR II-3305; Joined Cases T-94, 110 and 159/00, *Rica Foods and others/Commission*, [2002] ECR II-4677; Case T-45/02, *DOW AgroSciences/Parliament and Council*, [2003] ECR II-1973; Case T-369/03, *Arizona Chemical and others/Commission*, [2005] ECR II-5839; Case T-37/04, *Região autónoma dos Açores/Council*, [2008] ECR II-103.

⁵³⁹ Noting that *Codorniu* limited the scope of the abstract terminology test see PARFOURU, “*Locus Standi* of Private Applicants under the Article 230 EC Action for Annulment”, 2007, at 384.

⁵⁴⁰ Case 307/81, *Alusuisse/Council and Commission*, [1982] ECR 3463.

⁵⁴¹ Case 45/81, *Moksel/Commission*, [1982] ECR 1129.

⁵⁴² Joined Cases 239 and 275/82, *Allied Corporation and others/Commission*, [1984] ECR 1005. Clarifying the specificities of the case-law in the field of anti-dumping see NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 22 *et seq.*

⁵⁴³ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 259.

⁵⁴⁴ Case 138/79, *Roquette Frères/Council*, [1980] ECR 3333, paras. 13-16.

⁵⁴⁵ Case 139/79, *Maizena/Council*, [1980] ECR 3393, paras. 13-16.

⁵⁴⁶ Joined Cases 239 and 275/82, *Allied Corporation and others/Commission*, [1984] ECR 1005, paras. 4 and 12.

who are granted certain procedural rights under Union law, which happens mainly in the areas of competition, anti-dumping and state aid.⁵⁴⁷ Here, the Court focuses on the role that applicants have played in the procedure leading to the adoption of the contested act. For instance, in *Metro I*⁵⁴⁸ the CJEU considered that individuals entitled to request the Commission to find an infringement under current Articles 105 and 106 TFEU should have standing if the Commission decided not to act. In *Metro II*⁵⁴⁹, the CJEU acknowledged standing on the grounds that the applicant had submitted observations under the anti-trust regulation in force at the time. In time, the Court would clarify that *mere participation* is not, however, sufficient. It is necessary to consider the *part played* by the undertakings in the administrative procedure, notably that the applicants were at the origin of the complaint which led to the opening of the investigation procedure, that their views were heard during that procedure and that the conduct of the procedure was largely determined by its observations.⁵⁵⁰ Furthermore, in the field of state aids, applicants have to show that their position in the market was *substantially affected*.⁵⁵¹ Also in the field of competition law, proof of *effects on competitive position* is required.⁵⁵² In anti-dumping law, the Court focuses on the fact of the applicant was identified in the measure or concerned in the preliminary investigation.⁵⁵³ This will be the case if they have provided information that led to intervention of the institutions or formed part of the *raison d'être* of the measure.⁵⁵⁴ Scholars note that this case-law is “consistent with the American view... that there should be a link between the right to intervene before an administrative agency and the standing to seek judicial review of the agency’s actions.”⁵⁵⁵ However, this reasoning is not applied in other fields⁵⁵⁶, especially when directives are at stake.⁵⁵⁷

This case-law needs, however, to be contrasted with the situations in which the Union established specific procedural guarantees for the applicant, other than in the fields of competition,

⁵⁴⁷ For further developments see VAN GINDERACHTER, “Problématique de la recevabilité au regard de la réglementation CEE en matière de dumping et de subventions”, 1987, at 635-666; BIANCARELLI; GENESTE, “Le Tribunal de Première Instance des Communautés européennes et la protection juridictionnelle des entreprises en droit de la concurrence et des concentrations”, 1994, at 23-34; ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 75 *et seq.*, and 152 *et seq.*; SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 435 *et seq.*; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 571 *et seq.*; GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 406-412; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 264 *et seq.*; TÜRK, *Judicial Review in EU Law*, 2009, at 76 *et seq.*; HARTLEY, *The Foundations of European Union Law*, 2010, at 382 *et seq.*; CRAIG; BÚRCA, *EU Law*, 2011, at 499 *et seq.*; HARKER; HVIID; WRIGHT, “The EU Rules on Standing in Merger Cases”, 2011, at 506 *et seq.*

⁵⁴⁸ Case 26/76, *Metro/Commission*, [1976] ECR 1353.

⁵⁴⁹ Case 74/84, *Metro/Commission*, [1986] ECR 3021.

⁵⁵⁰ Case 264/82, *Timex/Council and Commission*, [1985] ECR 849 and Case 169/84, *Cofaz/Commission*, [1986] ECR 391.

⁵⁵¹ Case T-88/01, *Sniace/Commission*, [2005] ECR II-1165. See GRAVELLS, “Articles 173 and 175 EEC in the context of state aids”, 1989, at 228-236.

⁵⁵² See Case T-158/00, *ARD/Commission*, [2003] ECR II-3825, paras. 79-85. In oligopolistic markets it is sufficient to demonstrate that the applicant is a potential competitor. See Case T-114/02, *BaByliss/Commission*, [2003] ECR II-1279.

⁵⁵³ See Joined Cases 239 and 275/82, *Allied Corporation and others/Commission*, [1984] ECR 1005; Case T-598/97, *BSC Footwear Supplies and others/Council*, [2002] ECR II-1155. See GREAVES, “Locus Standi under Article 173 EEC When Seeking Annulment of a Regulation”, 1986, at 120 *et seq.*; VAN GINDERACHTER, “Problématique de la recevabilité au regard de la réglementation CEE en matière de dumping et de subventions”, 1987, at 637 *et seq.*; ARNULL, “Challenging EC Anti-Dumping Regulations”, 1992, at 73-81.

⁵⁵⁴ Case 191/82, *FEDIOL/Commission*, [1983] ECR 2913; Case 264/82, *Timex/Council and Commission*, [1985] ECR 849; Case T-597/97, *Euromin/Council*, [2000] ECR II-2419, para. 45; Case T-598/97, *BSC Footwear Supplies and others/Council*, [2002] ECR II-1155, para. 47;

⁵⁵⁵ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 31.

⁵⁵⁶ Case T-154/02, *Villiger Söhne/Council*, [2003] ECR II-1921, para. 55.

⁵⁵⁷ Case C-10/95 P, *Asocame/Council*, [1995] ECR I-4149.

anti-dumping and state aids law.⁵⁵⁸ In fact, the GC has also considered relevant the involvement of the applicant in other fields, as the decisions in *BI Vetmedica*⁵⁵⁹ and *Vischim*⁵⁶⁰ illustrate. Here, the rules must be absolutely clear and mere intervention will not be enough.⁵⁶¹ Moreover, the case-law makes clear that:

“[t]he fact that a person participates in one way or another in the process leading to the adoption of a Community act does not distinguish that person individually in relation to the act in question unless the relevant Community legislation has laid down *specific procedural guarantees* for such a person (emphasis added).”⁵⁶²

Hence, sending letters to the institutions, commenting on proposed acts will not be enough to grant standing even if the institution replies to them. This would be “tantamount to transforming the action for annulment into an *actio popularis*”⁵⁶³ and, consequently, in these cases the interests of those affected are “deemed to be represented by the political bodies called upon to adopt such measures.”⁵⁶⁴ Moreover, one should note that the case-law on the right to be heard excludes this right regarding the adoption of measures of general application.⁵⁶⁵

Furthermore, in cases in which an association has substituted itself for one or more of the members whom it represents, the Court considered that an association is individually concerned as long as its members are in a position to bring an admissible action in their own right⁵⁶⁶, or in so far as it can show that a provision of Union law expressly grants it a series of procedural rights.⁵⁶⁷ In other cases, the CJEU has admitted actions not based on the standing of its members where the

⁵⁵⁸ Case T-60/96, *Merck/Commission*, [1997] ECR II-849, para. 73; Case T-339/00, *Bactria/Commission*, [2002] ECR II-2287, para. 51; Case T-264/03 R, *Schmoldt and others/Commission*, [2003] II-5089, para. 69; Case T-109/07, *L'Oréal/OHIM - Spa Monopole (SPA THERAPY)*, [2009] ECR II-687, paras. 67, 68.

⁵⁵⁹ Joined Cases T-125 and 152/96, *Boehringer/Council and Commission*, [1999] II-3427.

⁵⁶⁰ Case T-420/05, *Vischim/Commission*, [2009] ECR II-3841.

⁵⁶¹ Case T-585/93, *Greenpeace and others/Commission*, [1995] ECR II-2205, paras. 56 and 63; Case C-10/95, *P Asocame/Council*, [1995] ECR I-4149; Case T-12/96, para. 59; Case T-54/98, *Aruba/Commission*, [2003] ECR II-3083, para. 42; Joined Cases T-38 to 50/99, *Sociedade Agrícola dos Arinhos/Commission*, [2001] ECR II-585, para. 46; Case T-196/03, *EFfCI/Parliament*, [2004] ECR II-4263, paras. 65-66; Case T-291/04, *Enviro Tech Europe and Enviro Tech International/Commission*, [2011], para. 67.

⁵⁶² Joined Cases T-481 and 484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee/Commission*, [1995] ECR II-2941, para. 55; Case T-585/93, *Greenpeace and others/Commission*, [1995] ECR II-2205, paras. 56 and 63; Case T-398/94, *Kahn Scheepvaart/Commission*, [1996] ECR II-477, paras. 48 and 49, and the case-law cited therein; Case T-60/96, *Merck/Commission*, [1997] ECR II-849, para. 73. See also Case T-13/99, *Pfizer Animal Health/Council*, [2001] ECR II-3305, paras. 81-106; Joined Cases T-38 to 50/99, *Sociedade Agrícola dos Arinhos/Commission*, [2001] ECR II-585, para. 48; Case T-70/99, *Alpharma/Council*, [2002] ECR II-3495, paras. 73-98; Case T-47/00, *Rica Foods/Commission*, [2002] ECR II-113, para. 55; Case T-370/02, *Alpenhain-Camembert-Werk and others/Commission*, [2004] ECR II-2097, paras. 67-68; Case T-264/03, *Schmoldt and others/Commission*, [2004] ECR II-1515, para. 100.

⁵⁶³ ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 45.

⁵⁶⁴ Case T-109/97, *Molkerei Großbraunshain and Bene Nahrungsmittel/Commission*, [1998] II-3533, para. 60.

⁵⁶⁵ Case T-369/03, *Arizona Chemical and others/Commission*, [2005] ECR II-5839. WARD notes that this ruling also demonstrates that the Court is not ready to accept that a measure is administrative in nature – partially due to the procedure through which it was adopted – and thus amounts to an act of individual application. See WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 305. See also Joined Cases T-94, 110 and 159/00, *Rica Foods and others/Commission*, [2002] ECR II-4677; Case T-45/02, *DOW AgroSciences/Parliament and Council*, [2003] ECR II-1973, paras. 32, 33; Case T-291/04 R, *Enviro Tech Europe and Enviro Tech International/Commission*, [2005] ECR II-475, para. 69.

⁵⁶⁶ Joined Cases T-447, 448 and 449/93, *AITEC and others/Commission*, [1995] ECR II-1971; Joined Cases T-481 and 484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee/Commission*, [1995] ECR II-2941; Case T-380/94, *AIUFASS and AKT/Commission*, [1996] ECR II-2169; Case T-229/02, *PKK and KNK/Council*, [2005] ECR II-539, para. 45.

⁵⁶⁷ See Case 191/82, *FEDIOL/Commission*, [1983] ECR 2913; Case T-12/93, *CCE Vittel/Commission*, [1995] ECR II-1247.

association has a *particular interest* in acting, which may happen if the association plays an *active part* in the procedure that led to the adoption of the measure.⁵⁶⁸ However, this is not an easy requirement to prove.⁵⁶⁹ Moreover, general principles of law, such as the right to be heard, do not require the participation of the persons affected since their interests are deemed to be represented by the political bodies which adopted the measure.⁵⁷⁰

Fourthly, standing can be granted if the institution adopting the act should have taken into account the *specific situation* of an individual, e.g. in the case of protection clauses. The leading case here is *Sofrimport*.⁵⁷¹ In this case the Commission was obliged under a Council regulation to take *special account* of goods in transit if it decided to suspend imports. As the apples imported by Sofrimport were being shipped from Chile at the time a restriction was imposed, the applicant was considered to be individually concerned by the Commission's decision. However, also this requirement may prove very difficult to satisfy and the case-law is not always clear-cut.⁵⁷² In *Unifruit Hellas*⁵⁷³ the case was distinguished on the grounds that there was not a Union regulation *expressly* imposing a *duty* on the Commission to take into consideration the goods in transit, and the action was dismissed.⁵⁷⁴ On the contrary, in *Antillean Rice Mills* the GC held that, even though no obligation to take account of the situation of goods in transit appeared as such in the relevant Union regulations, such an obligation existed "by reason of the *specific interest* which undertakings have in protecting their goods in transit against the effects of a safeguard measure, in so far as such undertakings are identified or identifiable before the Commission adopts a decision."⁵⁷⁵

Fifthly, there have been a few cases where the CJEU has established the existence of individual concern based on general principles of Union law. These decisions although isolated seem difficult to explain in light of the Court's traditional approach. The cases of *UEAPME* and

⁵⁶⁸ See Joined Cases 67, 68 and 70/85, *Van der Kooy/Commission* [1988] ECR 219, paras. 19-25; Case C-313/90, *CIRFS and others/Commission*, [1993] ECR I-1125, paras. 29,30; Joined Cases T-112 and 122/00, *Iberotam and others/Commission*, [2001] ECR II-97, para. 75; Case T-48/01, *Vainker/Parliament*, [2004] ECR I-A-51, II-197, para. 25; Case T-391/02, *Bundesverband der Nahrungsmittel- und Speiseresteverwertung and Kloh/Parliament*, [2004] ECR II-1447, para. 48; Case T-264/03, *Schmoldt and others/Commission*, [2004] ECR II-1515, paras. 131-143; Case C-368/05 P, *Polyelectrolyte Producers Group/Commission and Council*, [2006] ECR I-130.

⁵⁶⁹ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 303. See Case T-391/02, *Bundesverband der Nahrungsmittel- und Speiseresteverwertung and Kloh/Parliament*, [2004] ECR II-1447, paras. 48-50; Case C-78/03 P, *Commission/Aktionsgemeinschaft Recht und Eigentum*, [2005] ECR I-10737, paras. 55-59; Case T-196/03, *EFfCI/Parliament*, [2004] ECR II-4263, para. 42; Case T-40/04, *Bonino and others/Parliament and Council*, [2005] ECR II-2685, para. 70.

⁵⁷⁰ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 304. See Case T-268/99, *FNAB and others/Council*, [2000] ECR II-2893, para. 55; Joined Cases T-112 and 122/00, *Iberotam and others/Commission*, [2001] ECR II-97; Case C-78/03 P, *Commission/Aktionsgemeinschaft Recht und Eigentum*, [2005] ECR I-10737, para. 58; Case T-264/03, *Schmoldt and others/Commission*, [2003] II-5089, para. 90.

⁵⁷¹ Case 250/81, *Greek Cannery/Commission*, [1982] ECR 3535; Case 11/82, *Piraki-Patraiki/Commission*, [1985] ECR 207; Case 152/88, *Sofrimport/Commission*, [1990] ECR I-2477; Joined Cases T-38 to 50/99, *Sociedade Agrícola dos Arinhos/Commission*, [2001] ECR II-585, para. 51. See TÜRK, *Judicial Review in EU Law*, 2009, at 87 *et seq.*

⁵⁷² The position was briefly summarized by the GC in the Case T-196/03, *EFfCI/Parliament*, [2004] ECR II-4263: "[i]t is clear (...) that two cumulative conditions must be fulfilled for the claim concerning contractual commitments to render an action for annulment admissible. First, a rule of law superior to the legislative measure in question must have required the institutions to take account of the specific situation of the applicants as compared with that of any other person concerned by that measure. Second, the applicants must be parties to contracts already concluded, the performance of which, planned to take place during the period of application of the contested measure is prevented wholly or in part (paras. 52-53)."

⁵⁷³ Case T-489/93, *Unifruit Hellas/Commission*, [1994] ECR II-1201 and Case C-51/95, *Unifruit Hellas/Commission*, [1997] ECR I-727.

⁵⁷⁴ Noting that in this case the CJEU went back to its original position requiring that the act is in reality a decision addressed to the applicant see SCHOCKWEILER, "L'accès à la justice dans l'ordre juridique communautaire", 1996, at 6.

⁵⁷⁵ Para. 76.

Les Verts illustrate the point. In *UEAPME*, the CJEU established individual concern based essentially on two factors: (i) the special characteristic of the directive at stake and (ii) the importance of the substantive rule the applicant was seeking to enforce. The case involved a directive which imposed on Member States the obligation to enforce an agreement, and the Union institutions had only a formal role in the process. The GC considered that the mere fact that the act was called “directive” was irrelevant and it was necessary to examine if it was of direct and individual concern to the applicant. *UEAPME* was found not to have a right of negotiation of the directive which meant that it was not individually concerned. However, the Court proceeded and elaborated on a new principle according to which if there was a procedure such as the one in the case which was not akin to the *normal* legislative process – which did not follow the classic legislative procedures established in the Treaties and which did not involve the participation of the European Parliament –, the Union institutions had to verify the “representativity” of the signatories of the agreement. The Court held that as the case-law made clear, the participation of Parliament in the Union legislative process reflects at Union level a “fundamental democratic principle that the people must share in the exercise of power through a representative assembly.”⁵⁷⁶ Thus:

“[t]he *principle of democracy* on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the *participation of the people* be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement (...). In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.

(...) Where that degree of representativity is lacking, the Commission and the Council must refuse to implement the agreement at Community level. (...) *The judicial protection to which the existence of such a right gives rise implies that, where non-signatory representatives with those characteristics bring an action for annulment of the Council measure giving effect to the agreement at Community level on the basis of Article 4(2) of the Agreement, they must be regarded as directly and individually concerned by that measure* (emphasis added).”⁵⁷⁷

Hence, in *UEAPME* considerations regarding the principle of democracy contributed to extend the *locus standi* of private parties. Furthermore, as seen above, the case-law of both the CJ and the GC has already held admissible an action for annulment brought against a Union measure where “an *overriding provision of law* required the body responsible for it to take into account the applicant’s particular circumstances.”⁵⁷⁸ In fact, special substantive and procedural aspects of several applicants’ positions have been decisive in granting them standing. The principle of democracy would be such a new “special circumstance.” Hence, although *in casu* such principle

⁵⁷⁶ The Court mentioned its previous case-law: Case 138/79, *Roquette Frères/Council*, [1980] ECR 3333, para. 33; and Case 139/79, *Maizena/Council*, [1980] ECR 3393, para. 34; Case C-300/89, *Commission/Council (Titanium dioxide)*, [1991] ECR I-2867, para. 20.

⁵⁷⁷ Paras. 89, 90.

⁵⁷⁸ Para. 90. The Court cited Case 11/82, *Piraiiki-Patraiki and others/Commission*, [1985] ECR 207, paras. 11-32; Case C-152/88, *Sofrimport/Commission*, [1990] ECR I-2477, paras. 11-3; and Joined Cases T-480 and 483/93, *Antillean Rice Mills and others/Commission*, [1995] ECR II-2305, paras. 67-78.

was of little help to the applicant, scholars have noted that this decision marked “a critical new development in administrative and constitutional review”⁵⁷⁹ under Union law. In fact, “[n]ot only it introduced a new ‘head’ of challenge to Community legislation, it linked, for the first time, the issue of standing to the protection of ‘fundamental’ principles on which the Union is founded.”⁵⁸⁰

In *Les Verts*, the CJEU seems also to have stretched its case-law regarding the notion of individual concern. Indeed, in this case the applicant clearly belonged to an open class. The only class of members which could be identified at the time the measures were adopted were political groupings which were already represented. However, “they had no interest in mounting a challenge.”⁵⁸¹ Hence, highlighting the *specificity of the case*, as “certain political groupings took part in the adoption of a decision which deals both with their own treatment and with that accorded to rival groupings which were not represented”, and noting that the contested measure concerned the allocation of public funds for the purpose of preparing for elections and it was alleged that those funds were allocated unequally, the Court stated that it could not be considered that “only groupings which were represented and which were therefore identifiable at the date of the adoption of the contested measure are individually concerned by it.”⁵⁸² In fact, “such an interpretation would give rise to inequality in the protection afforded by the Court to the various groupings competing in the same elections”, as groupings not represented could “not prevent the allocation of the appropriations at issue before the beginning of the election campaign because they would be unable to plead the illegality of the basic decision except in support of an action against the individual decisions refusing to reimburse sums greater than those provided for.”⁵⁸³ In this scenario, it would therefore have been impossible for them to bring an action for annulment before the CJEU prior to the elections or to obtain an order from the Court suspending the application of the contested basic decision. Consequently, the Court accepted the action. Hence, the Court considered the consequences of its decision and the breach of the *principle of non discrimination* that propelled the admissibility of the action. In light of this decision it has been submitted that, despite the overall restrictions, a private applicant victim of discrimination should try to bring proceedings even if it is a member of an open category.⁵⁸⁴ Again individual concern seems to have been based on a general principle of Union law.

This decision has been considered a “true revolution” in the case-law of the CJEU regarding *locus standi* requirements.⁵⁸⁵ However, a more *nuanced* approach emerged from the words of the

⁵⁷⁹ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 316.

⁵⁸⁰ *Ibid.* Notwithstanding, one should note that this new head of challenge was introduced at the institutional level. In fact, it was the breach of the principle of democracy reflected in the institutional representation of citizens in the European Parliament or at the level of the representatives of management and labour which justified the decision of the CJEU. Moreover, one can say that *UEAPME* constitutes still an isolated case. In fact, the issue of standing remains somehow immune to the influence of certain fundamental principles of Union law, and more significantly immune to the need to ensure effective judicial protection. See *infra* Section 1.1.4.

⁵⁸¹ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 29.

⁵⁸² Para. 35.

⁵⁸³ Para. 36.

⁵⁸⁴ JACQUÉ, “Arrêt du 13 de avril 1986, *Parti écologiste ‘Les Verts’ c. Parlement européen*”, 1986, at 503; JACQUÉ, “*Les Verts v The European Parliament*”, 2010, at 322.

⁵⁸⁵ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 62; JACQUÉ, “*Les Verts v The European Parliament*”, 2010, at 323.

Judge *Rapporteur* in the case:

“[i]f the Court, in resolving the issue of individual concern, had adhered to the traditional criteria and had ignored the novelty of the situation, that would have produced the paradoxical result of making the action for annulment available to groupings which had no need of it and denying that remedy to the groupings which need it. Coming immediately after the declaration that the Community is founded on the rule of law, such ‘denial of justice’ would have made a mockery of the reasoning by which the Court arrived at the conclusion that it had jurisdiction to entertain an action for annulment against a measure of the European Parliament.”⁵⁸⁶

Moreover, it has been noted that “considerations of the *substance* influenced the position of the Court, since otherwise a flagrant case of lack of judicial protection would have arisen.”⁵⁸⁷ The solution reached in *Les Verts* should thus be understood as an “isolated response to a case of a particular kind”⁵⁸⁸ and has not been followed in other instances. In fact, it seems that the Court “had to come up with a creative solution in the light of the seriousness of the alleged infringement.”⁵⁸⁹ As CRAIG has put it:

“[t]he *rationale* for the more liberal approach in the *Greens* case must be sought on yet other grounds. The most likely explanation is that the Court wished to emphasize the fact that the Community was open to all shades of political party, and in that sense representative of European opinion. It did not wish to be seen supporting a regime in which those presently represented within the Parliament could weight the financial system in their own favour. To borrow from the language of Ely [J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980)], the Court was willing to use its own power to ensure that the democratic system was not used by the ‘ins’ to exclude or prejudice the ‘outs’.”⁵⁹⁰

This observation leads us to the last category of cases where the Court rendered more flexible its traditional approach to standing requirements of private parties: those where the *facts* and the *substance* of the case required and intervention of the CJEU despite any considerations on the standing of the applicants. In fact, standing has also been granted in a set of cases where specific rights or interests of private parties were affected in a particular and serious manner, and in cases which presented the Court with so “highly coloured facts”⁵⁹¹ that applicants managed to persuade the Union judges that they *deserved* a ruling on their case. Hence, for instance, in *Control Data*⁵⁹², the CJEU granted standing holding that:

“[t]he applicant is the *wholly-owned subsidiary* of the manufacturing undertaking, Control

⁵⁸⁶ KEELING, “The Reimbursement of Election Expenses”, 1994, at 254. See also JACQUÉ, “*Les Verts v The European Parliament*”, 2010, at 322.

⁵⁸⁷ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 62; GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 396.

⁵⁸⁸ JACQUÉ, “*Les Verts v The European Parliament*”, 2010, at 323; VANDERSANDEN, “Article 173”, 1992, at 1046. It was referred to as a “unique case.” See GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 396.

⁵⁸⁹ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 19.

⁵⁹⁰ CRAIG, Paul, “Legality, Standing and Substantive Review in Community Law”, 1994, at 527.

⁵⁹¹ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 60.

⁵⁹² Case 294/81, *Control Data/Commission*, [1983] ECR 911.

Data Corporation of Minneapolis. It is the *sole importer* for Belgium and itself submitted the application which led to the decision at issue. In *those circumstances*, to insist that the parent company must institute the proceedings before the Court or that the applicant must act jointly with the other subsidiaries which are importers in the Community *would constitute an excessive degree of formalism* (emphasis added).⁵⁹³

Furthermore, although in earlier rulings the Court considered that economic disadvantages would not be considered enough to establish individual concern⁵⁹⁴, the cases of *Extramet* and *Codorníu* seem to have been decided precisely on this basis. In *Extramet*, the CJEU held that:

“[t]he applicant has established the existence of a *set of factors* constituting *such a situation* which is peculiar to the applicant and which differentiates it, as regards the measure in question, from all other traders. The applicant is 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*. In addition, *its business activities depend to a very large extent on those imports and are seriously affected by the contested regulation* in view of the limited number of manufacturers of the product concerned and of the difficulties which it encounters in obtaining supplies from the sole Community producer, which, moreover, is its main competitor for the processed product (emphasis added).”⁵⁹⁵

One should note that in this case the applicant had been procedurally involved in the adoption of the regulation. However, the CJEU chose to declare the action admissible because of the size of *Extramet* and because the regulation would have devastating economic consequences for the company.⁵⁹⁶ This has led scholars to consider that although the Court reached the right result in *Extramet*, its reasoning was inadequate.⁵⁹⁷ In fact, the judgment failed to acknowledge that it represented a departure from the earlier case-law. Previous case-law was cited and presented as if it supported the result the Court had chosen to reach. However, despite the applicant’s extensive involvement in the procedure leading to the adoption of the contested regulation, the CJEU did not consider such involvement as a reason for upholding the admissibility of the action.⁵⁹⁸ This shows that the CJEU was in fact deciding on *new grounds*.

Later, in *Codorníu* the Court was even more laconic in grounding the reasons for individual concern, merely stating that:

“*Codorníu* registered the graphic trade mark ‘Gran Cremant de Codorníu’ in Spain in

⁵⁹³ In previous cases, the Court had disregarded the fact that the applicant was the sole importer (Case 1/64, *Glucoseries réunies/Commission de la EEC*, [1964] ECR 811) and the fact that the decision at stake had been enacted as a result of the particular situation of the applicant (Case 231/82, *Spijker/Commission*, [1983] ECR 2559).

⁵⁹⁴ Joined Cases 10 and 18/68, *Eridania Zuccherifici and others/Commission*, [1969] ECR 459.

⁵⁹⁵ Para 17. See MATARASO, “The Independent Importer’s Right to Review of Anti-Dumping Regulations before the European Court of Justice”, 1988-89, at 682-726.

⁵⁹⁶ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 79, noting that there were a few decisions in the early and mid nineties where the Court seemed to go even further and granted standing on the basis of the *adverse effect* that the measure would have on the applicant. See also, in the framework of competition and state aid proceedings respectively, Joined Cases T-528, 542, 543 and 546/93, *Metropole/Commission*, [1996] II-649 and Case T-435/93, *Association of Sorbitol Producers within the EC (ASPEC)/Commission*, [1995] ECR II-1281).

⁵⁹⁷ ARNULL, “Challenging EC Anti-Dumping Regulations”, 1992, at 79.

⁵⁹⁸ Hence, ARNULL notes that had the Court followed the AG’s approach, its decision would have been easier to reconcile with the rest of its case-law. See *ibid*.

1924 and *traditionally used that mark both before and after registration*. By reserving the right to use the term ‘crémant’ to French and Luxembourg producers, the contested provision prevents Codorníu from using its graphic trade mark.

It follows that Codorníu has established the existence of *a situation* which from the point of view of the contested provision differentiates it from all other traders (emphasis added).⁵⁹⁹

In so far as *Codorníu* acknowledged standing to an individual who proved to have an *acquired right* or a *legally protected interest*, such decision could have meant that the CJEU was willing in some instances to let go of the idea that the act should concern the applicant as if he/she were its addressees.⁶⁰⁰ As a matter of fact, “given the flexible terms in which the judgment in *Codorníu* was couched, this could have been interpreted as meaning that the applicant was individually concerned on account of the *particularly damaging effects* that the measure would have on its situation.”⁶⁰¹

Hence, *Extramet* and *Codorníu* could have constituted cause for optimism.⁶⁰² However, that was not in reality the case. The decisions ended up by having a limited impact⁶⁰³ and did not “signal the beginning of a new and more liberal approach to individual concern.”⁶⁰⁴ Scholars generally note that these cases have remained “just *special strands* of the case-law that introduced a construction of individual concern limited to *exceptional sets of facts*.”⁶⁰⁵ Subsequent decisions of the CJEU clarified that *Codorníu* was deemed to be individually concerned because the regulation affected its *specific right*, notably its trademark. However, there has been no firm clarification of what constitutes a “specific right” for these purposes, nor has any other applicant been successful on this basis.⁶⁰⁶ Moreover, in the field of anti-dumping, more recent case-law limited the potential of the *Extramet* judgment, by qualifying the circumstances in which such case arose as mostly “exceptional.”⁶⁰⁷ Furthermore, in future case-law, the CJEU would reiterate its classical formula according to which it is not sufficient that individuals rely on economic difficulties alone without

⁵⁹⁹ Paras. 21-22. See VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées, 1995, at 543, considering that the CJEU has made an extensive interpretation of individual concern based on the strict relationship between the applicants interest and the harm suffered.

⁶⁰⁰ SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 5. ENCHELMAIER considered that *Codorníu* involved a test based on the breach of absolute and definitive rights in line with *Codorníu*: “what is required (...) is an impairment of the rights themselves, not of the economic advantages of holding them.” See ENCHELMAIER, “No One Slips Through the Net”, 2005, at 184 and 190, 191.

⁶⁰¹ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 80.

⁶⁰² NIHOUL, “La recevabilité des recours en annulation introduits par un particulier à l’encontre d’un acte communautaire de portée générale”, 1994, at 186 noting that these decisions could be read as an invitation to the recently created GC to relax its approach to standing requirements of individuals.

⁶⁰³ CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 495.

⁶⁰⁴ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 80.

⁶⁰⁵ *Ibid.*, at 80, 81.

⁶⁰⁶ *Ibid.* See Case T-482/93, *Weber/Commission*, [1996] ECR II-609; Case T-99/94, *Asocame/Council*, [1994] II-871, para. 24; Case C-87/95 P *CNPAAP v Council* [1996] ECR I-2003, para. 36; Case T-109/97, *Molkerei Großbraunshain and Bene Nahrungsmittel/Commission*, [1998] II-3533, para. 70.

⁶⁰⁷ Case T-597/97, *Euromin/Council*, [2000] ECR II-2419, para. 49; Case T-598/97, *BSC Footwear Supplies and others/Council*, [2002] ECR II-1155, para. 48. Moreover the decisions of the CJ to reverse the judgment of the GC in Case C-312/00 P, *Commission/Camar and Tico*, [2002] ECR I-11355, holding that the main importers of a product could be regarded as individually concerned by the regulation they had asked the Commission to adopt in relation to this product; and in Case C-142/00, *Commission/Nederlandse Antillen*, [2003] ECR I-3483, holding the Netherlands Antilles, as the main exporters of rice from Overseas Countries and Territories to the EC, to be individually concerned by a regulation governing imports of rice from OCTs, appear to indicate a stricter approach outside the anti-dumping sphere.

establishing that the act has serious consequences for its activities.⁶⁰⁸ Very rarely, has the Court considered that economic interests or proprietary rights are sufficient to establish individual concern⁶⁰⁹, having also refused to enlarge the concept of disadvantage to other types of damages, aside from economic loss.⁶¹⁰ Hence, “the hope raised by *Codorniu* was dashed by the realisation that in most instances the *Plaumann* test of individual concern would be interpreted in the same manner as in *Plaumann* itself.”⁶¹¹ The optimism surrounding the decision in *Codorniu* was considered to be “largely misplaced.”⁶¹² In fact, “the test of individual concern seems to have become even stricter”⁶¹³ particularly regarding legislative acts, having the GC also taken “an increasingly demanding stance on direct concern.”⁶¹⁴ In light of the above, it is not surprising that both cases are considered to have been decided mostly *on their facts*.⁶¹⁵ Truly, one is left with the impression that as the CJEU is not entirely satisfied with its case-law on individual concern, it feels the need to accept some actions for annulment which despite not fitting into its traditional approach are grounded in a set of facts whose *importance* or *injustice* compels the Court to hear the case.

(ii) Critical Assessment: the Lack of a Consistent Conceptual Approach

I. In light of the above, one should note that the case-law of the CJEU regarding the notion of individual concern is far from being straightforward⁶¹⁶ and that the criticism regarding its lack of foreseeability and restrictive outcomes is most probably fair. Firstly, several decisions indicate that some addresses of an act belonging to an open class can occupy a special position within that class

⁶⁰⁸ See Case T-472/93, *Campo Ebro and others/Council*, [1995] ECR II-421; Case C-209/94 P, *Buralux and others/Council*, [1996] ECR I-615; Case T-268/99, *FNAB and others/Council*, [2000] ECR II-2893; and Case C-345/00 P, *FNAB and others/Council*, [2001] ECR I-3811; Case C-96/01, *Galileo and Galileo International/Council*, [2002] ECR I-4025. See also Case C-10/95 P, *Asocame/Council*, [1995] ECR I-4149, para. 49; Case T-114/96, *Biscuiterie confiserie LOR and Confiserie du Tech/Commission*, [1999] ECR II-913, para. 33; Case T-213/02, *SNF/Commission*, [2004] ECR II-3047, paras. 65-71; Case T-370/02, *Alpenhain-Camembert-Werk and others/Commission*, [2004] ECR II-2097, paras. 65-66; Case T-196/03, *EFfCI/Parliament*, [2004] ECR II-4263, paras. 56-62, where the CJEU considered that no specific rights were infringed.

⁶⁰⁹ Deciding on the negative see e.g., Case T-598/97, *BSC Footwear Supplies and others/Council*, [2002] ECR II-1155, paras. 51-54; Case C-451/98, *Antillean Rice Mills/Council*, [2001] ECR I-8949, paras. 54, 61 and 62; Case T-268/99, *FNAB and others/Council*, [2000] ECR II-2893, para. 49; Case C-351/99 P, *Eridania and others/Council*, [2001] I-5007, para. 58; Case T-58/00, *Bond van de Fegarbel-Beroepsverenigingen and others/Commission*, [2000] ECR II-3301, para. 18; Case C-142/00 P, *Commission/Nederlandse Antillen*, [2003] ECR I-3483, para. 69; Case C-312/00 P, *Commission/Camar and Tico*, [2002] ECR I-11355, para. 77; Case T-33/01, *Infront WM/Commission*, [2005] ECR II-5897, para. 167; Case C-96/01, *Galileo and Galileo International/Council*, [2002] ECR I-4025, paras. 40-51; Case T-45/02, *DOW AgroSciences/Parliament and Council*, [2003] ECR II-1973, para. 43; Case T-167/02, *Établissements Toulorge/Parliament and Council*, [2003] ECR II-1111, para. 56; Case T-264/03, *Schmoldt and others/Commission*, [2004] ECR II-1515, para. 113; Case C-482/04 P, *SNF/Commission*, unpublished, paras. 41-44. Deciding on the affirmative see e.g., Case T-13/99, *Pfizer Animal Health/Council*, [2002] ECR II-3305; Case T-70/99, *Alpharma/Council*, [2002] ECR II-3495; Case C-113/05 P, *EFfCI/Parliament and Council*, [2006] ECR I-46, para. 40.

⁶¹⁰ See Case T-206/02, *KNK/Council*, [2005] ECR II-523, para. 29. In contrast, see Case T-37/04 R, *Região autónoma dos Açores/Council*, [2004] ECR II-2153, para. 123. See WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 310.

⁶¹¹ CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 495; CRAIG; BÚRCA, *EU Law*, 2011, at 498, 499, noting that the “laudable hope that *Codorniu* might lead to a test for standing based on adverse impact, judged on the facts of the case, was not therefore realized.”

⁶¹² ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 51.

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*

⁶¹⁵ NIHOUL, “La recevabilité des recours en annulation introduits par un particulier à l’encontre d’un acte communautaire de portée générale”, 1994, at 186.

⁶¹⁶ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 81, qualifies the court’s case-law on individual concern as one of “bleak predictability.”

due to the *procedural guarantees* or *substantive protection* they enjoy or due to the impact of the act on their rights or economic situation.⁶¹⁷ This approach does not change the assessment of the nature of the act, which is still determined by its application to objectively determined situations.⁶¹⁸ Consequently, Union courts consider private applicants to be individually concerned by a normative act only in *exceptional* circumstances.⁶¹⁹ This restrictive approach is justified on the ground that the Treaty does not in principle allow a challenge of a normative act as it was designed “to safeguard the legislative nature of the regulation.”⁶²⁰

Secondly, the concept of individual concern encompasses the idea that the applicant should be in a *different* position from all other persons affected by the decision. Surely, belonging to a closed group of persons will be a secure indicator that individual concern exists. However, it does not work as a definitive criterion.⁶²¹ Moreover, to make standing dependent on the fact that the institution which adopted the act took into account the position of the applicant is dangerous, as it allows for the allegation that such consideration did not occur and consequently for the denial of standing to the individual affected.⁶²²

Thirdly, the case-law of the CJEU is also associated with the idea of participation in the administrative procedure which led to the adoption of the measure. However, the existence of a right to be heard is not for in of itself sufficient to grant standing to private parties. Moreover, there is not *as a general rule* a right to be heard regarding the adoption of acts of general application.⁶²³

Fourthly, it seems undisputable that, in some well-known cases, considerations of *substantive justice* – strange to the notion of individual concern and associated with the decision on the merits – militated in favour of admitting the action. One is left with the impression that in some cases the CJEU rejects the fact that the applicants cannot discuss the validity of certain acts which affect them negatively.⁶²⁴ Hence, STEIN and VINING noted that in the first three cases to have been admitted – *Toepfer, Bock* and *International Fruit Company* – the Court could have been inclined to look beyond jurisdictional arguments and grant standing where it *senses* an element of irregular administration.⁶²⁵ It is significant that in the first two cases the Court ultimately annulled the contested act in proceedings on the merits. More obviously perhaps, in the cases of *Codorníu* and

⁶¹⁷ TÜRK, *Judicial Review in EU Law*, 2009, at 94.

⁶¹⁸ *Ibid.*, at 94, 95 noting that the criteria applied to determine the nature of an act and those applied to determined individual concern overlap but are not identical. In fact, in some cases private applicants can be individually concerned by acts of general application. See also TÜRK, *The Concept of Legislation in European Community Law*, 2006, at 163, rejecting therefore the “hybridity theory.”

⁶¹⁹ TOTH, “The Individual and European Law”, 1975, at 679.

⁶²⁰ See Opinion of AG COSMAS, in Case C-321/95 P, *Greenpeace and others/Commission*, [1998] ECR I-1651.

⁶²¹ Case 64/69, *Compagnie française commerciale et financière/Commission*, [1970] ECR 221; Case T-489/93, *Unifruit Hellas/Commission*, [1994] ECR II-1201. See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 54.

⁶²² Case 11/82, *Piraiki-Patraiki/Commission*, [1985] ECR 207.

⁶²³ See Case C-104/97, *Atlanta/European Community*, ECR [1999] 6983, paras. 31-32; Case C-258/02, *Bactria Industriehygiene Service Verwaltungs GmbH/Commission*, ECR [2003] I-15105, para. 43; Case C-263/02 P, *Commission/Jego-Quéré*, ECR [2004] I-3435, para. 47.

⁶²⁴ STEIN; VINING, “Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context”, 1976, at 229.

⁶²⁵ Hence, in *Toepfer* some evidence suggested collusion between national and Commission officials to erase an administrative error through means not entirely compatible with good administration, and in *Bock* an improper delay and perhaps arbitrary recourse to a protective measure. In the *International Fruit Company* case the Court may have been concerned, in granting standing, that the Commission should not be in the position of precluding judicial review of its act by labelling it “regulation” rather than “decision.” See *ibid.*

Extramet, the particular circumstances of the applicants seem to have dictated the outcome of the decision on its admissibility. The same holds probably true for *Les Verts*. Hence, in the CJEU's decision on the admissibility of annulment actions one can perceive a concern with both the *procedural* and *substantive* justice of the case. It is not surprising, therefore, that some scholars have considered that the CJEU starts by deciding if it wants to admit the action, and afterwards applies the admissibility criteria.⁶²⁶ How far will the Court be willing to take this case-law, notably within the context of the changes introduced by the Lisbon Treaty, remains open to speculation.⁶²⁷

For what it is worth, the inconsistencies of the case-law show that the CJEU is most probably not satisfied with the outcomes of the *Plaumann* test and feels the need to mitigate some of its most unfair outcomes.⁶²⁸ In GORMLEY's words, the CJEU "is not afraid to undertake Houdini-like contortions in order to convince itself (but scarcely all academics and practitioners) that a particular litigant fits into the judicial straight-jacket which the celebrated *Plaumann* criteria have become."⁶²⁹ Nonetheless, the general tendency in the case-law is still restrictive and based on a "principle of rejection", especially regarding acts of general application. This was confirmed in the *UPA* decision, where the CJEU considered that although "a measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain natural or legal persons" it will be in such a case "*in the nature of a decision in their regard*."⁶³⁰ This statement echoes a return to the original case-law of the Court regarding challenges of measures of general application, which favours a more restrictive approach to standing of individuals. In fact, although there has been in the past a trend in the case-law which broadened access in some policy fields, the CJEU seems to have confirmed later on that such situations remain exceptional and restricted to fairly limited cases.⁶³¹

II. From a conceptual point of view the major difficulty surrounding the *Plaumann* test is the absence of a stable criterion which basis the *differentiation* element that the formula requires. In fact, it is common for national legal orders of Member States to require the proof of an *individual interest* to bring challenges against administrative measures. However, national courts tend to interpret this requirement liberally, and to admit that this interest may exist even if the person is not a member of a closed category of persons, as long as it is *individualized* in its position.⁶³² In European Union law, this individualization must take place with reference not only to the general community but also within the group of people affected by the contested act.⁶³³ Hence, for the establishment of individual concern, it is not enough for the applicant to show that he/she was

⁶²⁶ HARTLEY, *The Foundations of European Community Law*, 2007, at 368.

⁶²⁷ See *infra* Part II, Chapter 2.

⁶²⁸ Considering also that the CJEU is not pleased with its case-law see NIHOUL, "La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale", 1994, at 186.

⁶²⁹ GORMLEY, "Public Interest Litigation in Community Law", 2001, at 53.

⁶³⁰ Para. 36.

⁶³¹ BERROD; MARIATTE, "Le pourvoi dans l'affaire *Unión de Pequeños Agricultores c/Conseil*", 2002, at 8.

⁶³² See *infra* Part II, Chapter 2, Section 2.1.4.

⁶³³ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 51. Noting that in Germany third parties must be individualized from the public in general in order to be granted a right of action see CLASSEN, "Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle", 1996, at 44. The author is, notwithstanding, critical of the restrictive outcomes produced by the German approach. *Ibid.*, at 51.

affected by the act in a slightly different way to the others.⁶³⁴ This is especially true for acts of general application. The requirement of individual concern requires “an applicant to show a *real* difference, in qualitative or quantitative terms, between the repercussion for it of the disputed measure and its repercussions for the other people affected by it.”⁶³⁵ This is reflected in a batch of cases where the CJEU used the expression “specific rights” such as *Codorniu*, *Asocarne*, and *Molkerei Grossbraunshain*.⁶³⁶ Although from a different angle, on the one hand, the cases involving the existence of procedural rights, and on the other hand, the decisions in *Antillean Rice Mills*, *Sofrimport* and *Piraiiki-Patraiki*, also spoke the *language of rights*.⁶³⁷ Interpreted broadly this case-law might ultimately entail that the violation of *any right* of the applicant gives rise to a remedy.⁶³⁸ However, the CJEU has not yet gone that far.

It has been noted that the problem of using such an approach is that it sometimes comes perilously close to prejudicing substance.⁶³⁹ In fact, if an institution deprives an individual of *subjective* rights, notably property rights, the validity of such measure may be questioned in light of Union law which protects fundamental rights. However, such question should be reserved to the analysis on the merits. Hence, at the admissibility stage the existence of subjective rights should only be considered *prima facie*, by the mere allegation that the applicant was affected in a *particular way* by the contested act.

AG COSMAS noted in *Greenpeace* that if the applicants were entitled to individual rights, and if the contested decision infringed those rights, “then that decision did indeed ‘concern’ the appellants within the meaning of the fourth paragraph of Article 173 of the Treaty and the appellants were entitled, as a matter of principle, to challenge it.”⁶⁴⁰ Some authors also associate the notion of individual concern with the entitlement of individual rights. For instance, according to ALBORS-LLORENS, the notion of individual concern appears as an admissibility condition that has the purpose of ensuring private parties, whose *individual rights* have been breached by Union act, to have a chance to challenge such action.⁶⁴¹ Such view is endorsed in decisions of the CJEU such as those delivered in *Toepfer*, *Bock* and *Piraiiki-Patraiki*. However, it is questionable whether such cases involved subjective rights *proprio sensu*. The author seems to acknowledge such difficulty by stating that “the test of individual concern would be, to a certain extent, a kind of procedural equivalent to the substantive general principle of protection of legitimate expectations.”⁶⁴² Moreover, in some

⁶³⁴ ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 40.

⁶³⁵ *Ibid.*, 41.

⁶³⁶ Case T-109/97, *Molkerei Großbraunshain and Bene Nahrungsmittel/Commission*, [1998] II-3533, para. 70. One should further note that in *Codorniu* the CJEU did not use the expression “specific right” which was only introduced later in the case-law mentioning the decision in *Codorniu*. See Case T-482/93, *Weber/Commission*, [1996] ECR II-609, para. 69; Case C-87/95 P, *CNPAAP/Council*, [1996] ECR I-2003, para. 36. In Case T-100/94, *Michailidis and others/Commission*, [1998] ECR II-3115 the Court held that the applicants could not claim “neither a legitimate expectation or a vested right” (para. 69).

⁶³⁷ See SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 444.

⁶³⁸ SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 446.

⁶³⁹ ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 42; SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 446, mentioning Case T-60/96, *Merck/Commission*, [1997] ECR II-849, paras. 44-50.

⁶⁴⁰ Para. 59.

⁶⁴¹ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 52.

⁶⁴² *Ibid.*, at 53.

case-law regarding contractual relationships between private applicants and the Commission the CJEU seems to have accepted the action on the basis of the existence of a *mere legitimate interest*.⁶⁴³ *Extramet* confirmed that the existence of subjective rights is not required for an individual to be deemed individually concerned, as it was merely the impact on the applicants' economic position which allowed for the action to be admissible.⁶⁴⁴ In the field of state aids, the decision in *Cofaz*⁶⁴⁵ followed the same trend.

Surely, the CJEU clarified in *Plaumann* that the mere existence of a factual interest is not enough to distinguish the applicant in an individual manner. This orientation was later confirmed in the case of *Eridania*. In this case, despite the suggestion of the AG ROEMER who considered that the action should be admitted, the CJEU stated that, as the *Plaumann* test made clear, the existence of a mere factual interest was not sufficient to consider the applicant individually concerned.⁶⁴⁶ This orientation would, however, not be applied in a consistent manner throughout the case-law of the CJEU. The cases of *Control Data*⁶⁴⁷ and *Schiocchet*⁶⁴⁸ followed a much more liberal approach when compared to *Eridania*, a case with very significant factual similarities. Nonetheless, it seems that the major trend in the case-law seems to be to disregard the factual situation of the applicant.⁶⁴⁹

Truly, in the European Union law the difference between individual rights and interests has not proved relevant in the case-law.⁶⁵⁰ Hence, it is difficult to find the right fit for the CJEU's approach on *locus standi* requirements within the dichotomy between *objectivist* and *subjectivist* systems. FROMONT has suggested that under the TECSC the CJEU adopted an approach closer to the French system, whereas under the TEEC the German restrictive approach seemed to have prevailed.⁶⁵¹ Under old Article 33 TECSC private applicants could challenge the legality of individual decisions and recommendations concerning them and of general decisions and recommendations which they consider to involve a misuse of powers affecting them. The system was therefore more liberal than the one provided for in the TEEC: individuals could albeit limitedly challenge the validity of general measures and the requirement of "concern" seemed more lenient than that of "direct and individual concern" adopted in the TEEC.⁶⁵² As mentioned above, Article 33 TECSC could have been interpreted, nonetheless, according to German standards. By simply stating that individuals could challenge individual decisions concerning them,

⁶⁴³ See Opinions of AGs in Case 23/76, *Pellegrini and others/Commission and others*, [1976] ECR 1807 and Case 56/77, *Agence européenne d'intérêts/Commission*, [1978] ECR 2215..

⁶⁴⁴ ARNULL, "Private Applicants and the Action for Annulment since *Codomiu*", 2001, at 43.

⁶⁴⁵ Case 169/84, *Cofaz/Commission*, [1986] ECR 391, paras. 25-29.

⁶⁴⁶ See Joined Cases 10 and 18/68, *Eridania Zuccherifici and others/Commission*, [1969] ECR 459, para. 7.

⁶⁴⁷ Case 294/81, *Control Data/Commission*, [1983] ECR 911.

⁶⁴⁸ Case C-354/89, *Schiocchet/Commission*, [1991] ECR I-1775.

⁶⁴⁹ LENAERTS; CORTHAUT, "Judicial Review as a Contribution to the Development of European Constitutionalism", 2004, at 22.

⁶⁵⁰ See KOVAR; BARAV, "Variations nouvelles sur un thème ancien", 1976, at 73, 93. Noting that the term "right" although known to all Member States systems as generally described as somebody being entitled by law to demand something from the other, exhibits diverse conceptions and contents not only within the same legal order but also as between different legal orders, see BELJIN, "Rights in EU Law", 2008, at 93.

⁶⁵¹ FROMONT, "L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes", 1966, at 59. See also STEIN; VINING, "Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context", 1976, at 234.

⁶⁵² ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 40.

the Court could have considered that only decisions which affected the plaintiff individually, *i.e.* individual decisions, could be challenged. The German version of the Treaty supported such view by using the expression “*die sis individuell betreffenden Entscheidungen*.” However, the Court soon explained that such phrase encompassed two different requirements: that the decision should be an individual act, and that it should concern the applicant. Hence, individuals could challenge decisions *addressed* to others provided that such acts *concerned* them.⁶⁵³ In *Groupement des Industries Sidérurgiques Luxembourgeoises*⁶⁵⁴ the Court made clear that the formula “concerning them” did not mean that a decision had to be addressed to the applicant.⁶⁵⁵ Furthermore, the case-law of the CJEU in this respect followed a liberal trend, as this concern need not be individual or direct. In the same case, the interest of the *Groupement* was considered manifest and very direct because the result of the contested decision was to impose on undertakings in the group an additional levy of 8 francs on each tone of coal which they consumed. In *Nold*⁶⁵⁶, where the applicant was one of the undertakings subject to the trading regulations whose validity was being challenged, the Court explained that the requirement of “concern” meant that the decision “directly affected the position of the applicant.”⁶⁵⁷ In *Chambre Syndicale de la Sidérurgie de l’Est de la France*⁶⁵⁸, the existence of a competitive relationship between the applicants and the addressees of the decision was thought to be enough to prove that the former were likely to be affected by the contested measure and therefore were granted *locus standi*.⁶⁵⁹

The case of *De Gezamenlijke Steenkolenmijnen in Limburg*⁶⁶⁰ illustrates the tensions between the French and German approaches. AG LAGRANGE had considered that there should be a two stage assessment:

“[t]he process takes place in two stages: it is first established whether, on the facts, the *decision is individual in character* and then, if it is recognized as having that character, it must be established *whether the decision 'concerns' the applicant* and this must be done on the basis of the concept of *legal interest* which, although not expressed in the Treaty, is of the essence of an action for annulment as this is understood in the six countries of the Community. Of course, this does not mean any interest whatsoever; the word '*concerning*' is *strong enough in itself and seems to amount to the 'direct interest' which is frequently required under national law*. It is for the Court to rule on each case, gradually developing its case-law. This appears to be

⁶⁵³ SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 418.

⁶⁵⁴ Joined Cases 7 and 9/54, *Groupement des industries sidérurgiques Luxembourgeoises/ECSC High Authority*, [1954-1956] ECR 175.

⁶⁵⁵ AG ROEMER had suggested that, in concerning the legality of the Office Commercial's import monopoly, the applicants were not individually concerned, by holding that the applicants lacked *locus standi* because their interest in the matter was not peculiar to them. The Court rejected the AG's Opinion, and confirmed that individual concern was not necessary under the TECSC. Considering that the AG had opted for the German approach see BERROD, *La systématique des voies de droit communautaires*, 2003, at 617. By contrast, AG LAGRANGE had pressed for the adoption of the French approach in Case 3/54, *Assider/High Authority*, [1954-1956] ECR 63.

⁶⁵⁶ Case 18/57, *Nold KG/ECSC High Authority*, [1959] ECR 41.

⁶⁵⁷ Section D, at 51.

⁶⁵⁸ Joined Cases 24 and 34/58, *Chambre syndicale de la sidérurgie de l'est de la France/ECSC High Authority*, [1960] ECR 281.

⁶⁵⁹ In sharp contrast with the decision in Joined Cases 10 and 18/68, *Eridania Zuccherifici and others/Commission*, [1969] ECR 459. See also Joined Cases 172 and 226/83, *Hoogovens Groep/Commission*, [1985] ECR 2831.

⁶⁶⁰ Case 30/59, *De gezamenlijke Steenkolenmijnen in Limburg/ECSC High Authority*, [1961] ECR 1.

developing in a *more and more liberal direction* (...) (emphasis added).⁶⁶¹

Hence, based on the existence of a competitive relationship whose existence was not in dispute between the applicant association and the German undertakings who were the subjects of the contested measure, the AG considered the action to be admissible. The influence of the French system is undeniable.⁶⁶² In contrast, the High Authority had based its argument mostly on German-oriented considerations.⁶⁶³ The Court held the action admissible, stating that “for an application for annulment of a decision which is individual in character, submitted by an undertaking, to be admissible it is enough that the applicant claims that the decision concerns it and supports its claim by an appropriate statement explaining the interest which it has in having the decision declared void.”⁶⁶⁴

Also, pursuant to Article 48 TECSC only the undertakings and their associations involved in the production of coal and steel could challenge the High Authority decisions. Notwithstanding, the result was a very liberal one. According to the Court an association which established that its members have an *interest* in the challenge is deemed “concerned.” In *Wirtschaftsvereinigung Eisen-und Stahlindustrie*⁶⁶⁵ the Court stated that:

“[a]ccording to the statutes of the first applicant (...) it is a private association governed by German law having as its object the furtherance and defence of the general interests of its members who are producers of iron and steel. It is common ground that the contested provisions of General Decision no. 2/57 are *capable of affecting certain, even though perhaps divergent, interests, entrusted to the applicant*. The applicant thus has capacity to institute proceedings in accordance with the provisions of Articles 33, 48 and 80 of the Treaty (emphasis added).”⁶⁶⁶

Under the TEEC the applicants tried to convince the CJEU to adopt the same liberal approach.⁶⁶⁷ They were, however, unsuccessful. The Court could not ignore the differences in the wording of the two Treaties.⁶⁶⁸ Hence, it focused on the *legal effects* of the act on the applicant: the applicant must be affected *as if* it was the real addressee of the contested measure. Factual considerations are disregarded, and the approach resembles the German construction. Hence, in

⁶⁶¹ Opinion of AG LAGRANGE in *De gezamenlijke Steenkolenmijnen in Limburg*, at 37.

⁶⁶² FROMONT, “L’influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes”, 1966, at 60. Also considering that such approach is French-oriented see CANEDO, “L’intérêt à agir dans le recours en annulation du droit communautaire”, 2000, at 458 *et seq.*

⁶⁶³ FROMONT, “L’influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes”, 1966, at 60. Noting, however, that under the TECSC the case-law of the CJEU on standing of private parties was not limited to the analysis of *an intérêt à agir* see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 148.

⁶⁶⁴ Case 30/59, *De gezamenlijke Steenkolenmijnen in Limburg/ECSC High Authority*, [1961] ECR 1, at 16. Noting that this very liberal approach regarding standing requirements came close to the notion of *intérêt* adopted in the French system, and that in contrast under the TEEC the CJEU adopted a narrower approach, basing the notions of “direct and individual concern” in the existence of a damage to a right of the applicant, see ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 41, 42.

⁶⁶⁵ Case 13/57, *Wirtschaftsvereinigung Eisen-und Stahlindustrie/ECSC High Authority*, [1957-1958] ECR 265.

⁶⁶⁶ Case 13/57, *Wirtschaftsvereinigung Eisen-und Stahlindustrie/ECSC High Authority*, [1957-1958] ECR 265, at 276.

⁶⁶⁷ Noting that in another way the TEEC was more liberal than the TECSC as it allowed natural and legal persons to bring actions and not only undertakings or associations of undertakings see HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 18; CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 156 *et seq.*

⁶⁶⁸ See Opinion of AG LAGRANGE in *Producteurs*.

Toepfer, the first decision regarding the notion of direct concern, the Court focused on the *immediate effects* of the act in the situation of the applicant: the decision of the Commission came to force, immediately.⁶⁶⁹ In *Plaumann*, where the Court firstly defined the notion of individual concern, although it spoke about the existence of a *factual* situation, the Court allowed challenges only when the applicant is placed in a position *similar* to the addressee of the measure. According to FROMONT this analysis amounts to saying that the contested act *must affect the legal position of the individual*, which is closer to the German approach than the French one.⁶⁷⁰ Following the author, although the CJEU does not use the notion of subjective public rights, substantively, by requiring that the individual is put in the same or similar position of the addressee of the act, the Court endorses the German legally-oriented approach.⁶⁷¹ This would explain why in *Plaumann* the factual situation of the applicant was irrelevant, contrary to what happened in *Toepfer* where the individuals were deemed to be in a position similar to the direct addressees of the contested act.⁶⁷² This would also explain the Court's case-law on associations, which are not granted standing to defend the *collective interests* of their members.

CANEDO notes also that the French notion of *intérêt pour agir* has not permeated the CJEU's case-law on standing of private applicants.⁶⁷³ In contrast such notion would be reflected in the CJEU's approach under the TECSC. BERROT considered that whereas under the TECSC the notion of *intérêt* absorbed the *qualité à agir*, under the TEEC things went the other way around.⁶⁷⁴ The consequence was that the European notions of direct and individual became closer to the German subjectivist approach.⁶⁷⁵ BARAV, based mostly in *Codomíu*, considers that an individual has to be "*atteinte en ses droits spécifiques*"⁶⁷⁶ in order to be individually concerned, which is closer to the German approach. CASSIA notes that in EU law standing requirements do not reflect the French system. Here, *locus standi* "*n'est qu'une déclinaison de l'intérêt, puisqu'elle est constituée, tout come l'intérêt, par le rapport factuel de l'acte avec le requérant.*"⁶⁷⁷ In contrast, in EU law standing of individuals is based on the existence of a "*lien de droit*" between the act and the plaintiff.⁶⁷⁸ Accordingly, the CJEU stated that:

⁶⁶⁹ Joined Cases 106 and 107/63, *Toepfer/Commission of the EEC*, [1965] ECR 405, at 411.

⁶⁷⁰ FROMONT, "L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes", 1966, at 62.

⁶⁷¹ *Ibid.*, at 63.

⁶⁷² *Ibid.*

⁶⁷³ CANEDO, "L'intérêt à agir dans le recours en annulation du droit communautaire", 2000, at 454. In contrast RUFFERT considers that the notion of individual concern takes up the French concept of *intérêt légitime*. See RUFFERT, "Rights and Remedies in European Community Law", 1997, at 326. Also KOVAR and BARAV consider that to be directly and individually concerned it is not necessary to demonstrate the entitlement of a subjective right and that the Court "*consacre bien ici la notion d'intérêt lésé.*" See KOVAR; BARAV, "Variations nouvelles sur un thème ancien", 1976, at 93 *et seq.*, and 108.

⁶⁷⁴ See also BERROD, *La systématique des voies de droit communautaires*, 2003, at 616-622.

⁶⁷⁵ *Ibid.*, at 628.

⁶⁷⁶ BARAV, "Le droit au juge devant le Tribunal de première instance et la Cour de justice des Communautés européennes", 1998, at 200.

⁶⁷⁷ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 420 and, particularly on individual concern, see 547 *et seq.*

⁶⁷⁸ See e.g., Case T-60/96, *Merck/Commission*, [1997] ECR II-849, para. 44. The author concludes that under EU law the admissibility of actions for annulment is either based on subjective public rights or legitimate interests. See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 556. However, the author struggles with the two stage assessment adopted in cases where the Court analyses both the legal and factual dimensions of the case. See *ibid.*, at 568 *et seq.*, and 667 *et seq.* Furthermore, CASSIA notes that the CJEU sometimes requires an interest to sue, which is *factually* based. *Ibid.*, at 423 *et seq.*

“[e]ven on the assumption that the applicants *might suffer personal damage* linked to the alleged harmful effects of the nuclear tests in question on the environment or on the health of the general public, *that circumstance alone would not be sufficient* to distinguish them individually in the same way as a person to whom the contested decision is addressed (emphasis added).”⁶⁷⁹

Surely, the restrictive approach of the CJEU regarding standing requirements could lead one to the conclusion that the solution adopted therein is more German than French-oriented. However, there are also indications in the case-law that the Union judges have not adopted the German approach either.⁶⁸⁰ Hence, as stated above, there have been cases where the harm inflicted in the factual position of the applicant was enough to grant standing. The case of *Extramet* is probably the most obvious example, but there have been others.⁶⁸¹ For instance, in *Consorzio gruppo di azione locale Murgia Messapica*⁶⁸² the CJEU, after holding that the applicant was not entitled to any financial assistance from the Union, stated that:

“[t]he provisional acceptance of its project by the MAF and the inclusion of the project among those accorded secondary priority and the applicant's repeated participation in the meetings organized by the Commission and the MAF, and thus in the procedure on conclusion of which the contested decision was adopted, may nevertheless have given rise to *interests* of which the loss was of individual concern to the applicant (emphasis added).”⁶⁸³

III. Surely, the Treaties seem to have established a solution regarding the standing of private parties in legality review which constitutes a “middle ground” between the objectivist and subjectivist approaches to the standing of individuals.⁶⁸⁴ On the one hand, the automatic granting of standing to the addressees of a given act suggests that the authors of the Treaties sought inspiration in the German doctrine, as the French system does not dwell on the dichotomy addressee *v.* third party.⁶⁸⁵ On the other hand, the notions of direct and individual concern are close to the notion of *intérêt pour agir* adopted by French courts. Here, within the so-called *recours pour excès de pouvoir* the applicant must demonstrate to have a personal and direct interest in the cause, but not necessarily to be entitled to a subjective right, which is pivotal in the German system. Thus, the European solution does not seem to have opted clearly for one model instead of

⁶⁷⁹ Case T-219/95 R, *Danielsson and others/Commission*, [1995] ECR II-3051, para. 71.

⁶⁸⁰ Noting that regarding the extent of individualization the German system differs from the EU approach as in the EU the limited and identifiable number of persons affected will not be enough to grant standing see GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 391.

⁶⁸¹ See e.g., Case T-435/93, *ASPEC and others/Commission*, [1995] ECR II-1281, para. 70; Case T-442/93, *AAC and others/Commission*, [1995] ECR II-1329, para. 53; Case T-266/94, *Skibsvaerftsforeningen and others/Commission*, [1996] ECR II-1399, paras. 47-48;

⁶⁸² Case T-465/93, *Consorzio gruppo di azione locale “Murgia Messapica”/Commission*, [1994] ECR II-361.

⁶⁸³ Para. 26. Also in Joined Cases T-480 and 483/93, *Antillean Rice Mills and others/Commission*, [1995] ECR II-2305 the CJEU expressly mentioned the particular “factual circumstances” of the case (para. 76).

⁶⁸⁴ MARQUES, “O acesso dos particulares ao recurso de anulação após o Tratado de Lisboa”, 2010, at 107.

⁶⁸⁵ See GERSTNER, *Die Drittschutzdogmatik im Spiegel des französischen und britischen Verwaltungsgerichtsverfahrens*, 1995, at 72. For a critical view of the German approach regarding the protection of third parties see CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 45, 46.

the other.⁶⁸⁶ Moreover, although the idea of “differentiation” implied in the *Plaumann* formula relates with the German *Schutznormtheorie*, which focuses on identifying the circle of elements protected by a given norm, its concrete application by the CJEU determines stricter outcomes than the German solution.⁶⁸⁷ Only a few cases regarding protection clauses amount to a closer example of the application of such theory.⁶⁸⁸ Notwithstanding, the general trend in the case-law produces, in practice, more restrictive outcomes than either more objectivists or subjectivist approaches to standing of private parties.⁶⁸⁹

In my view, the CJEU’s case-law standing requirements under current Article 263(4) TFEU do not relate in a clear manner either to the protection of *interests* or to the entitlement of individual *rights*.⁶⁹⁰ Indeed, in the CJEU’s case-law there is no *formal* or *substantive* distinction between individual rights and interests.⁶⁹¹ The Court mentions the protection of rights and/or interests which are deemed to constitute *subjective* individual positions worthy of legal protection, without the need for an accurate distinction. One could almost say as PRECHAL did that where the Court uses the term “right” it has “nothing specif in mind.”⁶⁹² Accordingly, neither the language of rights nor the one of interests has been determinant in the Court’s case-law on standing to bring actions for annulment. Hence, the addressee of an act is always authorised to file an action regardless of whether or not he/she is entitled to *rights*. This has led BELJIN to consider that the concept of judicial protection is wider than the concept of EU rights because protection can also be achieved without them.⁶⁹³ However, an EU right does not always lead to the admissibility of an action for annulment.⁶⁹⁴ Only in rare cases has the Court based its decision on the existence of specific rights as, for example, patent rights⁶⁹⁵, trademark rights⁶⁹⁶ or procedural rights.⁶⁹⁷ Furthermore, the CJEU “repeatedly emphasizes factual elements without expressing a normative

⁶⁸⁶ Considering that here lies of the major weaknesses of the system see VON DANWITZ, *Verwaltungsrechtliches System und Europäische Integration*, 1996, at 232.

⁶⁸⁷ MARQUES, “O acesso dos particulares ao recurso de anulação após o Tratado de Lisboa”, 2010, at 108. The author suggests the adoption of the German solution which bases standing on the entitlement of subjective rights *proprio sensu*. See also VON DANWITZ, *Verwaltungsrechtliches System und Europäische Integration*, 1996, at 231.

⁶⁸⁸ E.g., Case 152/88, *Sofrimport/Commission*, [1990] ECR I-2477.

⁶⁸⁹ EHLERS, *Die Europäisierung des Verwaltungsprozessrechts*, 1999, at 53; VON DANWITZ, *Verwaltungsrechtliches System und Europäische Integration*, 1996, at 240, 241. *A fortiori* in the French system as well.

⁶⁹⁰ Also not agreeing with FROMONT’s conclusions in this respect, see KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 93, 94. These authors also consider that a situation of fact is sometimes sufficient.

⁶⁹¹ In Case 13/68, *Salgoil/Ministero del commercio con l'estero*, [1968] ECR 453, at 463 the CJEU held that “it is for the national legal system (...) to decide how the individual position thus protected is to be classified.” DANIELE notes that the case-law of CJEU may lead the Italian administrative courts to protect “*tutte le posizioni soggettive*” regardless of their technical classification as *diritti soggettivi* or *interessi legittimi* which follows the traditional division of jurisdiction between the *giudice ordinario* and the *giudice amministrativo*. See DANIELE, “L’effettività della giustizia amministrativa nell’applicazione del diritto comunitario europeo”, 1996, at 1385-1391.

⁶⁹² PRECHAL, “Protection of Rights”, 2008, at 158. See also PRECHAL, *Directives in European Community Law*, 1995, at 132-144 and DOWNES; HILSON, “Making Sense of Rights”, 1999, at 121-138; GRAZIADEI, “Rights in the European Landscape”, 2008, at 63 *et seq.*, trying to shed some light on the question of knowing what it means to say that a person is entitled to a right under Union law.

⁶⁹³ BELJIN, “Rights in EU Law”, 2008, at 101, 102, noting also that the grounds to file an action for annulment under the Treaties include “every infringement of this Treaty or of any rule of law relating to its application”, which requires no connection between the concern and the unlawfulness invoked.

⁶⁹⁴ In contrast, the entitlement to damages under Article 340 TFEU presupposes an infringement of a right granted under EU law.

⁶⁹⁵ Case T-213/02, *SNF/Commission*, [2004] ECR II-3047, para. 68.

⁶⁹⁶ Case T-370/02, *Alpenhain-Camembert-Werk and others/Commission*, [2004] ECR II-2097, para. 65.

⁶⁹⁷ Case T-27/02, *Kronofrance/Commission*, [2004] ECR II-4177, para. 34. See also CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 70.

approach in its examination.”⁶⁹⁸ This happens, for example, in decisions which mention the *factual* market positions and the case-law on state aids.⁶⁹⁹ Hence, CASSIA faces difficulties in sustaining his idea that the CJEU's case-law is based on the assessment of the *legal* situation of individuals when analyzing the CJEU's case-law on direct concern. Here, the CJEU has considered that an applicant will be deemed directly concerned “*en raison de l'incidence matérielle, de fait, que peut avoir l'acte attaqué sur la situation du requérant.*”⁷⁰⁰ In fact, as seen above the relevance of the entitlement of rights or interests is unclear in such case-law. Thus, although the impairment of rights is *one* possible way to argue in favour of direct and individual concern is not the *only* one and it may not be *enough*.⁷⁰¹

Surely, the authors of the Treaties were aware of the differences between Member States legal systems. However, the outcomes of the system established in the Treaties as interpreted by the CJEU have proved extremely inauspicious for individuals. In France, individuals may challenge both *decisions individuelles* and *règlements* and *locus standi* requirements are generally interpreted and applied broadly. However, there is no suspensory effect and the individual is not at the centre of the litigation. In Germany, challenges to regulations are exceptional (although they may take place in the context of constitutional review) and *locus standi* requirements are interpreted more strictly. However, actions for annulment have as a rule a suspensory effect and individuals' protection lies at the heart of the system of administrative justice. In the EU, individuals have the worst of both worlds: challenges against measures other than those addressed to them are exceptional, *locus standi* requirements are interpreted narrowly, there is no suspensory effect, and the individual is not put at the centre of the system of judicial review.⁷⁰²

Hence, it may be said that the alleged “revolutionary” innovation *vis-à-vis* International law of allowing individuals to bring actions directly before an international court – which could have led to the establishment of a system of judicial review focused on the protection of individuals along the lines of *Van Gend en Loos* – ended up to be understood in a *functionalized* way, limiting the scope and impact of the subjective control of legality at the Union level.⁷⁰³ It is thus not surprising that scholars and some sectors of the CJEU have consistently pressed for a broader interpretation of standing requirements.⁷⁰⁴ Furthermore, the CJEU's case-law is marked by all kinds of

⁶⁹⁸ BELJIN, “Rights in EU Law”, 2008, at 104.

⁶⁹⁹ Case C-106/98 P, *Comité d'entreprise de la Société française de production and others/Commission*, [2000] ECR I-3659, para. 39; Case T-158/00, *ARD/Commission*, [2003] ECR II-3825, para. 57. Noting that this case-law is thus more generous than the German approach see CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 71.

⁷⁰⁰ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 488. See e.g., Case T-54/96, *Oleifici Italiani and Fratelli Rubino Industrie Olearie/Commission*, [1998] ECR II-3377, para. 60. More clearly in the French version: “[i]l suffit de noter que, en l'espèce, ces conditions factuelles particulières ne sont pas réunies.”

⁷⁰¹ BELJIN, “Rights in EU Law”, 2008, at 104: “[t]he plaintiff will have to exhibit more than just a right to be individually affected.” The CJEU has also considered that *locus standi* to enforce EU rights before national courts can also be based either on rights or interests. See *infra* Part II, Chapter 2, Section 2.1.4.

⁷⁰² Noting that the European solution is tougher for individuals than the German solution as there is no suspensory effect of implementing acts see FROMONT, “L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes”, 1966, at 50.

⁷⁰³ Noting that in mature federations such as the United States (where private plaintiffs claiming consequential harm have been given standing to contest a general regulation), and Germany (where they have been permitted to contest decisions addressed to third parties), standing has been construed broadly whereas in analogous situations in the European Community individuals have been denied standing to sue see STEIN; VINING, “Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context”, 1976, at 221.

⁷⁰⁴ See e.g., Opinions of AGs in Case 6/68, *Zuckerfabrik Watenstedt GmbH/Council*, [1968] ECR 40910; Joined Cases 10 and 18/68, *Eridania Zuccherifici and others/Commission*, [1969] ECR 459; Case 162/78, *Wagner/Commission*, [1979]

fluctuations. Scholars note that it follows the moves of a “yo-yo, ou plus exactement d’un accordion.”⁷⁰⁵ VANDERSANDEN emblematically stated that an individual wishing to bring a direct action against an act other than one which is directly addressed to him “pénètre dans un labyrinthe”⁷⁰⁶ not knowing which lane to follow. There are no stable rules on this matter and there have been too many exceptions established in special cases whose limits and scope are far from clear. However, despite all suggestions, the Court has decided to maintain its traditional *Plaumann* formula. Surely, some progresses have been made in the past years, but they remain restricted to certain policy sectors and limited to manifestly unfair cases. This is certainly unfortunate as “a legal system may have impressive principles of judicial review, but these will be of scant comfort to those who cannot access the system because of the standing rules are unduly narrow.”⁷⁰⁷

1.1.4 The Irrelevance of a Breach of the Right to Effective Judicial Protection: “Do as I Say and not as I do...”

I. Another aspect of the CJEU’s case-law disclosing a non-subjectivist approach to judicial review in the EU is the limited, almost inexistent, impact of the right to effective judicial protection on the admissibility of actions for annulment brought by individuals. In fact, applicants often found their claims on the grounds that a dismissal of the case would be incompatible with either the principle of the rule of law⁷⁰⁸, the fundamental right of access to a court⁷⁰⁹ or the rights to a fair trial and an effective remedy established in Articles 6 and 13 ECHR.⁷¹⁰ These arguments have been rejected by the CJEU.⁷¹¹ According to the CJEU, a potential breach of such fundamental rights is irrelevant in the final decision to hear the case and does not enable a more generous approach to *locus standi* requirements. This is so regardless of the centrality of such right affirmed in a long line of case-law initiated with the aforementioned *Johnston* ruling.⁷¹²

Hence, since the 1960s, the Court has had to deal with the argument put forward by several applicants that “[i]f recourse to Article 173 were to be refused by reason of a restrictive interpretation of its wording, individuals would thus be deprived of all protection by the courts both under Community law and under national law, which would be contrary to the fundamental

ECR 3467; Case 45/81, *Moksel/Commission*, [1982] ECR 1129. See *infra* Part II, Chapter 2, Sections 2.1.4. and 2.1.5.

⁷⁰⁵ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 6.

⁷⁰⁶ VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 545. See also ROCHERE, “Droit au juge”, 1996, at 123-142; CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 238. Speaking of a “*labirinto de regole*” see BONI, “Il ricorso di annullamento delle persone fisiche e giuridiche”, 1998, at 105. See also Opinion of AG COLOMER in Case C-106/98 P, *Comité d’entreprise de la Société française de production and others/Commission*, [2000] ECR I-3659, qualifying such case-law as a “case-by-case approach” (para. 1) and Opinion of AG COSMAS in Case C-321/95 P, *Greenpeace and others/Commission*, [1998] ECR I-1651, noting that “the Court does not profess to adhere to an entirely immutable point of view” (para. 78).

⁷⁰⁷ CRAIG; BÚRCA, *EU Law*, 2011, at 507.

⁷⁰⁸ Case T-109/97, *Molkerei Großbraunshain and Bene Nahrungsmittel/Commission*, [1998] II-3533, para. 78.

⁷⁰⁹ Case T-12/96, *Areacova and others/Council and Commission*, [1999] ECR II-2301, para. 79. See also Joined Cases T-172, 175 to 177/98, *Salamander and others/Parliament and Council*, [2000] ECR II-2487, para. 73.

⁷¹⁰ Case T-219/95 R, *Danielsson and others/Commission*, [1995] ECR II-3051, para. 27.

⁷¹¹ See e.g., Case T-12/96, *Areacova and others/Council and Commission*, [1999] ECR II-2301, paras. 80-85; Case T-109/97, *Molkerei Großbraunshain and Bene Nahrungsmittel/Commission*, [1998] II-3533, paras. 76-78.

⁷¹² See *supra* Introduction.

principles governing all the Member States.”⁷¹³ The CJEU’s reply to such argument has been consistently the same:

“[t]hese considerations (...) cannot be allowed to override the clearly restrictive wording of Article 173, which it is the Court’s task to apply.”⁷¹⁴

Thus, for instance, in *Asocame*, the applicants claimed that the Spanish judicial system did not guarantee sufficient protection of individuals “owing to widespread structural delays occurring in cases dealt with by the courts having jurisdiction to hear cases concerning the subject-matter of the directive in question.”⁷¹⁵ The CJ considered that:

“[s]uch a circumstance, *even if proved*, cannot warrant a change in the system of remedies and procedures established by Articles 173, 177 and 178 of the Treaty which is designed to give the Court of Justice the power to review the legality of acts of the institutions. In *no case* can such a circumstance allow an action for annulment brought by a natural or legal person which does not satisfy the conditions laid down by the fourth paragraph of Article 173 to be declared admissible (emphasis added).”⁷¹⁶

Later, in *Salamander* the plaintiffs confronted the GC with the contention that the Union does not offer a system of sufficient legal protection of the individual against directives and thus violates the right to an effective remedy.⁷¹⁷ However, the GC firmly rejected the argument according to which the action would have to be considered admissible even if the applicant was not deemed individually concerned because otherwise it would not be granted effective judicial protection. In fact, such circumstances could not in any case justify the Court “in departing from the system of legal remedies established by the fourth paragraph of Article 173 of the Treaty, as explained by the case-law, and *exceed the bounds of its jurisdiction* under that provision”⁷¹⁸, as this would represent an usurpation of the function of the founding authority of the Union. Similarly, in *Pescadores*⁷¹⁹, a case involving a challenge to a Council’s regulation, the applicants complained on appeal that the strict interpretation on standing made by the GC constituted a breach of Article 6 ECHR in so far as it deprived them of their rights of defence. In fact, in the absence of a measure applying the contested regulation which could be challenged before a national court, the CJEU could not review the legality of that regulation by means of a preliminary ruling, “so that the only remedy open to the applicants [was] an application for the annulment of the regulation.”⁷²⁰ The CJ

⁷¹³ Case 40/64, *Sgarlata and others/Commission of the EEC*, [1965] ECR 215, at 227.

⁷¹⁴ *Ibid.*

⁷¹⁵ Case C-10/95 P, *Asocame/Council*, [1995] ECR I-4149, para. 16.

⁷¹⁶ Para 26. See exactly the same phrasing in Case C-87/95 P, *CNPAAP/Council*, [1996] ECR I-2003, para. 38.

⁷¹⁷ The GC pointed out that alternative national remedies were available in *some cases, at least in certain Member States*. For example, while *Salamander* was being tried, another tobacco company had managed to go to the High Court of England and Wales, which had asked for a preliminary ruling on validity of the same directive (Case C-74/99, *Imperial Tobacco and others*, [2000] ECR I-8599). Nonetheless, it may be difficult to plead in certain Member States that a national remedy has to be created to allow for a preliminary ruling on validity. See LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 23. See *infra* Sections 1.2.2(a) and 1.2.3(a).

⁷¹⁸ Paras. 74-75. See SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 294.

⁷¹⁹ Joined Cases T-54 and 73/00, *Federación de Cofradías de Pescadores de Guipúzcoa and others/Council*, [2001] ECR II-2691 and Case C-300/00 P (R), *Federación de Cofradías de Pescadores de Guipúzcoa and others/Council*, [2000] ECR I-8797.

⁷²⁰ Case C-300/00 P (R), *Federación de Cofradías de Pescadores de Guipúzcoa and others/Council*, [2000] ECR I-8797, para. 17.

limited itself to reiterating the *Asocame dictum*.⁷²¹

Hence, the CJEU has constantly and firmly confirmed that “whether there is in practice an alternative remedy available in the national courts is not ultimately relevant to the question of admissibility (...) since the absence of such a remedy will not render admissible an action which would be otherwise admissible.”⁷²²

II. The issue was largely explored in 2002, in the “long hot summer for individual concern”⁷²³, in the cases of *UPA*⁷²⁴ and *Jégo-Quéré*⁷²⁵ which involved challenges to Union regulations.⁷²⁶ As is well known, these cases illustrate the possibilities of *lacunae* in the judicial protection of individuals within the European legal order and became known for the contradictory perspectives therein adopted by the GC, the AG and the CJ. Thus, these cases gave a new breath to the issues of effective judicial protection within the European legal order. CASSIA considered that *UPA* and *Jégo-Quéré* raised three fundamental questions: (i) should an action for annulment be deemed admissible if an applicant demonstrates that he/she does not have any alternative means of protection?; (ii) should an applicant in such circumstances be considered individually concerned within the meaning of the Treaties?; (iii) or should such admissibility be founded in a new legal ground not established under the Treaties?⁷²⁷

In *UPA*, the applicants’ core arguments on appeal were interpreted by the Court to mean that in absence of adequate national legal remedies it was up to the CJEU to hear a direct action for annulment, even if the applicants did not meet the requirements of direct and individual concern.⁷²⁸ Indeed, it stems from para. 32 of the ruling that the applicant did not contest the fact that it was not individually concerned by the regulation.⁷²⁹ Thus, the main issue in the case was the

⁷²¹ See para. 37. See also Case C-87/95 P, *CNPAAP/Council*, [1996] ECR I-2003, para. 38; Case T-212/00, *Nuove Industrie Molisane/Commission*, [2002] ECR II-347, para. 48.

⁷²² ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 49. See also Case T-18/95, *Atlanta and Internationale Fruchtimport Gesellschaft Weichert/Commission*, [1996] ECR II-1669, para. 50; Case T-135/96, *UEAPME/Council*, [1998] ECR II-2335, para. 61; Case T-138/98, *ACAV and others/Council*, [1999] ECR II-1797, para. 68.

⁷²³ VAN DEN BROEK, “A Long Hot Summer for Individual Concern?”, 2003, at 61-79.

⁷²⁴ The case involved a challenge to a Council regulation on the establishment of a common organisation of the market in oils and fats. For a case comment see e.g., BERROD; MARIATTE, “Le pourvoi dans l’affaire *Unión de Pequeños Agricultores c/Conseil*”, 2002, 7-11; SARMIENTO, “La sentencia *UPA* (C-50/2000), los particulares y el activismo inactivo del Tribunal de Justicia”, 2002, 531-577; WAELBROECK, “Le droit au recours juridictionnel effectif du particulier”, 2002, at 3-8; GILLIAUX, “L’arrêt *Unión de Pequeños Agricultores*”, 2003, 177-202; MEHDI, “La recevabilité des recours formés par les personnes physiques et morales à l’encontre d’un acte de portée générale”, 2003, at 23 *et seq.*

⁷²⁵ The case involved a challenge to a Commission regulation establishing measures for the recovery of the stock of hake, notably prohibiting the use of certain fishing nets in certain geographical areas. For a case comment see e.g., CORTHAUT, “Comment on *Jégo-Quéré*”, 2002-2003, at 141 *et seq.*; GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2003, at 124 *et seq.*; BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*”, 2004, at 1639-1659. For a similar case see Case C-131/92, *Arnaud and others/Council*, [1993] ECR I-2573.

⁷²⁶ See also BERNAT, “The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community”, 2003, at 32 *et seq.*

⁷²⁷ CASSIA, “Continuité et rupture dans le contentieux de la recevabilité du recours en annulation des particuliers”, 2002, at 549.

⁷²⁸ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 28.

⁷²⁹ See para. 32 of the decision: “[a]s a preliminary point, it should be noted that the appellant has not challenged the finding of the Court of First Instance, in paragraph 44 of the contested order, to the effect that the contested regulation is of general application. Nor has it challenged the finding, in paragraph 56 of that order, that the specific interests of the appellant were not affected by the contested regulation or the finding, in paragraph 50 of that order, that its members are not affected by the contested regulation by reason of certain attributes which are peculiar to them or by

need to review the case-law on standing requirements when a gap of protection was identified. However, put this way, such argument sounded “like an appeal to the Court to adopt a *contra legem* interpretation of the rules on admissibility.”⁷³⁰ As a result, the CJ had no difficulty in dismissing the argument and in maintaining its previous orientation.

The CJ’s decision in *UPA* started with the premise that the applicants had not fulfilled the standing requirements. Notwithstanding, the CJ considered it necessary to see whether “in those circumstances”⁷³¹ the applicants could nonetheless have standing on the *sole ground* that in the alleged absence of any legal remedy before the national courts, the right to effective judicial protection required it. Here, the CJ recalled that the right to effective judicial protection is a fundamental right, which is part of the Union legal order based on the rule of law, stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR.⁷³² However, the CJ noted that within the “complete system of remedies established in the Treaties” two further avenues are available to individual applicants who want to obtain a ruling that particular Union measures are unlawful: first, they can institute proceedings in national courts and ask that questions of validity be referred to the CJ for a preliminary ruling under Article 267 TFEU; and secondly, they can plead the invalidity of Union acts indirectly in proceedings before the Union courts under Article 277 TFEU.⁷³³ Notwithstanding, one should note that the CJ did not elaborate on the *genuine nature* of these alternatives in the case *sub judice*.⁷³⁴ This approach contrasts with the CJEU’s assessment in other instances. For instance, in *Chernobyl*, where the Court was faced with an institutional conflict and with the issue of *locus standi* of Parliament, it provided a fairly comprehensive analysis regarding alternative remedies, stating that:

“[t]he circumstances and arguments adduced in the present case show that the *various legal remedies provided for both in the Euratom Treaty and in the EEC Treaty, however effective and diverse they may be, may prove to be ineffective or uncertain.*

First, an action for failure to act *cannot be used* to challenge the legal basis of a measure which has already been adopted.

Secondly, the submission of a reference for a preliminary ruling on the validity of such an act or the bringing of an action by Member States or individuals for the annulment of the act *are mere contingencies*, and the Parliament cannot be sure that they will materialize.

Finally, while the Commission is required to ensure that the Parliament’s prerogatives are

reason of factual circumstances in which they are differentiated from all other persons.”

⁷³⁰ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 28. Considering that the applicants made a “fundamental mistake” in non contesting their individual concern but in asking the CJEU to accept a new ground for admissibility which could not be accepted by the CJEU in light of the separation of competences between the CJEU and national jurisdictions see CASSIA, “Quelles perspectives pour la recevabilité du recours en annulation des particuliers?”, 2002, at 2827.

⁷³¹ Para. 33.

⁷³² Paras. 38-39. See also Case C-263/02 P, *Commission/Jégo-Quéré*, [2004] ECR I-3425, para. 29.

⁷³³ Para. 40. See also Case C-263/02 P, *Commission/Jégo-Quéré*, [2004] ECR I-3425, para. 30. Noting that the CJ adopted a strict approach to the system of judicial protection see BERROD; MARIATTE, “Le pourvoi dans l’affaire *Unión de Pequeños Agricultores c/Conseil*”, 2002, at 8. In fact, the authors note that in *UPA* the CJ did not mention the alternative of the action for damages pursuant to current Article 340 TFEU. This left open the question of knowing if by not mentioning it the CJ accepted that such form of action does not serve as an alternative to the action for annulment or if it considered “superabundant” to mention it. See *infra* Section 1.2.1(c).

⁷³⁴ Also noting that the CJEU does not point to the means that have to be available in national legal orders and does not dwell on their effectiveness see GILLIAUX, “L’arrêt *Unión de Pequeños Agricultores*”, 2003, at 181.

respected, that *duty cannot go so far as to oblige it to adopt the Parliament's position and bring an action for annulment* which the Commission itself considers unfounded.

It follows from the foregoing that the *existence of those various legal remedies is not sufficient to guarantee, with certainty and in all circumstances*, that a measure adopted by the Council or the Commission in disregard of the Parliament's prerogatives will be reviewed (emphasis added).⁷³⁵

Such analysis was clearly missing both in the CJ's *UPA* and *Jégo-Quéré* decisions.⁷³⁶ It seems that, when the individuals' standing is at stake, the CJ considers that "not each avenue of review individually, but rather the *sum of them* guarantees the right to effective judicial protection."⁷³⁷ Hence, the CJ prefers a *globalizing* approach to the individual's right of access to justice, where an effective remedy is guaranteed as long as individuals have access to a court whichever court it is.⁷³⁸

The CJ ended its ruling in *UPA* by stressing the *dicta* included in previous case-law: "that not even the danger of an infringement of the principle of effective judicial protection can justify a departure from the system of judicial protection constituted by the Treaties."⁷³⁹ Accordingly, the CJ does not accept an interpretation of the system of remedies, "to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue."⁷⁴⁰ This position is justified on the grounds that such an interpretation would require the Union courts, in each individual case, to examine and interpret national procedural law, which would go beyond their jurisdiction when reviewing the legality of Union measures. Furthermore, direct access to the CJEU cannot be dependent on the heterogeneity of the conditions available in national legal orders to address national courts as that would imply the existence of a "*droit d'accès au juge communautaire à géométrie variable*."⁷⁴¹ In this particular point, the AG and the CJ agreed.⁷⁴²

In sum, a modification of the traditional interpretation of the notion of individual concern is not deemed necessary because there are *alternative routes*. Consequently, the CJ considers that its strict interpretation of *locus standi* requirements is legitimate,⁷⁴³ and refuses to operate outside the *Plaumann* formula. Indeed, although acknowledging that the requirement of direct and individual concern must be interpreted *in light of the principle of effective judicial protection* by taking account of the various circumstances that may distinguish an applicant individually⁷⁴⁴, "such an interpretation

⁷³⁵ Paras. 16-20.

⁷³⁶ Although the GC had tried to explain why alternative avenues would not work in the case *sub judice*. See paras. 43-47 of the GC's decision.

⁷³⁷ KOCH, "Locus Standi of private applicants under the EU Constitution", 2005, at 513, 514.

⁷³⁸ BERROD; MARIATTE, "Le pourvoi dans l'affaire *Unión de Pequeños Agricultores c/Conseil*", 2002, at 9.

⁷³⁹ SCHWARZE, "The Legal Protection of the Individual against Regulations in European Union Law", 2004, at 295. See also ARNULL, "April Shower for *Jégo-Quéré*", 2004, at 287.

⁷⁴⁰ Para. 43. See Case C-263/02 P, *Commission/Jégo-Quéré*, [2004] ECR I-3425, para. 33.

⁷⁴¹ BERROD; MARIATTE, "Le pourvoi dans l'affaire *Unión de Pequeños Agricultores c/Conseil*", 2002, at 7.

⁷⁴² AG JACOBS had added that "to accept that *locus standi* under the fourth paragraph of Article 230 EC may depend on national law – which is likely to differ as between Member States and to develop over time – would inevitably lead to inequality and a loss of legal certainty in an area of law already marked by considerable complexity (para. 53)." See *infra* Part II, Chapter 2, Section 2.1.6.

⁷⁴³ KOCH, "Locus Standi of Private Applicants under the EU Constitution", 2005, at 514.

⁷⁴⁴ See, for example, Joined Cases 67, 68 and 70/85, *Van der Kooy/Commission*, [1988] ECR 219, para. 14; Case C-

cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.”⁷⁴⁵ This would, in the CJEU’s view, require an amendment to the Treaty.⁷⁴⁶ By holding that “any enhancement or extension of the judicial protection against acts of general application (...) has to respect the boundaries imposed by the wording of Art. 230 para. 4 EC”⁷⁴⁷ the judiciary “limits its own competence to interpret the law in favour of judicial protection to the extent which is justifiable without disregarding the wording of the Treaties.”⁷⁴⁸ Thus, the approach of the CJEU is said to be “in conformity with the traditional case-law and the general principles of the possibilities and limits of judge-made law.”⁷⁴⁹ Fully in line with its decision in *UPA*, the CJ considered in *Jégo-Quéré* that the interpretation of the condition of individual concern made by the GC, according to which “a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him”⁷⁵⁰, had the effect of removing all meaning from the requirement of individual concern set forth in current Article 263(4) TFEU and could not therefore be accepted.⁷⁵¹

III. The contrast between the AG’s Opinion in *UPA* and the CJ’s judgement is outstanding. In fact, AG JACOBS began its text with a reference to the right to effective judicial protection which “framed the entirety of his subsequent analysis.”⁷⁵² KOMBOS noted that effective judicial protection not only served as a yardstick for assessing whether the case-law on individual concern needs reconsideration but it also connected the available options with preliminary references⁷⁵³ and acquired a status comparable to a Rule of Recognition.⁷⁵⁴ It was in light of this fundamental right that the AG explained why indirect access through the preliminary rulings procedure was inadequate to ensure judicial protection to private parties. It was also in light of this right, by

358/89, *Extramet/Council*, [1991] ECR I-2501, para. 13, and Case C-309/89, *Codominu/Council*, [1994] ECR I-1853, para. 19). In Case C-167/02 P, *Rothley and others/Parliament*, [2004] ECR I-3149, decided two days before *Jégo-Quéré* the CJEU stated that: “[i]t must be borne in mind, as the Advocate General has noted in paragraph 62 of his Opinion, that the rules determining whether the Community Courts have jurisdiction, as regards either the commencement of direct actions before those Courts or where the Court is seized by way of a reference for a preliminary ruling made by a national court, must be interpreted *above all* in the light of the principle of effective judicial protection (*Union de Pequeños Agricultores v. Council*, paragraphs 41, 42 and 44) (para. 50).”

⁷⁴⁵ Para. 44.

⁷⁴⁶ One may question if that was indeed the case, as the expression “individual concern” may entail very different meanings. Moreover, the decisions in *Les Verts* or *Foto-Frost* show that the CJ is willing to make judicial revisions of the Treaties in other instances.

⁷⁴⁷ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 294. See also CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 497.

⁷⁴⁸ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 297.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ Para. 51.

⁷⁵¹ Considering that the CJ’s judgments in these cases show that the rhetoric of completeness generated by *Les Verts* lost through time part of its argumentative force by failing to persuade the Court itself to expand its established interpretation of direct and individual concern see ALEMANN, “What Has Been, and What Could Be, Thirty Years after *Les Verts/European Parliament*”, 2010, at 332.

⁷⁵² CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 497.

⁷⁵³ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 3.

⁷⁵⁴ *Ibid.*, at 4.

demonstrating that other alternatives were not viable, that the AG concluded that a new test on standing was necessary. Hence, the right to effective judicial protection “provided the foundation for the analysis, infused the detailed stages of the reasoning and was central to the conclusion.”⁷⁵⁵ CRAIG considered the AG’s Opinion in *UPA* “a classic example of the use of background rights and principles as a mechanism for the re-assessment of existing doctrine.”⁷⁵⁶ It was “clear that placing the right to effective judicial protection at the centre of the analysis was a powerful force in the demand for re-evaluation of the case law in this area.”⁷⁵⁷ Hence, AG JACOBS demanded the CJEU to “reorganise its priorities”⁷⁵⁸ and reverse not only the *Plaumann* formula but also, and more significantly, the *Salamander* approach.⁷⁵⁹

Also in the GC’s ruling in *Jégo-Quéré*, the right to effective judicial protection appeared as a pivotal element.⁷⁶⁰ In fact, not only the GC mentioned Article 47 of the Charter of Fundamental Rights⁷⁶¹, but it also assessed *in concreto* if the preliminary rulings procedure and the action for damages constituted genuine alternative routes for obtaining judicial protection.⁷⁶² Based on this analysis the GC held that:

“[t]he inevitable conclusion must be that the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and the second paragraph of Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation (emphasis added).”⁷⁶³

Aware that “such a circumstance cannot constitute authority for changing the system of

⁷⁵⁵ CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 499.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Ibid.* Within the CJEU the views of AG JACOBS have subsequently been expressly supported by AG GEELHOED in his Opinion in Case C491/01, *British American Tobacco (Investments) and Imperial Tobacco*, [2002] ECR I-11453, para. 50. Here, the AG stated that “a conclusion – leading to inadmissibility – would mean that the Community legal order does not provide effective safeguards for the claimants’ rights. As a result, no account would be taken of this important general principle of law that has been consistently recognised by the Court as underlying the constitutional traditions common to the Member States. This principle of law is laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’) and is expressed for the European Union in Article 47 of the Charter of Fundamental Rights (para. 47).”

⁷⁵⁸ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 3.

⁷⁵⁹ AG JACOBS would endorse the same views in his Opinion in *Jégo-Quéré*, although the structure of the latter is completely inverted and the centrality of the right to effective judicial protection and the inadequacy of preliminary references have been lost. See KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 12.

⁷⁶⁰ See also VAN DEN BROEK, “A Long Hot Summer for Individual Concern?”, 2003, at 61-79. Noting that the GC placed the precedents on effective judicial protection (*Les Verts/Johnston* and *Area Cova/Salamander*) in a higher hierarchical position regarding the standing precedent (*Plaumann*) see KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 6. Thus, the GC presented a new test on standing “in a cloth of deference to the ECJ’s jurisprudence and the logical structuring of hierarchy between different factors.” The GC softened the Opinion by avoiding the conclusion that previous case-law breached the right to effective judicial protection.

⁷⁶¹ Noting that the lack of reference to such provision in the CJ’s judgment shows that the Court refuses itself to engage in a discussion which it deems of a constitutional nature see BERROD; MARIATTE, “Le pourvoi dans l’affaire *Unión de Pequeños Agricultores c/Conseil*”, 2002, at t 8. Considering that the GC’s decision in *Jégo-Quéré* constituted a new illustration of the influence of fundamental rights on the European system of remedies see CASSIA, “Continuité et rupture dans le contentieux de la recevabilité du recours en annulation des particuliers”, 2002, at 549. Why the GC did not mention the Charter in the case of *UPA* remains open to speculation.

⁷⁶² Paras. 45, 46.

⁷⁶³ Para. 47. This understanding was somehow surprising, given that a few weeks earlier the GC had confirmed its traditional approach to admissibility by dismissing the case in Case T-47/00, *Rica Foods/Commission*, [2002] ECR II-113.

remedies and procedures established by the Treaty”, and that it could not overcome the wording of the Treaty, the GC, based on AG JACOBS’ Opinion in *UPA*, saw “no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.”⁷⁶⁴ In light of these considerations, the GC proposed a new test on standing of private parties, *expressly framed* to “ensure effective judicial protection for individuals.”⁷⁶⁵ Nonetheless, it has been noted that there is a fundamental difference between the approach of the GC and the Opinion of AG JACOBS.⁷⁶⁶ Whereas the AG made prior case-law obsolete, the GC subtly completed and refined what could have been deducted from earlier case-law, adding another case of differentiation of the individual. In fact, in the GC’s decision the right to effective judicial protection appeared as subsidiary to all other criteria established in previous case-law. It seems that according to the GC it is only when the applicant fails to demonstrate that he/she is individually concerned under the general criteria underlying the test for individual concern that the right to effective judicial protection becomes more relevant.⁷⁶⁷ Notwithstanding, by integrating the idea of a “complete system of legal remedies and procedures” into the examination of individual concern the GC went further than the CJ in this respect.⁷⁶⁸

In fact, as seen above, the CJ operated under a completely different logic both in *UPA* and *Jégo-Quére*. Here, *Plaumann* was the priority and effective judicial protection deserved subsidiary consideration. The CJ “stood firm, choosing instead to beat the traditional drum of the Treaty’s complete system of remedies”⁷⁶⁹ established in *Les Verts* which is not subject to controversy or discussion. Hence, if an individual cannot bring an action before the CJEU pursuant to current Article 263(4) TFEU it should look for effective judicial protection of his/her rights in national courts. Truth be said, it seems that the CJ does not acknowledge the existence of a denial of justice.⁷⁷⁰ The CJ made a “vain attempt”⁷⁷¹ to show that the existing standing requirements did not have the effect of making challenges to Union acts impossible, as it is up to the Member States to establish a system of legal remedies and procedures which ensures respect for the right to effective judicial protection within the decentralised system of legal protection in the Union.⁷⁷² According

⁷⁶⁴ Para. 49. See also para. 59 of Opinion of AG JACOBS in *UPA*.

⁷⁶⁵ See paras. 48-51. ENCHELMAIER noted that the GC’s interpretation fits an established interpretative pattern, that of teleological interpretation of Union law: the purpose of Article 230(4) TEC is to ensure rights under Union law. The interpretation of this provision must be guided by this purpose. See ENCHELMAIER, “No One Slips Through the Net”, 2005, at 212.

⁷⁶⁶ CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 242

⁷⁶⁷ CASSIA, “Continuité et rupture dans le contentieux de la recevabilité du recours en annulation des particuliers”, 2002, at 554, drawing attention to para. 51 of the judgement which starts by stating: “[i]n the light of the foregoing, and in order to ensure effective judicial protection for individuals...”

⁷⁶⁸ *Ibid.*, at 555.

⁷⁶⁹ HEFFERNAN, “Effective Judicial Remedies”, 2006, at 291.

⁷⁷⁰ See also ELIANTONIO; KAS, “Private applicants and the annulment procedure”, 2010, at 123.

⁷⁷¹ ARNULL, “Plus Ça Change...”, 2002, at 510.

⁷⁷² This passage can also be read as an appeal to the Member States to relax the restrictive version of ex-Article 230(4) TEC by a Treaty amendment and to grant more judicial protection against legislative and administrative acts of general application. See GROUSSOT, “The EC System of Legal Remedies and Effective Judicial Protection”, 2003, at 221; LANG, “Actions for Declarations that Community Regulations Are Invalid”, 2003, at 102; SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 297. Noting that the Court refuses to engage in a constitutional debate see ALBORS-LLORENS, “The Standing of Private Parties to Challenge

to the CJ, Member States are obliged to provide for such protection as a consequence of the obligations set forth in current Article 4(3) TEU, which establishes the principle of loyal cooperation. In light of this reasoning, “the decentralised judicial protection granted by the Member States could still justify the high criteria for admissibility of direct judicial protection against acts of general application without a violation of the principle of effective judicial protection.”⁷⁷³ In other words, the burden to provide a remedy rests in national courts.⁷⁷⁴ Thus, direct access to the CJEU remains an exception and the responsibility to ensure effective judicial protection rests exclusively in the hands of national authorities, notably national courts.⁷⁷⁵ In this context, the CJ opts for a *status quo* approach⁷⁷⁶, by refusing to inquire if private applicants are indeed effectively protected in national legal orders. According to the CJ, it is undisputable that the system of judicial protection established under the Treaties offers *sufficient* protection.⁷⁷⁷ Hence, the rule of law argument serves to *create* the “complete system of remedies” which is based on national courts and preliminary references: effectiveness of protection is equated with access to a court and it is presumed at the Union level.⁷⁷⁸

1.1.5 The Case-Law Favouring Objective and Institutional Dimensions of the System of Judicial Review

I. It has been noted that one of “the most important anomalies”⁷⁷⁹ arising from the restrictive interpretation adopted by the CJEU –mostly the CJ – on the standing requirements of private parties under the action for annulment lies with the fact that the Court has not hesitated to adopt a generous and flexible interpretation of current Article 263 TFEU regarding other elements of judicial review in the EU.⁷⁸⁰ In fact, it is often considered that “in some respects, the Court has

Community Measures”, 2003, at 91. The author notes that the the CJ could be consciously deciding to emphasise the role of Member States as main actors in the evolution of Union law and in the resolution of questions of such clear weight. The Court’s judgments in Case C-249/96, *Grant/South-West Trains*, [1998] ECR I-621, and in Case C-376/98, *Germany/European Parliament and Council*, [2000] ECR I-8419, on the Tobacco Advertising Directive, as well as its Opinion 2/94 on the Accession to the ECHR would be indicators that there are certain Treaty boundaries that the Court is not prepared to cross. Noting that after Joined Cases C-267 and 268/91, *Keck and Mithouard*, [1993] ECR I-6097 the CJ may have considered better to refrain from another jurisprudential revolution see BERROD; MARIATTE, “Le pourvoi dans l’affaire *Unión de Pequeños Agricultores c/Conseil*”, 2002, at 9.

⁷⁷³ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 295.

⁷⁷⁴ USHER, “Direct and Individual Concern”, 2003, at 584; LANG, “Developments, issues, and new remedies”, 2003, at 1904.

⁷⁷⁵ See BERROD; MARIATTE, “Le pourvoi dans l’affaire *Unión de Pequeños Agricultores c/Conseil*”, 2002, at 8; ALBORS-LORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 87.

⁷⁷⁶ WAELBROECK, “Le droit au recours juridictionnel effectif du particulier”, 2002, at 5.

⁷⁷⁷ As PICOD has put it, “il semble que la juridiction communautaire tienne pour suffisamment assuré, en vertu des textes, la protection juridictionnelle devant elle et qu’elle ne s’autorise à intervenir au titre de l’interprétation de certaines dispositions ambiguës ou, exceptionnellement, pour remédier à une carence non admissible.” See PICOD, “Le droit au juge en droit communautaire”, 1998, at 146.

⁷⁷⁸ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 9.

⁷⁷⁹ Opinion of AG JACOBS in *UPA*, para. 67.

⁷⁸⁰ The Court is used to flexible interpretations of the Treaties. See, for example, the Court’s interpretation of the concept of measures having equivalent effect to quantitative restrictions in Article 28 TEC in Case 8/74, *Procureur du Roi/Dasonville*, [1974] ECR 837, para. 5; or of the concept of worker in Article 39 EC in Case 53/81, *Levi/Staatssecretaris*, [1982] ECR 1035, paras. 9-17; the decisions in Case 2/74, *Reyners/Belgian State*, [1974] ECR 631 on the freedom of establishment, and in Case 33/74, *Van Binsbergen/Bedrijfsvereniging voor de Metaalnijverheid*, [1974] ECR 1299, on the freedom to provide services.

taken a very liberal approach”⁷⁸¹ to the interpretation of such provision. The standing requirements of private parties and notably the notion of individual concern has been, probably, the only aspect which the Court refuses to interpret broadly, thereby creating significant obstacles to direct access by private parties to the Union courts. As stated above, it is submitted that such mind-set reflects an *objectivist* and *institutional* approach to the system of judicial review established under the Treaties.

II. Hence, the CJEU has not hesitated to interpret broadly the terms of its *own jurisdiction*. For instance, the Court has adopted a flexible view when considering on what grounds the validity of Union measures can be challenged. The grounds established in Article 263 TFEU were inspired in French administrative law. Except for the “violation of the present Treaty” and of “every rule regarding its application”, which very much resemble the grounds of review foreseen in national legal systems to control the constitutionality of laws, all other grounds therein established are present in the so-called *recours pour excès de pouvoir*, which is “the core of the system of judicial review of administrative action”⁷⁸² in France, and was imported by other European continental systems. Notwithstanding, regarding the grounds based on the “infringement of the Treaty” or of “any rule relating to its application”, the CJEU has not hesitated to adopt a broad approach. Hence, the latter includes all binding provisions of the Union legal order, from the Treaties themselves and acts of secondary Union law, and extends to provisions of international law (agreements concluded before the TEU, customary international norms and agreements concluded by the Union itself) and to a body of made up general principles of Union law, such as the principle of proportionality, *ne bis in idem*, legitimate expectations, legal certainty, equality, and a extensive catalogue of fundamental rights.⁷⁸³

More significantly, if in the beginnings of European integration, the existence of different provisions in the initial version of the Treaties caused difficulties,⁷⁸⁴ the CJEU had no difficulty in accepting that an action for annulment based on the former TEEC/TEC could embody pleas referring to infringements of provisions of other Treaties.⁷⁸⁵ Hence, in *Greece/Council*⁷⁸⁶ the Court stated that:

“[t]he need for a *complete and consistent review of legality* requires that provision [Article 173 TEEC] to be construed as not depriving the Court of jurisdiction to consider, in proceedings for the annulment of a measure based on a provision of the EEC Treaty, a submission concerning the infringement of a rule of the EAEC or ECSC Treaties (emphasis added).”⁷⁸⁷

⁷⁸¹ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 17.

⁷⁸² ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 16.

⁷⁸³ See LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 306; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 339, mentioning the relevant case-law.

⁷⁸⁴ HARTLEY, *The Foundations of European Community Law*, 2007, at 339.

⁷⁸⁵ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 305.

⁷⁸⁶ Case 62/88, *Greece/Council*, [1990] ECR I-1527.

⁷⁸⁷ Para. 8. Noting the importance of the “coherence” argument see BERTEA, “Looking for Coherence within the European Community”, 2005, at 167 *et seq.*

Later, in *Busseni*⁷⁸⁸, the CJEU, taking into consideration the need to ensure the rule of law, accepted a batch of preliminary references regarding the interpretation of the TECSC – a possibility that was not foreseen in the Treaty of Paris. Here, the CJEU based its decision essentially on three main arguments: (i) the *parallelism* between Articles 31 TECSC, 164 TEC and 136 TEAEC; (ii) the fact that interpretation and appraisal of validity were related matters; and (iii) the *inconsistency* of leaving the interpretation of the TECSC solely in the hands of national courts.⁷⁸⁹ This case is especially important as it established that as far as the jurisdiction of the CJEU is concerned, *the principle of conferral should not be understood strictly*, which was also later confirmed in the case of *Zwartveld*.⁷⁹⁰ Here the CJEU admitted a request by a national court to give orders to the Commission to cooperate with national judicial proceedings regardless of the fact that such action was not foreseen in the Treaties. Based on the need to *ensure the respect of the duty of loyal cooperation* between the institutions and the Member States⁷⁹¹, the CJEU accepted jurisdiction to review the case, converting the request of the national court into a preliminary ruling on interpretation. The decision in *Foto-Frost*⁷⁹² can also be considered as a manifestation of such trend.⁷⁹³

The difficulties arising from the existence of three different Treaties were particularly evident regarding acts adopted under all of them. The issue was discussed in *Luxembourg/Parliament*⁷⁹⁴, which was brought before the entry into force of the TEU. In the original version of the Treaties, acts of Parliament could only be challenged under Article 38 TECSC and not under the TEEC nor under the TEAEC. Consequently, the European Parliament had considered the action brought by Luxembourg against Parliament's decision on the seat of the institutions of the EC to be inadmissible, because none of the Treaties gave a right of action in respect of the measures of Parliament in the case *sub judice*. In fact, Parliament sustained that “as regards Article 38 of the ECSC Treaty that is so because in adopting the contested resolution the Parliament made a single and indivisible use of its powers under the three Treaties so that the resolution [could not] be declared void solely in respect of the ECSC Treaty.”⁷⁹⁵ Thus, following Parliament's views, the decision would not be reviewable under *any* Treaty. However, the CJEU held that it could annul the decision solely on the basis of such provision⁷⁹⁶ stating that:

⁷⁸⁸ Case 221/88, *ECSC/Busseni*, [1990] ECR I495. In Case 106/77, *Amministrazione delle finanze dello Stato/Simmenthal*, [1978] ECR 629 the CJEU considered that it had jurisdiction to interpret provisions of the GATT agreement although the wording of the Treaties did not provide for such possibility.

⁷⁸⁹ Noting that the CJEU found a *lacuna* in the TECSC and filled it in using the analogy with the Treaties of Rome see RAMOS, “Reenvio prejudicial e relacionamento entre ordens jurídicas na construção comunitária”, 1993, at 145. The CJEU would later decide “in reverse” in Case 314/85, *Foto-Frost/Hauptzollamt Lübeck-Ost*, [1987] ECR 4199. See *infra* Section 1.2.2(b).

⁷⁹⁰ Case 2/88, *Criminal proceedings against Zwartveld and others*, [1990] ECR I-3365.

⁷⁹¹ See para. 18.

⁷⁹² Case 314/85, *Foto-Frost/Hauptzollamt Lübeck-Ost*, [1987] ECR 4199.

⁷⁹³ See *infra* Section 1.2.2(b).

⁷⁹⁴ Case 230/81, *Luxembourg/Parliament*, [1983] ECR 255. Previously, in Case 208/80, *Lord Bruce of Donington/Aspden* [1981] ECR 2205, which was brought under Article 177 of the TEEC, the Court examined and by implication held to be lawful the rules adopted by the Parliament to govern the reimbursement of expenses and the indemnities paid to its members.

⁷⁹⁵ Para. 14.

⁷⁹⁶ The CJEU did not annul the decision in this particular case, but did it later on in Case 108/83, *Luxembourg/Parliament*, [1984] ECR 1945. See also Case 101/63, *Wagner/Fohrmann and others*, [1964] ECR 381; Case 222/83, *Commune de Differdange/Commission*, [1984] ECR 2889.

“[s]ince the single Parliament is an institution common to the three Communities it necessarily acts in the field of the three Treaties including that of the ECSC Treaty when it adopts a resolution relating to its operation as an institution and the organization of its secretariat. It follows that *the jurisdiction of the Court* and the proceedings provided by the first paragraph of Article 38 of the Treaty are applicable to measures such as the contested resolution which relate *simultaneously and indivisibly to the spheres of the three Treaties* (emphasis added).”⁷⁹⁷

Hence, it appears that “where *an institution’s activities* are not confined to one Treaty alone, the remedies given by any relevant Treaty can be used to challenge the measure”⁷⁹⁸ and that “if an act is annulled under one Treaty, it is annulled for all relevant Treaties.”⁷⁹⁹ More significantly, the CJEU considered that since it had jurisdiction under the TECSC there was “[n]o need to consider the question whether the principles appertaining to observance of the law and review in that respect by the Court as embodied in Article 164 of the EEC Treaty and Article 136 of the TEAEC require that Article 173 of the EEC Treaty and Article 146 of the EAEC Treaty be interpreted as meaning that the Parliament may be a party to proceedings before the Court.”⁸⁰⁰ Hence, by avoiding the question of passive *locus standi* of the European Parliament under the Rome Treaties, the CJEU reinforced the scope of judicial protection.⁸⁰¹

III. The issue of passive standing of Parliament would later be dealt with in *Les Verts* where the Court accepted to review two measures adopted by the European Parliament, regardless of the fact that, at the time, Article 173 TEEC referred only to acts of the Council and the Commission.⁸⁰² Here, the *spirit* and the *system* of the Treaties were considered fundamental arguments in allowing such challenge.⁸⁰³ It has been considered that *Les Verts* was a “particularly

⁷⁹⁷ Para. 19.

⁷⁹⁸ HARTLEY, *The Foundations of European Community Law*, 2007, at 339.

⁷⁹⁹ *Ibid.* See also Case 222/83, *Commune de Differdange/Commission*, [1984] ECR 2889, para. 6: “[i]n its judgment of 10 February 1983 (...) the Court held in essence that if the contested measure relates simultaneously and indivisibly to the spheres of more than one Treaty, an action is admissible to the extent to which the jurisdiction of the Court and the remedies provided for by the relevant provisions of one of the Treaties are applicable to the measure in question.”

⁸⁰⁰ Para 20.

⁸⁰¹ AG MANCINI in *Les Verts*, referring to the decision in Case 230/81, *Luxembourg/Parliament*, [1983] ECR 255, said: “[I] would however draw the Court’s attention to a sentence which strikes me as highly significant. After referring to Articles 173 and 146, the judgment points out that ‘there is no express provision in those articles for active or passive participation of the Parliament in the proceedings before the Court’. Am I wrong in saying that the emphasis in that *obiter dictum* is on the adjective ‘express’? I would not think so. It must therefore be accepted that the decision under consideration undeniably points in the direction of the interpretation which I favour” (para. 7).” The AG also pointed to CJEU’s first of the two “Isoglucose” judgments (Case 138/79, *Roquette Frères/Council*, [1980] ECR 3333; Case 139/79, *Maizena/Council*, [1980] ECR 3393) where the Court decided that the Parliament’s intervention was admissible on the basis of Article 37 of the Statute of the Court, rejecting the Council’s view according to which such intervention should be equated with the right of action.

⁸⁰² BEBR, “The Standing of the European Parliament in the Community System of Legal Remedies”, 1990, at 171, analysing the evolution of the Parliaments position in the system of judicial control over Union action. It is commonly held that Parliament acts were excluded from judicial review given the limited powers granted to Parliament under the TEEC. A *contrario*, the TECSC allowed for the challenge of Parliament’s actions. Considering that this reasoning is not entirely convincing as Parliament could under the TEEC adopt acts which produced legal effects *vis-à-vis* third parties see JACQUÉ, “*Les Verts v The European Parliament*”, 2010, at 321.

⁸⁰³ Noting that Parliament abstained from raising any objection of admissibility as it would make it easier to convince the Court to grant standing to sue in a subsequent case see JACQUÉ, “*Les Verts v The European Parliament*”, 2010, at 317. In contrast, Parliament may have assumed that the Court would follow its traditional jurisprudence and find that *Les Verts* was not individually concerned.

audacious”⁸⁰⁴ decision as the CJEU disregarded the wording of the Treaties in order to fill in a gap of judicial protection. Scholars have qualified it as a judicial revision of the Treaty⁸⁰⁵ and the decision has been pointed as a “clear example of a very liberal interpretation by the Court even against the wording of a Treaty provision, in order to uphold the rule of law in the EC.”⁸⁰⁶

Some scholars consider that in cases where the Treaties are silent, it is possible to say that the Court commonly fills in *lacunae juris*, acting as a constitutional court would.⁸⁰⁷ Such *lacunae* are filled with recourse to superior principles of law deduced from an interpretation of the whole European legal order, and such operation involves a genuine constitutional law-making exercise.⁸⁰⁸ Accordingly, in *Les Verts* the CJEU seems to have *interpreted* the silence of the Treaties regarding the Parliament’s standing as not excluding such possibility and, by doing this, it acknowledged the existence of a *lacuna*.⁸⁰⁹ It is doubtful, however, whether the Court was in fact filling in a normative *lacuna proprio sensu*. Surely, the Court could have adopted another orientation. As the possibility of challenges against acts of the Parliament was not foreseen in the Treaties, one could easily assume that Member States intentionally wanted to exclude such possibility, or at least gave a signal in that direction. To contradict or overcome such exclusion would amount to a *contra* or *praeter legem* interpretation of the Treaties which is still different from filling in *lacunae*. Indeed, one thing is to find a gap in a system of law and fill it in with recourse to general principles deduced from and found within the system itself. Another thing is to consider that, by being silent, the Treaties provided a solution – and consequently there is no *lacuna* – but such solution is deemed unacceptable in light of superior principles of law that govern such system. The practical consequences of this distinction may not be significant, but from a conceptual point of view these two approaches can reflect a more or less intensive judicial activism in the construction of the normative system. In my view, the reasoning of the CJEU in *Les Verts* was not sufficiently clear to draw a safe conclusion on which approach the Court preferred. In any case, what should be highlighted from that judgment is the fact that, *whatever the judicial exercise involved*, the CJEU did not hesitate to broaden the scope of judicial review based on *objective* and *systemic* considerations and the need to ensure the rule of law at the institutional level and the balance of powers established in the Treaties. It is significant that the right to effective judicial protection has not even once been mentioned in such a landmark decision. In contrast, the references to the institutional balance between the institutions and the need to ensure a “complete system of judicial review” lie in the heart of the decision.⁸¹⁰

⁸⁰⁴ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 18.

⁸⁰⁵ JACQUÉ, “Arrêt du 13 de avril 1986, *Parti écologiste ‘Les Verts’ c. Parlement européen*” 1986, at 503; JACQUÉ, “*Les Verts v The European Parliament*”, 2010, at 318: “[t]he pre-eminence of the rule of law thus empowers the Court to implicitly revise the treaty so that the Court can play its full role.”

⁸⁰⁶ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 21, noting that the stand point of the Court was repeated in Case 221/86 R, *Groupe des droites européennes/Parliament*, [1986] ECR 2579, para. 10.

⁸⁰⁷ CONSTANTINESCO, “The ECJ as a Law-Maker”, 2000, at 76. *Per contra*, considering that the CJEU could not acknowledge *locus standi* of Parliament against the wording of the Treaties see MEGRET [et al.], *Le droit de la Communauté Économique Européenne*, 1983, at 91.

⁸⁰⁸ CONSTANTINESCO, “The ECJ as a Law-Maker”, 2000, at 77 *et seq.*

⁸⁰⁹ *Ibid.*, at 76.

⁸¹⁰ Later, AG DARMON considered in *Maurisen and others* (Joined Cases 193 and 194/87, *Maurissen and Union syndicale/Court of Auditors*, [1989] ECR 1045) that the *Les Verts* analysis could “be applied without limitation to review of

IV. The delegation of powers to other entities set up by the institutions also raised problems of judicial review and passive *locus standi*. In *Snupat*⁸¹¹ the CJEU accepted that the decisions adopted by the *Caisse de péréquation de ferrailles importés* (CPFI) – a body set up by the ECSC High Authority for the administration of a subsidy system for steel scrap – were reviewable acts, under Article 33 TECSC. Here the CJEU noted that:

“[i]n this regard there must be taken into consideration the fact that the CPFI was an *organ of a financial arrangement set up by the High Authority* and that it *held its powers from the latter*.

Moreover, as has been found above, notifications from the CPFI in fact constituted *the final administrative decision*, which the High Authority could have avoided if it had made provision for administrative appeals against the deliberations of the Brussels agencies under clearly defined conditions.

Therefore, it must be accepted – and to do otherwise *would be to deprive the undertakings of the protection* afforded them by Article 33 of the ECSC Treaty – that the decisions adopted by the CPFI (...) rank as decisions of the High Authority and, as such, are open to applications for annulment under the conditions laid down in Article 33 (emphasis added).”⁸¹²

This case-law would later apply to other situations where the Commission delegated powers to external bodies.⁸¹³ More recently, the CJEU accepted in *Sogelma*⁸¹⁴ a challenge brought against a batch of decisions of the European Agency for Reconstruction (EAR) relating to cancellation of a tender procedure for a public works contract and the organisation of a tender procedure. Here, the CJEU stated that the fact that the EAR was established on the basis of secondary legislation and was not among the Union institutions listed in the Article 230(1) TEC, and that such legislation did not provide that the CJEU had jurisdiction to hear actions for annulment against other decisions taken by the EAR, did not preclude review by the Court under Article 230 TEC. Recalling and citing *Les Verts*, the Court held that:

“[t]he general principle to be elicited from that judgment is that any act of a Community body intended to produce legal effects *vis-à-vis* third parties must be open to judicial review. It is true that *Les Verts*, paragraph 24, refers only to Community institutions and the EAR is not one of the institutions listed in Article 7 EC. None the less, the situation of

measures adopted by the Court of Auditors: “[t]he *ratio decidendi* of the Court’s judgment in that case [*Les Verts*] in my opinion renders otiose any discussion whether the Court of Auditors is an institution in the strict sense. The need to review the legality of measures can be no less pressing in the case of a measure adopted by a “quasi-institution” or “an auxiliary body vested with specific powers of an administrative nature.” (...) the absence of provisions concerning the susceptibility of its acts to litigation follows logically from their very nature. On the other hand, *if the Court of Auditors feels it necessary to take measures which produce definitive legal effects, the judicial review available in the Community would be incomplete if the Court declined to examine them* (paras. 53-57).” The CJEU has however excluded actions brought against the European Investment Bank. See Case T-460/93, *Tête and others/EIB*, [1993] ECR II-1257.

⁸¹¹ Joined Cases 32 and 33/58, *Snupat/ECSC High Authority*, [1959] ECR 127.

⁸¹² Joined Cases 32 and 33/58, *Snupat/ECSC High Authority*, [1959] ECR 127, at 137, 138.

⁸¹³ Questioning if it applied to situations where the Commission delegates powers to Member States, see HARTLEY, *The Foundations of European Community Law*, 2007, at 341. See also Joined Cases T-369/94 and 85/95, *DIR International Film and others/Commission*, [1998] ECR II-357, paras. 55-56; Case T-133/03, *Schering-Plough/Commission and EMEA*, unpublished.

⁸¹⁴ Case T-411/06, *Sogelma/EAR*, [2008] ECR II-2771.

Community bodies endowed with the power to take measures intended to produce legal effects *vis-à-vis* third parties is *identical* to the situation which led to the *Les Verts* judgment: it cannot be acceptable, in a Community based on the rule of law, that such acts escape judicial review (emphasis added).⁸¹⁵

These views were also consistent with the decision in *Mills/EIB*.⁸¹⁶ Here, in spite of the fact that Article 179 TEEC gave the Court jurisdiction in disputes between the Community and its servants, and that the European Investment Bank was a legal person distinct from the Community itself, the CJEU decided that “the staff of the Bank are (...) placed in a special legal situation identical to that of the staff of the institutions of the Community.”⁸¹⁷ Such identical situation allowed them to bring actions before the Court.

V. Furthermore, the Court has not hesitated to broaden access to justice by institutional actors. Prior to the entry into force of the TEU, the first paragraph of ex-Article 173 of the TEEC did not mention the European Parliament, which seemed quite unfair as after *Les Verts*, said institution could have its acts challenged by other institutions or by private parties.⁸¹⁸ Thus, in the latter case Parliament based the inadmissibility of the action on its lack of capacity to bring proceedings. Such absence demanded that an “essential balance” should be maintained between Parliament’s powers and obligations. At the hearings Parliament was even more assertive in invoking the “*argument du parallélisme*”⁸¹⁹, holding that a broad interpretation of Article 173 TEEC implied, in order for the system of judicial review laid down therein to be consistent, that it had the power to contest the acts of the other institutions: *cuius incommoda eius et commoda*. Hence, the capacity to sue and be sued should “go hand in hand: the Parliament cannot be sued unless it itself has the capacity to sue.”⁸²⁰

The first position of the CJEU in this respect was, however, a bit discouraging. In the *Comitology*⁸²¹ case the Court rejected the Parliament’s claim for *locus standi*, disregarding the principle of institutional balance and the rule of law.⁸²² However, one year later in the *Chernobyl* case, where the parties discussed the correct legal basis of a Council’s act, the Court concluded that Parliament *needed* to have a right of action, since other institutional alternatives – considered in the

⁸¹⁵ Para 37. One should not that the CJEU disregarded the relevance of its previous case-law. Notably, it considered that Case T-148/97, *Keeling/OHIM*, [1998] ECR II-2217, Case C-160/03, *Spain/Eurojust*, [2005] ECR I-2077, and Joined Cases T-311/06 R I, 311/06 R II, 312/06 R and 313/06 R, *FMC Chemical and others/EFSA*, [2007] ECR II-21 did not affect the finding that an act emanating from a Community body intended to produce legal effects *vis-à-vis* third parties cannot escape judicial review by the Community judiciary. Moreover, the Court noted that previous case-law holding that acts adopted pursuant to delegated powers were to be imputed to the delegating institution, which was obliged to defend in a court of law the act in question (Case T-133/03, *ScheringPlough/Commission and EMEA*; Joined Cases T-369/94 and 85/95, *DIR International Film and others/Commission*, [1998] ECR II-357) was not comparable to those of the present case.

⁸¹⁶ Case 110/75, *Mills/EIB*, [1976] ECR 955.

⁸¹⁷ Para. 13.

⁸¹⁸ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 23.

⁸¹⁹ JACQUÉ, “Arrêt du 13 de avril 1986, *Parti écologiste “Les Verts” c. Parlement européen*”, 1986, at 502.

⁸²⁰ See Opinion of AG MANCINI in *Les Verts*, para. 6; BEBR, “The Standing of the European Parliament in the Community System of Legal Remedies”, 1990, at 186 *et seq.*

⁸²¹ Case 302/87, *Parliament/Council (Comitology)*, [1988] ECR 5615.

⁸²² For further developments, see e.g., ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 24, 25.

previous case – were not available in this case, and consequently there was a “procedural gap.”⁸²³ Considering that “the existence of those various legal remedies is not sufficient to guarantee, *with certainty and in all circumstances*, that a measure adopted by the Council or the Commission in disregard of the Parliament’s prerogatives will be reviewed”⁸²⁴ and that “those prerogatives are one of the elements of the institutional balance created by the Treaties”⁸²⁵, the Court reversed its *Comitology* decision, holding in *Chernobyl* that “an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives”, for while “the absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment *may constitute a procedural gap*, (...) it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties.”⁸²⁶

ARNULL noted that although the CJEU did not expressly overrule the *Comitology* approach – which was cited in the *Chernobyl* ruling – the two decisions cannot be reconciled.⁸²⁷ However, it is true that the Court did not depart from its previous views: “[w]hat the Court did in ‘*Chernobyl*’ was to *create a new right of action*, analogous to but separate from the right of the other institutions to bring annulment proceedings, in order to preserve the institutional balance created by the Treaties and to enable it to fulfil its task of ensuring respect for the law.”⁸²⁸ In any case, it is important to highlight that the argument based on the principle of institutional balance allowed the Court to accept access to judicial review by an institutional actor “*bien au delà des termes du traité*.”⁸²⁹ Thus, scholars consider that “this case is of the utmost importance in so far as the Court upheld the rule of law despite the wording of the Treaty.”⁸³⁰

Surely, the “evolution of the *locus standi* of the Parliament shows that the Court is ready to uphold a comprehensive system of judicial protection.”⁸³¹ Nevertheless, although *Les Verts* and *Chernobyl* have constantly been referred to as examples of the utmost importance “of the extent to which the Court has been prepared to stretch the Treaty”⁸³² one should note that in both cases the Court was merely enforcing the principle of institutional balance.⁸³³ Once again, in this context, the CJEU “has not eschewed fundamentally redrawing the constitutional balance through its case

⁸²³ See Case 70/88, *Parliament/Council (Chernobyl)*, [1990] ECR I-2041, para. 26. For a critical analysis of the *Chernobyl* decision see BOULOIS, “La qualité du Parlement Européen pour agir en annulation”, 1989, at 119 *et seq*

⁸²⁴ Para. 20.

⁸²⁵ Para. 21.

⁸²⁶ Para. 26. It is important to notice that Member States as *Herren der Verträge*, subsequently consummated this fundamental change in the constitutional balance by taking over the formula devised by the Court in the text of the Treaties on the occasion of the following IGC, and later by elevating Parliament to the status of privileged applicant. See LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 20. The Treaty of Nice raised the European Parliament to the status of privileged applicant. Currently, the Court of Auditors, the European Central Bank, and the Committee of Regions must show which of their prerogatives has been infringed within the meaning of *Chernobyl* case-law.

⁸²⁷ ARNULL, “The Action for Annulment”, 2000, at 185.

⁸²⁸ *Ibid.*

⁸²⁹ JACQUÉ, “Arrêt du 13 de avril 1986, *Parti écologiste ‘Les Verts’ c. Parlement européen*”, 1986, at 503, speaking of a genuine “*révision judiciaire du traité*.”

⁸³⁰ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 25.

⁸³¹ *Ibid.*, at 26.

⁸³² ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 19.

⁸³³ See paras. 22-25 of the decision.

law on *locus standi*.”⁸³⁴ However, it is remarkable that the right to effective judicial protection was not mentioned in neither of those rulings. As a matter of fact, as seen above, the CJEU has not showed the same willingness to *stretch* the limits of the Treaties, under the “umbrella” of the rule of law, when the judicial protection of individuals is at stake.

VI. Lastly, regarding Member States’ access to the CJEU, the case-law has also been fairly liberal.⁸³⁵ In *Germany/Commission*⁸³⁶ the Court declared inadmissible an application by the Federal Republic of Germany for an order for payment directed against the Commission. It held however that the Member State could have brought an action for failure to act. For that reason the Court added that the failure to provide for the type of action brought by Germany did not constitute “a *lacuna* which must be filled in order to ensure that persons concerned have effective protection for their rights.”⁸³⁷ AG MANCINI saw an important *obiter dictum* in this case:

“[i]ts meaning seems to me to be that the *obligation to observe the law takes precedence over the strict terms of the written law*. Whenever required in the interests of judicial protection, the Court is prepared to *correct or complete* rules which limit its powers in the name of the principle which defines its mission (emphasis added).”⁸³⁸

At another level, the CJEU has not hesitated to adopt a generous view regarding the grant of interim relief in the context of institutional conflicts. Hence, in another case which opposed Germany to the Commission⁸³⁹, the German government requested the Court to suspend a Commission decision requiring repayment of a state aid which was held incompatible with the common market. The Commission argued that such suspension was not possible as it was not foreseen in the TECSC. The CJEU firmly dismissed the argument, holding that:

“[t]he unavailability of interim measures in such a case would not be compatible with the *general principle of Community law* which gives individuals a right to complete and effective judicial protection (...). That principle requires that interim protection be available to individuals, if it is necessary for the full effectiveness of the definitive future decision, in order to ensure that *there is no lacuna in the legal protection* provided by the Court of Justice (...) (emphasis added).”⁸⁴⁰

In summary, the CJEU has not hesitated to interpret broadly several *objective* and *institutional* elements of judicial review in the Union legal order. *Per contra*, the *subjective* element, enshrined in

⁸³⁴ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 20.

⁸³⁵ In Case 166/78, *Italy/Council*, [1979] ECR 2575, the CJEU held that Article 173(1) TEEC “confers on every Member State the right to challenge, by an application for annulment, the legality of every Council regulation, without the exercise of this right being conditional upon the positions taken up by the representatives of the Member States of which the Council is composed when the regulation in question was adopted (para. 6).” The Council had argued in the case that the application should be deemed inadmissible by reason of the affirmative unqualified vote cast by Italy when the regulations in question were adopted by the council and also of the vote cast by the Italian representative on the management committee. Noting the favourable approach to Member States standing, see CANEDO, “L’intérêt à agir dans le recours en annulation du droit communautaire”, 2000, at 461.

⁸³⁶ Case 44/81, *Germany/Commission*, [1982] ECR 1855.

⁸³⁷ Para. 7.

⁸³⁸ Opinion of AG MANCINI in *Les Verts*, at 1350.

⁸³⁹ Case C-399/95 R, *Germany/Commission*, [1996] ECR I-2441.

⁸⁴⁰ See paras. 45-46.

the possibilities afforded to individuals to challenge the validity Union acts has not proved worthy of the same considerations.

1.1.6 The “Hidden Reasons” for the CJEU’s Restrictive Approach to Direct Access: *Une Certaine Idée* of the Union’s Judicial System and the Issue of Caseload

I. Given the lack of a consistent and coherent basis for the CJEU’s approach to judicial review of Union acts at the initiative of individuals, scholars have tried to “read between the lines” and cogitate on the CJEU’s true motivations behind the restrictive approach regarding the standing of private parties to bring an action for annulment. Hence, some literature points to what I call the “hidden reasons” of the case-law of the CJEU, in so far as they are not *explicitly* mentioned in the Court’s judgments.⁸⁴¹

Some authors have suggested that the comparison between the TECSC and the TEEC *pushed* the Court to such solution.⁸⁴² Also the absence of a distinction between *legislation* and *administration* at the Union level was pointed as a justification for the strict approach of the CJEU regarding challenges against acts of general application.⁸⁴³ HARDING held that:

“[i]t has perhaps been easy, amid the welter of technical and difficult discussion of ‘direct and individual concern’ under Article 173(2), to lose sight of a relatively simple message that is forcefully sent out from some of the earlier instances of private challenge of the legality of Community action: that Article 173(2) itself, taken together with Article 189, does not, and was probably *never intended to hold out much hope to private plaintiffs* in the case of measures not actually addressed to them. From the Treaty, it is unequivocally clear that true regulations cannot be challenged by individuals, that there is a difference between regulations and decisions and that decisions not addressed to the complainant can only be challenged by him if he has a special interest in the matter—that is, he is directly and individually concerned (emphasis added).”⁸⁴⁴

It has also been argued that the limitation to direct challenges against acts of general application is mostly justified because there are indirect ways of having such acts reviewed in the EU. As the majority of Union acts are applied and implemented by Member States, Union measures do not *in principle* affect individual citizens *directly*. Thus, individuals could and should challenge national measures which implement Union law in national courts. This idea emerges from the CJEU’s case-law, notably from the idea of a “complete system of legal remedies and

⁸⁴¹ See GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2007, at 128.

⁸⁴² ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 45.

⁸⁴³ NIHOUL, “La recevabilité des recours en annulation introduits par un particulier à l’encontre d’un acte communautaire de portée générale”, 1994, at 171-194; ROCHÈRE, “Droit au juge”, 1996, at 138; ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 72.

⁸⁴⁴ HARDING, “The Private Interest in Challenging Community Action”, 1980 at 355. See also LOUIS, “Le droit pour les particuliers d’agir en annulation selon le traité du marché commun”, 1964, at 218; MEGRET [et al.], *Le droit de la Communauté Économique Européenne*, 1983, at 121. Criticizing this position see CRAIG, “Legality, Standing and Substantive Review in Community Law”, 1994, at 523; CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 180 et seq.

procedures” established in *Les Verts*. Such a *complete system* is mostly anchored in national courts and in their duties to ensure effective judicial protection, although the CJEU draws attention for typical EU alternative remedies, notably the plea of illegality, the preliminary rulings procedure and the action for damages.⁸⁴⁵ Here, scholars note that “the CJEU has always been rather generous when deciding about the admissibility of these kinds of action in order to compensate for the lack of a right to challenge acts of general application directly.”⁸⁴⁶ Nonetheless, this approach has not prevented the CJEU from setting up high substantive standards for the plaintiff to be successful on the merits.⁸⁴⁷

Others scholars have pointed to the international nature of the European Union — , a body at the borderline between the federal and the international realms — within which the very idea of an individual having standing to bring an action before an international court would be “little short of revolutionary.”⁸⁴⁸ RASMUSSEN considered that the CJEU’s restrictive case-law matched its long term interest in “reshaping the judiciary of the Community to allow itself to act more like a high court of appeals of Community law, with courts and tribunals of Member States, and any administrative and other Community courts which might be established, acting as courts of first instance.”⁸⁴⁹ This interest *outweighs* the citizen’s interest in direct access to the Court.⁸⁵⁰ Hence, in order to preserve its status, the CJEU channels applicants to challenge Union acts before national courts which should function as filters to the CJEU.⁸⁵¹

ARNULL noted that “the most progressive of the Court’s decisions have been concerned principally with making of Community work.”⁸⁵² Where it was necessary to protect the rights of individuals against the Member States the Court has not hesitated to do it. However, “where conflict was between the rights of the individual and those of the Community’s still immature institutions (...) the Court initially tended to give precedence to the latter.”⁸⁵³ The application of double standards to judicial review of Union and Member State action is evident in this respect. The breakdown of the CJEU’s initial restrictive approach would take place against the background of increasing Union maturity. The suggestions of the CJ to create a first instance court would be in line with this view. Hence, “given the dynamic nature and wide-ranging effects” of most instances

⁸⁴⁵ See *infra* Section 1.2.1.

⁸⁴⁶ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 289, 290. See also NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 30; CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 190; ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 72.

⁸⁴⁷ See *infra* Section 1.2.1(c).

⁸⁴⁸ STEIN; VINING, “Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context”, 1976, at 222. One other author noted that the right conferred to individuals under the Treaties was “*un privilège, sans précédent dans l’ordre international*.” See CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 41.

⁸⁴⁹ RASMUSSEN, “Why is Article 173 Interpreted against Private Plaintiffs?”, 1980, at 122. The author analyses and disregards several arguments which had been put forward at that stage, such as the (i) compact among states argument; (ii) the sovereignty argument; (iii) the more power less control argument, (iv) the political compromise argument; (v) the administration aversion against judicial review argument; and (vi) the lack of loyalty and solidarity argument.

⁸⁵⁰ For a critical analysis of this position see CRAIG, “Legality, Standing and Substantive Review in Community Law”, 1994, at 522.

⁸⁵¹ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 421.

⁸⁵² ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 45.

⁸⁵³ *Ibid.*, at 46.

of legally binding action taken within the framework of the Union, there would be “force in the argument that the award of remedies to private parties should be tempered by the need to protect the efficient and purposeful working of the Community.”⁸⁵⁴ Thus, some scholars speak about a “long-standing desire to prevent Community measures from being continuously challenged.”⁸⁵⁵ SCHWARZE related the CJEU’s approach with the “the fear of legal uncertainty in the case of juridical nullification of regulations.”⁸⁵⁶ Union measures are often only adopted after long and hard negotiations and as a result of compromises difficult to achieve. Hence, the adoption of Union legislation could be essentially impeded if these measures were annulled. In this context, “judicial protection should only be granted under certain constitutional restraints.”⁸⁵⁷ Thus, “entre la garantie des droits des individus et le succès de l’entreprise communautaire, les auteurs du traité et la Cour ont délibérément choisi le deuxième terme de l’équation.”⁸⁵⁸

CRAIG has suggested that the CJEU’s reluctance to allow standing to individuals in the mainline cases might be best appreciated by focusing on the nature of the subject matter involved.⁸⁵⁹ The author follows HARTLEY, who considered that the CJEU is more reluctant to afford standing where the norm which is contested is of a discretionary nature.⁸⁶⁰ Hence, the CJEU would not wish to be placed “in a position whereby it is being constantly asked to second guess the discretionary choices made by the other Union institutions.”⁸⁶¹ It would also be inappropriate for the CJEU simply to substitute its view on the “correct” balance between the objectives set out in the Treaties for that of the institutions. The CJEU has two techniques at its disposal to prevent it being placed in this position: either adopt a restrictive standard of review or employ very strict tests of standing. The advantage of this second approach over the first is that it is far less demanding upon the CJEU’s time, as an in-depth analysis of the substantive claim is obviated. In light of these considerations, the strict requirements for standing in the mainline cases could be explained by the desire of the Court not to become “enmeshed in large numbers of cases in which applicants seek to challenge the way that the Commission and Council have exercised their discretion to make policy choices”.⁸⁶² In contrast, in matters of competition, state aid, and

⁸⁵⁴ HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 25. Noting that this argument justifies the existence of restrictive rules on standing but not the arbitrariness and obscurity of the current test see CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 422.

⁸⁵⁵ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 217. AG LAGRANGE held that “since the Treaty is largely a ‘traité cadre’ or framework law which normally must be implemented by general regulations, the possibility of even a partial annulment of such a regulation poses ‘an extreme danger’ to the system, if, as is frequently the case, the regulation represents a laborious compromise reached in the Council pursuant to the unanimity rule or practice.” See STEIN; VINING, “Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context”, 1976, at 230. For further developments see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 188 *et seq.*

⁸⁵⁶ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law, 2004, at 289. See also ALMEIDA, “Le recours en annulation des particuliers”, 1995, at 869; BOROWSKI, “Die Nichtigkeitssklage gem. Art. 230 Abs. 4 EGV”, 2004, at 879.

⁸⁵⁷ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law, 2004, at 289. In *Federolio* the GC considered that the admissibility of an action for annulment should be “based on the public interest of the Community.” See Case C-122/96, *Federolio/Commission*, [1997] ECR II-1559, para. 64.

⁸⁵⁸ BERROD, *La systématique des voies de droit communautaires*, 2003, at 577.

⁸⁵⁹ CRAIG, “Legality, Standing and Substantive Review in Community Law”, 1994, at 525; KAPTEYN; VAN THEMAAT, *Introduction to the Law of the European Communities*, 1998, at 477.

⁸⁶⁰ HARTLEY, *The Foundations of European Union Law*, 2010, at 382 *et seq.* Rejecting the argument see TÜRK, *The Concept of Legislation in European Community Law*, 2006, at 164, 165.

⁸⁶¹ CRAIG, “Legality, Standing and Substantive Review in Community Law”, 1994, at 526.

⁸⁶² *Ibid.* Such policy choices were mainly related with the Common Agriculture Policy.

anti-dumping the interests of the Union could be determined more unequivocally and the CJEU would be more willing to accept direct actions.⁸⁶³

II. Notwithstanding, the majority scholars has noted that the CJEU is basically fearful of finding itself overwhelmed by a flood of suits brought by individuals if a broader notion of standing is adopted.⁸⁶⁴ In reality, the CJEU is mostly concerned with practical workload problems.⁸⁶⁵ Since Union acts “generally serve purposes of economic regulation, admitting judicial protection of the individual would provoke legal challenges by the enterprises concerned and would thus increase the number of court proceedings significantly.”⁸⁶⁶ As ALBORS-LLORENS has put it:

“[i]t could be that the drafters of the EC Treaty were fearful that granting wide access to private parties would open the floodgates of litigation before the European Court and diminish the efficacy of EU Law by posing a constant threat to the legality of Community measures.”⁸⁶⁷

This fear would have been aggravated by the successive enlargements of the EU and by the extension of the CJEU’s jurisdiction to measures initially excluded from such jurisdiction.⁸⁶⁸ Consequently, the Court prefers to rely on the decentralized application of the Union law and to push litigation to national courts. This is the core idea of *jurisdictional subsidiarity* in the EU. Hence, in the search for a solution which enables the effective control of its caseload the CJEU reinforces “une certaine idée” of the Union’s judicial architecture fundamentally based on national courts, with the CJEU acting as a “Supreme” or “Constitutional Court” for the Union.

Surely, there is a certain inconsistency in intending that individuals bring suits directly before Union courts and then being afraid of the caseload such possibility might determine. However, it is an undeniable fact that litigation has increased significantly over the past decades. A brief analysis of the CJEU’s statistics shows not only an increase in the number of actions brought

⁸⁶³ The argument fails when one considers that the extension of Union competences along the years had no reflex in the broadening of direct access by private parties. See BIERNAT, “The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community”, 2003, at 8.

⁸⁶⁴ See e.g., BROWN; JACOBS, *The Court of Justice of the European Communities*, 1989, at 107; NIHOUL, “La recevabilité des recours en annulation introduits par un particulier à l’encontre d’un acte communautaire de portée générale”, 1994, at 171-194; SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 6; BONI, “Il ricorso di annullamento delle persone fisiche e giuridiche”, 1998, at 106; ARNULL, “Private Applicants and the Action for Annulment since *Codorniu*”, 2001, at 51; SCHEPEL; BLANKENBURG, “Mobilizing the European Court of Justice”, 2001, at 24; 53; GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 434 *et seq.*; CALLIESS, “Kohärenz und Konvergenz beim europäischen Individualrechtsschutz”, 2002, at 2002, at 3579; BOROWSKI, “Die Nichtigkeitsklage gem. Art. 230 Abs. 4 EGV”, 2004, at 903. See also Opinion of AG COSMAS in *Greenpeace*, para. 117;

⁸⁶⁵ CRAIG; BURCA, *EU Law*, 2011, at 507.

⁸⁶⁶ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law, 2004, at 289.

⁸⁶⁷ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 42. The creation of the GC was partially determined by such concerns. See Council Decision 88/591/ECSC, EEC and Council Decision 93/350/ECSC, EEC. For further developments see SCHERMERS, “The European Court of First Instance”, 1988, 541-558; VAN GINDERACHTER, “Le Tribunal de première instance des Communautés européennes”, 1989, 63-105; BIANCARELLI, “La création du Tribunal de première instance des Communautés européennes”, 1990, 1-25; MILLETT, *The Court of First Instance of the European Communities*, 1990, at 1 *et seq.*, VILAÇA, “L’évolution du système juridictionnel communautaire avant et après Maastricht”, 1995, at 181-189; ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, 10-12; NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 18; LENAERTS, “The European Court of First Instance”, 2000, 97-116.

⁸⁶⁸ ROCHÈRE, “Droit au juge”, 1996, at 140.

before the Union courts but also — and as a consequence —, a more limited capacity to deal with caseload reflected in a lengthier duration of proceedings.⁸⁶⁹ The issue goes beyond a mere *factual* assessment. It has a significant *legal* meaning. On the one hand, it may involve a conflict between the sub-rights included in the more general right of effective judicial protection, *i.e.* the right of access to justice and the right to justice within a reasonable time.⁸⁷⁰ In fact, a generous approach to the *access* dimension of such fundamental right risks hindering the *time* dimension inherent to that same right. In the end, by extending access one would not be improving the system of administration of justice *as a whole*.⁸⁷¹ On the other hand, it may be equated to a question of *institutional choice*.⁸⁷² The rule of law and the very idea of constitutionalism seem to imply that a strong judicial presence and strong legal rights will provide the protection of the individual that will allow markets and democracies to flourish.⁸⁷³ However, some scholarship finds the essence of law not “in disembodied principles and abstract values” but in the “character of those processes that make, interpret, and enforce law.”⁸⁷⁴ The interaction of these processes moulds the supply of and demand for law. Law should be considered a product of a process — the adjudicative process — filled with *limits* and *trade-offs*. Hence, defining the role for law means defining a role for this adjudicative process, and that requires recognizing its limits.⁸⁷⁵ Accordingly, this approach might imply a reduction of the number of cases which should be allocated to courts.

In light of the foregoing, it is not surprising that, in *UPA*, the Council and the Commission have played the “caseload card” arguing that a broader interpretation of the notion of individual concern would “result in a flood of additional challenges to Community acts.”⁸⁷⁶ To this argument AG JACOBS responded that:

“[I] am not convinced that a relaxation of the requirements for individual concern would result in a deluge of cases which would overwhelm the judicial machinery. There is *no record of that having happened in those legal systems, inside and outside the European Union,*

⁸⁶⁹ The statistics on the CJEU’s activities are available in the CJEU’s website (www.curia.eu). In the press release on the statistics concerning judicial activity in 2010 one could read “the number of new cases brought is constantly increasing and in 2010 reached an unprecedented figure.” Nonetheless, there seems to have been an overall reduction in 2010 in the duration of proceedings.

⁸⁷⁰ The conflict between the sub-rights included in the right to effective judicial protection has already given rise to litigation in Strasbourg. See BERMES, “Conflicting Human Rights, 2005, at 305 *et seq.* The right to justice within a reasonable time was discussed in Case C-185/95 P, *Baustahlgewebe/Commission*, [1998] ECR I-8417. For a case comment see PALLARO, “Il diritto all’equo processo nell’ordinamento giuridico comunitario alla luce della recente giurisprudenza della Corte di Giustizia”, 2000, 493-509; SUDRE, “Droit communautaire des droits fondamentaux”, 2000, at 503-505; EDITORIAL COMMENTS, “Preliminary Rulings and the Area of Freedom, Security and Justice”, 2007, at 1. See also Case 120/73, *Lorenz GmbH/Bundesrepublik Deutschland and others*, [1973] ECR 1471.

⁸⁷¹ See Articles 104(2), 104a and 104b of the Rules of Procedure of the CJ. To face some of the pressure that time imposes on the Union judicial system, the Union legislator introduced several means of accelerated procedures, which aim to contribute to better and faster judicial decision making. See *e.g.*, the decision creating an urgent preliminary ruling procedure (Article 23-A of the Statute of the CJEU): Council Decision 2008/79/EC, Euratom. See also ARNULL, “The Past and Future of the Preliminary Rulings Procedure”, 2003, at 351, mentioning the creation, in 2000, of the accelerated procedure (OJ L 122, 24/5/2000, p. 43-45) and of the possibility to decide by reasoned order. See also; EDITORIAL COMMENTS, “Preliminary Rulings and the Area of Freedom, Security and Justice”, 2007, at 5 *et seq.*; KOUTRAKOS, “Speeding up the Preliminary Reference Procedure”, 2008, at 617-618; PAIS, “A cooperação judiciária com a entrada em vigor do Tratado de Lisboa”, 2012, at 63-78.

⁸⁷² See *infra* Part II, Chapter 3, Section 3.1.

⁸⁷³ KOMESAR, *Law’s Limits*, 2001, at 4.

⁸⁷⁴ *Ibid.*, at 3.

⁸⁷⁵ *Ibid.*

⁸⁷⁶ See Opinion of AG JACOBS in *UPA*, para. 73.

which have in recent years progressively relaxed their requirements for standing (emphasis added).⁸⁷⁷

There is in fact no reason why a change in the test of individual concern “should necessarily involve any dramatic net increase in the overall number of challenges to legality brought by non-privileged applicants.”⁸⁷⁸ There are good reasons to believe so. At the outset, it is highly unlikely that a person who is not seriously affected by a measure will spend his/her time and money on the time-consuming and quite expensive procedure involved in getting it annulled.⁸⁷⁹ The time limit set forth in the Treaties as well as the obligation to pay the costs in the case of unsuccessful actions will certainly dissuade those allegedly “busybodies.” In contrast, if an applicant decides to pursue the case it is likely, even *presumed*, that the act affects his interests in a relevant way.

More significantly, the alternative route to direct challenge in which the CJEU relies—which lies with the preliminary rulings procedure—, seems to be in this respect more problematic, as the CJ has almost no control over the range of applicants that can litigate *via* Article 267 TFEU or the type of norm that can be challenged. To shift challenges to legality of Union acts to the realm of direct challenge would indeed give the CJEU more scope for control through the determination of whether there was a *substantial adverse impact* on the individuals’ legal position.⁸⁸⁰

Furthermore, it is noticeable that caseload concerns seem to trouble mostly the CJ, as the GC has already admitted the possibility of relaxing standing requirements in order to allow a broader access by individuals to the Union’s judicial system. However, somehow paradoxically, limiting direct access of private parties to Union courts is mostly avoiding the overload of the GC, which is competent to decide on direct actions brought by private applicants. By encouraging recourse to national courts in order to indirectly access Union courts through the preliminary rulings procedure, the CJ is in reality contributing to increase its own caseload as it retains, for the moment, exclusive competence to decide on preliminary references.⁸⁸¹ What is more, this solution may imply more judicial energy by the Union courts as they may be involved twice in the same case: in the decision on the inadmissibility of the direct action and in the preliminary reference. Hence, in practical terms, the argument does not seem very persuasive. Cases will end up in Luxembourg *via* preliminary references, with all the inconveniences that AG JACOBS pointed out in *UPA*.⁸⁸² Moreover, this approach contributes to transfer legal protection of individuals to the CJ, contrary to the wishes of Member States when creating the GC.⁸⁸³

⁸⁷⁷ Para. 79. Endorsing the same view see, e.g., MEHDI, “La recevabilité des recours formés par les personnes physiques et morales à l’encontre d’un acte de portée générale”, 2003, at 48.

⁸⁷⁸ CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 507; CRAIG; BÚRCA, *EU Law*, 2011, at 507, noting that a more liberal interpretation of standing requirements would shift some cases to direct challenge and would give the CJEU more scope for control. See also CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 191, considering that there are good reasons to believe that the number of actions brought will not increase significantly, notably the fact that most citizens do not choose courts as a regular *forum* to solve disputes.

⁸⁷⁹ GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 442.

⁸⁸⁰ CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 507.

⁸⁸¹ Nonetheless, see Article 256 TFEU. See also CRAIG; BÚRCA, *EU Law*, 2011, at 506. Noting that preliminary references and actions for infringement constitute the main cause of the CJEU’s workload, and not direct actions see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 195.

⁸⁸² See *infra* Section 1.2.2.

⁸⁸³ Recitals of Council Decision 88/591/ECSC, EEC, Euratom.

Notwithstanding, for purposes of the present study it is important to highlight that the workload concerns underlying the Court's case-law echo an *objective, institutional and systemic* perspective of the Union's system of judicial protection. In fact, by focusing on the organization and adequate functioning of the court system the CJEU brings into the issue of judicial protection of private parties objective, institutional and systemic considerations which seem to prevail over the *subjective* dimension of the right of access to justice. In AG MISCHO's words:

“[i]t should be observed that the risk of a proliferation of applications to the Court is a factor *which cannot be taken into consideration* in determining whether or not such firms are entitled to judicial review of the decisions affecting them (emphasis added).”⁸⁸⁴

Besides the fact that “as a matter of principle it is an admission of weakness to let the extent of judicial protection depend on the ECJ's perceived burden”⁸⁸⁵, “it is abundantly clear that the essentially managerial difficulties caused by the Court's workload cannot be used indefinitely as an excuse for failing to tackle other issues which are vital to the health and legitimacy of the Union.”⁸⁸⁶ In a European Union “whose measures produce a direct impact on the interests of natural a legal persons and Member States alike, and where the legislative process is still vitiated by a substantial lack of democracy, the reasons stated above do not provide a full justification, especially when alternative means of redress are not always available.”⁸⁸⁷

1.2 Indirect Access by Private Parties to the CJEU: Still an Objectivist, Institutional and Systemic Approach to the Judicial Protection of Private Parties

1.2.1 The “Alternative Routes” Approach

a) General Remarks

I. It became *obiter dictum* in the CJEU's case-law that if an action for annulment brought by a natural or legal person against a measure of general application was held inadmissible because standing requirements were not satisfied, such a person could have recourse to the other remedies provided for in the Treaty which are designed to ensure judicial review of Union acts.⁸⁸⁸ Within the “complete system of legal remedies and procedures” acknowledged in *Les Verts* the Court clarified that where the Union institutions were responsible for the implementation of Union measures, natural or legal persons *could bring a direct action* before the CJEU against implementing measures which were addressed to them or which were of direct and individual concern to them and, in support of such an action, *plead the illegality* of the general measure on which they were based. In contrast, if implementation was a matter for the national authorities, individuals could *plead the invalidity of general measures before the national courts and convince the latter to request the CJEU*

⁸⁸⁴ See Opinion of AG MISCHO in Joined Cases 133 and 150/87, *Nashua Corporation and others/Commission and Council*, [1990] ECR I-719, para. 56.

⁸⁸⁵ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 30, 31.

⁸⁸⁶ ARNULL, “The Action for Annulment”, 2000, at 190.

⁸⁸⁷ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 42.

⁸⁸⁸ See e.g., Case T-207/97, *Berthu/Council*, [1998] ECR II-509, para. 29.

for a preliminary ruling.⁸⁸⁹ Consequently, the CJEU considered that the European judicial system was both complete and coherent.⁸⁹⁰

Although scholars have noted that the first unequivocal mention in the Court's case-law to the complete nature of the system of remedies and procedures within the EU was made in *Les Verts*⁸⁹¹, this approach was not entirely novel in the CJEU's case-law. In fact, the idea of a "complémentarité des voies de droits"⁸⁹² had already been relied on under the TECSC. In his Opinion in *Assider*⁸⁹³, AG LAGRANGE noted that:

"[o]n a pu aussi faire observer que les entreprises bénéficiaient dans certains cas de garanties, indirectes sans doute, mais précieuses, leur permettant de faire proclamer l'illégalité des décisions de la Haute Autorité. Nous pensons ici à l'article 36, 3e alinéa, sur les sanctions, qui institue une véritable exception d'illégalité en cas d'application d'une amende, et qui a été évoqué à la barre. Nous pensons aussi à l'article 41 attribuant compétence à la Cour pour statuer, à titre préjudiciel, sur la validité des délibérations de la Haute Autorité et du Conseil, dans le cas où un litige porté devant un tribunal national mettrait en cause cette validité. Cette règle peut être fort utile pour les entreprises et même pour les tiers (emphasis added)."⁸⁹⁴

Nonetheless, already in 1954, the AG did not seem entirely convinced that such system offered effective judicial protection to private litigators as:

"[i]l faut bien reconnaître cependant que, si utile que puisse être la protection ainsi accordée, que ce soit celle de l'article 36 ou celle de l'article 41, elle n'est qu'indirecte et partielle et n'équivaut pas à l'ouverture générale et directe qu'aurait constituée l'attribution aux entreprises et aux autres personnes privées intéressées des mêmes droits qu'aux États membres pour le recours en annulation (emphasis added)."⁸⁹⁵

II. Hence, there seem to be two main alternative routes to the direct access to the CJEU by private parties. Firstly, in proceedings initiated before national courts, the latter may and should refer any questions on validity of Union acts to the CJEU for a preliminary ruling.⁸⁹⁶ Secondly, implementing or any kind of other acts taken by the Union institutions on the basis of an illegal Union act of general application can be challenged in cases pending before the CJEU on the grounds of invalidity of the underlying act.⁸⁹⁷ In *Jégo-Quéré* the GC pointed yet to another

⁸⁸⁹ LENAERTS, "The Legal Protection of Private Parties under the EC Treaty," 1998, at 593. Indirect access implies by definition that the contested act is relevant to the proceedings but is not itself the subject matter of the proceedings. In Case 126/83, *STS/Commission*, [1984] ECR 2769, the CJEU mentioned the possibility of initiating arbitration proceedings (see para. 20).

⁸⁹⁰ See *supra* Introduction.

⁸⁹¹ See BERROD; MARIATTE, "Le pourvoi dans l'affaire *Unión de Pequeños Agricultores/Conseil*", 2002, at 9.

⁸⁹² CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 159.

⁸⁹³ Case 3/54, *Assider/High Authority*, [1954-1956] ECR 63.

⁸⁹⁴ Opinion of AG LAGRANGE in *Assider* at 174.

⁸⁹⁵ Opinion of AG LAGRANGE in *Assider* at 175. See also later Opinion of AG ROEMER in Joined Cases 55 to 59 and 61 to 63/63, *Acciaierie Fonderie Ferriere di Modena/ECSC High Authority*, [1964] ECR 211.

⁸⁹⁶ The first case which mentioned this possibility was Joined Cases 19 to 22/62, *Fédération Nationale de la Boucherie en Gros and others/Council*, [1962] ECR 491. See also Case T-219/95 R, *Danielsson and others/Commission*, [1995] ECR II-3051, para. 77; Case T-122/96, *Federolio/Commission*, [1997] ECR II-1559, para. 80; Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 40; Case C-263/02 P, *Commission/Jégo-Quéré*, [2004] ECR I-3425, para. 30.

⁸⁹⁷ See NEUWAHL, "Article 173 Paragraph 4 EC", 1996, at 18, 19.

alternative route, *i.e.* the action for damages against an illegal conduct of the EU.⁸⁹⁸

In light of this case-law, scholars have analysed the three possible avenues which could function as alternative means for obtaining judicial review of Union acts.⁸⁹⁹ Nonetheless, in the present study I will focus my attention on the avenues offered by the combination of national proceedings and preliminary rulings on validity. In fact, the two other avenues seem far less relevant from the perspective of an individual wishing to challenge directly the validity of Union measures.

b) The Limited Impact of the Plea of Illegality

I. Current Article 277 TFEU establishes the so-called plea of illegality. It has been considered that “the *rationale* of the plea of illegality is not only to prevent a complete denial of justice, but to ensure an indirect challenge of normative acts at any time.”⁹⁰⁰ The purpose of the plea is to prevent parties from being obliged to bear the negative consequences from illegal regulations⁹⁰¹ by allowing an individual to invoke the invalidity of an act of general application *in the moment of its application*.⁹⁰² The fact that Member States limited the use of the plea of illegality to acts of general application seems to indicate that such form of action intended precisely to mitigate the restrictive right of private parties to challenge directly normative acts.⁹⁰³

However, the *rationale* behind the plea of illegality is not to constitute an additional and

⁸⁹⁸ Case T-177/01, *Jégo-Quéré/Commission*, [2002] ECR II-2365, para. 44. The action for damages was also mentioned in Joined Cases 9 and 12/60, *Belgium/Vloeberghs and ECSC High Authority*, [1962] ECR 171; Joined Cases C-15 and 108/91, *Buckl and others/Commission*, [1992] ECR I-6061; Case T-460/93, *Tête and others/EIB*, [1993] ECR II-1257; Case T-119/95, *Hauer/Council and Commission*, [1998] ECR II-2713, brought under the TECSC; Joined Cases T-172, 175 to 177/98, *Salamander and others/Parliament and Council*, [2000] ECR II-2487. Also mentioning the action for damages as an alternative remedy see VAN GERVEN, “The Legal Protection of Private Parties in the Law of the European Economic Community”, 1976, at 2.

⁸⁹⁹ Noting that the possibility of the Member States acting on behalf of their citizens under Article 263 TFEU does not seem to play any relevant role in the Court’s case-law see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 236 *et seq.*

⁹⁰⁰ VOGT, “Indirect Judicial Protection in EC Law”, 2006, at 368. See Case T-61/96, *Meoro Avilés/Commission*, [1998] ECR I-A443, II-1289, paras. 33-35, mentioning the plea as an alternative remedy. See also Case 92/78, *Simmenthal/Commission*, [1979] ECR 777; Case 216/82, *Universität Hamburg/Hauptzollamt Hamburg-Kehrwieder*, [1983] ECR 2771; Case T-82/96, *ARAP and others/Commission*, [1999] ECR II-1889; Case 120/99, *Kik/OHIM (Kik)*, [2001] ECR II-2235; Case C-11/00, *Commission/ECB*, [2003] ECR I-7147; Case C-241/01, *National Farmers’ Union*, [2002] ECR I-9079. Mentioning the advantages of the plea of illegality see BEBR, “Judicial Remedy of Private Parties against Normative Acts of the European Communities”, 1967, at 9 *et seq.*; SINANIOTIS, “The Plea of Illegality in EC Law”, 2001, at 103 *et seq.* For further references see MARQUES, *A Excepção de Ilegalidade no Contencioso da União Europeia*, 2008, at 27, stressing the *subjective* function of the plea.

⁹⁰¹ SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 485.

⁹⁰² See Case 9/56, *Meroni/ECSC High Authority*, [1957-1958] ECR 133 and Case 92/78, *Simmenthal/Commission*, [1979] ECR 777.

⁹⁰³ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 197. See also BEBR, “Judicial Remedy of Private Parties against Normative Acts of the European Communities”, 1967, at 8; BARAV, “The Exception of Illegality in Community Law”, 1974, at 368; SINANIOTIS, “The Plea of Illegality in EC Law”, 2001, at 105. Accordingly, the CJEU confirmed that although the Treaty mentioned regulations the plea could be raised regarding any act of general application (Case 92/78, *Simmenthal/Commission*, [1979] ECR 777, para. 40; Joined Cases T-6 and 52/92, *Reinartz/Commission*, [1993] ECR II-1047, para. 56). Under Article 36(3) TECSC the possibility seemed open regarding individual and general acts. However the CJEU restricted it to acts of general application (Case 21/64, *Macchiorlati Dalmás e Figli/ECSC High Authority*, [1965] ECR 175, at 187; Case 270/82, *Estel/Commission*, [1984] ECR 1195, para. 11; Case 76/83, *Boël/Commission*, [1984] ECR 859, para. 4; Case T-26/90, *Finsider/Commission*, [1992] ECR II-1789, para. 61). For further developments see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 292-294; MARQUES, *A Excepção de Ilegalidade no Contencioso da União Europeia*, 2008, at 67 *et seq.*; TÜRK, *Judicial Review in EU Law*, 2009, at 208 *et seq.* Accordingly, current Article 277 TFEU mentions any acts of general application. HARTLEY notes that in *Simmenthal* the CJEU admitted the plea against normative acts *in substance*. See HARTLEY, *The Foundations of European Union Law*, 2010, at 414.

independent cause of action, but to be invoked where proceedings are brought before the CJEU under another provision of the Treaties.⁹⁰⁴ Hence, the plea of illegality is a “parasitic procedure.”⁹⁰⁵ Or as VOGT has put it:

“[t]he *rationale* of Art. 241 EC is thus narrowed down to merely ‘prevent a denial of justice’, the relationship between Art.241 EC and Art.230 EC is interpreted as a case of ‘either or’.”⁹⁰⁶

In fact, while the purpose of the time limit established under current Article 263(6) TFEU is to protect legal certainty, the plea of illegality aims to uphold the principle of legality, by allowing the CJEU to declare a normative act inapplicable in a specific case, even if such time limit has passed.⁹⁰⁷ It works as an *incidental* and *subsidiary* method of judicial review.⁹⁰⁸ In *Wöhrmann*⁹⁰⁹, the applicants had based their action on ex-Article 184 TEEC from which they inferred the existence of a right, so far as jurisdiction is concerned, to refer to the Court the validity of the Commission’s decisions at stake. The CJEU held that:

“[t]his is however not the meaning of Article 184. It is clear from the wording and the general scheme of this Article that a declaration of the inapplicability of a regulation is only contemplated in proceedings brought before the Court of Justice itself under some other provision of the Treaty, and *then only incidentally and with limited effect* (emphasis added).”⁹¹⁰

II. Hence, although the plea of illegality can be invoked by any party within proceedings initiated before the CJEU, it presupposes that an action has already been brought before Union courts.⁹¹¹ From the point of view of the individual wishing to challenge *directly* the validity of Union acts the plea is of limited help: either the individual has standing to bring such action – which as seen above will be a highly exceptional situation⁹¹² – or he/she does not have standing and has to wait that a privileged or semi-privileged applicant initiates the suit.⁹¹³ Hence, regarding

⁹⁰⁴ VOGT, “Indirect Judicial Protection in EC Law”, 2006, at 366.

⁹⁰⁵ CHALMERS; DAVIES; MONTI, *European Union Law*, 2012, at 430.

⁹⁰⁶ VOGT, “Indirect Judicial Protection in EC Law”, 2006, at 367. The author is critical of this approach considering that the *rationale* behind the plea of illegality is not only to prevent a complete denial of justice, but also to ensure an indirect challenge of normative acts *at any time*.

⁹⁰⁷ *Ibid.*, at 366.

⁹⁰⁸ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 198.

⁹⁰⁹ Joined Cases 31 and 33/62, *Wöhrmann/Commission of the EEC*, [1962] ECR 501.

⁹¹⁰ At 507.

⁹¹¹ The most common scenario is the plea to be raised in an action for annulment, but scholars have also considered possible to invoke it within an action for failure to act or an action for damages, although not within the context of a preliminary reference. Member States may albeit limitedly also invoke the plea within infringements proceedings. See e.g., Case C-404/97, *Commission/Portugal*, [2000] ECR I-4897, paras. 34, 35. For further developments see ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 199, 200; SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 486 *et seq.*; SINANIOTIS, “The Plea of Illegality in EC Law”, 2001, at 110 *et seq.*; MARQUES, *A Excepção de Ilegalidade no Contencioso da União Europeia*, 2008, at 101-139; TÜRK, *Judicial Review in EU Law*, 2009, at 206; HARTLEY, *The Foundations of European Union Law*, 2010, at 417, mentioning that indirect challenge is no rule out in *any kind of proceedings* before the CJEU.

⁹¹² See *supra* Sections 1.1.2 and 1.1.3.

⁹¹³ See also SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 6. Hence, where the main action is inadmissible the plea is also inadmissible. See Case 33/80, *Albini/Council and Commission*, [1981] ECR 2141, para. 17; Joined Cases 89 and 91/86, *Étoile commerciale and CNTA/Commission*, [1987] ECR 3005, para. 22; Case C-64/93, *Donatab and others/Commission*, [1993] ECR I-3595, para. 20; Case T-154/94, *CSF and CSME/Commission*, [1996] ECR II-1377; Case T-154/02, *Villiger Söhne/Council*, [2003] ECR II-1921; Case T-386/04, *Eridania Sadam and others/Commission*, [2005] ECR II-2531, para. 52.

decisions addressed to private parties, the plea of illegality allows no more than to ground the invalidity of such act on another act of general application, without broadening access.⁹¹⁴ Regarding normative acts, such mechanism does not broaden access either, given that the main action will have to be, *as a general rule*, initiated by institutional actors.

Moreover, the plea of illegality presupposes the existence of an implementing Union measure. However, that is not the rule. It is unusual that the Union institutions adopt implementing measures regarding individuals. Such task is mostly conferred to Member States.⁹¹⁵ Hence, the plea applies only to those *exceptional situations* where a Union institution is entrusted with the application of Union legislation. In the majority of cases individuals must challenge state implementing measures in national courts and persuade the latter to request the CJ to rule on the (in)validity of the Union's legislation at stake.⁹¹⁶ This also contributes to the limited efficacy of the plea of illegality as an alternative remedy to challenge Union law.

Lastly, one should also note that a successful plea of illegality does not have the same effect as an action for annulment.⁹¹⁷ The consequence of a plea of illegality is the mere inapplicability of the act to the individual applicant – it has a mere *inter partes* effect. Hence, the general act will remain in force, although the implementing act is annulled.⁹¹⁸ As a result, the plea is “*une voie de droit marginale*”⁹¹⁹ and scholars have long considered that it cannot work as a substitute for the action for annulment.⁹²⁰

c) Disregarding the Action for Damages

I. The procedural route of an action for damages based on the non-contractual liability of the Union also fails to provide for an adequate solution for an individual who is adversely affected by a Union act and wishes to challenge its validity.⁹²¹ In fact, as the GC correctly stated in *Jégo-Quéré* that:

⁹¹⁴ The Court has made it clear that a certain connection must exist between the measure challenged in the main proceedings and the act whose illegality is raised. Usually that is the case when “the legal basis of the decision which is being attacked.” See Case 92/78, *Simmmenthal/Commission*, [1979] ECR 777, para. 39; Joined Cases 275/80 and 24/81, *Krupp/Commission*, [1981] ECR 2489, para. 32; Joined Cases 87 and 130/77, and 22/83, and 9 and 10/84, *Salerno and others/Commission and Council*, [1985] ECR 2523, para. 36; Joined Cases T-6 and 52/92, *Reinartz/Commission*, [1993] ECR II-1047, para. 56. However, such connection may exist when the act does not constitute the legal basis of the act in issue in the main action. For a decision under the TECSC see Joined Cases 140, 146, 221 and 226/82, *Walzstahl-Vereinigung and Thyssen/Commission*, [1984] ECR 951. See also MARQUES, *A Excepção de Ilegalidade no Contencioso da União Europeia*, 2008, at 93-100; TÜRK, *Judicial Review in EU Law*, 2009, at 206-207.

⁹¹⁵ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 203.

⁹¹⁶ TÜRK, *Judicial Review in EU Law*, 2009, at 205.

⁹¹⁷ SINANIOTIS, “The Plea of Illegality in EC Law”, 2001, at 122-124.

⁹¹⁸ See Case C-434/98 P, *Council/Busacca and others*, [2000] ECR I-8577, para. 26. See also MARQUES, *A Excepção de Ilegalidade no Contencioso da União Europeia*, 2008, at 141-146.

⁹¹⁹ BERROD, *La systématique des voies de droit communautaires*, 2003, at 679 *et seq.*

⁹²⁰ See e.g., TOTH, “The Individual and European Law”, 1975, at 681, and more recently MEHDI, “La recevabilité des recours formés par les personnes physiques et morales à l'encontre d'un acte de portée générale”, 2003, at 31, 32; PARFOURU, “*Locus Standi* of Private Applicants under the Article 230 EC Action for Annulment”, 2007, at 366. *Per contra*, LANG suggests that the plea of illegality could work as an adequate alternative, citing Joined Cases C-27 and 122/00, *Omega Air and others*, [2002] ECR I-2569. See LANG, “Actions for Declarations that Community Regulations Are Invalid”, 2003, at 102. However, Article 241 TEC was not mentioned in the case. In fact, this was a clear Article 267 TFEU case. See BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*”, 2004, at 1653.

⁹²¹ See also LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 26. On the action for damages see e.g., HEUKELS; MACDONEL, *The Action for Damages in Community Law*, 1997; WAKEFIELD, *Judicial Protection through the Use of Article 288(2) EC*, 2002.

“[s]uch action cannot result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal. Given that it presupposes that damage has been directly occasioned by the application of the measure in issue, such an action is *subject to criteria of admissibility and substance which are different from those governing actions for annulment, and does not therefore place the Community judicature in a position whereby it can carry out the comprehensive judicial review which it is its task to perform.* In particular, where a measure of general application, such as the provisions contested in the present case, is challenged in the context of such an action, the review carried out by the Community judicature *does not cover all the factors which may affect the legality of that measure, being limited instead to the censuring of sufficiently serious infringements of rules of law intended to confer rights on individuals* (emphasis added).”⁹²²

That is to say that the action for damages is governed by different rules from the ones which apply to the control of legality of Union acts. Hence, it is noticeable that the action for damages was not mentioned in *Les Verts* as part of the complete system of remedies and procedures.

II. The independence of the action for annulment and the action for damages was established early in *Plaumann* and has been maintained in later case-law. It is significant that in *Plaumann* the CJEU adopted a strict view of the possibilities of awarding damages, by stating that:

“[a]n administrative measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage upon those whom it affects. The latter cannot therefore claim damages by reason of that measure. The Court cannot by way of an action for compensation take steps which would nullify the legal effects of a decision which, as stated, has not been annulled.”⁹²³

After stating in *Lütticke*⁹²⁴ that the action for damages is “an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose”⁹²⁵ the CJEU added in *Aktien-Zuckerfabrik Schöppenstedt*⁹²⁶ that such action “differs from an application for annulment in that its end is not the abolition of a particular measure, but compensation for damage caused by an institution in the performance of its duties.”⁹²⁷ The Court would later maintain that an action for damages is inadmissible where its purpose is to secure the same result as an action for annulment.⁹²⁸

Hence, according to settled case-law the action for damages requires the existence of harm caused in the individual’s legal position and does not allow for a similar control of legality to the

⁹²² Para. 46. See Case C-352/98 P, *Bergaderm and Goupil/Commission*, [2000] ECR I-5291, para. 41 to 43; Case T-155/99, *Dieckmann & Hansen/Commission*, [2001] ECR II-3143, paras. 42, 43. As regards the requirement of “a sufficiently serious infringement” see Joined Cases C-104/89 and 37/90, *Mulder and others/Council and Commission*, [1992] ECR I-3061, paras. 18, 19; and, for a case in which the rule invoked “was not intended to confer rights on individuals” see Case T-196/99, *Area Cova and others/Council and Commission*, [2001] ECR II-3597, para. 43.

⁹²³ Case 25/62, *Plaumann/Commission of the EEC*, [1963] ECR 126, at 108.

⁹²⁴ Case 4/69, *Lütticke/Commission*, [1971] ECR 325.

⁹²⁵ Para. 6.

⁹²⁶ Case 5/71, *Zuckerfabrik Schoepfenstedt/Council*, [1971] ECR 975.

⁹²⁷ Para. 3. See also Case 43/72, *Merkur/Commission*, [1973] ECR 1055, para. 4.

⁹²⁸ See Case 175/84, *Krohn/Commission*, [1986] ECR 753.

action for annulment. In fact, following the CJEU's case-law not every kind of illegality gives rise to damages. Pursuant to the so-called *Schöppenstedt* formula:

“[w]here legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action (...) unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred (emphasis added).”⁹²⁹

After aligning the regime of Member State and Union liability⁹³⁰, the CJEU held more recently in *Bergaderm*⁹³¹ that “the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Union institution concerned manifestly and gravely disregarded the limits on its discretion.”⁹³² This case-law has made it extremely difficult to win cases on the merits.⁹³³

For purposes of this study, it suffices to highlight that the action for damages is not a suitable alternative to the action for annulment in so far as it (i) pursues a different purpose, *i.e.* to obtain financial compensation as a consequence of a breach of Union law; (ii) does not result in a removal of the act from the Union legal order but merely in compensation *post factum*⁹³⁴; and (iii) it is submitted to specific rules and principles.⁹³⁵ In practice, there have been cases where the claim in damages was dismissed because, despite there being a breach which could have resulted in annulment, it was either not sufficiently serious⁹³⁶, or the rule was not intended to confer rights on the individual.⁹³⁷

d) Focusing on the “National Routes” and Preliminary Rulings on Validity

I. If neither the plea of illegality nor the action for damages function as alternative means to a direct challenge of Union measures, the avenues offered by the combined application of the duties imposed on national courts and the preliminary rulings procedures deserve a closer attention. In fact, preliminary rulings on validity constitute an indirect and collateral method of judicial review, and open up a “useful additional channel that allows private parties to obtain review”⁹³⁸ of potentially illegal Union acts. Given the fact that the vast majority of Union normative acts are implemented by national authorities, Article 267 TFEU assumes considerable importance to individuals wishing to challenge Union acts against which a direct challenge is

⁹²⁹ Para 11. When a decision is at stake the CJEU does not make a separate the finding of the gravity of the illegality. See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 205; Case 253/84, *GAEC de la Ségaude/Council and Commission*, [1987] ECR 123.

⁹³⁰ Joined Cases C-46 and 48/93, *Brasserie du pêcheur/Bundesrepublik Deutschland and The Queen/Secretary of State for Transport, ex parte Factortame and others*, [1996] ECR I-1029, paras. 40-47.

⁹³¹ Case C-352/98 P, *Bergaderm and Goupil/Commission*, [2000] ECR I-5291.

⁹³² Para. 43. For further developments see HILSON, “The Role of Discretion in EC law on Non-Contractual Liability” 2005, at 677-695.

⁹³³ CRAIG, *EU Administrative Law*, 2012, at 701. Noting the few cases where damages were actually granted see *e.g.*, SCHOCKWEILER, “L'accès à la justice dans l'ordre juridique communautaire”, 1996, at 5.

⁹³⁴ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 26.

⁹³⁵ See also LENAERTS, “The Legal Protection of Private Parties under the EC Treaty”, 1998, at 620.

⁹³⁶ Joined Cases C-104/89 and 37/90, *Mulder and others/Council and Commission*, [1992] ECR I-3061, paras. 18-19.

⁹³⁷ Case T-196/99, *Area Cova and others/Council and Commission*, [2001] ECR II-3597, para. 43. See CORTHAUT; VANNESTE, “Waves between Strasbourg and Luxembourg”, 2006, at 506.

⁹³⁸ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 177.

usually not available.⁹³⁹ Furthermore, it has been mainly through the system of preliminary rulings that the CJEU has had the chance to elaborate on the most fundamental principles of the European legal order.⁹⁴⁰ Thus, its importance “can hardly be overestimated.”⁹⁴¹ The CJEU has considered that preliminary references are “essential for the preservation of the Community character of law established by the Treaty.”⁹⁴² Scholars have referred to it as “one of the most original features”⁹⁴³ of the Union’s system – the “jewel in the Crown”⁹⁴⁴ of the CJEU’s jurisdiction – a “*facteur de cohésion irremplaçable*”⁹⁴⁵ and “*l’un des plus grands succès don’t puisse s’enorgueillir la construction communautaire*.”⁹⁴⁶

Hence, the severity of the conditions imposed on direct access by individuals to the CJEU was mitigated by a system of indirect challenge.⁹⁴⁷ As AG MISCHO stated in *National Farmers’ Union*⁹⁴⁸ that:

“[i]t is thus indeed the impossibility of using the action for annulment to challenge the Community measure, and that alone, which determines the availability of the right to contest the validity of that act before a national court, the form and the nature of the measure being immaterial.”⁹⁴⁹

In fact, in preliminary references all kinds of Union acts, “without exception”⁹⁵⁰, are deemed reviewable, which contrasts with what happens under the action for annulment.⁹⁵¹ Moreover, private applicants do not have to fulfil strict *locus standi* conditions to raise a question of validity. Consequently, preliminary references have “enabled individual litigants, through their national courts, to bring before the CJ questions as to the validity of genuinely general Community legislation which they could not have challenged directly”⁹⁵², and “to raise the question of the validity of EC legislation where an action for annulment has been held inadmissible.”⁹⁵³

⁹³⁹ TÜRK, *Judicial Review in EU Law*, 2009, at 213.

⁹⁴⁰ Mentioning the principles of direct effect, supremacy, fundamental rights protection and the elimination of obstacles to market freedoms see e.g., JOLIET, “L’article 177 du traité CEE et le renvoi préjudiciel”, 1991, at 592, 593.

⁹⁴¹ LENZ; GRILL, “The Preliminary Ruling Procedure and the United Kingdom”, 1995-1996, at 846.

⁹⁴² Case 166/73, *Rheinmühlen Düsseldorf/Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1974] ECR 33, para. 2. Its adoption has been suggested in the context of the ECHR. See MACDONALD, “The Luxembourg Preliminary Ruling Procedure and its Possible Application in Strasbourg”, 1998, at 593-603.

⁹⁴³ HARTLEY, *The Foundations of European Union Law*, 2010, at 287.

⁹⁴⁴ CRAIG; BÜRCA, *EU Law*, 2011, at 442.

⁹⁴⁵ See BERGERÉS, “*Vademecum de la question préjudicielle de l’article 177 du traité CEE*”, 1994, at 181.

⁹⁴⁶ See JOLIET, “L’article 177 du traité CEE et le renvoi préjudiciel”, 1991, at 616.

⁹⁴⁷ NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 18. BERGERÉS considers that preliminary references on validity “*permettent de palier l’absence directe des particuliers dans le recours en annulation*.” See BERGERÉS, “*Vademecum de la question préjudicielle de l’article 177 du traité CEE*”, 1994, at 181.

⁹⁴⁸ Case C-241/01, *National Farmers’ Union*, [2002] ECR I-9079.

⁹⁴⁹ Opinion of AG MISCHO, para. 65.

⁹⁵⁰ Case 322/88, *Grimaldi/Fonds des maladies professionnelles*, [1989] ECR 4407, para. 8. However, rulings of the CJEU are excluded from review. See Case 69/85, *Wünsche/Germany*, [1986] ECR 947. Also the CJEU has ruled that the Treaty makes no provision for a reference regarding an institution’s failure to act. See Case C-68/95, *T. Port/Bundesanstalt für Landwirtschaft und Ernährung*, [1996] ECR I-6065. For further developments see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 354 *et seq.* This affirmation has nonetheless to be mitigated by the freezing effect of Article’s 263(6) TFEU time limits. See *infra* Section 1.3.

⁹⁵¹ See *supra* Section 1.1.2(b). See e.g., Case T-193/04, *Tillack/Commission*, [2006] ECR II-3995, para. 80.

⁹⁵² Case 24/75, *Petroni/ONTPS*, [1975] ECR 1149. For further examples see ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 187.

⁹⁵³ Case 125/77, *KSH/Hoofdprodukschap voor Akkerbouwprodukten*, [1978] ECR 1991. In this case, in an earlier action for annulment in Case 101/76, *Koninklijke Scholten Honig/Council and Commission*, [1977] ECR 797 the regulation at issue had been held not to be of direct and individual concern to the applicant. See USHER, “Direct and Individual Concern”, 2003, at 586.

Additionally, preliminary rulings have also been used to “bypass the institutional enforcement procedures against Member States”⁹⁵⁴, and the “very restrictive nature of the action for failure to act.”⁹⁵⁵

Furthermore, the only relevant time limit for a challenge to the validity of Union acts before a national court is that for bringing the national action, so that Union legislation applied at the national level on a continuing basis by national administrative authorities can be challenged at any time. In contrast, direct actions have to be brought within two months counting from “the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.”⁹⁵⁶ It has thus happened that a private citizen who could not possibly have brought an action for annulment successfully challenged the validity of a provision of general legislation fifteen years after its enactment.⁹⁵⁷ Moreover, “[i]t would be misleading to picture the private plaintiff as a disinterested legal watchdog, alert to identify as soon as may be any possibly illegal Community activity.”⁹⁵⁸ The individual’s interest is likely to arise when his own activities are affected by Union action, “usually through the instrumentality of Member State authorities and not necessarily very soon after the inception of the Community measure.”⁹⁵⁹ In this context, preliminary rulings proceedings appear “as an equally if not more natural avenue of review.”⁹⁶⁰

II. Hence, the CJEU relies heavily on national courts and on the avenues offered by Article 267 TFEU to mitigate the problems caused by its strict approach to direct legality review.⁹⁶¹ More importantly, this decentralized approach to judicial review of Union acts could well be the reason underlying the restrictive interpretation of standing requirements. As seen above, such an approach may be seen as matching the long standing desire of the CJEU to function as a “Supreme Court” for the Union with national courts acting as courts of first instance and filtering litigation that reaches Luxembourg.⁹⁶² Reliance on national courts is thus a pivotal element of the Union *integrated* judicial architecture.

However, this system of judicial review of Union acts based on national courts and preliminary rulings on validity does not work adequately in order to fill the “black hole”⁹⁶³ in the judicial protection of private parties. A detailed analysis of the possibilities offered by this *combined* system shows that it does not provide a satisfactory alternative to the action for annulment.

⁹⁵⁴ USHER, “Direct and Individual Concern”, 2003, at 587. See Joined Cases 80 and 81/77, *Ramel/Receveur des Douanes*, [1978] ECR 927, where the Commission had earlier withdrawn enforcement proceedings against France in relation to the charges at issue.

⁹⁵⁵ *Ibid.*

⁹⁵⁶ Article 263(6) TFEU.

⁹⁵⁷ Case 41/84, *Pinna/Caisse d’allocations familiales de la Savoie*, [1986] ECR 1.

⁹⁵⁸ HARDING, “The Impact of Article 177 of the EEC Treaty on the Review of Community Action”, 1981, at 96.

⁹⁵⁹ *Ibid.*

⁹⁶⁰ *Ibid.* Noting, however, that the CJEU has adopted a stricter view on the admissibility of preliminary references, which “pourraient reléguer au second plan cette procédure” see BARAV, “Le droit au juge devant le Tribunal de première instance et la Cour de justice des Communautés européennes”, 1998, at 216, especially at 213-216.

⁹⁶¹ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 323.

⁹⁶² See *supra* Section 1.1.6.

⁹⁶³ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 26.

Notably, such system does not ensure “*with certainty and in all circumstances*”⁹⁶⁴ that judicial review at the initiative of individuals will take place.

The issue has been long explored in the literature. Most commentators have rejected the idea that Article 267 TFEU provides a suitable alternative to Article 263(4) TFEU.⁹⁶⁵ It was also one of the main points of AG JACOBS’ Opinion in *UPA*.⁹⁶⁶ I will thus limit my analysis to the essential points of the discussion and try to avoid unnecessary repetitions. The subsequent analysis is divided in two sections. Firstly, I shall try to demonstrate why the system envisaged by the CJEU does not work, from a *practical* point of view, as an adequate alternative means of judicial protection of private parties. For reasons of clarity, I shall base my analysis on AG JACOBS’ main arguments, i.e. (i) lack of access to courts; (ii) lack of competence of national courts; (iii) lack of remedies available to individuals; and (iv) the procedural disadvantages of the preliminary references procedure.⁹⁶⁷ Subsequently, I shall focus on what seem to be the two main *conceptual* difficulties in the CJEU’s case-law underlying the system of *jurisdictional subsidiarity* which do not enable such system to work as an alternative means of judicial protection. Here, I shall try to demonstrate that it is mostly the conceptual basis of the Union’s decentralised system of judicial review that does not allow for the affirmation that the Treaties have *indeed* established a “complete system of remedies and procedures.” In my view, the main flaw underlying the *deficit* of judicial protection of private parties in the EU resides not only in the procedural *lacunae* that the system has given rise to, but also and above all in the difficulties faced by the CJEU in filling in those gaps of protection in light of *its own views* of the Union’s judicial system.

1.2.2 The So-called “Gap Theory”: Practical Difficulties Surrounding Indirect Access to the CJEU

a) Lack of Access: the Absence of Implementing Measures

I. As seen above, the restrictive approach of the CJEU to the standing of individuals to bring a direct action may be justified by the fear that the Union courts become drowned in actions for annulment, which would jeopardize their already limited capacity to give an adequate and speedy response to the increasingly growing number of cases brought before them. In this scenario, pushing litigation to national courts would sound like a good solution.⁹⁶⁸ However, when the validity of Union acts is at stake, the avenues offered at the national level may well prove *insufficient*. The case of *Greenpeace* provides a good example of the difficulties faced by private parties in trying

⁹⁶⁴ See Case 70/88, *Parliament/Council*, [1991] ECR I-4529, para. 20. See *supra* Section 1.1.5.

⁹⁶⁵ See, e.g., CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 502 *et seq.*; RAGOLLE, “Access to Justice for Private Applicants in the Community Legal Order”, 2003, at 101; CORTES MARTIN, “*Ubi Ius, Ibi Remedium*”, 2004, at 233-261; KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 515 *et seq.*; “VAN DEN BERGHE, “The EU and Issues of Human Rights Protection”, 2010, at 126; CRAIG; BÜRCA, *EU Law*, 2011, at 505-507.

⁹⁶⁶ See Opinion in Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, paras. 36-49. See also Opinion of AG JACOBS delivered on 21 March 1991 in Case C-358/89, *Extramet/Council*, [1991] ECR I-2501, paras. 71-74. See also SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 453, 454.

⁹⁶⁷ TÜRK, *Judicial Review in EU Law*, 2009, at 232 *et seq.* See also BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*”, 2004, at 1650-1652; CRAIG; BÜRCA, *EU Law*, 2011, at 506.

⁹⁶⁸ See *supra* Section 1.1.6.

to challenge the validity of Union acts within the current system of judicial review.⁹⁶⁹

As is well known, the case of *Greenpeace* involved the challenge of a Commission decision granting Spain financial assistance for the construction of two power stations in the Canary Islands by three environmental interest groups and local residents. On appeal, the applicants argued that the refusal of the GC to hear the case for lack of standing created a legal *vacuum* in ensuring compliance with the Union environmental legislation, since “in this area the interests are, by their very nature, common and shared, and the rights relating to those interests are liable to be held by a potentially large number of individuals so that there could never be a closed class of applicants”⁹⁷⁰ satisfying the criteria adopted by the Court. Moreover, this legal *vacuum* could not be filled by the possibility of bringing proceedings before the national courts. In fact, such proceedings had been brought in the present case, but they concerned the Spanish authorities’ failure to comply with their obligations under Union law, and not the legality of the Commission’s measure itself. AG COSMAS analysis was enlightening:

“[I] think it useful to point out that (...) certain of the appellants sought to prevent the construction works in question by seeking the appropriate remedies before the competent national courts. Those proceedings are *still pending*. On the other hand, *there is no question pending before the Court of Justice* submitted for a preliminary ruling by a Spanish court on the issue of the legality of the relevant Commission decision to continue financing of the works on the Canary Islands. *Nor do I see in what way the issue of the legality of that decision could be raised in the context of national proceedings*. Those proceedings can concern only the lawfulness of the administrative authorizations granted for construction of the electricity-generating power stations, or of the environmental impact assessment. But, even if any such supplementary issue could, exceptionally, be raised, *the protection likely to be afforded by the national court would certainly not be as far-reaching and comprehensive as that which would have been secured by the appellants, had their action before the Court of First Instance been successful*. The judgment of the national court could not extend to cover the issue of legality of the financing *per se* or, *a fortiori*, lead to the setting aside of the Commission decision to continue financing (emphasis added).”⁹⁷¹

To the argument based on the absence of adequate and effective judicial remedies in the case the CJ simply replied that the actions brought in national courts although having a different subject-matter of the action brought before the GC, were based on the same rights afforded to individuals by Union law, which meant that “in the circumstances of the present case those rights [were] fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling.”⁹⁷² However, as WARD rightfully noticed “this finding is founded on false premises.”⁹⁷³ In fact, the solution left the applicants with a remedy against Spanish authorities but

⁹⁶⁹ Case T-585/93, *Greenpeace and others/Commission*, [1995] ECR II-2205 and Case C-321/95 P, *Greenpeace and others/Commission*, [1998] ECR I-1651. See GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 420-426.

⁹⁷⁰ Para. 18.

⁹⁷¹ Opinion of AG COSMAS, para. 74.

⁹⁷² Para. 33.

⁹⁷³ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 326.

not the Union institutions. Somehow paradoxically, the latter seemed to “have been granted scope to breach statutory duties to comply with environmental standards, safe in the knowledge that it will be near impossible for private parties to contest their conduct directly”⁹⁷⁴ before the CJEU.

Later, in *Areacova*⁹⁷⁵ the CJ reiterated that “the possibility for individuals to have their rights protected by means of an action before the national courts, which have the power to grant interim relief and, where appropriate, to make a reference for a preliminary ruling (...) constitutes the *very essence* of the Community system of judicial protection.”⁹⁷⁶ However, given that in the specific circumstances of the case it was impossible to bring the matter before national courts, in the absence of implementing measures, this statement although “presenting itself as a linear application of *Les Verts*, sounded rhetorical and empty.”⁹⁷⁷

II. Indeed, it may not always be possible to initiate proceedings in national courts. As AG RUIZ-JARABO COLOMER has put it in *Atzeni*⁹⁷⁸, a preliminary ruling on validity works as a viable option only when a *national implementing measure* has been adopted: “if there is no such State measure, it is clearly not possible to make a reference for a preliminary ruling.” Thus, “if in the latter case it is not possible to bring a direct action either, the comprehensive nature of the system of remedies is called into question.”⁹⁷⁹

One should note that in *Les Verts* the CJEU presupposed the existence of implementing measures, adopted either at the Union or national level. It was the possibility to challenge either of those implementing acts that allowed the affirmation that the system of legal remedies and procedures established under the Treaties is *complete*. The same holds true for the *dicta* in *UPA*, where the Court delegated in national courts the responsibility to allow the challenge of normative Union acts, by challenging the respective national implementing measures. However, this is not always the case. In some cases Union acts are applied directly either by national authorities or the Union institutions without entailing the existence of implementing measures. Hence, DOUGAN has noted that:

“[t]his puzzling *dictum* in *UPA* — which seems still to wed the Member States obligations to provide effective judicial protection to the existence of national implementing measures — hardly encourages the idea that the Court in *Unión de Pequeños Agricultores* was seriously concerned to solve the problem of decentralised access to judicial process for claimants seeking to challenge the validity of self-executing Community measures (emphasis added).”⁹⁸⁰

Thus, where implementing measures are lacking, gaps of protection will inevitably arise. Scholars have considered that in cases where there is no challengeable measure in national legal orders the reliance on preliminary rulings on validity results in “a complete denial of remedy to

⁹⁷⁴ *Ibid.*

⁹⁷⁵ Joined Cases C-300 and 388/99 P, *Area Cova and others/Council*, [2001] ECR I-983.

⁹⁷⁶ Para. 54.

⁹⁷⁷ ALEMANN, “What Has Been, and What Could Be, Thirty Years after *Les Verts*/European Parliament”, 2010, at 328.

⁹⁷⁸ Joined Cases C-346 and 529/03, *Atzeni and others*, [2006] ECR I-1875.

⁹⁷⁹ Opinion of AG RUIZ-JARABO COLOMER, para. 85.

⁹⁸⁰ DOUGAN, *National Remedies before the Court of Justice*, 2004, at 337.

applicants.”⁹⁸¹ The so-called “gap theory”⁹⁸² became clear in the first actions brought by individuals before the CJEU.⁹⁸³ Private applicants have argued in several occasions that recourse to the national courts is not always possible. The typical cases where a gap of protection may arise is where a Union act of general application does not require any national act of implementation that could form the basis of a claim before the national court. In this type of cases, the only available alternative to individuals would be to breach the law and in an action brought against them by national authorities defend themselves on the basis of the invalidity of the Union act at stake. As it has been put in a very well-known commentary:

“[a] Regulation may, as a matter of substance, be patently and outrageously unlawful; it may breach the principles of non-discrimination and proportionality, violate fundamental rights and inflict huge financial loss on large numbers of persons; but unless one of those persons can show that he is somehow singled out by the Regulation and injured more severely than the category to which he belongs, he will be unable to challenge it directly before the Union court. All he can do is to defy the Regulation and wait till an attempt is made to enforce it against him in the national courts, where he may of course contest the validity of the Regulation and succeed in having the issue referred to the European Court under Article 177.”⁹⁸⁴

Aside from the inconvenience in waiting for the implementation of Union measures adversely affecting their interests, there may be cases where such implementation never happens.⁹⁸⁵ Moreover, the fact that an individual affected by a Union measure may, in some instances, be able to bring the validity of a Union act before the national courts by violating the rules laid down by the measures and rely on the invalidity of those rules as a defence in criminal or civil proceedings directed against him does not offer the individual an adequate mean of judicial protection. In AG JACOBS words “[i]ndividuals clearly cannot be required to breach the law in order to gain access to justice.”⁹⁸⁶ The European Court of Human Rights (ECtHR) has also confirmed in *Posti and Rahko/Finland*⁹⁸⁷ that “no one can be required to breach the law so as to be able to have a ‘civil right’ determined in accordance with Article 6 § 1.”⁹⁸⁸ This statement was more recently confirmed by the CJEU itself in the case of *Unibet*⁹⁸⁹, where the CJ held that:

“[i]f, on the contrary (...) it [an individual] was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that

⁹⁸¹ KOCH, “Locus Standi of Private Applicants under the EU Constitution”, 2005, at 515.

⁹⁸² See e.g., DOUGAN, *National Remedies before the Court of Justice*, 2004, at 333 *et seq.*, noting that in these cases there is a genuine risk of claimants being squeezed between to illiberal regimes on standing.

⁹⁸³ Case 66/76, *CFDT/Council*, [1977] ECR 305.

⁹⁸⁴ MANCINI; KEELING, “Democracy and the European Court of Justice”, 1994, at 188.

⁹⁸⁵ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 348.

⁹⁸⁶ Opinion of AG JACOBS in Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 43; Case T-177/01, *Jégo-Quéré/Commission*, [2002] ECR II-2365, para. 45. See also CORTHAUT, “Comment on *Jégo-Quéré*”, 2002/2003, at 143; ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 87; RAGOLLE, “Access to Justice for Private Applicants in the Community Legal Order”, 2003, at 91; KOCH, “Locus Standi of Private Applicants under the EU Constitution”, 2005, at 515.

⁹⁸⁷ Case *Posti and Rahko/Finland*, Application no. 27824/95, Judgement of 24/09/2002.

⁹⁸⁸ Para. 64.

⁹⁸⁹ Case C-432/05, *Unibet*, [2007] ECR I-2271.

would not be sufficient to secure for it such effective judicial protection.”⁹⁹⁰

Nonetheless, this is exactly the situation that an individual wishing to challenge an EU measure can find himself/herself in. In the case of self-executing EU acts “the only strategy is to become a criminal and hope for a sympathetic judge willing to refer the question to the ECJ.”⁹⁹¹ As BIONDI noticed, it is obvious that “there is something that does not work here”:

“[w]hilst the right of an effective judicial protection is violated by a national provision obliging the individual to *break the law to test its lawfulness*, the same principle is instead respected in the same legal situation but with reference to Article 230 EC.”⁹⁹²

Hence, in order to avoid a policy of “*deux poids, deux mesures*”⁹⁹³ the CJEU should extend the reasoning in *Unibet* to the control of validity of Union acts. Otherwise the coherence of the system will be inevitably compromised.⁹⁹⁴

III. There have been some *attempts* to deny the existence of gaps of protection in these cases. Thus, the CJ held in *Jégo-Quéré* that there was not any gap of protection as the fact that the contested regulation applied directly, without intervention of national authorities, did not mean that:

“[a] party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is *possible for domestic law* to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to *seek from the national authorities under that legislation a measure which may itself be contested before the national courts*, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by Regulation No. 1162/2001 *may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly* (emphasis added).”⁹⁹⁵

Based on these considerations one could question if some of the most well-known cases involved the existence of a gap of protection. Hence, it could be argued that in *Extramet* the applicant could have challenged the national act implementing the anti-dumping regulation and within the national judicial proceedings address the CJEU under the preliminary rulings

⁹⁹⁰ Para. 64. See also AG SHARSTON’s Opinion in *Unibet*, para. 44. For further developments see e.g. ARNULL, “Case C432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslen*”, 2007, at 1763-1780; ANAGNOSTARAS, “The Incomplete State of Community Harmonisation in the Provision of Interim Protection by the National Courts”, 2008, at 586-597; BO, “La pronuncia della Corte di giustizia nella causa *Unibet* tra principio di autonomia processuale e principio di non discriminazione”, 2008, at 1065-1078; JACCHIA; FRIGO, “Responsabilità extracontrattuale degli Stati membri, effettività e rimedi giurisdizionali nella giurisprudenza della Corte di giustizia”, 2008, at 643-680; VAN WAEYENBERGE; PECHO, “L’Arrêt *Unibet* et le Traité de Lisbonne”, 2008, at 123-156.

⁹⁹¹ BIONDI, “How to Go Ahead as an EU Law National Judge”, 2009, at 236.

⁹⁹² *Ibid.* Also noting the paradox see ARNULL, “The Principle of Effective Judicial Protection in EU Law”, 2011, at 56.

⁹⁹³ LENAERTS, “Le Traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l’Union”, 2009, at 742.

⁹⁹⁴ See ANAGNOSTARAS, “The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights”, 2007, at 735.

⁹⁹⁵ Noting that in other language versions – notably the French, German and Spanish ones – the same paragraph comes closer to the expression “it cannot be excluded” see BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*”, 2004, at 1648.

procedure.⁹⁹⁶ However, time pressured: the applicant needed the money to pursue its economic activity. ENCHELMAIER noted that despite any interim measures, Extramet would have become more dependent on supplies by Péchinery.⁹⁹⁷ This dependence could not be cured by the anti-dumping duties or by the release of any security furnished instead. Proceedings in national courts alleging an abuse of dominant position by Péchinery could be avoided by the latter's supply of just enough to Extramet in order for it to stay in business. Extramet was thus deprived of an effective remedy in national courts, which justified granting direct access to the CJEU. In *UPA*, the contested regulation established the possibility to benefit from a subsidy which had not yet been granted. In this kind of situations the individual could always address the national administration requesting the grant of such benefit, and "provoke" the existence of a national act which could then be challenged before national courts.⁹⁹⁸ However, in *Jégo-Quéré*, as the Commission regulation established a prohibition which was enforceable directly and regardless of the adoption of national measures, it is certainly more difficult to argue that the applicant was not, in the absence of implementing measures, deprived of access to a court. Nonetheless, in *ACAV*⁹⁹⁹, which involved a challenge to a regulation imposing a prohibition of drift-nets, the Commission pointed out that the possibilities for making a reference for a preliminary ruling were "not non-existent but reduced."¹⁰⁰⁰ Even if the regulation did not involve an implementing measure, there was nothing to prevent the applicants from seeking an authorisation to use nets of that kind and challenge a possible refusal by the competent authorities to issue it to them. In other words, the applicant could have asked the national authorities *not to apply EU law*.

Besides the fact that this approach contradicts the direct applicability of regulations, it is highly questionable if an applicant should be required to *build* every piece of a legal suit with the sole purpose of avoiding the application of excessively strict procedural rules.¹⁰⁰¹ NIHOUL has suggested that national authorities *invent* a mechanism whereby individuals can ask them what their attitude would be if the individual were to adopt a certain type of behaviour which was seemingly contrary to an EU act.¹⁰⁰² This suggestion has, rightfully, been deemed highly artificial: "[i]t is asking authorities on a set of purely hypothetical circumstances whose formulation is entirely in the hands of the party requesting the position and which would quite possibly change before the authority had to take a 'real' decision on the matter."¹⁰⁰³ No such obligation flows from Union law.

Furthermore, even if it is possible to identify a national measure which is challengeable in national courts, it is not certain that a preliminary reference on validity will occur.¹⁰⁰⁴ Moreover,

⁹⁹⁶ See NIHOUL, "La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale", 1994, at 183, noting also that the national judge could have suspended the national act while the preliminary ruling was pending.

⁹⁹⁷ ENCHELMAIER, "No One Slips Through the Net", 2005, at 182.

⁹⁹⁸ See TÜRK, *Judicial Review in EU Law*, 2009, at 217.

⁹⁹⁹ Case T-138/98, *ACAV and others/Council*, [1999] ECR II-1797.

¹⁰⁰⁰ Para. 34.

¹⁰⁰¹ CASSIA, "Continuité et rupture dans le contentieux de la recevabilité du recours en annulation des particuliers", 2002, at 551.

¹⁰⁰² NIHOUL, "Individus, entreprises et recours en annulation", 2002, at 201.

¹⁰⁰³ BROWN; MORIJN, "Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*", 2004, at 1650.

¹⁰⁰⁴ See *infra* Section 1.2.2.(c).

there may be cases where implementing national measures do exist but there is no possibility of challenging such acts *judicially*, if for instance the possibility of a challenge is limited to administrative proceedings.¹⁰⁰⁵ Hence, there may be cases where there are no national *judicial* procedures within which national implementing measures can be challenged and consequently a preliminary reference will not be possible. Private parties can therefore find themselves deprived of judicial protection, a result which is incompatible with the principle that the Community is based upon the rule of law and with the principle of effective judicial protection.¹⁰⁰⁶ This seems to have been the case in the *Confédération française démocratique du travail (CFDT)*¹⁰⁰⁷, where the applicant sought the annulment of a Council's decision designating representative organizations required to draw up lists of candidates for the consultative committee referred to in Article 18 of the TECSC. In support of its claims, CFDT argued that the admissibility of the application flowed from the basic principle of Article 31 of the TECSC whereby "the Court shall ensure that in the interpretation and application of this Treaty, and of the rules laid down for the implementation thereof, the law is observed."¹⁰⁰⁸ It further maintained that in the absence of a real opportunity to institute proceedings within the national legal system there was a risk that the inadmissibility of the action before the CJ would mean that its case could not be heard. In fact, in its decision of February 10, 1978, the *Conseil d'État* had ruled out its jurisdiction to hear the case. The CJ also dismissed the application considering that it could not "on its own authority (...) amend the actual terms of its jurisdiction"¹⁰⁰⁹, thus leaving the applicant facing a judicial *vacuum*.¹⁰¹⁰ Consequently, CFDT turned to the European Commission on Human Rights for breach of Article 6 ECHR. Its complaint was, however, also dismissed on the grounds of lack of jurisdiction *ratione personae*, as the Community was not a party to the Convention.¹⁰¹¹

IV. To put it briefly, in certain cases, the national route may be neither feasible nor effective. However, as seen above, in the CJEU's perspective, such circumstance does not enable the Court to introduce a *change* in the system of remedies and procedures established in the Treaties: *in any circumstance* such event allows for the admissibility of a direct action where proof of direct and individual concern – as understood in the Court's case-law – is not established.¹⁰¹² Hence, procedural gaps of protection *do arise* and the CJEU's approach to the Union's judicial system does not allow it to fill in those gaps.

¹⁰⁰⁵ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 191, 192. See also GRANGER, "Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts", 2007, at 131, stressing that the problem lies mainly in the absence of national proceedings.

¹⁰⁰⁶ ALBORS-LLORENS, "The Standing of Private Parties to Challenge Community Measures", 2003, at 82.

¹⁰⁰⁷ Case 66/76, *CFDT/Council*, [1977] ECR 305. See ALKEMA, "Application No. 8030177, *Confédération Française Démocratique du Travail v. the European Communities*", 1979, at 498-508.

¹⁰⁰⁸ This obligation is currently established in Article 19(1) TEU *in fine*.

¹⁰⁰⁹ Para. 8.

¹⁰¹⁰ Mentioning also the cases of *Eridania*, *Gibraltar* and *Sgarlata* as emblematic of *lacunae* in the judicial protection of individuals see ALMEIDA, "Le recours en annulation des particuliers", 1995, at 866, 867.

¹⁰¹¹ See FERNANDEZ ESTEBAN, *The Rule of Law in the European Constitution*, 1999, at 124, note 66.

¹⁰¹² See *supra* Section 1.1.4.

b) Lack of Competence: the *Foto-Frost* Principle

I. Regardless of the fact that Member States did not introduce different regimes for questions on interpretation and on validity of Union law the CJEU considered that the Treaties did not “settle the question whether [national] courts themselves may declare that acts of Community institutions are invalid.”¹⁰¹³ Hence, facing the existence of a *lacuna* and based on the need to ensure the uniform application of Union law and the coherence of the system of judicial review established under the Treaties¹⁰¹⁴, the CJEU held in *Foto-Frost* that, national courts, regardless of whether a judicial remedy exists against their decisions under national law, have no jurisdiction to declare that Union acts are invalid.¹⁰¹⁵

With this ruling the Court created a new obligation to refer, *praeter legem*, which was – and still remains¹⁰¹⁶ – not mentioned in the Treaties. This solution was in line with the wording of the Treaty of Paris, which gave the CJEU exclusive competence to decide on the validity of ECSC acts.¹⁰¹⁷ AG MANCINI, who in his Opinion in the case qualified the issue as one “*tra i più scabrosi che questa Corte abbia mai dovuto affrontare*”¹⁰¹⁸, noted that the prevailing view in early academic literature was that preliminary references on validity should be mandatory.¹⁰¹⁹

It is said that *Foto-Frost* turned Union law into a legal order into a system of *decentralized application* and of a *centralized disapplication*.¹⁰²⁰ Thus, a national court facing doubts regarding the

¹⁰¹³ Para. 13. In Case 101/78, *Granaria/Hoofdproduktschap voor Akkerbouwprodukten*, [1979] ECR 623, the CJEU had already considered that a Union act must be presumed valid until the competent Court makes a finding that it is invalid. However, the CJEU did not clarify which court should be considered *competent*.

¹⁰¹⁴ The CJEU added to these “fundamental requirements” of the Union legal order, a practical consideration concluding that it is in the best position to undertake the review of legality of Union acts. See BEBR, “The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty”, 1988, at 670. The author notes, nonetheless, that the autonomous nature of the Union legal order and the principle of supremacy although not mentioned by the Court constitute additional important arguments to justify *Foto-Frost*. See *ibid.*, at 678. AG MANCINI had also drawn attention to the anomaly arising from the fact that inferior courts could invalidate Union law, whereas last instance courts could not. See Opinion in *Foto-Frost*, para. 5.

¹⁰¹⁵ Para. 20. Noting the importance of the “coherence” argument see BERTEA, “Looking for Coherence within the European Community”, 2005, at 164. See also QUADROS, “Comentário ao Acórdão do Tribunal de Justiça de 22 de Outubro de 1987, Proc. 314/85, *Foto-Frost c. Hauptzollamt Lübeck-Ost*”, 2011, at 234 *et seq.*

¹⁰¹⁶ Regretting that *Foto-Frost* was not included in the CT see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 82. For a critical assessment of *Foto-Frost* see e.g., CAMPOS; CAMPOS, *Contencioso Comunitário*, 2002, at 150; GORJÃO-HENRIQUES, *Direito da União*, 2010, at 512, 513.

¹⁰¹⁷ Article 41 TECSC. Also the ill-fated Treaty on the European Defence Community laid down the exclusive jurisdiction of the Court in these matters (see British White Paper, The European Defence Community Treaty, Cmd. No. 9127, 1954).

¹⁰¹⁸ Opinion of AG MANCINI in *Foto-Frost*, para. 4.

¹⁰¹⁹ Opinion of AG MANCINI in *Foto-Frost*, at 4218. Other AGs had suggested such a solution. See Opinion of AG CAPOTORI, in Case 101/78, *Granaria/Hoofdproduktschap voor Akkerbouwprodukten*, [1979] ECR 623, (the invalidity of a Union act “cannot be established other than through proceedings before the Court of Justice (under Article 173 or 177 of the EEC Treaty) and that until such a ruling is given every measure is presumed to be lawful and has effect”); and Opinion of AG DARMON in Case 112/83, *Produits de Maïs/Administration des douanes et droits indirects*, [1985] ECR 719 (“Articles 173 to 176 of the Treaty concerning application for a declaration that a measure is void and Article 177 concerning preliminary rulings on validity clearly imply that the Court has the sole power to decide on the legality of secondary legislation”). Noting that the decisions of the Court in Case 11/70, *Internationale Handelsgesellschaft mbH Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125; Case 101/78, *Granaria/Hoofdproduktschap voor Akkerbouwprodukten*, [1979] ECR 623; Case 61/79, *Amministrazione delle finanze dello Stato/Denkavit italiana*, [1980] ECR 1205; and Case 112/83, *Produits de Maïs/Administration des douanes et droits indirects*, [1985] ECR 719 constituted also signs suggesting the exclusive jurisdiction of the CJEU see BEBR, “The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty”, 1988, at 674 *et seq.*

¹⁰²⁰ QUADROS, *A Função Subjectiva da Competência Prejudicial do Tribunal de Justiça das Comunidades Europeias*, 2006, at 42. Nonetheless, national courts may grant interim relief while preliminary rulings on validity are pending. See Joined Cases 143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest/Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, [1991] ECR I-415 and Case C-465/93, *Atlanta Fruchthandels-gesellschaft and others (I)/Bundesamt für Ernährung und Forstwirtschaft*, [1995] ECR I-3761.

validity of a Union act and wishing to declare such act invalid is under an obligation to refer such question to the CJEU and wait for its ruling which will be binding on the case *sub judice*. Surely, this centralized system of judicial review – based on the premise that the CJEU is in the best position to decide on the validity of Union acts¹⁰²¹ – contrasts with the decentralized application of Union law by national authorities. One should note, however, that the same concern underlies both ideas: *i.e.* the need to ensure the maximum application of Union law in Member States legal orders, by limiting the situations where its validity and application is called into question.

II. The right to effective judicial protection requires that individuals have access to a court which is competent to solve their case. In fact, one of the guarantees included in the fundamental right to effective judicial protection is the right to the so-called lawful or natural judge – the *juge legal* or the *gesetzlicher Richter* – which mainly determines that private parties must have access to the judge with jurisdiction to decide their case. As a consequence of *Foto-Frost* this is not the case of national courts when the challenge of Union acts is at stake. Thus, an individual who brings a suit in a national court requesting it to declare invalid a measure of Union law will most probably have its case dismissed. The only possible way for such applicant to have such question of validity solved in a court of law is to mount a legal suit, under national procedural rules, and trust that the national court makes a reference to the CJ. This mechanism has been considered a “*detour bien artificiel pour aboutir à la saisine de la juridiction compétente*.”¹⁰²² Since national courts are not competent to declare a Union act invalid the preliminary rulings procedure is destined to play an *artificial role* in allowing for an indirect access to the CJEU. As AG JACOBS put it:

“[i]n a case concerning the validity of a Community measure, the competence of the national court is limited to assessing whether the applicant’s arguments raise sufficient doubts about the validity of the impugned measure to justify a request for a preliminary ruling from the Court of Justice. *It seems to me, therefore, artificial to argue that the national courts are the correct forum for such cases* (emphasis added).”¹⁰²³

III. The *Foto-Frost* principle finds its inspiration in Member States legal orders where constitutional review is concentrated in higher and specialized courts, separate from the judiciary.¹⁰²⁴ Scholars have commonly pointed to the Italian *questione di legittimità costituzionale* and the German *konkrete Normenkontrollverfahren* as the main inspirations for the creation of the preliminary rulings on validity.¹⁰²⁵

¹⁰²¹ Para. 18.

¹⁰²² SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 6; WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 877.

¹⁰²³ Opinion of AG JACOBS, para. 41. Considering that on issues of validity national courts should be deemed “*forum non conveniens*” see GINTER, “Access to Justice in the European Court of Justice in Luxembourg”, 2002, at 386.

¹⁰²⁴ In accordance with the dominant constitutional trends in post-war Europe particularly as expressed by HANS KELSEN. For discussion on the main trends existing in European countries see FROMONT, “La diversité de la justice constitutionnelle en Europe”, 2005, at 89-103; AMARAL, “Problemas da *judicial review* em Portugal”, 2005, at 67-90.

¹⁰²⁵ Noting that despite the success of the EU preliminary references procedure, the latter is not an invention of the authors of the Treaties as it was inspired in the Italian and German systems of constitutional review see PESCATORE, *Le recours préjudiciel de l’article 177 du traité CEE et la coopération de la Cour avec les juridictions nationales*, 1986, at 7. In contrast, the system of preliminary references on interpretation seems to have been inspired in the French longstanding

Hence, in Italy, access to constitutional review is rather circumscribed. The Italian system offers only *a posteriori*, indirect review, which arises mainly out of a separate judicial proceeding.¹⁰²⁶ The “keys that open the doors to constitutional review are primarily in the hands of ordinary judges”, who have an important function of screening the questions that the *Corte Costituzionale* will be called upon to answer. Thus, the constitutional proceeding begins with a “certification order” whereby the ordinary judge suspends the suit and submits the question of constitutionality to the constitutional court.¹⁰²⁷ However, in Italy, constitutional review is limited exclusively to laws: ordinary courts retain the power to control the validity of delegated or administrative normative acts.

Similarly, in Germany, only the *Bundesverfassungsgericht* has the competence to find that a statute is incompatible with the *Grundgesetz*. If any other court considers a law to be unconstitutional and therefore wishes not to apply it, it must suspend its proceedings and refer the question of constitutionality to the constitutional court.¹⁰²⁸ This mechanism is not a remedy the initiation of which lies in the hands of private parties.¹⁰²⁹ However, in Germany, anyone who feels that his or her fundamental rights have been infringed by the public authorities – including the judiciary – may lodge a constitutional complaint directly in the Federal Constitutional Court. The *Verfassungsbeschwerde* constitutes the main form of constitutional review used in Germany and may be directed against a measure of an administrative body, against the verdict of a court or against a law.¹⁰³⁰

In the European Union, although national judges have become ordinary judges of Union law – *les juges communautaires de droit commun* –, their competence is restricted to the application and interpretation of Union measures.¹⁰³¹ Thus, they cannot declare any Union act invalid, not even of an administrative nature. Hence, that description is “not appropriate for cases which do not involve questions of interpretation, but raise only issues of the validity of Community measures, since in such cases the national courts do not have power to decide what is at issue.”¹⁰³² Considering that individuals are granted direct access to the CJEU to challenge the validity of

tradition of leaving to the government the interpretation of international treaties. See JOLIET, “L’article 177 du traité CEE et le renvoi préjudiciel”, 1991, at 592; QUADROS, *A Função Subjectiva da Competência Prejudicial do Tribunal de Justiça das Comunidades Europeias*, 2006, at 31, 32; EDWARD, “CILFIT and Foto-Frost in their Historical and Procedural Context”, 2010, at 175.

¹⁰²⁶ GROPPI, “The Italian Constitutional Court”, 2010, at 4.

¹⁰²⁷ *Ibid.* In that order, the judge must indicate the relevance and plausibility of the question, the law challenged, and the constitutional provision that it allegedly violates.

¹⁰²⁸ This is the concrete review of statutes. See Article 100 (1) GG: “[i]f a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.” Additionally, the Federal Government, a State Government or one quarter of the members of the Bundestag may have the constitutionality of a statute reviewed (abstract review of statutes). See Article 93(2) GG.

¹⁰²⁹ STEINBERGER, “Judicial Protection of Human Rights at the National Level”, 1991, at 160.

¹⁰³⁰ Article 93(4a): “(1) The Federal Constitutional Court shall rule: (...) 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been infringed by public authority. For further developments see e.g., STEINBERGER, “Judicial Protection of Human Rights at the National Level”, 1991, at 189 *et seq.* See *infra* Part II, Chapter 2, Section 2.1.5.

¹⁰³¹ Case T-219/95 R, *Danielsson and others/Commission*, [1995] ECR II-3051, para. 77.

¹⁰³² Opinion of AG JACOBS, para. 41.

Union acts only in very rare cases, the EU system retained *again* the most restrictive features of national legal systems where it drew inspiration from.

IV. The *Foto-Frost* doctrine has long been criticized in the literature.¹⁰³³ It should be noted that this principle was based on the need to ensure the uniform application and the coherence of Union law. According to the CJEU the “requirement of uniformity is *particularly imperative* when the validity of a Community act is in issue” as “divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.”¹⁰³⁴ However, it is clear that the coherence and uniformity of Union law are also undermined by the possibility left open to national courts to consider Union acts valid. If, national judges are “entitled to rule that an impugned Community measure is perfectly valid, even if rigorous arguments have been raised to the contrary”¹⁰³⁵, coherence and uniformity of Union law may be equally impaired as different courts may take different views on the validity of a given measure.

For what it is worth, *Foto-Frost* precludes national courts from *invalidating* Union acts. This means that private parties cannot challenge directly the validity of Union law in national courts. What the CJEU gave with one hand – by considering national courts the primary *forum* to enforce Union law – it took with the other – by not allowing national courts to invalidate Union law. Surely, the Court could have favoured the introduction of a (more) decentralized system of judicial review, closer for instance to the American model. This option would be in line with the decentralized application of Union law in national legal orders and would have allowed private parties to challenge the validity of Union acts – or at least some of them – directly in national courts. In this scenario, the issue of the right to the lawful judge would probably be less problematic. In the current circumstances, however, as SCHERMERS and WAELEBROECK have rightfully noticed:

“[o]bliging parties to go before a national court while the Court of Justice itself was adamant not to allow the latter to decide on such issues would imply a judicial ‘roundabout’ which is neither in the interest of the parties, nor the courts, nor certainly in the interest of the economy of procedure or of legal certainty.”¹⁰³⁶

Thus, the combined effect of the restrictive approach to direct access to the Union courts

¹⁰³³ See e.g., BARAV, “La plénitude de compétence du juge national en sa qualité de juge communautaire”, 1991, at 3; BOULOUIS, *Droit institutionnelle de l’Union Européenne*, 1997, at 317; CLAES, *The National Courts’ Mandate in the European Constitution*, 2006, at 224-231, with further references; KOMAREK, “In the Court(s) We Trust?”, 2007, at 477; LECZYKIEWICZ, “‘Effective Judicial Protection’ of Human Rights After Lisbon”, 2010, at 338 *et seq.* In contrast, favouring the decision see e.g., SCHERMERS; WAELEBROECK, *Judicial Protection in the European Communities*, 2001, at 268; QUADROS, *A Função Subjectiva da Competência Prejudicial do Tribunal de Justiça das Comunidades Europeias*, 2006, at 42; EDWARD, “CILFIT and *Foto-Frost* in their Historical and Procedural Context”, 2010, at 182. Noting that *Foto-Frost* was accepted by Member States courts see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 321 *et seq.* AG MANCINI confessed in his Opinion in the case to have suggested such solution “subject to one exception, a number of doubts and, above all, no little apprehension as to how a judgment in accordance with that proposal would be received (para. 4).” The same AG considered in Case C-355/04 P, *Segi and others/Council*, [2007] ECR I-1657 that *Foto-Frost* should not apply to the third pillar. See *infra* Chapter 2, Section 2.1.

¹⁰³⁴ Case 27/95, *Woodspring District Council/Bakers of Nailsea*, [1997] ECR I-1847, para. 20.

¹⁰³⁵ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 353.

¹⁰³⁶ SCHERMERS; WAELEBROECK, *Judicial Protection in the European Union*, 2001, at 542.

and the *Foto-Frost* case-law creates a *judicial vacuum* and restricts the individuals' right to the lawful judge, a situation which is difficult to justify in light of the principles that found the very existence of the EU. It is not surprising, therefore, that commentators have considered that the logical conclusion to draw from *Foto-Frost* is that the CJEU must open more widely the doors to Union courts.¹⁰³⁷ It is inconsistent to hold inadmissible direct actions on the grounds of the existence of alternative remedies in national courts and at the same time deprive the latter of powers of judicial review.

c) Lack of Remedy: no Right to a Preliminary Ruling on Validity

I. More significantly perhaps, is the fact that the preliminary references procedure is not available to individuals *as a matter of right*. Thus “recalcitrant national courts”¹⁰³⁸ may in practice deprive individuals of “an effective remedy.”¹⁰³⁹ In fact, as the CJEU has put it in *IATA*¹⁰⁴⁰:

“[a]rticle 234 EC does not constitute a *means of redress available to the parties* to a case pending before a national court and therefore the mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a question has been raised within the meaning of Article 234 EC (...). Accordingly, the fact that the validity of a Community act is contested before a national court *is not in itself sufficient to warrant referral of a question to the Court for a preliminary ruling* (emphasis added).”¹⁰⁴¹

Thus, under Article 267 TFEU national courts have a *discretionary power* to refer questions to the Union courts.¹⁰⁴² Hence, it is only *if* the national court considers it *necessary* to enable it to give judgment that it shall refer a question to the CJ. The decision “lies therefore with the national court whether to make a reference.”¹⁰⁴³ It is solely in the hands of the national judge to determine, in light of the special features of each case, if he/she needs a preliminary ruling which enables him/her to give judgment.¹⁰⁴⁴ At the most private parties have a mere “right of initiative” to raise questions of EU law¹⁰⁴⁵, even under *Foto-Frost* or the obligation established in Article 267(3) TFEU. The national judge retains full power in deciding on the existence of the questions¹⁰⁴⁶, their

¹⁰³⁷ *Ibid.*, at 495.

¹⁰³⁸ ENCHELMAIER, “No One Slips Through the Net?”, 2005 at 196.

¹⁰³⁹ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 515.

¹⁰⁴⁰ Case C-344/04, *IATA and ELFAA*, [2006] ECR I-403.

¹⁰⁴¹ Para 28. Stressing the distinction between *references from appeals* see HARTLEY, *The Foundations of European Union Law*, 2010, at 286. National courts may, on the contrary, raise the EU law questions on their own motion. See also BARAV, “Le renvoi préjudiciel communautaire”, 1997, at 4.

¹⁰⁴² Not even the public prosecutor can compel the national court to make a reference. See also Case 93/78, *Mattheus/Doego*, [1978] ECR 2203, para. 46. Noting the “*rôle pivot*” of national courts in this respect see BERROD, *La systématique des voies de droit communautaires*, 2003, at 855 et seq.

¹⁰⁴³ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 188. The CJ has said that it will not judge the appropriateness of the references raised by the national courts. See Case 93/78, *Mattheus/Doego*, [1978] ECR 2203, para. 6.

¹⁰⁴⁴ Case 166/73, *Rheinmühlen Drüsseldorf/Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, [1974] ECR 33, paras. 4, 5; Joined Cases 36 and 71/80, *Irish Creamery Milk Suppliers Association*, [1981] ECR 735, paras. 6-7; Joined Cases C-332, 333 and 335/92, *Eurico Italia and others/Ente Nazionale Risi*, [1994] ECR I-711, para. 17.

¹⁰⁴⁵ See BEBR, “The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty”, 1988, at 685.

¹⁰⁴⁶ ARNULL, “References to the European Court”, 1990, at 381; BARAV, “Le renvoi préjudiciel communautaire”, 1997, at 3; ARNULL, “The Past and Future of the Preliminary Rulings Procedure”, 2003, at 345.

relevance and the possible application of the *CILFIT*'s¹⁰⁴⁷ exceptions. There is not in any case an automatic preliminary references procedure.¹⁰⁴⁸ This may explain why for many judges a reference to the CJEU remains “an exceptional event as it is not always easy for those unfamiliar with Community law to identify and formulate relevant questions and to set out the background to a case clearly and concisely.”¹⁰⁴⁹

Hence, individuals have *no right* to decide if a reference should be made and *no guarantee* that a reference will *in fact* be made. In the famous *Bulmer* case¹⁰⁵⁰ LORD DENNING considered that “if both parties want the point referred... the English court should have regard to their wishes.” However, he stated, “it should not give them undue weight”, as the final decision lies solely in the hands of national courts. Furthermore, it is for national courts to decide *which questions* to refer to the CJEU. The courts are not obliged to include all such questions or all grounds of invalidity invoked by the parties.¹⁰⁵¹ This discretion may end up redefining the questions raised by the parties. Individuals may not define the scope of the questions to refer¹⁰⁵², nor contest the description of the facts submitted by the national court.¹⁰⁵³ In the *Berlim butter* cases¹⁰⁵⁴ the applicants argued that their application for annulment should be held admissible in order to ensure full legal protection, as the questions submitted to the CJ by the *Verwaltungsgericht Frankfurt am Main* for a preliminary ruling in a previous case had related only to some of the allegations which the applicants had set out in support of this application. The CJ firmly rejected the argument stating that:

“[t]he fact that the national court is empowered to determine which questions it intends to submit to the Court is *an inherent feature of the system of means of redress* established by the

¹⁰⁴⁷ Case 283/81, *CILFIT/Ministero della Sanità*, [1982] ECR 3415.

¹⁰⁴⁸ Although Article 267(3) TFEU does not have the same wording as Article 267(2) TFEU one should consider that national courts of last instance retain full power to decide if the question is relevant and necessary to enable it to give judgment. See PESCATORE, *Le recours préjudiciel de l'article 177 du traité CEE et la coopération de la Cour avec les juridictions nationales*, 1986, at 17. Notwithstanding, there is still a difference between the possibilities offered under both provisions. In fact, under the Article 267(2) even if the national judge considers an answer to the question to be necessary to enable it to give judgement it may not address the CJEU if other considerations relating with the case so determine. Such option is not available under Article 267(3).

¹⁰⁴⁹ DIMITRIOS, *The Interim Protection of Individuals before the European and National Courts*, 2006, at 134; ARNULL, *The European Union and its Court of Justice*, 2006, at 104 *et seq.*

¹⁰⁵⁰ In Case *H. P. Bulmer Ltd. v. J. Bollinger SA* [1974] 2 WLR 202. GORMLEY considered that “under the guise of being helpful, they could in fact appear intended to fetter the discretion of the lower courts to make a reference, or at least they could have such an effect, or be heavily dissuasive.” See GORMLEY, “References for a Preliminary Ruling”, 2002, at 461. LORD DENNING's criteria were famously revisited by the Sir THOMAS BINGHAM in *R. v. International Stock Exchange of the United Kingdom and the Republic of Ireland, Ex p. Else et al.* [1993] Q.B. 534. The English courts seem to adopt a more relaxed approach nowadays and seem to be more ready to refer. See Case *Customs and Excise Commissioners v. ApS Samex (Hanil Fiber Industrial Co. Ltd., third party)* [1983] 1 All ER 1042. Hence, it has been considered that unless the court is completely confident it must refer. One would say that if the national court is *completely* confident in the answer there is no real question of EU law which is necessary to give judgment in the first place. For further developments see JACOBS, “When to refer to the European Court”, 1974, at 492; ARNULL, “References to the European Court”, 1990, at 381 *et seq.*; LENZ; GRILL, “The Preliminary Ruling Procedure and the United Kingdom”, 1995-1996, at 853 *et seq.*; GORMLEY, “References for a Preliminary Ruling”, 2002, at 66; CRAIG; BÚRCA, *EU Law*, 2011, at 460.

¹⁰⁵¹ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 48.

¹⁰⁵² Case 44/65, *Hessische Knappschaft/Singer et Fils*, [1965] ECR 965, at 970. Cases where the CJ decide to accept questions put by private parties remain the exception. See Case 17/72, *Gesellschaft für Getreidehandel/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1972] ECR 1071, para. 2; Joined Cases 103 and 145/77, *Royal Scholten-Honig/Intervention Board for Agricultural Produce*, [1978] ECR 2037, paras. 16-17.

¹⁰⁵³ Case 104/77, *Öhlschlager/Hauptzollamt Emmerich*, [1978] ECR 791, para. 4.; Case C-364/92, *SAT Fluggesellschaft/Eurocontrol*, [1994] ECR I-43, paras. 12-14.

¹⁰⁵⁴ Case 97/85, *Deutsche Lebensmittelwerke/Commission*, [1985] ECR 1331; Joined Cases 133 to 136/85, *Rau/BALM*, [1987] ECR 2289.

Treaty and is not therefore an argument which is capable of justifying a broad interpretation of the conditions of admissibility laid down in the second paragraph of Article 173 of the EEC Treaty (emphasis added).¹⁰⁵⁵

II. Therefore, although preliminary rulings on validity are mandatory under the *Foto-Frost* case-law, there is still a considerable margin of discretion of the national judge in deciding whether or not to refer the question to the CJ.¹⁰⁵⁶ In *Foto-Frost* the CJ stated that national courts would be under an obligation to refer if they have “serious doubts” on the validity of the measure. In *IATA* the CJ “settled on the phrase ‘well-founded’ as the touchstone for the cogency which argument on validity must reach before the obligation to stay proceedings and make reference will apply”.¹⁰⁵⁷ Notwithstanding, national courts “may examine the validity of a Community act and, if they consider that the arguments put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the act is completely valid.”¹⁰⁵⁸ Thus, from the individual’s perspective the scale of discretion enjoyed by national courts in sending questions to the CJ constitutes an important hurdle “blocking effective judicial protection.”¹⁰⁵⁹

Furthermore, the discretion of national courts is reinforced by the existence of exceptions established in the CJEU’s case-law to the obligation to refer. Such exceptions, established in the *CILFIT* ruling, imply a reasonable margin of latitude of national courts. Although *CILFIT* was delivered within a preliminary ruling on interpretation scholars have questioned if it applies to questions on validity. One could say that not only are the *CILFIT* exceptions applicable to references on *validity* made by national courts of last resort, but they may also be transposable to the general obligation to refer questions on *invalidity* imposed on every national court. In fact, courts of last resort have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Union law is necessary to enable them to give judgment, and notably to decide if the question is relevant, *i.e.*, if the answer to that question, regardless of what it may be, can affect the outcome of the case.¹⁰⁶⁰ Furthermore, a previous ruling on the same question¹⁰⁶¹ – a materially identical question which has already been the subject of a preliminary ruling in a similar case, or a question involving the same points of law, irrespective of the nature of the proceedings which led to that decision and even if the questions at issue are not strictly identical¹⁰⁶² – may deprive a second reference of its object. This is especially relevant regarding validity references, as a decision of the CJ in a preliminary ruling, although having an *inter partes*

¹⁰⁵⁵ Para 12.

¹⁰⁵⁶ See ARNULL, “The Past and Future of the Preliminary Rulings Procedure”, 2003, at 345.

¹⁰⁵⁷ Case C-344/04, *IATA and ELFAA*, [2006] ECR I-403, para. 32. Notwithstanding, the French and Italian language versions of this ruling do not include “well”, and refer only to “*fondée*” and “*fondati*” respectively which may lead to discrepancies in the application of this case-law. See WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 352, providing examples of cases where national courts refused to refer.

¹⁰⁵⁸ Case C-344/04, *IATA and ELFAA*, [2006] ECR I-403, para. 29.

¹⁰⁵⁹ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 349.

¹⁰⁶⁰ Case 283/81, *CILFIT/Ministero della Sanità*, [1982] ECR 3415, para. 15.

¹⁰⁶¹ See also Joined Cases 28 to 30/62, *Da Costa en Schaake NV and others/Administratie der Belastingen*, [1963] ECR 31.

¹⁰⁶² Case 283/81, *CILFIT/Ministero della Sanità*, [1982] ECR 3415, paras. 13-14.

effect, must be taken in consideration by national courts in other cases brought before them.¹⁰⁶³ Lastly, if the correct application of Union law is obvious as to leave “no scope for any reasonable doubt”¹⁰⁶⁴ as to the manner in which the question raised is to be resolved the national judge is not under any obligation to refer.¹⁰⁶⁵ In summary, although the *CILFIT* criteria were developed within a framework of judicial cooperation with national legal orders, with the aim of safeguarding the uniformity of EU law¹⁰⁶⁶, one should note that the margin of discretion left to national courts may prove problematic, as the exceptions to the obligation to refer enable national judges to decide the case themselves without any supervision whatsoever by the CJEU.¹⁰⁶⁷

III. Furthermore, there is a real risk that some judges are discouraged to refer certain questions to the CJ.¹⁰⁶⁸ Such refusal could be, notably, associated with the principle of supremacy. As is well known, some national courts – *maxime* supreme or constitutional courts of Member States – refuse to accept an unconditional supremacy of EU law over national constitutional norms.¹⁰⁶⁹ This *national resistance* associated with the lack of a hierarchical judicial relationship between national and Union courts may preclude national judges from referring controversial

¹⁰⁶³ Case 66/80, *International Chemical Corporation/Amministrazione delle finanze dello Stato*, [1981] ECR I191.

¹⁰⁶⁴ Case 283/81, *CILFIT/Ministero della Sanità*, [1982] ECR 3415, para. 16. The CJEU accepted the so-called *acte clair* doctrine, according to the old Latin maxim *in claris non fit interpretatio* and close to MONTESQUIEU's idea according to which “les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur” (*De l'esprit des lois*, Livre XI, Chapitre VI). However, the CJEU imposed severe constraints hoping that all national courts would play along. The *acte clair* doctrine is far from being uncontroversial. One could start by stating the obvious: in order to determine if an act needs clarification it has to be interpreted in the first place. See BLANCHET, “L'usage de la théorie de l'acte clair en droit communautaire”, 2001, at 410. Criticizing the adoption of the *acte clair* doctrine see e.g., ANAGNOSTARAS, “Preliminary Problems and Jurisdiction Uncertainties”, 2005, at 878-890. It has been considered that the requirements imposed by the CJEU are too strict. See e.g., HARTLEY, *The Foundations of European Union Law*, 2010, at 311. AG JACOBS has suggested that not all language versions should be considered in his Opinion in Case C-338/95, *Wiener/Hauptzollamt Emmerich*, [1997] ECR I-6495. Some scholars have suggested a relaxation of *CILFIT*'s conditions (e.g., RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1109; CRAIG “The Classics of EU Law Revisited”, 2010, at 188; PAIS, “A cooperação judiciária com a entrada em vigor do Tratado de Lisboa”, 2012, at 67), in order to allow national courts to decide more points of interpretation of EU law. However, there seems to be no indication in the case-law that the CJEU is willing to change its position. Nonetheless, in Case C-495/03, *Intermodal Transports*, [2005] ECR I-8151, the CJEU held that national courts are not required to ensure that the matter is equally obvious to bodies of a non-judicial nature, as administrative bodies (paras. 38-39). More recently, EDWARD considered that *CILFIT*'s exceptions read in light of Article 104(3) of the Rules of Procedure of the CJ are “no more than common sense.” See EDWARD, “*CILFIT* and *Foto-Frost* in their Historical and Procedural Context”, 2010, at 179.

¹⁰⁶⁵ Considering that the *acte clair* theory will also apply to preliminary rulings on validity see ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 189. If a national court considers a Union act to be clearly valid it should not be obliged to make a reference. See also JOLIET, “L'article 177 du traité CEE et le renvoi préjudiciel”, 1991, at 610. In contrast, MOITINHO DE ALMEIDA and BARAV consider that the *CILFIT* exceptions do not apply to questions on validity. See ALMEIDA, “O regime de reenvio prejudicial na jurisprudência do Tribunal de Justiça das Comunidades”, 1987, at 117; BARAV, “Le renvoi préjudiciel communautaire”, 1997, at 7. Some authors note that the possibilities of a justified breach of the obligation to refer are more reduced in these cases. See JIMENO BULNES, *La cuestión prejudicial del artículo 177 TCE*, 1996, at 315.

¹⁰⁶⁶ For further developments see e.g., JOLIET, “L'article 177 du traité CEE et le renvoi préjudiciel”, 1991, at 603 *et seq.*; CRAIG, “The Classics of EU Law Revisited”, 2010, at 185 *et seq.*

¹⁰⁶⁷ See DUARTE, “A teoria do acto claro e o art. 177.º do Tratado CEE”, 1986, at 226. Noting that “it cannot be said with complete confidence ... that all top national courts invariably apply Community law conscientiously and pay due regard to their obligations under the third paragraph of Article 234” see ARNULL, “The Past and Future of the Preliminary Rulings Procedure”, 2003, at 350.

¹⁰⁶⁸ Also mentioning the issue of constitutional conflicts see MAHER, “National Courts as European Community Courts”, 1994, at 242, 243; TRIDIMAS, “Knocking on Heaven's Door”, 2003, at 45, 46. Noting that using national courts as *filters* could discourage them from referring cases to the CJ, especially in *borderline cases* see LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 31.

¹⁰⁶⁹ Analysing the links between of preliminary references and the principle of supremacy see RAMOS, “Reenvio prejudicial e relacionamento entre ordens jurídicas na construção comunitária”, 1993, at 253 *et seq.*

questions to the CJEU, notably when constitutional conflicts arise.¹⁰⁷⁰ For instance, it is questionable whether it should be expected from national courts to make a reference for a preliminary ruling when faced with a question on the validity of Union law which allegedly contravenes a fundamental right protected within the EU legal order. If in a given case one of the parties brings a constitutionality appeal and the national constitutional court declares the Union act invalid on the grounds of a breach of a fundamental principle protected under the national constitution, the national judge will find himself in a difficult position. Indeed, making a reference to the CJ for a preliminary ruling on validity risks jeopardising the finality of the decision of the constitutional court in precisely one of those situations where supremacy is deemed not to be absolute by national legal orders. Hence, the concrete interactions between the national courts involved in a case as well as the procedural behaviour of the parties may influence the existence (or not) of a preliminary ruling on the validity of Union law in a given case. The so-called judicial *Kompetenz-Kompetenz* – i.e. the question of knowing who has the last word on the validity of Union law¹⁰⁷¹ – remains an unsolved issue, putting at risk the objectives and proper functioning of the preliminary references mechanism. As TRIDIMAS has put it:

“[i]rrespective of the use of the preliminary reference procedure, a number of national courts do not share the ECJ’s view that Community law reigns supreme over the national constitutions and that “ECJ *locuta is res finita*.” Although this will only be tested *in extremis*, supremacy is conditional and reversible.”¹⁰⁷²

IV. Last but not least, problems may arise if a national court refuses to make a preliminary ruling. There is no question that a legislation which impairs the compliance with such obligation must be revoked. However, should a national court decide not to refer a question of *invalidity* there is *no effective remedy* available for private parties. Hence, a “gap in legal protection arguably exists when a national court does not share a party’s conviction that a preliminary reference (...) is necessary to reach a decision.”¹⁰⁷³ As a matter of fact, the obligation to seek a preliminary ruling cannot be enforced directly: compliance with such obligation is based on the relationship of trust linking national courts and the CJEU.¹⁰⁷⁴ Thus, the system lies in the *hope* that preliminary questions are in practice referred to the Court. As STRASSER has put it, Article 267 TFEU:

“[f]osters a system of judicial co-operation between national courts and the European Court of Justice, in which the Court is more at the mercy of the national judiciaries than *vice versa*. For the ability of the Court to make rulings on Community law is limited by the judges presiding in national courts, in whom the responsibility to refer lies. Accordingly, the Court of Justice depends on national courts for the opportunity to consider such questions. This reliance

¹⁰⁷⁰ See e.g., TRIDIMAS, “Knocking on Heaven’s Door”, 2003, at 45-46; DUARTE; GOMES, “O Tribunal Constitucional Português e a garantia de aplicação do Direito da União Europeia”, 2010, at 695-725.

¹⁰⁷¹ See SCHILLING, “The Autonomy of the Community Legal Order”, 1996, at 389-409; WEILER; HALTERN, “The Autonomy of the Community Legal Order”, 1996, at 411-448; WEILER; HALTERN, “Constitutional or International?”, 2000, at 331-364; CLAES, *The National Courts’ Mandate in the European Constitution*, 2006, at 452 *et seq.*

¹⁰⁷² TRIDIMAS, “Knocking on Heaven’s Door”, 2003, at 48.

¹⁰⁷³ LENZ, “The Role and Mechanism of the Preliminary Ruling Procedure”, 1994-1995, at 394.

¹⁰⁷⁴ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 78.

renders the preliminary reference procedure *particularly vulnerable*, even as it makes possible legal developments that might not have survived political and formal legislative processes.

(...) The strength of this system is not at its greatest with respect to preliminary rulings, however. Indeed, the viability of the Article 177 is *dependent upon the willingness of national courts to comply*. (...) Yet Article 177 is framed in extremely voluntary terms – perhaps inspired by the general finding that non-compliance and defiance often result when judiciaries impose values not generally held. There is *no practical way to force a national court to adhere to its Article 177 obligation*, barring an Article 169 action brought by the Commission against the offending court's Member State. *Nor is there any means of ensuring that a preliminary ruling, once given, will be applied by the national court*. These deficits are significant, given the centrality of the preliminary reference procedure to legal uniformity in the Community (emphasis added).¹⁰⁷⁵

Hence, the main limitation of the preliminary rulings mechanism lies with the absence of an adequate enforcement mechanism. Some solutions have been addressed in the literature.¹⁰⁷⁶ Some commentators have admitted the possibility of the Commission bringing an infringement action against the Member State, considering that national courts are included in the broad notion of state under the CJEU's case-law.¹⁰⁷⁷ This seems to be the understanding of both the CJEU¹⁰⁷⁸ and of the Commission¹⁰⁷⁹, regardless of the theoretical obstacles and practical difficulties in bringing such an action. In fact, this solution seems questionable. Not only it is unclear what the scope of the Member State's obligation to "take the necessary measures to comply with the judgment of the

¹⁰⁷⁵ STRASSER, "Evolution & Effort", 1995-1996, at 71.

¹⁰⁷⁶ See JIMENO BULNES, *La cuestión prejudicial del artículo 177 TCE*, 1996, at 319 *et seq.*; BAQUERO, "De la cuestión prejudicial a la casación europea", 2005, at 35-58, proposing an appeal for cassation open to individuals before the CJEU against possible violations of Union law by national supreme courts when cohesion and unity of Union law are at stake. Favouring such an appeal see also LOUIS, "The Court in the Constitution", 2006, at 141. In the Spinelli Draft Treaty, Article 43 provided for such an appeal in two cases: a lack of reference by a last instance judge or a violation of a preliminary ruling by this judge.

¹⁰⁷⁷ Case 77/69, *Commission/Belgium*, [1970] ECR 237. See PESCATORE, *Le recours préjudiciel de l'article 177 du traité CEE et la coopération de la Cour avec les juridictions nationales*, 1986, at 28; ALMEIDA, "O regime de reenvio prejudicial na jurisprudência do Tribunal de Justiça das Comunidades", 1987, at 113-124; LENZ, "The Role and Mechanism of the Preliminary Ruling Procedure", 1994-1995, at 398; SIMON, *Le système juridique communautaire*, 1997, at 678; ANDERSON; DEMETRIOU, *References to the European Court*, 2002, at 186; CAMPOS; CAMPOS, *Contencioso Comunitário*, 2002, at 158; ALMEIDA, "A cooperação judiciária entre o TJCE e os órgãos jurisdicionais nacionais", 2003, at 67; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 77 and 194, noting that this may result in domestic remedies being taken with a view to reversing the infringement of EU law or at least its consequences.

¹⁰⁷⁸ See Opinion 1/09, [2011], para. 87. See also Opinion of AG WARNER in Case 9/75, *Meyer-Burckhardt/Commission*, [1975] ECR 1171 and in Case 30/77, *Regina/Bouchereau*, [1977] ECR 1999. See Case 77/69, *Commission/Belgium*, [1970] ECR 237, which adopted a broad notion of state. The CJEU seems also to rely on the possibility for other national courts to refer questions. See CRAIG; BURCA, *EU Law*, 2008, at 479.

¹⁰⁷⁹ See Written Question no. 1907/85 of 5.11.1985 and Answer by the Commission dated of 10/02/1986. However, see Answer to Written Question no. 526/83 where the Commission considered that although such possibility exists it is not the more adequate means of control as it could prejudice the relationship between national courts and the CJEU. See QUADROS, *A Função Subjectiva da Competência Prejudicial do Tribunal de Justiça das Comunidades Europeias*, 2006, at 65, noting that the Commission initiated infringement proceedings against Germany in 1985 and 1990 because of the refusal of the *Bundesfinanzhof* to refer questions to the CJEU. Noting that the Commission notified Germany of its concerns with *Solange I* decision and France with concerns regarding the decision of the *Conseil d'Etat* in *Cohen-Bendit* see PESCATORE, *Le recours préjudiciel de l'article 177 du traité CEE et la coopération de la Cour avec les juridictions nationales*, 1986, at 28. However, the action for infringement was not initiated. For further developments see QUADROS, *A Função Subjectiva da Competência Prejudicial do Tribunal de Justiça das Comunidades Europeias*, 2006, at 137 *et seq.* Also questioning the adequacy of the action for infringement see JIMENO BULNES, *La cuestión prejudicial del artículo 177 TCE*, 1996, at 323; ROUHETTE, "Quelques aspects de l'application du mécanisme du renvoi préjudiciel", 1997, at 19; ORTEGA, *El acceso de los particulares a la justicia comunitaria*, 1999, at 209.

Court”¹⁰⁸⁰ should be, but also it is hard to see how compliance of this obligation can take place without breaching the principle of the separation of powers, the independence of the judiciary¹⁰⁸¹, *res judicata*¹⁰⁸² and other procedural guarantees. Hence, LOUIS was probably right when he advocated that this remedy “can only be used in specific cases close to rebellion.”¹⁰⁸³

More significantly, an action for infringement serves poorly the interests of private parties. Not only individuals cannot initiate such an action¹⁰⁸⁴, but also the delays, costs and uncertainties of this course of action do not seem to compensate for the damages suffered by individuals who lost the case in national courts. Furthermore, the CJEU’s “sitting in judgment over a national court would not be conducive to the spirit of mutual respect and co-operation between the ECJ and national courts which is the very foundation of the preliminary reference system.”¹⁰⁸⁵ It is not surprising therefore that such action has not been brought by the Commission directly against national courts thus far, despite flagrant breaches of the duty to refer.¹⁰⁸⁶ KOMAREK has noticed that the Commission will scarcely (if ever) pursue a case for infringement based on judicial breaches.¹⁰⁸⁷

The CJEU found another way to compensate individuals in these cases.¹⁰⁸⁸ As is well known, the *Köbler*¹⁰⁸⁹ case imported the *Francoovich*¹⁰⁹⁰-principle to this domain.¹⁰⁹¹ Under *Köbler*, “the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of infringements of Community law for which they are responsible

¹⁰⁸⁰ Article 260(1) TFEU.

¹⁰⁸¹ Highlighting the issue of the independence of the judiciary see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 77. See SCHOCKWEILER, “L’indépendance et la légitimité du juge dans l’ordre juridique communautaire”, 1993, at 671-680.

¹⁰⁸² See Opinion of AG LÉGER in *Köbler*, para. 101. See also GROUSSOT; MINSEN, “*Res Judicata* in the Court of Justice Case-Law”, 2007, at 387, note 7. In Case C-234/04, *Kapferer*, [2006] ECR I-2585 the CJ drew the attention to the importance for both the Union legal order and national legal systems of the principle of *res judicata*, stating that: “[i]n order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question (paras. 20-21).” See, however, Case C-119/05, *Lucchini*, [2007] ECR I-6199.

¹⁰⁸³ LOUIS, “The Court in the Constitution”, 2006, at 140.

¹⁰⁸⁴ Also the CJEU has held that a failure by the Commission to initiate such an action is a non-reviewable act, as “the Commission has no obligation to commence proceedings under that article; it has a discretionary power precluding the right of individuals to require it to adopt a particular position and to bring an action for annulment against its refusal to take action.” See Case C-87/89, *Sonito and others/Commission*, [1990] ECR I-1981, para. 6.

¹⁰⁸⁵ ENCHELMAIER, “No One Slips Through the Net”, 2005, at 199.

¹⁰⁸⁶ *Ibid.*, at 198. In Case 129/00, *Commission/Italy*, [2003] ECR I-14637, which involved a controversial application by Italian courts of certain tax measures, the Commission brought the action for infringement on the grounds that by maintaining in force the national piece of legislation which, “as construed and applied by the administrative authorities and the courts”, the Italian Republic failed to fulfil its obligations under the TEC. The CJ, although stating that, “[a] Member State’s failure to fulfil obligations may, in principle, be established under Article 226 EC whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution (para. 29, citing Case 77/69 *Commission v Belgium* [1970] ECR 237, para. 15)”, condemned the Italian legislator and not the Italian courts for not amending the legislation at stake and did not impose the re-opening of previous cases decided by *res judicata*.

¹⁰⁸⁷ KOMAREK, “In the Court(s) We Trust?”, 2007, at 474.

¹⁰⁸⁸ Opinion 1/09, [2011], para. 86.

¹⁰⁸⁹ Case C-224/01, *Köbler*, [2003] ECR I-10239. See CLASSEN, “Case C-224/01, *Gerhard Köbler v. Republik Österreich*”, 2004, 813-824; PAIS, “Comentário ao Acórdão do Tribunal de Justiça de 30 de Setembro de 2003, Proc. C-224/01, *Gerhard Köbler c. Republik Österreich*”, 2011, at 122-150.

¹⁰⁹⁰ Joined Cases C-6 and 9/90, *Francoovich and Bonifaci/Italy*, [1991] ECR I-5357. See SZYSZCZAK, “European Community Law”, 1992, at 690-697.

¹⁰⁹¹ Noting that this action for damages fits well with some Member States legal traditions see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 79. See also SIMON, “La responsabilité des États membres en cas de violation du droit communautaire par une juridiction suprême”, 2003, 3-6; MARTÍN RODRÍGUEZ, “State Liability for Judicial Acts in European Community Law”, 2005, 605-621; PFANDER, “*Köbler v. Austria*”, 2005, 275-297.

is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance.”¹⁰⁹² Hence, in *principle*, state liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Union law is governed by the general conditions of state liability under Union law. However, regarding the second of those conditions, regard must be taken to the “specific nature of the judicial function and to the legitimate requirements of legal certainty.”¹⁰⁹³ Consequently, state liability for an infringement of Union law by a decision of a national court adjudicating at last instance can be incurred *only in the exceptional cases* where such court has *manifestly infringed* the applicable law.¹⁰⁹⁴ Surely, the more serious the breach the more likely an action in damages is to succeed. However, scholars have considered that the *Köbler* judgment has a “very high symbolic value but it is of limited practical application.”¹⁰⁹⁵

Although construed in exceptional terms, this solution is also somewhat controversial. Firstly, it is unclear if in *Köbler* the obligation to pay damages arose as a consequence of the breach of the obligation to refer or of the decision of the national court to follow the relevant previous case-law of the CJEU. Secondly, it is far from obvious whether *Köbler* should also apply to preliminary rulings on validity, binding on all national courts regardless of their position in the internal judicial hierarchy.¹⁰⁹⁶ Lastly, the limitations to an action for damages are evident: (i) the substantive conditions of state liability are extremely difficult to meet, which means that individuals will probably see their case dismissed on the merits, and more significantly, (ii) the outcome of the case will only compensate the individual financially, not ensuring the situation which would have existed had the preliminary reference been made.¹⁰⁹⁷

V. As a result of the foregoing, having a preliminary ruling on a given case may not be as simple as it may appear *prima facie*. It is necessary (i) to persuade the national judge to make the reference¹⁰⁹⁸; (ii) that the national judge correctly assesses the factual and legal context of the case; (iii) to wait for the answer of the CJ (which may take in average up to two years); and finally, (iv) to make sure that the national court applies such ruling to the case *sub judice*, possibly re-opening the debate on several points of law and/or fact.¹⁰⁹⁹ Moreover, in order for the preliminary rulings

¹⁰⁹² Para. 50.

¹⁰⁹³ Para. 53.

¹⁰⁹⁴ Moreover, the CJEU itself softened its stance by finding that the Austrian Supreme Court did not commit a serious breach in overlooking a precedent. See also the *minimal approach* taken in the only case so far, which dealt with the question of liability in respect of a judicial failure: Case C-173/03, *Traghetti del Mediterraneo*, [2006] ECR I-5177. See RUFFERT, “Case C-173/03, *Traghetti del Mediterraneo Spa in Liquidation v. Italian Republic*”, 2007, at 479-486; BIONDI, “How to Go Ahead as an EU Law National Judge”, 2009, at 237, note 51.

¹⁰⁹⁵ BIONDI, “How to Go Ahead as an EU Law National Judge”, 2009, at 237, note 51.

¹⁰⁹⁶ Considering that there is no reason why this case-law is not transposable to manifest breach of Union law in failure to refer for validity, see WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 351.

¹⁰⁹⁷ Hence, state liability has been considered a “second rank alternative” in the enforcement of Union rights. See PRECHAL, “Direct Effect and State Liability”, 2006, at 299. Noting that the decision in Case C-2/06, *Kempter*, [2008] ECR I-411 might have complicated this puzzle even more see WARD, “Do Unto Others as You Would Have Them Do Unto You”, 2008, at 752. In fact, it is not clear whether the re-opening of the procedure is a remedy that needs to be exhausted before *Köbler* damages can be claimed.

¹⁰⁹⁸ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 350, pointing to cases where English and French national judges decided not to refer.

¹⁰⁹⁹ VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 549, 550.

mechanism to function adequately, it is necessary to ensure a certain degree of legal preparation of national judges dealing with European Union law.¹¹⁰⁰ In fact, “[f]or ordinary Member State courts challenge to the validity of an EC measure may be a novel action, when compared with the matters they deal with on a daily basis.”¹¹⁰¹ As a result, “they may be prone to error in assessing whether a reference is necessary.”¹¹⁰² This is especially relevant regarding judges in new Member States, which may have to deal with a “particularly steep learning curve.”¹¹⁰³ It shouldn’t come as a surprise that judges of the several Member States address the CJ with an unequal regularity,¹¹⁰⁴ and that for some of them references remain an “exceptional event.”¹¹⁰⁵

In light of all the above, scholars have considered that the very own characteristics of the preliminary rulings mechanism denies private parties access to an effective remedy¹¹⁰⁶, and that the uncertainties and difficulties surrounding preliminary references “*plaident en faveur d’un assouplissement de la recevabilité des recours directs.*”¹¹⁰⁷

d) Lack of an Adequate Remedy: the Procedural Disadvantages of the Preliminary Rulings Procedure

In addition to the difficulties mentioned above, there are a number of reasons why a direct action is deemed more appropriate for determining issues of validity than the preliminary rulings on validity, which have been very clearly identified by AG JACOBS in *UPA*.¹¹⁰⁸ Firstly, contrary to direct actions, preliminary rulings do not involve a full exchange of pleadings, as all parties have the same two months deadline to submit their observations to the CJ, which is the only written plea allowed.¹¹⁰⁹ Conversely, in direct actions applicants have a chance to expose their views and reply to the defence.¹¹¹⁰

Secondly, as seen above, and contrary to what happens in direct actions, within the preliminary rulings mechanism it is for national courts to devise the questions to be answered by the CJEU, which means that individual applicants may find their claims redefined by the questions referred. Thus, not all arguments put by the parties in a case are sent to Luxembourg.¹¹¹¹

¹¹⁰⁰ LANG, “The Duties of National Courts under Community Constitutional Law”, 1997 at 16, noting that EU law must be perceived by national judges as “*your law*.” See also MATTLI; SLAUGHTER, “The Role of National Courts in the Process of European Integration”, 2000, at 257 *et seq.*

¹¹⁰¹ WARD *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 364.

¹¹⁰² *Ibid.*

¹¹⁰³ ARNULL, “The Past and Future of the Preliminary Rulings Procedure”, 2003, at 347. For an overview see MICHAL, “Learning to Talk”, 2008, at 1611-1643, and for a case note see LAZOWSKI, “The Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences Between National Courts and the Court of Justice”, 2008, at 187-197.

¹¹⁰⁴ See ROUHETTE, “Quelques aspects de l’application du mécanisme du renvoi préjudiciel”, 1997, at 16. For an analysis of the causes of such variation see CARRUBBA; MURRAH, “Legal Integration and Use of the Preliminary Ruling Process in the European Union”, 2005, at 399-418.

¹¹⁰⁵ ARNULL, “The Past and Future of the Preliminary Rulings Procedure”, 2003, at 347, noting the risks of the case-law of the CJEU which sets limits to the admissibility of preliminary references.

¹¹⁰⁶ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 515

¹¹⁰⁷ VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 550.

¹¹⁰⁸ Opinion of AG JACOBS in *UPA*, paras. 44-47.

¹¹⁰⁹ WAELBROECK; VERHEYDEN, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires”, 1995, at 403.

¹¹¹⁰ Article 47 of the Rules of Procedure of the GC.

¹¹¹¹ See *supra* Sections 1.2.2(c) and 1.2.3(b).

Thirdly, the preliminary references procedure does not allow for the participation of all parties that could be interested in the proceedings. In reference proceedings, interested individuals cannot submit observations under Article 23 of the Statute of the CJEU unless they have intervened in the action before the national court.¹¹¹² That may be difficult, for although information about reference proceedings is published in the Official Journal, individuals may not be aware of actions in the national courts at a sufficiently early stage to intervene.¹¹¹³ Moreover, the CJEU has already taken a strict view on the question of knowing who should be considered a party within the national proceedings.¹¹¹⁴ In contrast, the institutions and Member States can intervene in direct actions, and the public in general is informed of the existence of the action by means of a notice published in the Official Journal. Third parties may, if they are able to establish a *sufficient interest*, intervene pursuant to Article 40 of the Statute of the Court. Furthermore, under Article 24(2) of the same Protocol the CJ may require the Member States and institutions which are not participating in the proceedings to supply all information which it considers necessary for the purposes of the case before it.

Fourthly, proceedings in national courts are liable to entail longer delays which may themselves be incompatible with the principle of effective judicial protection and with the need for legal certainty.¹¹¹⁵ The CJEU has stated already that the right to justice within a reasonable time is part of the fundamental right to effective judicial protection which should be observed by Union courts.¹¹¹⁶

Lastly, the potential for delay inherent in proceedings brought before domestic courts, with the possibility of appeals within the national system, makes it likely that interim measures will be necessary in many cases.¹¹¹⁷ However, although national courts have jurisdiction to suspend a national measure based on a Union measure or otherwise to grant interim relief pending a ruling from the CJEU, the exercise of that jurisdiction is subject to a number of conditions and is to some extent dependent on the discretion of national courts.¹¹¹⁸ Moreover, interim measures awarded by a national court are confined to the Member State in question, as it is not clear that

¹¹¹² The Court has stated in that regard that a person who has not sought and been granted leave to intervene before the national court is not entitled to submit observations to the Court under Article 23 of the Statute of the Court. See order of the President of the Court of 26 February 1996 in Case C-181/95, *Biogen* [1996], ECR I-717, para. 6, under which, *a contrario*, any person who has been granted leave to intervene before the national court is entitled to submit observations to this Court.

¹¹¹³ Whether or not a person is to be considered a party in the national suit is, *in principle*, an issue to be decided according to the criteria of national law. See Case 9/74, *Casagrande/Landeshauptstadt München*, [1974] ECR 773.

¹¹¹⁴ In Joined Cases C403 and 429/08, *Football Association Premier League and others*, the Court disallowed the intervention of private parties who had provoked their intervention in the national suit in order to participate in the preliminary rulings procedure. Highlighting the importance of the participation of private parties in judicial proceedings as a form of legitimating the role of the judiciary see TROCKER, “La tutela giurisprudenziale dei diritti dell’uomo tra esigenze di partecipazione e imperativi di funzionalità”, 1991, at 814, 815.

¹¹¹⁵ Considering that the current means available to individuals to challenge regulations are “inappropriate, tortuous, long and expensive” see SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 7.

¹¹¹⁶ Case C-185/95 P, *Baustahlgewebe/Commission*, [1998] ECR I-8417. See also Case 120/73, *Lorenz GmbH/Bundesrepublik Deutschland and others*, [1973] ECR 1471. See *supra* note 870.

¹¹¹⁷ See Opinion of AG JACOBS in *UPA*, para. 44.

¹¹¹⁸ See Joined Cases 143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest/Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, [1991] ECR I-415 and Case C-465/93, *Atlanta Fruchthandels-gesellschaft and others (I)/Bundesamt für Ernährung und Forstwirtschaft*, [1995] ECR I-3761.

the CJEU may grant interim relief itself in the context of preliminary proceedings.¹¹¹⁹ This means that applicants may have to bring proceedings in more than one Member State, as it is established that national authorities of other Member States cannot rely on an interim order issued in a given Member State in order to suspend the application of a measure whose validity is being contested in the CJEU. Hence, an interim measure in the Member State concerned will be necessary.¹¹²⁰ Given the possibility of conflicting decisions by courts in different Member States, this solution not only prejudices the uniform application of Union law, but can also, in extreme cases, totally subvert it.

1.2.3 Conceptual Difficulties Surrounding Jurisdictional Subsidiarity

a) The Uncertain Duties of National Courts “as a Matter of Union law”

I. As seen above, the restrictive interpretation of standing requirements of private parties has been justified by the CJEU on the grounds that possible gaps of protection should be remedied either by the Member States in the context of an amendment to the Treaties, or by the national judiciaries which are put under a general obligation to ensure the effective application of Union law and, thus, the effective judicial protection of rights of private parties under Union law.¹¹²¹ Hence, as seen above, in the *UPA* case the CJEU stated that:

“[i]n accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, *so far as possible*, to *interpret and apply* national procedural rules governing the exercise of rights of action in a way that *enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act*” (emphasis added).¹¹²²

This delegation of responsibility in national legal orders “to iron the remaining wrinkles”¹¹²³ is said to constitute the “*clef de voute*”¹¹²⁴ of the CJEU’s construction of the Union’s “complete system of legal remedies and procedures.” It is also the corollary of a legal order which is “*propre et intègre*”¹¹²⁵ in Member States legal systems. Member States are thus “under a duty to facilitate the functioning of the complete system of remedies”¹¹²⁶ by establishing in their domestic legal orders a system of legal remedies and procedures which ensures the right to effective judicial protection. In

¹¹¹⁹ Considering that a change in the system would be necessary in order to introduce a fast track reference for interim relief to the GC, so that an applicant who is able to convince a judge to refer a question on validity has the opportunity to seek a Union wide interim order suspending the act across the Union see WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 219. Considering that the CJEU’s refusal to grant interim relief in preliminary rulings (Case C-186/01 R, *Dory*, [2001] ECR I-7823, para. 13) is open to criticism see TÜRK, *Judicial Review in EU Law*, 2009, at 235. The wording of current Article 279 TFEU which mentions “any cases before it” and the analogy between the action for annulment and preliminary rulings on validity should allow for that possibility. Nonetheless, the author acknowledges that it is possible that the CJEU may be more reluctant to grant interim measures than national courts.

¹¹²⁰ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 350.

¹¹²¹ See *supra* Section 1.1.4.

¹¹²² Para. 42. In Case C-119/05, *Lucchini*, [2007] ECR I-6199 that very same duty was associated with effectiveness of EU law: “[i]t is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law (para. 60).”

¹¹²³ HEFFERNAN, “Effective Judicial Remedies”, 2006, at 296.

¹¹²⁴ BERROD; MARIATTE, “Le pourvoi dans l’affaire *Unión de Pequeños Agricultores/Conseil*”, 2002, at 10.

¹¹²⁵ *Ibid.*

¹¹²⁶ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 514.

the CJEU's case-law this duty implies that national courts *interpret* and *apply* national procedural rules governing the exercise of the rights of action in a way that *facilitates* effective judicial protection.¹¹²⁷ Hence, national courts must firstly (i) allow private parties, *in so far as possible*, to challenge national measures based on Union acts of general application, and secondly, (ii) ensure that in such proceedings individuals can rely on the invalidity of the Union act at stake. In light of these considerations, national legal orders must thus ensure access to justice at two different levels: before national courts and before the CJEU *via* the preliminary rulings on validity.

In this context, it has been noted that if at first sight the CJEU merely sets up a decentralized system of judicial review based on the principle of subsidiarity, “on a closer look a totally different picture appears (...) as the Court puts the responsibility for making that system work effectively with the Member States.”¹¹²⁸ As a matter of fact, “the degree of judicial protection is made dependent on the ability and creativity of the national judge to provide such remedy.”¹¹²⁹ However, the extension of the duties imposed on national courts at the first level remains highly uncertain.

II. In fact, the lack of a national act which can be contested in national courts may prove a definitive obstacle to access jurisdiction. One should note that both in *UPA* and *Les Verts* the CJEU presupposed the existence of a national act which could be challenged under national law. Thus, for instance, in France, whilst such absence has not constituted a problem within the civil judicial system, the absence of a reviewable act constitutes a manifest obstacle to access within the system of administrative justice.¹¹³⁰ In *État de Sarre e.a.* the *Conseil d'État* refused to refer a question on validity of a directive on the grounds that it had not yet been specifically implemented in the national legal order.¹¹³¹

In the United Kingdom such absence has not proved a hurdle. In *Royal Scholten-Honig*¹¹³² the *Royal Scholten-Honig* simply sought a declaration that a Council regulation was invalid. The reference in *R/Secretary of State for Health Ex parte Imperial Tobacco*¹¹³³ emerged from an application for judicial review of the Tobacco Advertising Directive.¹¹³⁴ The applicants sought leave to apply for judicial review in national courts of, *inter alia*, the intention and/or obligation on the part of the United Kingdom to give effect to the requirements of the directive. They also requested that a preliminary ruling be sought from the CJ. As the CJ had already annulled the directive in

¹¹²⁷ *Ibid.*

¹¹²⁸ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 34.

¹¹²⁹ *Ibid.*, at 29. Noting that the jurisdictional subsidiarity in the EU is different from the one of the ECHR was the former depends on the capacity of national courts of ensuring the right of action see GILLIAUX, “L’arrêt *Unión de Pequeños Agricultores/Conseil*”, 2003, at 189.

¹¹³⁰ BERROD; MARIATTE, “Le pourvoi dans l’affaire *Unión de Pequeños Agricultores c/Conseil*”, 2002, at 11.

¹¹³¹ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 350. In another case (*Syndicat des embouteilleurs de France*, 10 July 1995) the same Court refused to make a reference on the grounds that the national act was not reviewable under national procedural law. For further developments, see CASSIA, “Le juge administrative français et la validité des actes communautaires”, 1999, at 431 *et seq.*

¹¹³² Joined Cases 103 and 145/77, *Royal Scholten-Honig/Intervention Board for Agricultural Produce*, [1978] ECR 2037.

¹¹³³ Case C-74/99, *Imperial Tobacco and others*, [2000] ECR I-8599. While *Salamander* was been tried, another tobacco company had managed to go to the High Court of England and Wales, which had asked for a preliminary ruling on validity of the same directive (Case C-74/99, *Imperial Tobacco and others*, [2000] ECR I-8599).

¹¹³⁴ Directive 98/43/EC.

*Germany/Parliament and Council*¹¹³⁵ it dismissed the case. However, later, such a reference was expressly held to be admissible in *R/Secretary of State for Health Ex parte BAT and Imperial Tobacco*¹¹³⁶, even with regard to the validity of a Directive which had not yet been implemented in the United Kingdom. The French Government and the Commission sustained in the case that the request was inadmissible, because the time limit set for implementation of the directive had not yet expired and the national legislation transposing the directive in the United Kingdom had not yet been adopted.¹¹³⁷ Moreover, they argued that to permit an individual to challenge the validity of a directive in those circumstances would constitute a means of circumventing current Article 263(4) TFEU which would be contrary to the system of legal remedies established by the Treaty. The CJEU disagreed and held that:

“[t]he opportunity open to individuals to plead the invalidity of a Community act of general application before national courts is not conditional upon that act's actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly (emphasis added).”¹¹³⁸

Later in *Omega Air and others*¹¹³⁹, English courts accepted an action brought against the authorities responsible for civil aviation in the United Kingdom and Ireland, with a view to having a Union regulation declared inapplicable.¹¹⁴⁰

Some scholars have welcomed this orientation.¹¹⁴¹ WARD noted that “there would seem to be no reason, then, to take this step further, and bind Member State courts, pursuant to their EC Treaty Article 10 duties, to receive challenges to the validity of primary EC rules, absent even domestic implementing measures.”¹¹⁴² Such statement would be confirmed by current Article 19(2) TEU. NIHOUL also considers that this case-law implies an obligation for Member States to adapt their procedural rules so as to give individuals the opportunity to contest in national courts the national authorities’ intention to implement a directive.¹¹⁴³ DE WITTE has considered that Member States’ autonomy in deciding judicial procedures and remedies may be set aside and that

¹¹³⁵ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-0000,

¹¹³⁶ Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, [2002] ECR I-11453, expressly citing UPA.

¹¹³⁷ See Case C-316/93, *Vaneetveld*, [1994] ECR I-763, paras. 16 and 19.

¹¹³⁸ Para. 40. See GILLIAUX, “L’arrêt Unión de Pequeños Agricultores”, 2003, at 188.

¹¹³⁹ Joined Cases C-27 and 122/00, *Omega Air and others*, [2002] ECR I-2569. By the time a decision was taken to include in the proposals for a directive and a regulation certain airplanes, it was too late for Omega to change its business plans. It considered that, despite its approaches to the Union institutions, its situation had not been taken into consideration. See paras. 37-39.

¹¹⁴⁰ Scholars have also mentioned other cases where British courts have attracted *forum-shopping* applicants. See Case C-344/04, *IATA and ELFAA*, [2006] ECR I-403 ; Case C-210/03, *Swedish Match*, [2004] ECR I-11893.

¹¹⁴¹ NIHOUL, “Le recours des particuliers contre les actes communautaires de portée générale”, 2003, at 38.

¹¹⁴² WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 218. See also LANG, “The Duties of National Courts under Community Constitutional Law”, 1997, at 111; LANG, “Actions for Declarations that Community Regulations Are Invalid”, 2003, at 104 *et seq.* A form of declaratory action is available at least in Germany, the United Kingdom and Portugal. It appears that mounting an indirect challenge would also be possible in Italy, Ireland, the Netherlands and Belgium. For a comparative overview see SCHWENSFEIER, *Individuals’ Access to Justice under Community Law*, 2009, at 145-184. Nonetheless, it may be difficult to plead in certain Member States that a national remedy has to be created to allow for a preliminary ruling on validity. See CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 259; LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 23.

¹¹⁴³ NIHOUL, “Le recours des particuliers contre les actes communautaires de portée générale”, 2003, at 39 *et seq.*

national courts are obliged to provide for indirect means of review such as a free-standing action to allow them to examine the legality of the measure and if necessary to refer the question to Luxembourg.¹¹⁴⁴ In light of these considerations, LANG considered that there is no gap in the judicial protection of individuals under EU law.¹¹⁴⁵ ARNULL, LENAERTS, ARTS and MASELIS contest such view.¹¹⁴⁶

One could arguably read these judgments as imposing on all national courts the obligation to provide for effective remedies enabling individuals to challenge Union acts in cases where an action for annulment appears not to be available.¹¹⁴⁷ For reasons of equality between applicants across the Union and in order to avoid *forum shopping* this approach should be imposed on Member States currently not providing for such remedies.¹¹⁴⁸ It is, however, *very doubtful* that the CJEU has imposed such obligation. In fact, in the above mentioned rulings the CJEU merely allowed for the preliminary reference: it did nothing as to impose on national courts a duty to accept all kinds of declaratory actions.¹¹⁴⁹ Moreover, if the CJ wanted to ensure that Member States have a duty to allow such possibility the expected wording in UPA would have been “must be possible”¹¹⁵⁰ instead of the mitigated formula mentioned above.¹¹⁵¹

In fact, the CJEU is especially cautious when transferring the responsibility to ensure effective judicial protection to national courts. In the Court’s own words the latter must do *their utmost, in so far as possible*, to fill in any remedial gaps.¹¹⁵² This obligation echoes another duty imposed on national courts: the one of interpreting EU law *in so far as possible* to ensure effectiveness of Union law.¹¹⁵³ Such duty does not, however, imply *contra legem* interpretations and is limited by general principles of law, particularly those of legal certainty and non-retroactivity. Thus, as ROSS has put it, national courts are under an obligation of reconciling national law with Union law only “to a point of mutually tolerable risk.”¹¹⁵⁴

Moreover, such duties are construed on the basis of the duty of loyal cooperation currently established in Article 4(3) TFEU. Regardless of the importance of such provision¹¹⁵⁵, the concrete

¹¹⁴⁴ WITTE, “The European Judiciary after Lisbon”, 2009, at 52, 53.

¹¹⁴⁵ LANG, “Actions for Declarations that Community Regulations Are Invalid”, 2003, at 111.

¹¹⁴⁶ ARNULL, “April Shower for *Jégo-Quéré*”, 2004, at 288; LENAERTS, ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 90, note 420.

¹¹⁴⁷ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 30.

¹¹⁴⁸ *Ibid.*

¹¹⁴⁹ DOUGAN noted that welcoming such references is *hardly the same* as insisting that national courts are under an obligation to admit action for judicial review of self-executing Union acts. See DOUGAN, *National Remedies before the Court of Justice*, 2004, at 337.

¹¹⁵⁰ BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*”, 2004, at 1649.

¹¹⁵¹ Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 42.

¹¹⁵² In the field of administrative procedural law see Joined Cases C-261 and 262/01, *van Calster and Cleeren*, [2003] ECR I-12249.

¹¹⁵³ Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891, para. 26; Case C-106/89, *Marleasing*, [1990] ECR I-4135, para. 8; Joined Cases C-397 and 403/01, *Pfeiffer* [2004] ECR I-8835, para. 113; Case C-105/03, *Pupino*, [2005] ECR I-5285, para. 42; Opinion of AG TIZZANO in Case C-144/04, *Mangold*, [2005] ECR I-9981, paras. 112-121.

¹¹⁵⁴ ROSS, “Effectiveness in the European Legal Order(s)”, 2006, at 493.

¹¹⁵⁵ “Article 10 is the most important and the most dynamic single Article in the E.C. Treaty. It has already given rise to some of the most important principles of Community law, such as the duty and power of national courts to give effective protection to rights granted by Community law, the duty to give direct effect to directives against the State, the duty to interpret national laws so as to be compatible with Community law, the right to judicial review, and the duties not to interfere with the effectiveness of Community competition law or with the working of the common agricultural policy. It is the basis for the duty to avoid conflicts between national and Community decisions.” See XIX Congress of

positive duties which it gives rise to are far from being straightforward.¹¹⁵⁶ LANG argues that this provision does not create duties *alone*. It is, therefore, necessary to identify one other rule, principle or objective of Union law which is to be facilitated or which should not be jeopardised for possible duties to arise.¹¹⁵⁷ One should note that the duty to create new remedies in order to give effective protection to Union rights does not find basis in the Treaties.¹¹⁵⁸ Consequently, the same author concludes that the duty of loyal cooperation “is not a legal basis for making justiciable every weakness in the national application of Community rules.”¹¹⁵⁹

For what it is worth, this “formulation chimes with the CJEU’s approach to the ‘completeness’ of the system of legal remedies and procedures created by the Treaty.”¹¹⁶⁰ In fact, “instead of acknowledging that the system is not complete and does not fully guarantee effective judicial protection the CJEU asserts to the contrary and imposes a duty on national courts to ‘plug the gaps’ even where national law does not provide for it.”¹¹⁶¹

III. Furthermore, there seem to be significant conceptual difficulties in admitting that national courts are indeed under an obligation to admit any judicial actions which allow for a preliminary ruling on validity to take place. Indeed, this duty does not fit well with the CJEU’s case-law on national procedural autonomy and the division of competences between national and Union courts.

The Court’s formulation in *UPA* appeals inevitably to the notion of national procedural autonomy – “where Community law seems to stop and national law takes over”¹¹⁶² – also referred in the literature as “national procedural competence”¹¹⁶³ or national “responsibility”¹¹⁶⁴, as it implies that it is the responsibility of Member States to define the conditions under which the application of Union law takes place in national legal orders.¹¹⁶⁵ As is well known, national courts

FIDE, the *Fédération Internationale pour le Droit Européen Congress* (Helsinki, 2000), Vol. I, at 373-426. The CJEU affirmed the importance of the duty of loyal cooperation, stating that it “entails an obligation on the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law and imposes on Member States and the Community institutions mutual duties to cooperate in good faith.” See Case C-339/00, *Ireland/ Commission*, [2003] ECR I-11757, para. 71, reiterated in Case C-344/01, *Germany/ Commission*, [2004] ECR I-2081, para. 79. See also Order in Case 2/88, *Zwartveld and others*, [1990] ECR I-3365, para. 17, and Case C-275/00, *First and Franex*, [2002] ECR I-10943, para. 49.

¹¹⁵⁶ LANG, “The Duties of Cooperation of National Authorities and Courts under Article 10 EC”, 2001, at 84-93.

¹¹⁵⁷ *Ibid.*, at 91.

¹¹⁵⁸ *Ibid.*, at 87.

¹¹⁵⁹ *Ibid.*, at 93.

¹¹⁶⁰ BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*”, 2004, at 1649.

¹¹⁶¹ *Ibid.*

¹¹⁶² PRECHAL, “Community Law in National Courts”, 1998, at 681.

¹¹⁶³ VAN GERVEN, “Of Rights, Remedies and Procedures”, 2000, at 502; KILPATRICK, “Turning Remedies Around”, 2001, at 145; DELICOSTOPOULOS, “Towards European Procedural Primacy in National Legal Systems”, 2003, at 599-613; DOUGAN, *National Remedies before the Court of Justice*, 2004, at 14. See also PRECHAL; SHELKOPLYAS, “National Procedures, Public Policy and EC Law”, 2004, at 592; TRSNTENJAK; BEYSEN, “European Consumer Protection Law”, 2011, at 95-124, separating *procedural* autonomy from *remedial* autonomy.

¹¹⁶⁴ BELJIN, “Rights in EU Law”, 2008, at 92.

¹¹⁶⁵ Noting that the principle of national procedural autonomy strikes a sensible balance between supremacy and the need for procedural rules see HOSKINS, “Tilting the Balance”, 1996, at 367. Nonetheless, the issue is not undisputed among scholars. Some note that the case-law of the CJEU has in some respects subverted the *Rewe*-principle. See e.g., HARLOW, “A Common European Law of Remedies”, 2000, at 71. KAKOURIS has already stated that national procedural autonomy does not exist. See KAKOURIS, “Do the Member States Possess Judicial Procedural Autonomy”, 1997, at 1389-1412. However, other authors consider that national procedural autonomy is still the rule. See e.g., DOUGAN, *National Remedies before the Court of Justice*, 2004, at 293.

are the “primary venue for the assertion of Community rights.”¹¹⁶⁶ Since in the current state of Union law the EU is still missing a complete system of harmonized procedural rules, the invocation of rights under Union law is subject to the national rules on remedies and procedures.¹¹⁶⁷ According to the famous *Rewe*¹¹⁶⁸-formula:

“[i]n the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. The position would be different only if the conditions made it impossible in practice to exercise the rights which the national courts are obliged to protect” (emphasis added).¹¹⁶⁹

Hence, in the EU, several systems of judicial protection are juxtaposed for the protection of Union rights: that of the EU and those of Member States.¹¹⁷⁰ As long as the “twin principles” of equivalence and effectiveness are ensured, the application of Union law takes place within the framework and environment of national law, notably national procedural law.¹¹⁷¹ As ROSS puts it:

“[t]his formula appears to maintain an uneasy hierarchy (mirrored by attribution of responsibility) between substance (EC law rights) and procedures (national rules) and demands intervention in the latter as part of the co-operative duties imposed by Art.10 EC upon national courts as organs of the Member States. This function of effectiveness in its co-operative context sanctions and requires the use of national judicial discretion in relation to national law.”¹¹⁷²

The *Rewe*-doctrine has been consistently applied by the CJEU to a wide variety of situations, including time limits and limitation periods, national rules on evidence, sanctions, the reimbursement of national charges levied contrary to the requirements of EU law, the duties of

¹¹⁶⁶ TRIDIMAS, *The General Principles of EU law*, 2006, at 419. Noting that the Union uses national courts in accordance with the way they are organized in Member States see KAKOURIS, “Do the Member States Possess Judicial Procedural Autonomy”, 1997, at 1394.

¹¹⁶⁷ Nonetheless, there are already some EU law instruments which deal with the harmonisation of procedural rules. See e.g., GOTTWALD, “Principles and Current Problems of Uniform Procedural Law in Europe Under Brussels Convention”, 1997, at 139-165; HEß, “The Integrating Effect of European Civil Procedure Law”, 2002, at 3-17; TULIBACKA, “Europeanization of Civil Procedures”, 2009, at 1527-1565. In 1994, the Storme Commission (an unofficial body of academic experts from each Member State) set out a project of a European Judicial Code of procedural law.

¹¹⁶⁸ Case 33/76, *Rewe/Landwirtschaftskammer für das Saarland*, [1976] ECR 1989. See also BIONDI, “The European Court of Justice and Certain National Procedural Limitations”, 1999, at 1271-1287.

¹¹⁶⁹ Para. 5; Case 45/76, *Comet BV/Produktschap voor Siergewassen*, [1976] ECR 2043, para. 13. The formulations in the Court’s case-law regarding the principle of effectiveness have varied. In Joined Cases C-222 to 225/05, *van der Weerd and others*, [2007] ECR I-4233 AG MADURO stated that: “[t]he principle of effectiveness accordingly precludes procedural rules that render the exercise of rights conferred by Community law practically impossible or excessively difficult (para. 16).” Noting that this rephrasing of the test requires merely an *adequate* degree of effectiveness see TRSNTENJAK; BEYSEN, “European Consumer Protection Law”, 2011, at 102. Considering that the form and extent of the remedies available are in the absence of EU law rules a matter for Member States provided that such remedies provide *adequate* (not just *minimum*) judicial protection, i.e. allow individuals to obtain redress which is commensurate with the nature and degree of interference with those individuals’ rights see VAN GERVEN, “Of Rights, Remedies and Procedures”, 2000, at 503, 504.

¹¹⁷⁰ BELJIN, “Rights in EU Law”, 2008, at 96.

¹¹⁷¹ For an analysis of the two principles see e.g., TRIDIMAS, “Enforcing Community Rights in National Courts”, 2000, at 38 *et seq.*

¹¹⁷² ROSS, “Effectiveness in the European Legal Order(s)”, 2006, at 480.

national courts to raise EU law questions *ex officio*, interim relief, jurisdictional issues, among others.¹¹⁷³ Nevertheless, one of the major difficulties regarding the principle of national procedural autonomy is to determine which *forms of action* have to be available in national legal orders in order to ensure effective application of EU law. Questions regarding causes of action, standing of private parties, rights to intervene in judicial proceedings may not find an obvious answer.¹¹⁷⁴ Notably, it is not clear which steps are national courts required to take *as a matter of Union law* to protect the rights of individuals granted by Union rules.¹¹⁷⁵

Hence, the question remains open on how far the duty of national courts to create new remedies *as a matter of Union law* goes when such remedies are not available *under national law*. Subject to the requirements of equivalence and effectiveness mentioned above, procedures and remedies are, *in principle*, a matter for national law. The CJEU considered in the *Butter-buying Cruises*¹¹⁷⁶ case that:

“[a]lthough the EEC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, *it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law.*”¹¹⁷⁷

Hence, provided that equivalence and effectiveness are respected, there is in principle no duty to create new forms of action not previously established in national legal orders.¹¹⁷⁸ Or as AG WARNER has put it the *Ferwerda*¹¹⁷⁹ case: “(...) the Court cannot create Community law where none exists: that must be left to the Community’s legislative organs.” In light of this approach CARANTA stated that the principle of judicial protection in EU law works like a shield, not like a sword, *i.e.* it only forbids the application of an existing domestic provision, but does not dictate a new rule.¹¹⁸⁰

However, the judgment in *Butter-buying Cruises* “raised the potentially thorny question of where the distinction lay between adapting the circumstances in which an existing remedy should be granted and creating a new remedy.”¹¹⁸¹ In fact, over time, the “no new remedies approach” would be “qualified in various ways.”¹¹⁸² The CJEU would come to admit the need for new forms

¹¹⁷³ For a recent overview see HEUKELS; TIB, “Towards Homogeneity in the Field of Legal Remedies Convergence and Divergence”, 2002, at 115; LENAERTS, “National Remedies for Private Parties in the Light of the EU law Principles of Equivalence and Effectiveness”, 2011, at 13-37.

¹¹⁷⁴ See EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1200. Noting the fine line separating rights, remedies and procedures see VAN GERVEN, “Bridging up the Gap between Community and National Laws”, 1995, at 694; RUFFERT, “Rights and Remedies in European Community Law”, 1997, at 332; HARLOW, “A Common European Law of Remedies”, 2000, at 72, 73; KILPATRICK, “The Future of Remedies in Europe”, 2000, at 4, 5; VAN GERVEN, “Of Rights, Remedies and Procedures”, 2000, at 501-536.

¹¹⁷⁵ ARNULL, “Case C432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*”, 2007, at 1763. REICH called the coexistence of national procedural autonomy and the necessity of properly enforcing EU law a “hybridization” of remedies based both on national law as a basis but reshaped under the influence of EU law. See REICH, “Horizontal Liability in EC Law”, 2007, at 707. See also SMITH, “Remedies for Breaches of EU Law in National Courts, 1999, at 312.

¹¹⁷⁶ Case 158/80, *Rewe/Hauptzollamt Kiel*, [1981] ECR 1805.

¹¹⁷⁷ Para. 6 of the summary.

¹¹⁷⁸ The Court’s case-law would also add the requirements of adequacy and proportionality to national remedies. See Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891.

¹¹⁷⁹ Case 265/78, *Ferwerda*, [1980] ECR 617.

¹¹⁸⁰ CARANTA, “Judicial Protection against Member States”, 1995, at 706.

¹¹⁸¹ ARNULL, “Case C432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*”, 2007, at 1773.

¹¹⁸² CRAIG; BURCA, *EU Law*, 2011, at 221; WEATHERILL, “Addressing Problems of Imbalanced

of action for the enforcement of Union rights and the need to fill in *remedial voids*.¹¹⁸³ The case-law on the right to reimbursement of taxes unduly paid provides a good example.¹¹⁸⁴ This case-law was presented as a direct consequence of the principle of effectiveness¹¹⁸⁵ and scholars have considered that it involves the duty to provide for a *particular remedy* at the national level. Moreover, the creation of a special cause of action for *state liability* as a matter of Union law constitutes a good example of judicial activism and is probably the most significant creation of the CJEU to this date. As early as 1976, in the *Russo*¹¹⁸⁶ case, the CJEU considered that a Member State is liable for the damages it causes as a consequence of a breach of EU law. However, this affirmation was not considered seriously in a time where direct effect and supremacy were not yet fully accepted as EU law principles.¹¹⁸⁷ The honour was therefore left to the *Francoovich* decision, where the CJEU held “that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.”¹¹⁸⁸ Later, in *Munoz*¹¹⁸⁹ the CJEU made it clear that individuals must be provided with *pre-emptive remedies* where this contributes substantially to ensuring the achievement of the purpose of a Union rule, which led EILMANSEBERGER to consider that “individuals would now have a complete set of primary and secondary remedies at their disposal for the protection of Community rights in private relationships.”¹¹⁹⁰ Furthermore, the *Factortame*¹¹⁹¹ case dealt with the need to provide for *interim relief* with regard to national law potentially conflicting with EU law. Nonetheless, the Court’s decision left undecided the issue of knowing what would have happened if there were no adequate remedies available in the national legal order. Although the CJEU was not absolutely clear in this regard, it seems that the answer would have to be that interim relief had to be granted anyways, if for no other reason, as a consequence of the principle of supremacy.¹¹⁹²

Implementation in EC Law”, 2000, at 98; BARAV, “A aplicação do direito comunitário pelos tribunais nacionais” 1999, at 49.

¹¹⁸³ TRSNTENJAK; BEYSEN, “European Consumer Protection Law”, 2011, at 105.

¹¹⁸⁴ See TATHAM, “Restitution of Charges and Duties Levied by Public Administration in Breach of European Community Law”, 1994, at 146 *et seq.*

¹¹⁸⁵ Case 199/82, *Amministrazione delle finanze dello Stato/San Giorgio*, [1983] ECR 3595, para. 12.

¹¹⁸⁶ Case 60/75, *Russo/AIMA*, [1976] ECR 45.

¹¹⁸⁷ Noting that it was probably an affirmation “too outlandish” to be taken seriously, see EILMANSEBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1223.

¹¹⁸⁸ Para. 37. It wasn’t clear, however, if such a doctrine would apply to subjective rights such as the ones at stake in *Francoovich*, i.e., directly attributed by EU norms, or extended also to rights such as the ones involved in the *Van Gend en Loos* case, which are indirectly derived from obligations imposed on third parties by EU law. See EILMANSEBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1225. See also FITZPATRICK; SZYSZCZAK, “Remedies and Effective Judicial Protection in Community Law”, 1994, at 434-441; BARAV, “A aplicação do direito comunitário pelos tribunais nacionais”, 1999, at 50 *et seq.*; VAN GERVEN, “Of Rights, Remedies and Procedures”, 2000, at 509 *et seq.*; TRIDIMAS, *The General Principles of EU law*, 2006, at 498 *et seq.*

¹¹⁸⁹ Case C-253/00, *Munoz and Superior Fruiticola*, [2002] ECR I-7289, where the Court found that the applicants, fruit traders, had a right to enforce the obligation imposed by directly applicable Union legislation not to offer for sale fruit not conforming to established quality standards by means of civil proceedings against a competitor. It appears that, in the absence of such a right of action, there would have been *no possibility* for the applicants to assert that right.

¹¹⁹⁰ EILMANSEBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1228, noting that if *Munoz* is to be applied in other fields, certain clarifications are necessary. First, in order to avoid an *actio popularis* it is necessary to devise a criterion which enables one to determine who can bring such pre-emptive remedies. Second, it is necessary to clarify how far national procedural law may go in establishing additional conditions for such remedies.

¹¹⁹¹ Case C-213/89, *The Queen/Secretary of State for Transport, ex parte Factortame*, [1990] ECR I-2433. See SIMON; BARAV, “Le droit communautaire et la suspension provisoire des mesures nationales”, 1990, at 591-597.

¹¹⁹² In *Factortame* the national court did not have to *invent* a new interim measure as it could rely on a national procedural provision which just happened to be inapplicable to the case. The issue could have been solved by applying the *Simmenthal* case-law disregarding national conflicting law. See EILMANSEBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1211. For further developments on interim relief see BARAV,

In light of the above, VAN GERVEN considered that ultimately the CJEU abandoned the “no new remedies” approach: at least in some cases Member States and national courts have to broaden existing remedies so as to preserve the full effectiveness of Union rules. Furthermore, to know which remedies must be available in national legal orders depends on the content of the rights which said remedy intends to secure and consequently may vary from one rule to another.¹¹⁹³ Thus, later case-law would *soften* national procedural autonomy reinforcing the need to ensure effectiveness of EU law.¹¹⁹⁴ One could say that the more important the right conferred at a substantive level, the more willing would the CJEU be to disregard national procedural autonomy and enter in considerations regarding the scope and nature of remedies that have to be available in national legal orders.¹¹⁹⁵ Notwithstanding, one should note that this case-law was based on the interpretation of certain provisions of Union secondary law, which should be interpreted as requiring the existence of certain remedies. The situation is surely different when no remedial provisions of Union law exist, and the question lies exclusively with the need to determine the national remedies that must be available to enforce a Union right.

However, despite such evolution, it remained unclear whether the principle of effective judicial protection requires the existence of some kind of *declaratory relief* in national legal orders which allows for challenges grounded in Union law. The issue was discussed in the recent *Unibet* case which did not involve the interpretation of any remedial provisions of secondary Union law, but the possibility of having Union rights acknowledged by means of a declaratory action in national courts.¹¹⁹⁶ Unibet had purchased advertising space in a number of different Swedish media with a view to promoting its gaming services on the internet. In accordance with the Law on Lotteries, the Swedish State took a number of measures, including obtaining injunctions and

“Enforcement of Community rights in the national courts”, 1989, at 369 *et seq.*; JOLIET, “Protection juridictionnelle provisoire et droit communautaire”, 1992, at 1059-1065; OLIVER, “Interim measures”, 1992, at 7-27; CARANTA, “Judicial Protection against Member States”, 1995, at 707 *et seq.*; VAN GERVEN, “Bridging up the Gap between Community and National Laws” 1995, at 684 *et seq.*; ALMEIDA, *A Tutela de Direitos Subjectivos Derivados do Direito Comunitário*, 2000; VAN GERVEN, “Of Rights, Remedies and Procedures”, 2000, at 513 *et seq.*; SINANIOTIS, *The Interim Protection of Individuals before the European and National Courts*, 2006; TRIDIMAS, *The General Principles of EU law*, 2006, at 467 *et seq.*; ALVIM, *A Tutela Judicial Provisória dos Particulares no Âmbito do Direito Comunitário*, 2008.

¹¹⁹³ VAN GERVEN, “Bridging up the Gap between Community and National Laws”, 1995, at 693.

¹¹⁹⁴ Case 177/88, *Dekker/Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941; Case C-377/89, *Cotter and others/Minister for Social Welfare*, [1991] ECR I-1155; Case C-208/90, *Emmott/Minister for Social Welfare and Attorney General*, [1991] ECR I-4269. The latter was limited in later case-law. See e.g., in Case C-338/91, *Steenhorst-Neerings/Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, [1993] ECR I-5475. For further developments see HOSKINS, “Tilting the Balance”, 1996, at 368 *et seq.*; BIONDI, “The European Court of Justice and Certain National Procedural Limitations”, 1999, at 1279; TRIDIMAS, “Enforcing Community Rights in National Courts”, 2000, at 41; FLYNN, “Whatever happened to Emmott?”, 2000, at 51 *et seq.*; KILPATRICK, “Turning Remedies Around”, 2001, at 156 *et seq.*

¹¹⁹⁵ Also, the CJEU has not hesitated to determine the scope and nature of the remedies that have to be available under Union law. Hence, for instance, in *Cooté* (Case C-185/97, *Cooté/Granada Hospitality*, [1998] ECR I-5199) the CJ considered that the directive at issue required Member States to introduce into their national legal systems “such measures as are necessary to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment within the meaning of the directive (para. 28).” In *Schneider* it considered that the Equal Treatment Directive should be interpreted as meaning that the possibility of pursuing claims for compensation by judicial process was adequately satisfied by an action brought in the civil courts even if a parallel action in the administrative courts involved no fact-finding powers. See Case C-380/01, *Schneider*, [2004] ECR I-1389.

¹¹⁹⁶ See ANAGNOSTARAS, “The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights”, 2007, at 727-739; ARNULL, “Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*”, 2007, at 1763-1780; LENAERTS, “The Rule of Law and the Coherence of the Judicial System of the European Union”, 2007, at 1646; CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 280, 283.

commencing criminal proceedings, against those media which had agreed to provide Unibet with advertising space. However, no administrative action or criminal proceedings were brought against Unibet. Hence, the applicant brought an action against the Swedish State seeking, firstly, (i) a *declaration* that it had the right under the Treaties to promote its gaming and betting services in Sweden and was not prevented from doing so by the prohibition established in national law; secondly, (ii) compensation for the damage suffered as a result of that prohibition on promotion; and, thirdly, (iii) a *declaration* that the prohibition and the measures and sanctions for breach thereof did not apply to it. All of these actions were dismissed. In particular, the declaratory pleas were dismissed on the grounds that such application implied an abstract review of a legislative provision, whereas such an action is inadmissible under Swedish law. On appeal, the national court considered that it did not follow from the case-law of the CJEU that the principle of judicial protection required that an abstract review of a legislative provision should be possible where there is no provision for such an action under national law. This court also considered that if Unibet were to exercise the rights it claimed and promote its services in Sweden, the compatibility of that prohibition with Union law could be examined by the court seized in the context of a direct action against administrative measures or in criminal proceedings. Hence, the case involved the question of knowing “whether the principle of effective judicial protection of an individual’s rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State to bring a free-standing action for an examination as to whether national provisions are compatible with Article 49 EC if other legal remedies permit the question of compatibility to be determined as a preliminary issue.”¹¹⁹⁷ The CJEU basically reiterated its previous case-law, considering that the Treaties were “*not intended to create new remedies* in the national courts to ensure the observance of Community law other than those already laid down by national law (...).”¹¹⁹⁸ However, it added that, it would be otherwise “if it were apparent from the *overall scheme* of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under Community law.”¹¹⁹⁹

Scholars have considered that the message of this judgement is twofold. On the one hand, the CJEU will only control national remedies if there has been a very strong failure of protection of private parties. There is a presumption of trust in the national system, which involves a presumption of good faith (equivalence) and of capacity (effectiveness). On the other hand, the CJEU will adopt a contextual approach to remedies, as the absence or inadequacy of a particular remedy may be relevant in one particular Member State but not the other.¹²⁰⁰ Furthermore, in *Unibet* the Court left the door open to admit in the future the possibility of a duty to create new

¹¹⁹⁷ Para. 36.

¹¹⁹⁸ Para. 40.

¹¹⁹⁹ Para. 41. See ANAGNOSTARAS, “The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights”, 2007, at 734. AG SHARPSTON had considered that “when assessing whether national procedural rules satisfy the criteria developed by the Court, the *overall judicial context* is examined” and that “the mere fact that a specific right of action is not available in a given legal system for the assertion of a Community law right will not necessarily mean that the principle of effective protection is infringed (para. 36).”

¹²⁰⁰ See CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 283.

remedies *ex novo*,¹²⁰¹ although it associated this obligation with the principle of national procedural autonomy and with the *interpretative duty* established in UPA referred above.¹²⁰² This double reasoning makes the boundaries of such obligation uncertain and the “practical effect of that statement ... hard to gauge.”¹²⁰³ Hence, although scholars have considered that *Unibet* inaugurates “officially the departure from the no new remedies rule and to authorise expressly the involvement of the courts in the development of the legal actions that are considered indispensable to satisfy the effectiveness requirements”¹²⁰⁴, it has been understood that the duty to create new remedies operates only *occasionally*¹²⁰⁵ and in *exceptional* cases.¹²⁰⁶

Lastly, problems may arise if, under national law, no court is competent to hear a given claim based on Union law. On the issue of jurisdiction the case-law is also not straightforward. As a rule, it is for national legal orders to determine which courts have jurisdiction to hear the claims based on Union law. The case of *Borelli*¹²⁰⁷ seems to have suggested that national courts need to set aside national provisions which limit or exclude their jurisdiction, in order to accept jurisdiction to decide a case. However, this affirmation somehow contrasts with the rulings in *Bozzetti*¹²⁰⁸ and *Unibet*.¹²⁰⁹ Even the *strong* obligation imposed on national courts to set aside conflicting national law flowing from *Simmenthal*¹²¹⁰ seems to be limited to national courts or tribunals *already found competent* to decide the cases.¹²¹¹ Thus, some case-law suggests that the CJEU leaves this issue mainly in the hands of national courts, thereby not obliging them to take jurisdiction when this is absent. Nonetheless, more recently, in *Impact*¹²¹², the Court clarified that the requirements of equivalence and effectiveness are also applicable to jurisdiction issues, and that individuals should be able to bring action before a single court for a single claim and cannot be asked to bring different suits in several courts for pursuing the same cause of action.

Summing up, in establishing the obligation to facilitate *as far as possible* the challenge of

¹²⁰¹ Noting that this *dicta* clarified the previous case-law, stating that *sometimes* new remedies have to be created see ARNULL “Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslem*”, 2007, at 1773. Also noting that the ruling takes effectiveness one step forward and *may imply the creation of totally new courses of action* see ANAGNOSTARAS, “The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights”, 2007, at 734.

¹²⁰² Considering that *Unibet* is a good example proving that there is a very fine line between the (re)interpretation of procedural and other conditions governing existing remedies on the one hand, and the creation of new remedies on the other, see TRSNTENJAK; BEYSEN, “European Consumer Protection Law”, 2011, at 105 *et seq.*

¹²⁰³ ARNULL, “Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslem*”, 2007, at 1773.

¹²⁰⁴ ANAGNOSTARAS, “The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights”, 2007, at 739.

¹²⁰⁵ *Ibid.*, at 738.

¹²⁰⁶ ARNULL, “Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslem*”, 2007, at 1780.

¹²⁰⁷ Case C-97/91, *Oleificio Borelli/Commission*, [1992] ECR I-6313. See GARCÍA DE ENTERRÍA, “The Extension of the Jurisdiction of National Administrative Courts by Community Law”, 1993, at 19-37.

¹²⁰⁸ Case 179/84, *Bozzetti/Invernizzi*, [1985] ECR 2301. See also Case 13/68, *Salgoil/Ministero del commercio con l'estero*, [1968] ECR 453, where the CJEU held that “it is for the national legal system to determine which court or tribunal has jurisdiction to give this protection and, for this purpose, to decide how the individual position thus protected is to be classified (at 463).” See also DANIELE, “L’effettività della giustizia amministrativa nell’applicazione del diritto comunitario europeo”, 1996, at 1388.

¹²⁰⁹ See also Case C-446/93, *SEIM/Subdirector-Geral das Alfândegas*, [1996] ECR I-73; Joined Cases C-10 to 22/97, *Ministero delle Finanze/IN.CO.GE.90 and others*, [1998] ECR I-6307; Case C-224/01, *Köbler*, [2003] ECR I-10239.

¹²¹⁰ Case 106/77, *Amministrazione delle finanze dello Stato/Simmenthal*, [1978] ECR 629.

¹²¹¹ See DOUGAN, *National Remedies before the Court of Justice*, 2004, at 10.

¹²¹² Case C-268/06, *Impact*, [2008] ECR I-2483, para. 51. See also Case C-54/96, *Dorsch Consult Ingenieurgesellschaft/Bundesbaugesellschaft Berlin*, [1997] ECR I-4961, para. 40; Case C-76/97, *Tögel/Niederösterreichische Gebietskrankenkasse*, [1998] ECR I-5357, para. 22; Case C-258/97, *HI*, [1999] ECR I-1405, para. 22. See PICHERAL, “Droit communautaire des droits fondamentaux”, 2000, at 513-515.

Union acts, the CJEU confirms that national procedural autonomy is still the rule in this regard. Hence, an obligation of national judges to close the gaps, by becoming a “rubber stamp desk” for the CJEU contradicts the CJEU’s own case-law, as it would significantly curtail national procedural autonomy. In fact, this would mean that national judges may have to introduce entirely new rules of procedure in their national legal orders or alter the existent ones.¹²¹³ Such an obligation collides with the CJEU’s “no new remedies” approach. Even under the more intrusive line of the CJEU’s case-law, effectiveness of Union law has never implied unequivocally a general duty to accept all kinds of judicial actions at the national level *as a matter of Union law*.

IV. Furthermore, when elaborating on the principle of effectiveness the CJEU stated in *Peterbroeck*¹²¹⁴ and *Van Schjindel*¹²¹⁵ that:

“[e]ach case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the *basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration*” (emphasis added).¹²¹⁶

Indeed, national procedural rules exist for a reason and are deemed legitimate as a matter of principle. Hence, a conflict between such rules and the effectiveness of Union law must be resolved through a balancing exercise, which was established by the CJEU under a procedural “rule of reason.”¹²¹⁷ However, scholars note that by definition, *any procedural norm* can be justified on the grounds of legal certainty and proper conduct of proceedings.¹²¹⁸ It is not surprising therefore that

¹²¹³ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 34.

¹²¹⁴ Case C-312/93, *Peterbroeck, Van Campenhout & Cie/Belgian State*, [1995] ECR I-4599. For a case comment see BARBIERI, “Poteri del giudice amministrativo e diritto comunitario”, 1996, at 688-700.

¹²¹⁵ Joined Cases C-430 and C-431/93, *Van Schjindel/Stichting Pensioenfonds voor Fysiotherapeuten*, [1995] ECR I-4705.

¹²¹⁶ Case C-312/93, *Peterbroeck, Van Campenhout & Cie/Belgian State*, [1995] ECR I-4599, para. 14. Considering these requirements to be “pretty reasonable as they substantially reaffirm that both sets of rules (...) have the same aims of guaranteeing an efficient composition of conflicting interests, access to justice and protection of the rights of private parties” see BIONDI, “How to Go Ahead as an EU Law National Judge”, 2009, at 229. Considering that the Court adopted an “objective justification model” see DOUGAN, *National Remedies before the Court of Justice*, 2004, at 30. DELICOSTOPOULOS reads national procedural autonomy as a kind of *Dasonville*-pronouncement: “all procedural rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, the effective enforcement of Community law are to be considered as measures contrary to Community law and must be inoperative.” See DELICOSTOPOULOS, “Towards European procedural primacy in national legal systems”, 2003, at 605. BIONDI suggests a more *Keck*-oriented approach: “certain procedural limitations which are not by their nature such as to prevent access to the full enjoyment of Community Rights or to impede it more that it impedes the access of domestic rights, do not come within the scope of Community law.” See BIONDI, “The European Court of Justice and Certain National Procedural Limitations”, 1999, at 1284. WARD has also suggested a *Keck* approach, according to which primary reliance should be put on the principle of equivalence, rather than the principle of effectiveness, in assessing the compatibility of national procedural rules with Union law: once this test has been satisfied, procedural rules will be compatible with Union law, provided that they do not strike at the essence of right of access to a court, pursue a legitimate aim, and are proportionate. See WARD, “Do Unto Others as You Would Have Them Do Unto You”, 2008, at 754.

¹²¹⁷ PRECHAL, “Community Law in National Courts”, 1998, at 690, 691; BIONDI, “The European Court of Justice and Certain National Procedural Limitations”, 1999, at 1277. Considering that this balancing exercise is a consequence of the duty of loyal cooperation and that it involves the application of the proportionality principle see TRSNTENJAK; BEYSEN, “European Consumer Protection Law”, 2011, at 103.

¹²¹⁸ See HOSKINS, “Tilting the Balance”, 1996, at 375, noting that the formula became vague, and that the initial

national courts tend to deem national procedural rules justified and that only in a few cases has the CJEU found to exist a violation of the so-called twin principles.¹²¹⁹ In fact, the CJEU has held, in several instances, that national procedural rules are acceptable regardless of the protection of Union rights. For instance, in *Evans*¹²²⁰, the CJEU considered that the negative impact of a procedural national rule must be assessed in light of the domestic legal system *as a whole*.¹²²¹ In *Grundig Italiana*¹²²² the CJEU considered that reasonable time limits in order to bring an action aimed at protecting rights under EU law are allowed under the principle of effectiveness, in the interest of *legal certainty*.¹²²³ More recently, in *Kühne*¹²²⁴, the CJEU balanced the duty of loyal cooperation with the imperative of legal certainty, stating that a duty to reopen an administrative procedure which led to a decision contradicting case-law of the CJEU was far from automatic. More significantly, in *Unibet*, the available means of action were considered *sufficient* in light of the principle of effectiveness in so far as other *alternative means* made it possible to contest the validity of national law even if incidentally. In the latter case, the Court made a clear *de minimis* assessment¹²²⁵, as it was highly questionable that the action for damages could be considered a genuine alternative to a declaratory action.¹²²⁶ One could say that from the point of view of individuals, the decision in *Unibet* stopped short on protecting individual rights. Or as ANAGNOSTARAS has stated:

“[s]een in this perspective, the judgment confirms that the availability of a given remedy is guaranteed by Community law only to the extent that this is absolutely indispensable to provide an apposite measure of legal protection. Otherwise, the legislature is given *complete latitude to organise the remedial scheme* in any way it believes it appropriate to serve optimally the administration of justice (emphasis added).”¹²²⁷

Hence, under the principle of effectiveness differences among national legal orders and institutions as well as minor limitations of the efficacy of a given legal provision are still within the

simpler version of national procedural autonomy which looks into the practical effect of the national rule offered a more objective yardstick for measuring the validity of national measures.

¹²¹⁹ See HEUKELS; TIB, “Towards Homogeneity in the Field of Legal Remedies Convergence and Divergence”, 2002, at 116, noting that the *Rewe* criteria imply only a minimum harmonisation.

¹²²⁰ Case C-63/01, *Evans*, [2003] ECR I-14447.

¹²²¹ Para. 46.

¹²²² Case C-255/00, *Grundig Italiana*, [2002] ECR I-8003, paras. 34-37. See also Case C-228/96, *Aprile/Amministrazione delle Finanze dello Stato*, [1998] ECR I-7141, para. 19; Case C-62/00, *Marks & Spencer*, [2002] ECR I-6325, para. 38.

¹²²³ ACCETTO; ZLEPTING, “The Principle of Effectiveness”, 2005, at 392.

¹²²⁴ Case C-453/00, *Kühne & Heitz*, [2004] ECR I-837. For a case comment see GATTINARA, “Il ruolo comunitario delle amministrazioni nazionali alla luce della sentenza *Kühne & Heitz*”, 2004, at 489-500; CARANTA, “Case C-453/00, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*”, 2005, at 179-188.

¹²²⁵ ANAGNOSTARAS speaks about a “minimum remedial intervention.” See ANAGNOSTARAS, “The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights”, 2007, at 733. Noting that “adequate protection” of individuals’ rights would be a more appropriate yardstick than “minimum protection” see VAN GERVEN, “Of Rights, Remedies and Procedures”, 2000, at 531.

¹²²⁶ The applicants had argue that the action for damages was not an adequate remedy as it was hard to mount and even if it where successful, it would not have *erga omnes* effects. See Opinion of AG SHARPSTON, para. 51. Also questioning the adequacy of the action for damages see ANAGNOSTARAS, “The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights”, 2007, at 736, 737; ARNULL, “Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslem*”, 2007, at 1775.

¹²²⁷ ANAGNOSTARAS, “The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights”, 2007, at 733.

margin permitted by Union law and are therefore tolerated.¹²²⁸ As ACCETTO and ZLEPTING have noted:

“[w]hile individuals mostly care about their rights, the reasoning of the Court must also sustain *the entire system*, and it seems incongruous to suggest that the exigencies of individual rights would always trump wider systemic considerations (emphasis added).”¹²²⁹

Accordingly, “the principle of effectiveness is, ultimately and fundamentally, about ensuring the integrity and coherence of the Community legal order *as a whole*.”¹²³⁰ Effectiveness is not conceived as a procedural guarantee of private parties in the Union’s judicial system: it aims to ensure the effectiveness of the Union legal order *objectively* considered. The rights of private parties emerge as secondary in this construction, which means that they are to be sacrificed in cases where a *de minimis* approach to effectiveness does not compromise the global enforcement of Union law. Surely, this *de minimis* assessment determines a sacrifice to the uniform and effective application of EU law. However, this sacrifice is to be considered as a *systemic flaw* inherent to the Union legal order.¹²³¹ In so far as small sacrifices to Union rights do not compromise the *global effectiveness* of Union law they will not be struck down by the CJEU. Hence, more than finding the right fit for the interaction between *rights* and *remedies* belonging to two different legal orders, the case-law of the CJEU on national procedural autonomy shows some reluctance from the CJEU in building such relationship in terms of effective judicial protection rather than in terms of effectiveness of the Union legal order.¹²³² As a result, the principle of effectiveness assessed in light of *contextual* and *systemic* concerns precludes the existence of a duty to create new forms of action in national legal orders. In fact, it would always be possible to argue that the principle of legal certainty would not allow for such deep and wide-ranging changes in national procedural law notably through judge-made law. Thus, the duty imposed on national judges to fill in remedial gaps seems compromised by the very own case-law of the CJEU on national procedural autonomy.

V. Furthermore, it is noticeable that the case-law of the CJEU on national procedural autonomy was developed in the context of ensuring the *effectiveness of EU law* in Member States legal orders, *i.e.* against Member States.¹²³³ Here, effectiveness showed up as “a more sophisticated

¹²²⁸ Hence, in order to prevail the national interest must have systemic implications for the national legal order and must be grounded in a general legal principle recognised by, although not necessarily originating in Union law. The governing principle of effectiveness will normally favour the outcome where such national interest is not unnecessarily eroded, unless a contrary outcome would undermine the general structure of the Union legal order as a whole. See ACCETTO; ZLEPTING, “The Principle of Effectiveness”, 2005, at 402, 403. See also VAN GERVEN, “Of Rights, Remedies and Procedures”, 2000, at 505 and 521, noting that under the CJEU’s case-law Union rights do not have to be *fully* secured in a *uniform* manner throughout the Union. Thus objective uniform enforcement of Union law is not a Union principle such as direct effect, supremacy or access to a court.

¹²²⁹ ACCETTO; ZLEPTING, “The Principle of Effectiveness”, 2005, at 392.

¹²³⁰ *Ibid.*

¹²³¹ The mere existence of directives shows the lack of uniformity which the system implies.

¹²³² Noting the close link between the principle of effective judicial protection and the duty to ensure the full effectiveness of Union law see PRECHAL; SHELKOPLYAS, “National Procedures, Public Policy and EC Law”, 2004, at 591, who consider that the general principle of effective judicial protection *expanded* the principle of effectiveness; TRSNTENJAK; BEYSEN, “European Consumer Protection Law”, 2011, at 98. Also noting that in some cases the CJEU relies primarily on the full effectiveness of EU law rather than on effective judicial protection of individuals see PRECHAL, “Protection of Rights”, 2008, at 156.

¹²³³ See CARANTA, “Judicial Protection against Member States”, 1995, at 703-726. Noting that under the duty of loyalty national courts are called on to give effect to EU law where national governments have failed to do so see

and tailored mechanism for the exploration of the dynamics between national and European law than the blunt exhortation of supremacy” as it “can determine both the *point at which* EC law intervenes and the *extent of remedial action* required from the national court.”¹²³⁴ As in the majority of cases Member States are entrusted with the application of Union acts, effectiveness of Union law is by large dependent upon the means of action and the remedies available in national courts.¹²³⁵ In this regard, effectiveness of Union law may be impaired in several ways. Notably, there may be substantive and procedural obstacles to its application that range from subtle legal rules, to administrative practices, to systemic flaws in the national institutional set-out. This concern applies to administrative authorities, independent regulators and national courts.¹²³⁶ A system where *rights* are separated from *remedies*, and where national *remedies* follow different logics, traditions and objectives, may compromise the effectiveness of Union *rights*. Hence, effectiveness appears as “an institutional mantra operative at both national and European levels in order to secure the replication of the latter style of reasoning in the former.”¹²³⁷

In this context, the CJEU faced difficulties in reconciling supremacy of Union law with national procedural rules. In fact, this has not always proved easy. Scholars note that the initial case-law of the CJEU on national procedural autonomy changed overtime: an attitude of great deference to national procedural autonomy gave place to a rigid scrutiny of the judicial protection ensured by Member States.¹²³⁸ Following GROUSSOT and MINSEN:

“[i]t appears that the Court of Justice has developed two distinct lines of case-law in order to assess the Community legality of national procedural law. The first line is traditionalist since it is strongly based on the respect of national procedural autonomy. In contrast, the second line is mainly founded on the principle of supremacy and leads to the elaboration of a very progressive approach bolstering the full effectiveness of Community law.”¹²³⁹

Effectiveness of Union law may thus “inspire or clothe national judicial creativity in relation to domestic provisions”¹²⁴⁰ and may determine the availability of a remedy or a procedural power of a court under national law. There will always be a direct connection between a Union right

MAHER, “National Courts as European Community Courts”, 1994, at 232 and 234. Considering that the greatest weight must always be attached too the objective of ensuring complete effectiveness of Union law, see KAKOURIS, “Do the Member States Possess Judicial Procedural Autonomy”, 1997, at 1406. Speaking about a “shift to effectiveness” see KILPATRICK, “The Future of Remedies in Europe”, 2000, at 6. See also KILPATRICK, “Turning Remedies Around”, 2001, at 149 *et seq.*; DOUGAN, *National Remedies before the Court of Justice*, 2004, at 28 *et seq.* and 65 *et seq.*

¹²³⁴ ROSS, “Effectiveness in the European Legal Order(s)”, 2006, at 495, 496.

¹²³⁵ HIMSWORTH, “Things Fall Apart”, 1997, at 291.

¹²³⁶ ACCETTO; ZLEPTING, “The Principle of Effectiveness”, 2005, at 376.

¹²³⁷ ROSS, “Effectiveness in the European Legal Order(s)”, 2006, at 480.

¹²³⁸ ACCETTO; ZLEPTING, “The Principle of Effectiveness”, 2005, at 388.

¹²³⁹ GROUSSOT; MINSEN, “*Res Judicata* in the Court of Justice Case-Law”, 2007, at 390. Also noting the existence of two major trends see PRECHAL, “Community Law in National Courts”, 1998, at 687-689; HEUKELS; TIB, “Towards Homogeneity in the Field of Legal Remedies Convergence and Divergence”, 2002, at 113 *et seq.* Noting the changes in the evolution of the CJEU’s case in this respect see DANIELE, “L’effettività della giustizia amministrativa nell’applicazione del diritto comunitario europeo”, 1996, at 1386; TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1189 *et seq.*; TRIDIMAS, *The General Principles of EU law*, 2006, at 420 *et seq.*; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 87 *et seq.*; CRAIG; BÚRCA, *EU Law*, 2011, at 223-231. Speaking about the functional desire for *greater effectiveness* conveniently pointed in the same direction as the symbolism of effective judicial protection of rights of individuals in the construction of the Community see KILPATRICK, “Turning Remedies Around”, 2001, at 144; DOUGAN, *National Remedies before the Court of Justice*, 2004, at 28 *et seq.* and 225 *et seq.*

¹²⁴⁰ ROSS, “Effectiveness in the European Legal Order(s)”, 2006, at 480.

being pursued by an individual and the access to it at the national level.

However, this construction may imply a *conceptual difficulty* when transposing this case-law to the admissibility of national actions which allow for preliminary rulings on validity. It is clear that these cases do not involve the need to ensure *effectiveness* of Union law. On the contrary it is the creation of a certain form of action which allows private applicants to question the validity and application of Union law that is at stake. Hence, the duties imposed on national courts in *Unibet* and *UPA*, despite using a similar phrasing, must be distinguished. In fact, one thing is to require national courts “to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective (...) of ensuring effective judicial protection of an individual’s rights under Community law.”¹²⁴¹ Another thing is to impose such interpretative duty so as to allow the challenge of a national act giving effect to a Union measure whose validity is primarily at stake. It is, therefore, significant that ARNULL associates the *Unibet* duty and not the *UPA* one with the wording of current Article 19(2) TEU.¹²⁴² Hence, although the principle of effectiveness has proven a strong weapon in enforcing EU law against Member States – reinforcing the global effectiveness of Union law –, the *rationale* behind this case-law does not make sense regarding challenges to the validity of Union acts.

VI. In light of the above, one may question what is the place for national procedural autonomy in those cases where national courts are expected to fill in a remedial gap which arises as a consequence of the strict interpretation of standing requirements of private parties.¹²⁴³ According to the CJEU it seems that national courts are expected not only to be the primary venue for asserting Union rights, but also for challenging the validity of Union acts.¹²⁴⁴ However, according to the same court, national procedural autonomy is not compromised. Moreover, when the validity of Union acts is at stake, it is unclear which – if any – limits apply to such principle in this respect. It seems to make little sense to consider in this context equivalence or effectiveness concerns. On the one hand, it is hard to envisage a situation where national courts have to deal with a similar difficulty *under national law*. On the other hand, in these cases it is precisely the *effectiveness* along with the validity of the Union act at stake which is, by definition, being questioned. One could thus conclude that national procedural autonomy is not circumvented by these principles. As a consequence, the likelihood of national courts stretching the boundaries of national procedural law, *as a matter of Union law*, in order to fill in gaps of judicial protection is reduced.

Nonetheless, there is one dimension of the principle of effectiveness which could be deemed

¹²⁴¹ Case C432/05, *Unibet*, [2007] ECR I-2271, para. 44.

¹²⁴² ARNULL, “Case C432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*”, 2007, at 1769.

¹²⁴³ For KAKOURIS who thinks that national procedural autonomy does not exist *as a matter of principle*, the issue will not probably be problematic. See KAKOURIS, “Do the Member States Possess Judicial Procedural Autonomy”, 1997, at 1389-1412.

¹²⁴⁴ TRIDIMAS, *The General Principles of EU law*, 2006, at 419.

relevant in this respect, *i.e.* the effectiveness of the preliminary references mechanism.¹²⁴⁵ This would mean that national courts would be under a duty to accept all kinds of judicial actions which would allow for preliminary rulings on validity to take place. There is a possible indicator in the CJEU's case-law that in cases where a national provision impedes access to the preliminary references procedures the test of reasonableness established in *Peterbroeck* and *Van Schijndel* will, in principle, not justify said rule.¹²⁴⁶ In fact, national procedural rules which are capable of affecting the possibility of an "open dialogue"¹²⁴⁷ between the CJEU and national judges, in particular by reducing the possibility of making a reference, have not been accepted by the CJEU. In *Rheinmühlen Düsseldorf*¹²⁴⁸ the CJEU held that the existence of a rule of domestic law whereby an inferior court is bound on points of law by the rulings of a superior court cannot of itself take away the power provided for by Article 267 TFEU of referring cases to the Court.¹²⁴⁹

Also, the different outcomes of *Peterbroeck* and *Van Schijndel* could also prove the point.¹²⁵⁰ Scholars have struggled in trying to reconcile both decisions.¹²⁵¹ One possibility is to consider that whereas in *Van Schijndel* it seems that *any court* could at *any time* refer a question to the CJEU, in *Peterbroeck* the proceedings were of such kind as to preclude such possibility.¹²⁵² In fact, in *Peterbroeck* the CJEU stressed "the special features of the procedure in question", considering that (i) the national court was the first court which could make a reference to the CJEU; (ii) the limitation period during which new pleas could be raised by the appellant had expired by the time the national court held its hearing so that the latter was denied the possibility of considering the question of compatibility of the national measure with Union law; and (iii) no other national court or tribunal in subsequent proceedings could of its own motion consider such question of the

¹²⁴⁵ Noting the interactions between national procedural autonomy and the preliminary references mechanism see MASTROIANNI, "Rinvio pregiudiziale e sospensione del processo civile", 2000, at 91-109.

¹²⁴⁶ Some case-law indicates that this reasonableness test does not have to be applied in every case. See Case C-441/93, *Pafitis and others*, [1996] ECR I-1347; Case C-212/94, *FMC and others*, [1996] ECR I-389; Joined Cases C-192 to 218/95, *Comateb and others/Directeur général des douanes et droits indirects*, [1997] ECR I-165. See PRECHAL; SHELKOPLYAS, "National Procedures, Public Policy and EC Law", 2004, at 692, noting that in these cases the CJEU did not consider the *rationale* for the national rules at all.

¹²⁴⁷ DOUGAN, *National Remedies before the Court of Justice*, 2004, at 46.

¹²⁴⁸ Case 166/73, *Rheinmühlen Düsseldorf/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1974] ECR 33.

¹²⁴⁹ Para 5. Noting that the CJEU "*relativise ainsi la dépendance hiérarchique des juridictions inférieures*" see BARAV, "Le renvoi préjudiciel communautaire", 1997 at 6.

¹²⁵⁰ Regarding these decision some authors spoke about "tilting the balance" and others about "striking the balance". See HOSKINS, "Tilting the Balance", 1996, at 365-377; JACOBS, "Enforcing Community Rights and Obligations in National Courts", 1997, at 25-36. Recent decisions of the CJEU seem to have clarified that *Peterbroeck* was more out of line with the trend in the case-law. See WARD, "Do Unto Others as You Would Have Them Do Unto You", 2008, at 749. See Joined Cases C-222 to 225/05, *van der Weerd and others*, [2007] ECR I-4233, and Opinion of AG MADURO in the case; Case C-455/06, *Heemskerk and Schaap*, [2008] ECR I-8763; Case C-40/08, *Asturcom Telecomunicaciones*, [2009] ECR I-9579.

¹²⁵¹ HEUKELS, "Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*; and Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*", 1996, at 337 *et seq.*; HOSKINS, "Tilting the Balance", 1996, at 372 *et seq.*; BURCA, "National Remedies for Breach of EC law", 1997, at 37-46; HIMSWORTH, "Things Fall Apart", 1997, at 296 *et seq.*; LANG, "The Duties of National Courts under Community Constitutional Law", 1997, at 13 *et seq.*; PRECHAL, "Community Law in National Courts", 1998, at 691 *et seq.*; DELICOSTOPOULOS, "Towards European Procedural Primacy in National Legal Systems", 2003, at 607; PRECHAL; SHELKOPLYAS, "National Procedures, Public Policy and EC Law", 2004, at 598, 599; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 144.

¹²⁵² DOUGAN, *National Remedies before the Court of Justice*, 2004, at 48. See also Case C-126/97, *Eco Swiss*, [1999] ECR I-3055. See also HOSKINS, "Tilting the Balance", 1996, at 375; PRECHAL, "Community Law in National Courts", 1998, at 693, 694; PRECHAL; SHELKOPLYAS, "National Procedures, Public Policy and EC Law", 2004, at 589-611; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 106, note 485.

compatibility.¹²⁵³ In contrast, it has been noted that “where the possibility of an Article 234 EC reference is still possible, the Court will not intervene, even though the effect of the domestic procedural rule is to deprive the individual of the opportunity to assert his/her Treaty rights.”¹²⁵⁴ The judicial policy at work is “instead moulded by the Court’s desire to protect Article 234 EC as an effective medium for dialogue between the Community and domestic courts on the interpretation of Treaty law.”¹²⁵⁵

More recently, in *Cartesio*¹²⁵⁶, the CJEU held that lower courts retain jurisdiction to refer even in face of a negative decision of a higher court rendered on appeal. Hence:

“[t]he second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling *cannot be called into question by the application of those rules*, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings (emphasis added).”¹²⁵⁷

If that is so, one could argue that national judges are under an obligation to allow preliminary references to take place. Such obligation would be in line and would reinforce the duty to “plug” gaps of judicial protection. However, besides the fact that the latter duty has not been unequivocally established in the case-law¹²⁵⁸, this construction collides with another line in the CJEU’s case-law on the admissibility of preliminary references. As is well known, the CJ has refused to accept references which are merely hypothetical and abstract.¹²⁵⁹ The CJ does not in principle accept to hear “test cases.” In the *Foglia*¹²⁶⁰ cases the CJEU rejected a batch of questions on the basis that the dispute between the parties in the national proceedings was not genuine. Considering that the parties to the main action were in agreement as to the result to be attained, the CJEU held that the action was of an “artificial nature” and thus it had no jurisdiction to give a ruling on the case.¹²⁶¹ Surely, *Foglia* has long been criticised in the literature and was delivered within a preliminary ruling for interpretation.¹²⁶² Nonetheless, the Court has consistently held that

¹²⁵³ See also BARBIERI, “Poteri del giudice amministrativo e diritto comunitario”, (1996) at 694 *et seq.* For a critical analysis of these arguments see TRIDIMAS, *The General Principles of EU law*, 2006, at 462.

¹²⁵⁴ DOUGAN, *National Remedies before the Court of Justice*, 2004, at 49.

¹²⁵⁵ *Ibid.* Hence national procedural rules can restrict access to the CJEU but not excluded altogether.

¹²⁵⁶ Case C-210/06, *Cartesio*, [2008] ECR I-9641.

¹²⁵⁷ Para. 98.

¹²⁵⁸ Nonetheless, such conclusion does not compromise the principle of passivity which was the issue in *Van Schijndel*: EU law does not require that national courts initiate proceedings of their own motion. See also Case C-472/99, *Clean Car Autoservice*, [2001] ECR I-9687, para. 29.

¹²⁵⁹ See e.g., Case C-83/91, *Meilicke/ADV-ORGA*, [1992] ECR I-4871, paras. 32-33; Case C-467/04, *Gasparini and others*, [2006], ECR I-9199, paras. 44-45.

¹²⁶⁰ Case 104/79, *Foglia/Novello*, [1980] ECR 745; and Case 244/80, *Foglia/Novello*, [1981] ECR 3045. See HARTLEY, *The Foundations of European Union Law*, 2010, at 306, 307, noting that there were grounds for believing that the whole transaction was construed in order to raise a test case. However, the author criticizes the decision arguing that on the surface at least the dispute was genuine and bringing a test case is a recognized device for obtaining a ruling in a disputed question of law. ARNULL qualified the case as an “assault on discretion”. See ARNULL, “The Past and Future of the Preliminary Rulings Procedure”, 2003, at 346. See also BARAV, “Preliminary Censorship”, 1980, 443-467; BARAV, “Le renvoi préjudiciel communautaire”, 1997, at 9, 10. See also Case C-82/91, *Meilicke/ADV-ORGA*, [1992] ECR I-4871.

¹²⁶¹ Noting that it seems that the CJEU is not willing to accept preliminary questions when individuals build an artificial legal suit just to have access to the CJEU see VANDERSANDEN, “Contentieux communautaire”, 1996, at 177.

¹²⁶² BEBR, “The existence of a genuine dispute”, 1980, at 530, questioning what in reality can be considered a

it cannot give a preliminary ruling on a question submitted by a national court where the problem is merely hypothetical.¹²⁶³ The CJ will refuse to issue a ruling if “it appears that the procedure of Article 177 of the Treaty has been misused and been resorted to, in fact, in order to elicit a ruling from the Court by means of a spurious dispute.”¹²⁶⁴ Hence, notwithstanding the fact that the CJEU has been cautious in the application of the *Foglia* doctrine, truth is that it has never reversed the precedent, which can be said not to fit well with the artificiality of certain national actions brought exclusively with the purpose of enabling a preliminary ruling on validity.

VII. In sum, the *complete* nature of the system of judicial review depends on the “*garde-fou*” of the obligation imposed on national authorities to ensure the effectiveness of Union law. However, the duties imposed on national courts in this regard are established under a very cautious formula. Thus, it cannot be inferred from the case-law of the CJEU that a national court is obliged to declare admissible an action brought against a public authority’s intention to apply a regulation or to transpose a directive into the national legal order, where the procedural law of the Member State does not provide for such form of declaratory relief.¹²⁶⁵ It comes as no surprise that such obligation remains a “mere obligation to do the best endeavours.”¹²⁶⁶ In fact, a duty to accept all kinds of actions in national courts would conflict with the CJEU’s case-law on national procedural autonomy, the principle of effectiveness and artificial litigation. As seen above, this case-law suggests yet again an *objectivist* and *systemic* approach to the Union’s system of judicial review. What is more, it is precisely the CJEU’s own views that do not enable the affirmation that the system of judicial review in the EU is either complete or coherent. In fact, in the absence of such duty, the complete nature of the system of judicial review is compromised. If the national judge deems that *it is not possible* to accept a challenge to a Union act within the framework of national procedural law, the individual is left in a “dead end”¹²⁶⁷ without protection. Hence, national procedural autonomy

fabricated dispute.

¹²⁶³ See, in particular, Joined Cases C-430 and 431/99, *Sea-Land Service and Nedlloyd Lijnen*, [2002] ECR I-5235, para. 46: “[n]evertheless, the Court has held that it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.”

¹²⁶⁴ Case C-231/89, *Gmurzynska-Bscher/Oberfinanzdirektion Köln*, [1990] ECR I-4003, para. 23. The CJEU would limit this review to manifest cases. See e.g., Case 46/80, *Vianl/Orbat*, [1981] ECR 77; Case 267/86, *Van Eycke/ASPA*, [1988] ECR 4769, para. 12; Case C-118/94, *Associazione Italiana per il WWF and others*, [1996] ECR I-1223, para. 15; Case C-129/94, *Ruiz Bernáldez*, [1996] ECR I-1829, para. 7; Case C-36/99, *Idéal tourisme*, [2000] ECR I-6049, para. 22. See CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001, at 186, with further references.

¹²⁶⁵ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 90, note 78, noting that the CJEU is resigned to the fact that in some cases an individual must infringe a Union act before he/she can challenge it. In contrast, noting that in such case the Member State had to enact provisions which provide an individual with a remedy to access national courts to raise the invalidity of a Union act see TÜRK, *Judicial Review in EU Law*, 2009, at 220.

¹²⁶⁶ Noting that it does not seem that the need for a declaratory relief is imposed by the CJEU’s case-law see GILLIAUX, “L’arrêt Unión de Pequeños Agricultores”, 2003, at 187. See also LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 189, considering that what is involved in the Court’s case-law is a commitment to make the best endeavours and then it rests only where there are national implementing measures. Accordingly the CJEU leaves two loopholes open: on the one hand, the degree of judicial protection is made dependent on the creativity of national judges only and, on the other hand, there is no solution for situations where no implementing measures exist. See also LENAERTS, “The Rule of Law and the Coherence of the Judicial System of the European Union”, 2007, at 1628, 1629.

¹²⁶⁷ CORTHAUT, “An Effective Remedy for All?”, 2005, at 128.

and judicial subsidiarity do not fit adequately. In light of the above, one may question why the Union's system of judicial review should provide for the involvement of national courts in the adjudication of the legality of Union acts.¹²⁶⁸ The participation and mostly the reliance on national courts to control the legality of Union measures seem to be itself a weakness of the system.¹²⁶⁹

Lastly, one should draw attention to two further issues. Firstly, if the duties imposed on national courts in this respect are established to fill in a remedial gap of protection, one could argue that where no such gap exists, national courts are not under any obligation to adapt national procedures.¹²⁷⁰ This would mean that national judges would be under an obligation to determine standing of private parties under current Article 263(4) TFEU in order to determine the admissibility of the action at the national level. Besides the fact that it is questionable whether national courts should be required to solve a question which even for the CJEU is highly complex to decide, this would probably imply the involvement of the CJ in the admissibility stage through a preliminary reference on interpretation. If the answer is negative, *i.e.* that individuals do not have standing before the GC, the national courts would have to facilitate access to the CJEU by accepting jurisdiction and making a preliminary reference on validity. However, if the answer is affirmative, then national courts would be under no obligation to admit the case and no preliminary ruling would be possible. Meanwhile, the two months time limit would have already probably elapsed by the time a final decision on admissibility was reached.

One final difficulty regards the system of enforcement of the duties imposed on national courts. As mentioned above, an action for infringement against a Member State for failure by the national judiciary to provide individuals with sufficient degree of protection will be a highly exceptional situation. Also, the Commission has not brought an action against a Member State for breach of a national court's obligation to refer.¹²⁷¹ There is no indication that the Commission will be more willing or able to monitor whether national legal systems provide for effective remedies which allow the indirect challenge of Union acts.¹²⁷² Hence, the only alternative available to individuals would be a *Köbler* action for damages against the Member State. This could mean that an individual would have to bring an action in national courts on the grounds that those very same courts did not provide him/her a remedy which allows for the challenge of a Union act *via* the preliminary rulings procedure. Despite being a "procedural nightmare"¹²⁷³, one does not have to go too far in order to guess the probabilities of success of such course of action. As it amounts for *loss of an opportunity*, the national judge would have to assess (i) the likelihood of success of the applicants claim in the main action, *i.e.*, (ii) the probability of having the action held admissible; (iii) the probability of having a question referred, and (iv) the probability of the CJ declaring the act

¹²⁶⁸ ENCHELMAIER, "No One Slips Through the Net", 2005, at 202.

¹²⁶⁹ *Ibid.*

¹²⁷⁰ Considering that if the same effectiveness can be achieved by less intrusive means in national procedural autonomy, as a more flexible interpretation of Article 263(4) TFEU this should be preferable see LENAERTS; CORTHAUT, "Judicial Review as a Contribution to the Development of European Constitutionalism", 2004, at 36.

¹²⁷¹ LANG, "The Principle of Effective Protection of Community Law Rights", 2000, at 272, 273; LENAERTS; CORTHAUT, "Judicial Review as a Contribution to the Development of European Constitutionalism", 2004, at 36.

¹²⁷² LENAERTS; CORTHAUT, "Judicial Review as a Contribution to the Development of European Constitutionalism", 2004, at 37.

¹²⁷³ *Ibid.*

invalid. Most probably the CJEU would become involved in the action for damages after all. Meanwhile the individual could yet be facing the dilemma of either breaching Union law or comply with a potentially invalid act.¹²⁷⁴

b) The Objectivist Nature of the Preliminary Rulings Procedure

I. Even if an individual gets through the first obstacle and succeeds in building a suit in national legal orders – he/she will have to face the second tier of *procedural hurdles* in making sure that a preliminary ruling will *in fact* take place. As seen above, individuals have no guarantee that a reference will be made and that a ruling of the CJ will be delivered.¹²⁷⁵ It is submitted that such uncertainty is *inherent* to the legal nature of the preliminary rulings procedure, which was not conceived as a primary means to protect individual rights.¹²⁷⁶ This idea underlies the *purpose* and *function* of preliminary references and the *main features* of their legal regime.

II. The preliminary rulings procedure ensures an open dialogue and cooperation between national and Union courts, allowing for a better judicial decision-making.¹²⁷⁷ According to the CJEU, such mechanism intends to ensure the correct application of Union law, and thus *serves* the Union legal order *per se*.¹²⁷⁸ Hence, although it is true that preliminary rulings have served an important function of improving the protection of Union rights and contributing to the development of the CJEU's case-law, notably on fundamental rights¹²⁷⁹, in its *legal framework* preliminary references were designed to fulfil mainly an *objectivist* purpose of ensuring the correct and uniform application of Union law by national courts. Hence the CJEU held that:

“[A]rticle 177 is essential for the *preservation of the Community character of the law* established by the Treaty and has the *object of ensuring that in all circumstances this law is the same in all states of the Community* (emphasis added).”¹²⁸⁰

This *objective* dimension arises very clearly from the several functions that have been attributed to such mechanism.¹²⁸¹ Firstly, preliminary rulings work as an auxiliary of the

¹²⁷⁴ *Ibid.*

¹²⁷⁵ Noting that the strategy of exhorting national courts to fill in the remedial gap does not resolve de procedural difficulties of the preliminary references procedure and the discretionary nature of such references see CRAIG; BURCA, *EU Law*, 2011, at 506.

¹²⁷⁶ Also noting that preliminary references do not “serve individual justice” see KOMAREK, “In the Court(s) We Trust?”, 2007, at 476.

¹²⁷⁷ The CJEU has established what should be considered as a “national court or tribunal” for purposes of Article 267 TFEU. See Case C-54/96, *Dorsch Consult Ingenieurgesellschaft/Bundesbaugesellschaft Berlin*, [1997] ECR I-4961. See e.g., BASSI, “Ancora sul rinvio pregiudiziale alla Corte di giustizia e sulla nozione di giudice nazionale”, 2000, at 155-169; TRIDIMAS, “Knocking on Heaven’s Door”, 2003, at 27 *et seq.*; ANAGNOSTARAS, “Preliminary Problems and Jurisdiction Uncertainties”, 2005, at 878-890.

¹²⁷⁸ Considering that the preliminary ruling procedure favours mostly the Union legal order see e.g., EBKE, MALHERBE, “Les techniques contentieuses d’application du droit des Communautés européennes”, 1986, at 221; SIMON, *Le système juridique communautaire*, 1997, at 662; VILLAGÓMEZ CEBRIÁN, *La cuestión prejudicial en el derecho comunitario europeo*, 1994, at 99; CIENFUEGOS MATEO, *Las sentencias prejudiciales del Tribunal de Justicia*, 1998, at 51; QUADROS; MARTINS, *Contencioso da União Europeia*, 2007, at 92.

¹²⁷⁹ See *infra* Part II, Chapter 1, Section 1.2.1.

¹²⁸⁰ Case 166/73, *Rheinmühlen Düsseldorf/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1974] ECR 33, para. 2; and recent Opinion 1/09, [2011], para. 83.

¹²⁸¹ Noting that current Article 267 TFEU has a “*sens objectif*” in so far as it mentions “a question ... raised before any court or tribunal of a Member State” which means that it is of no relevance to determine who raised the point of EU law in the national proceedings see PESCATORE, *Le recours préjudiciel de l’article 177 du traité CEE et la coopération de la*

interpretation of Union law entrusted to national courts. As a consequence of the principle of direct effect, national courts became the “loyal lieutenants”¹²⁸² of the CJEU which must enforce Union law in the cases brought before them.¹²⁸³ In the CJEU’s own words national courts act as “Community courts of general jurisdiction.”¹²⁸⁴ This is in line with the idea of creating a possibility for national courts to ask for the cooperation of the CJEU when they face difficulties in such application. In fact, the national judge is a “generalist judge” by opposition to the CJEU which is a “specialized judge” of Union law.¹²⁸⁵ This function was also acknowledged by the CJEU itself who held that:

“Article 177 (...) tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States (emphasis added).”¹²⁸⁶

Also, yet again according to the CJEU, “the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the *very nature of the law* established by the Treaties.”¹²⁸⁷

Secondly, preliminary rulings also serve to ensure *supremacy* of Union law, which is a central aspect of the *global effectiveness* of the Union legal order. On the one hand, questions of interpretation ensure that conflicting national law is disapplied in the case *sub judice*, thereby contributing, albeit indirectly, to a certain uniformity of Member State law. It has been said that their effect is similar to an action for infringement initiated at the national level.¹²⁸⁸ On the other hand, questions of validity ensure that the CJEU has the last word concerning the validity and application of Union law, avoiding that possible questions of constitutionality of Union acts affect their application and enforcement in national legal orders. It ensures the ultimate judicial *Kompetenz-Kompetenz* of the CJEU which is the indispensable and Siamese-side of the principle of supremacy.¹²⁸⁹ Hence, the CJEU has held that:

“[t]he effectiveness of Community law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case

Cour avec les juridictions nationales, 1986, at 13. Hence, the national judge may refer to the CJEU *ex officio*.

¹²⁸² WEATHERILL, “Addressing Problems of Imbalanced Implementation in EC Law”, 2000, at 103.

¹²⁸³ MAHER, “National Courts as European Community Courts”, 1994, at 226 *et seq.*, noting that national courts are already *in situ*, are inexpensive to the EU and enjoy the respect of citizens, at 242; LANG, “The Duties of National Courts under Community Constitutional Law”, 1997, at 3; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 244; CLAES, *The National Courts' Mandate in the European Constitution*, 2006, at 58 *et seq.*

¹²⁸⁴ See e.g., Case T-51/89, *Tetra Pak/Commission*, [1990] ECR II-309, para. 42. The situation of national courts is said to be of “*dédoulement fonctionnel*”, i.e. when determining a dispute governed by national law, they remain part of the national legal order, but when deciding a case governed by Union law “they belong from the functional point of view” to the Union judicial architecture. See KAKOURIS, “Do the Member States Possess Judicial Procedural Autonomy”, 1997, at 1393, 1394.

¹²⁸⁵ PERTEK, *La pratique du renvoi préjudiciel en droit communautaire*, 2001, at 12.

¹²⁸⁶ Case 166/73, *Rheinmühlen Düsseldorf/Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1974] ECR 33, para. 2.

¹²⁸⁷ Opinion 1/09, [2011], para. 85.

¹²⁸⁸ See JOLIET, “L'article 177 du traité CEE et le renvoi préjudiciel”, 1991, at 598; O'KEEFE, “Is the Spirit of Art. 177 under Attack?”, 1998, at 529; OLIVER, “La recevabilité des questions préjudicielles”, 2001, at 35 *seq.*; PERTEK, *La pratique du renvoi préjudiciel en droit communautaire*, 2001, at 22.

¹²⁸⁹ MARTINS, *O Princípio do Primado do Direito Comunitário sobre as Normas Constitucionais dos Estados-Membros*, 2006, at 156 *seq.* with further references.

governed by Community law from exercising the right conferred on it by Article 177 of the EEC Treaty to refer to the Court of Justice questions concerning the interpretation or validity of Community law in order to enable it to decide whether or not a provision of domestic law was compatible with Community law (emphasis added).¹²⁹⁰

Thirdly, as mentioned almost *ad nauseam* in the CJEU's judgments, preliminary references work as a guarantee of the *uniformity of Union law*.¹²⁹¹ Union law should be applied as a *common law* to all Member States, *i.e.* as uniformly as possible. These concerns underlie the ruling in *CILFIT* where the CJEU established limitations to the obligation to refer under the Treaties.¹²⁹² Here, the CJEU held clearly that:

“[o]bligation to refer a matter to the Court of Justice is based on cooperation, established with a view to ensuring the *proper application and uniform interpretation of Community law in all the Member States*, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the third paragraph of Article 177 seeks to *prevent the occurrence within the Community of divergences in judicial decisions* on questions of Community law. *The scope of that obligation must therefore be assessed, in view of those objectives*, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other, where such a question of interpretation is raised within the meaning of Article 177 (emphasis added).¹²⁹³

Also, concerns with uniformity of Union law justify the obligations to refer established in Article 267(3) TFEU and in the *Foto-Frost* ruling.¹²⁹⁴ Here, the CJEU held that national courts could not declare a Union measure to be invalid based on two main *objectivist* considerations: (i) the requirement of *uniformity* in the application of Union law, which is said to constitute the *main purpose* of the preliminary reference mechanism, and (ii) the need to ensure *coherence* of the system of judicial protection established by the Treaty.

Foto-Frost discloses yet a fourth main function associated with the preliminary rulings

¹²⁹⁰ Case C-348/89, *Mecanarte-Metalurgica da Lagoa/Alfandega do Porto*, [1991] ECR I-3277. The CJ also stated that: “[t]he effectiveness of the system established by Article 177 of the EEC Treaty requires that the national courts have the widest possible powers to refer questions to the Court of Justice if they consider that a case pending before them raises issues requiring an interpretation or an appraisal of the validity of provisions of Community law whose determination is necessary for the resolution of the dispute brought before them (paras. 43-45).”

¹²⁹¹ See *e.g.*, Case 16/65, *Schwarze/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1965] ECR 877; Case C-454/98, *Schmeink & Cofreth and Strobel*, [2000] ECR I-6973. See *e.g.*, BERGERÉS, “*Vademecum de la question préjudicielle de l'article 177 du traité CEE*”, 1994, at 181; LENZ, “The Role and Mechanism of the Preliminary Ruling Procedure”, 1994-1995, at 391; BARAV, “Le renvoi préjudiciel communautaire”, 1997, at 1; CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 160 *et seq.*

¹²⁹² Case 283/81, *CILFIT/Ministero della Sanità*, [1982] ECR 3415. See LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 195. For an historical overview see EDWARD, “*CILFIT and Foto-Frost in their Historical and Procedural Context*”, 2010, at 173 *et seq.*

¹²⁹³ Para. 7. Later, in Case C-461/03, *Gaston Schul Douane-expéditeur*, [2005] ECR I-10513 the Court considered that the *CILFIT* exceptions would not apply to *Foto-Frost* type of cases, notably where the Court has already declared invalid analogous provisions of another comparable regulation, it stated that: “[t]he *main purpose* of the jurisdiction conferred on the Court by Article 234 EC is to ensure that Community law is *applied uniformly by national courts*. That requirement of uniformity is *particularly vital where the validity of a Community act is in question*. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the essential unity of the Community legal order and undermine the fundamental requirement of legal certainty (para. 21).” AG RUIZ-JARABO COLOMER had suggested that there should be an exception to *Foto-Frost* when an issue of validity fulfilled the requirements of *Da Costa*.

¹²⁹⁴ Regarding the notion of national courts which are under this obligation see Case C-99/00, *Lyckeskog*, [2002] ECR I-4839, paras. 14-19.

mechanism which is to ensure the *control of legality* of Union law.¹²⁹⁵ Hence, preliminary rulings on validity produce similar effects to judgments invalidating Union acts.¹²⁹⁶ Furthermore, the grounds of invalidity are the same under Articles 263 and 267 TFEU.¹²⁹⁷ In the CJEU's own words these provisions establish the "two mechanisms provided by the Treaty for reviewing the legality of acts of the Community institutions."¹²⁹⁸

Fifthly, preliminary rulings have also been deemed to safeguard the *jurisdiction of the CJEU*. This was one of the major arguments used in *Foto-Frost*. Also the *CILFIT* ruling shows the concern of the CJEU to protect its own prerogatives by controlling the assessment on the need to make a preliminary reference.¹²⁹⁹ In fact, in delineating the framework within which national courts are to be considered exempted from any obligation to refer, the CJEU established limits to the possibilities to refer. In *CILFIT* the CJEU gives and takes¹³⁰⁰: it gives the opportunity not to refer but it limits the circumstances where this is possible. Thus, in limiting the cases in which national judges may, regardless of a previous ruling, refer a question of interpretation, the CJEU clearly intended to safeguard its jurisdiction and reinforce its authority.¹³⁰¹ According to the case-law, national courts may *only* refer questions (i) if they remain in doubt regarding the scope or meaning of a given act;¹³⁰² (ii) if they consider there to be new arguments or changes in legislation which are deemed to be relevant;¹³⁰³ (iii) if they want the CJEU to change its previous case-law.¹³⁰⁴ In this light, scholars have noted that by "using a stick and carrot strategy", the CJEU "has contributed to reinforce its position by handing down judgements that underline the vertical nature of its relation with national courts (*Foto-Frost*), followed by decisions stressing horizontal traits (*CILFIT*)."¹³⁰⁵ In light of the above, STONE SWEET qualified these decisions as "episodes in supremacy politics."¹³⁰⁶

The intention of safeguarding the CJEU's jurisdiction becomes evident in the case-law on

¹²⁹⁵ See also Opinion of AG MANCINI in *Foto-Frost*. See JOLIET, "L'article 177 du traité CEE et le renvoi préjudiciel", 1991, at 598.

¹²⁹⁶ Case 66/80, *International Chemical Corporation/Amministrazione delle finanze dello Stato*, [1981] ECR 1191, paras. 11-17.

¹²⁹⁷ Joined Cases 21 to 24/72, *International Fruit Company and others/Produktschap voor Groenten en Fruit*, [1972] ECR 1219, paras. 4-5: "[a]ccording to the first paragraph of Article 177 of the EEC Treaty 'the Court of Justice shall have jurisdiction to give preliminary rulings concerning ... the validity ... of acts of the institutions of the Community. Under that formulation, the jurisdiction of the court cannot be limited by the grounds on which the validity of those measures may be contested.'"

¹²⁹⁸ Case 112/83, *Produits de Maïs/Administration des douanes et droits indirects*, [1985] ECR 719, para. 17.

¹²⁹⁹ It should be noticed that the way the CJEU framed its application in the Union legal order reflected mostly systemic concerns. See Case 283/81, *CILFIT/Ministero della Sanità*, [1982] ECR 3415, paras. 16-20.

¹³⁰⁰ See ARNULL, "The Use and Abuse of Article 177", 1989, at 622; MANCINI; KEELING; "From *Cilfit* to *ERT*", 1991, at 1 *et seq.*; CRAIG; BÚRCA, *EU Law*, 2011, at 457. Considering that *CILFIT* is the expression of "a particularly subtle compromise" see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 76.

¹³⁰¹ SARMIENTO, "Constructing and Deconstructing Judicial Authority in Europe", 2010, at 195. *CILFIT*'s exceptions are currently established in Article 104(3) of the Rules of Procedure. Hence, in *CILFIT*, the need to ensure uniformity of Union law determined that the existence of previous rulings of the CJEU would exempt last instance courts from the obligation to refer. This *erga omnes* effect, which extend also to preliminary ruling on validity grants the decisions of the CJEU a general binding authority, which reinforces also the Court's position in the Union's judicial architecture. See CIENFUEGOS MATEO, *Las sentencias prejudiciales del Tribunal de Justicia*, 1998, at 120 *et seq.*; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 363-368; TÜRK, *Judicial Review in EU Law*, 2009, at 228-231; CRAIG; BÚRCA, *EU Law*, 2011, at 452.

¹³⁰² Case 29/68, *Milch-Fett-und Eierkontor/Hauptzollamt Saarbrücken*, [1969] ECR 165 and Article 102 of the Rules of Procedure.

¹³⁰³ Case 28/67, *Molkerei Zentrale Westfalen-Lippe/Hauptzollamt Paderborn*, [1968] ECR 143.

¹³⁰⁴ Case 244/80, *Foglia/Novello*, [1981] ECR 3045.

¹³⁰⁵ SARMIENTO, "Constructing and Deconstructing Judicial Authority in Europe", 2010, at 195.

¹³⁰⁶ SWEET, "The Juridical Coup D'état and the Problem of Authority", 2010, at 207.

the admissibility of preliminary references. In fact, the CJEU has asserted its jurisdiction, by refusing certain questions on the grounds that they are irrelevant to the case, they are merely hypothetical or the information contained in the files is insufficient.¹³⁰⁷ In its initial case-law the CJEU's approach in this respect was very liberal. The Court was even prepared to correct improperly framed references. In *Costa*¹³⁰⁸ it considered that it had the power to extract from a question imperfectly formulated by the national court those questions which really did pertain to the interpretation of the Treaty.¹³⁰⁹ In time, the CJEU would become stricter regarding the duties of national courts in correctly framing the questions referred. Moreover, the CJEU reserved itself the *ultimate authority* to decide if a reference is warranted or not, and notably if the national dispute is genuine or not. This approach is exemplified by the decisions in the *Foglia* cases mentioned above.¹³¹⁰ Surely it can be said that this decision was not without controversy. In fact, it may be very difficult to determine if a given case serves as a "test case" that simply raises a question of principle or if there is a real dispute. The facts in *Foglia* are illustrative of such difficulty. Moreover, the mere fact that parties agree on the question of interpretation does not mean that the dispute is not real. Thus, truth be said, the CJEU has been cautious when applying the *Foglia* doctrine.¹³¹¹ Notwithstanding, one should note again that *Foglia* was not just about hypothetical cases. It was mostly about *supremacy* and *control* over Article 267 TFEU and the *judicial hierarchy* between national and Union courts.¹³¹² In fact, this decision changed the approach of the CJEU regarding its role within the preliminary references procedure: it no longer considers itself a passive receptor of preliminary references and it will assert some control over the suitability of the reference.¹³¹³

Put briefly, the CJEU's case-law has acknowledged and contributed to reinforce the *objectivist* nature of the preliminary rulings procedure. Preliminary references operate "*juge à juge*"¹³¹⁴ and are based on the need to ensure the uniformity, supremacy and control of legality of Union law. Based on these premises the competence of national judges was limited and the CJEU became the main set where the two legal orders meet. Thus, preliminary references take place by and large *in the interest of Union law itself*.¹³¹⁵

¹³⁰⁷ Case 126/80, *Salonia/Poidomani e Giglio*, [1981] ECR 1563; Case 244/80, *Foglia/Novello*, [1981] ECR 3045; Joined Cases C-320 to 322/90, *Telemarsicabruzzo and others/Circostel and others*, [1993] ECR I-393; Case C-83/91, *Meilicke/ADV-ORGA*, [1992] ECR I-4871.

¹³⁰⁸ Case 6/64, *Costa/E.N.E.L.*, [1964] ECR 1195, para. 4.

¹³⁰⁹ See also Case 16/65, *Schwarze/Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, [1965] ECR 877, at 886, 887.

¹³¹⁰ See Case 104/79, *Foglia/Novello*, [1980] ECR 745, para. 11, and Case 244/80, *Foglia/Novello*, [1981] ECR 3045, para. 7. See BEBR, "The Possible Implications of *Foglia v. Novello II*", 1982, at 421 *et seq.*

¹³¹¹ See e.g., Case C-412/93, *Leclerc-Siplec/TF1 and M6*, [1995] ECR I-179; Case C-341/01, *Plato Plastik Robert Frank*, [2004] ECR I-4883; Case C-144/04, *Mangold*, [2005] ECR I-9981. From the 1990s onwards the ECJ started to use *Foglia* in a number of categories of cases, i.e. a) hypothetical nature of question; b) questions are not relevant for the resolution of the national action; c) questions which are not articulated enough for the ECJ to be able to give any meaningful legal response, and d) cases where the facts are insufficiently clear for the Court to be able to apply the relevant legal rules. For further developments see CRAIG; BÚRCA, *EU Law*, 2011, at 462 *et seq.* The CJEU will reject a reference if the appraisal of the validity of the Union act at stake bears no relation with the actual facts in the main action and its purpose. See e.g., Case C-296/03, *GlaxoSmithKline*, [2005] ECR I-669, para. 22.

¹³¹² CRAIG; BÚRCA, *EU Law*, 2011, at 466. Noting that the relationship between the CJEU and national courts has become more vertical and multilateral, see *ibid.*, at 443. See also WYATT, "Foglia (no 2)", 1982, at 187, noting that superior courts are inevitably entrusted with the competence to determine their own jurisdiction. ARNULL notes that the CJEU approach to control preliminary references is determined by workload concerns. See ARNULL, "The Past and Future of the Preliminary Rulings Procedure", 2003, at 347.

¹³¹³ CRAIG; BÚRCA, *EU Law*, 2011, at 466. See also BEBR, "The existence of a genuine dispute", 1980, at 525.

¹³¹⁴ JOLIET, "L'article 177 du traité CEE et le renvoi préjudiciel", 1991, at 593.

¹³¹⁵ There have been even clearer examples of the objective function of such mechanism. Hence, previous Article

III. Accordingly, preliminary rulings are a unique mechanism from the point of view of the rights of private parties.¹³¹⁶ Firstly, as seen above, they are not available *as a matter of right*.¹³¹⁷ Secondly, contrary to what happens with the action for annulment, these proceedings are *not contentious*. This is mostly because preliminary rulings were conceived more as “a kind of constitutional control than as a direct method of protection of the rights of private parties.”¹³¹⁸ As the CJEU stated in *Hessische Knappschaft*¹³¹⁹:

“[t]he authors of Article 177 intended to establish direct co-operation between the Court of Justice and the courts and tribunals of the Member States by way of a *non-contentious procedure excluding any initiative of the parties*, who are merely invited to be heard in the course of that procedure (emphasis added).”¹³²⁰

Hence, the Court held that where the national court had referred only a question of interpretation, a party was not allowed to raise the question of the validity of the provision at issue before the CJ.¹³²¹ In fact, private parties “are merely invited to state their case within the legal limits laid down by the national court.”¹³²² They cannot change the tenor of the questions as defined by the national judge.¹³²³ Thus, in *Deutsche Lebensmittelwerke* the CJEU held that:

“[t]he fact that the national court is empowered to determine which questions it intends to submit to the Court is an *inherent feature* of the system of means of redress established by the Treaty and is *not therefore an argument which is capable of justifying a broad interpretation of the conditions of admissibility* laid down in the second paragraph of Article 173 of the EEC Treaty (emphasis added).”

Thirdly, preliminary references are not conceived as *adversarial proceedings*. They do not involve the existence of procedural parties *proprio sensu*.¹³²⁴ Parties are merely allowed to submit written observations.¹³²⁵ However, as these observations are submitted within the same deadline

68(3) TEC established the possibility of the Council, the Commission or a Member State to request the CJEU to give a ruling on a question of interpretation of Title IV TEC or of acts of the institutions of the Community based on this Title. This was clearly the case of an action brought in the interest of Union law as it did not involve the existence of a dispute. Also, the Protocol on the interpretation by the CJEU of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters established in Article 4(1) established a proceeding similar to a *cassation* appeal established in some Member States. It aimed mainly to ensure the uniformity of case-law.

¹³¹⁶ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 179.

¹³¹⁷ Case 283/81, *CILFIT/Ministero della Sanità*, [1982] ECR 3415, para. 9. See *supra* Section 1.2.2.(c).

¹³¹⁸ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, 179.

¹³¹⁹ Case 44/65, *Hessische Knappschaft/Singer et Fils*, [1965] ECR 965.

¹³²⁰ At 971. See also Case 6/71, *Rheinmühlen Düsseldorf/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1971] ECR 719, para. 1; Case C-364/92, *SAT Fluggesellschaft/Eurocontrol*, [1994] ECR I-43, para. 9.

¹³²¹ The applicant had stated that by virtue of Articles 173 and 185 TEEC, the regulation at stake did not apply, and contended that the request for a preliminary ruling should be declared to be without purpose. The CJ replied that: “[s]ince the right to determine the questions to be brought before the Court thus devolves upon the court or tribunal of the Member State alone, the parties may not change their tenor or have them declared to be without purpose. Consequently the Court of Justice cannot be compelled at the request of a party to entertain a question when the initiative for referring it to the Court pertains not to the parties but to the court or tribunal of the Member State itself, or to entertain within the particular framework of Article 177 a claim based primarily on Article 184 (at 970, emphasis added).” See also USHER, “Direct and Individual Concern”, 2003, at 586.

¹³²² Case 62/72, *Bollmann/Hauptzollamt Hamburg Waltersdorf*, [1973] ECR 269, para. 4.

¹³²³ Case 44/65, *Hessische Knappschaft/Singer et Fils*, [1965] ECR 965, at 971; Case 5/72, *Grassi/Amministrazione delle finanze dello Stato*, [1972] ECR 443, para. 4; Case C-297/94, *Brugère and others*, [1996] ECR I-1551, para. 19.

¹³²⁴ BERGERÈS, “*Vade-mecum* de la question préjudicielle de l'article 177 du traité CEE”, 1994, at 184.

¹³²⁵ Pursuant to Article 23 of the Statute of the CJEU. See also JOLIET, “L'article 177 du traité CEE et le renvoi

there is no right of reply, and thus no adversarial proceedings. Individuals may participate in the proceedings before the CJEU and carry all information they deem relevant to the process, which also means they are not defending personal interests *per se*. Moreover, the CJEU has interpreted strictly the notion of parties who can intervene in this stage of the proceedings¹³²⁶ and has held that within Article 267 TFEU private parties are “merely invited to be heard in the course of that procedure.”¹³²⁷

Fourthly, private parties *cannot enforce the obligation to refer* a question to the CJEU.¹³²⁸ To deal with these types of violations of Union law the Treaties rely on *objective* means of control of legality. In fact, under the Treaties it seems that the Commission may initiate an action for infringement against the Member State.¹³²⁹ It is clear that individuals cannot initiate such procedure. As is well known, the action for infringement has a mainly *objectivist* nature and can only be brought either by the Commission or by other Member States. At the most, private parties can make a request or file a claim with the Commission and try to convince such institution that an action for infringement should take place. However, the Commission enjoys a large power of appraisal and both the decision not to initiate such proceedings or a failure to do so are not reviewable by the CJEU.¹³³⁰ More significantly, the effects of a ruling of the CJEU finding that a Member State has breached Union law are of little help for individuals.¹³³¹ Such rulings have a mere declaratory effect and the CJEU cannot give an order to the national court to make a reference or revoke the national judgment.¹³³² Moreover, the enforcement proceeding established in Article 258 TFEU is also not dependent on the will or wishes of individuals. Hence, it is for the national legal orders to create mechanisms which allow for the national enforcement of the judgments of the CJEU acknowledging an infringement of Union law. Such judgments may,

préjudiciel”, 1991, at 594. Noting that “*observations écrites ne saurait être confondues avec des conclusions*”, see BERGERÉS, “*Vademecum de la question préjudicielle de l'article 177 du traité CEE*”, 1994, at 184.

¹³²⁶ Joined Cases C-403 and 429/08, *Football Association Premier League and others*, not yet published.

¹³²⁷ Case C-364/92, *SAT Fluggesellschaft/Eurocontrol*, [1994] ECR I-43, para. 9. See also the judgment in Case 44/65, *Hessische Knappschaft v Maison Singer et Fils* [1965] ECR 965.

¹³²⁸ For cases where national courts got it wrong see KORTE, *Primus Inter Pares*, 1991, at 14 *et seq.* Noting a “worrying lack of preliminary rulings” and an “alarming amount of decisions making questionable interpretations of EC law, where no reference was made to the ECJ due to *CILFIT*” see SARMIENTO, “Constructing and Deconstructing Judicial Authority in Europe”, 2010, at 196.

¹³²⁹ See *supra* Section 1.2.2(c).

¹³³⁰ HARTLEY, *The Foundations of European Union Law*, 2010 at 332. See Case 247/87, *Star Fruit/Commission*, [1989] ECR 291, para. 11; Case T-24/90, *Automec/Commission*, [1992] ECR II-2223; Case T-309/97, *Bavarian Lager*, [1999] ECR II-3217. Some authors have suggested that an illegal refusal to initiate such an action would give rise to Union liability in damages. See LECOURT, *L'Europe des juges*, 1976, at 267; SILVA, “O papel das partes e outros interessados no processo de reenvio prejudicial”, 1995, at 147 *et seq.*; HARTLEY, *The Foundations of European Union Law*, 2010, at 333. The CJEU has already agreed to such solution. See Case 14/78, *Denkavit/Commission*, [1978] ECR 2497; Case T-571/93, *Lefebvre and others/Commission*, [1995] ECR II-2379; Case T-201/96, *Smanor and Ségaud/Commission*, [1997] ECR II-1081; Case T-351/99, *Bruntey/Commission*, [2001] ECR I-A-165, II-757. The probabilities of success of such course of action are nonetheless highly doubtful. Proof of causation is surely one of the main difficulties. See also Opinion of AG WARNER in Case 9/75, *Meyer-Burckhardt/Commission*, [1975] ECR 1171, considering that such an action should not be admissible.

¹³³¹ See also WEATHERILL, “Addressing Problems of Imbalanced Implementation in EC Law”, 2000, at 93, 94, considering that infringement proceedings are cumbersome and intransparent and that review at the behest of the individual is limited.

¹³³² It seems clear that although infringements decisions may have an indirect impact on individuals’ legal positions, its addresses are only the Member states, which should be understood *lato sensu*. Accordingly, individuals will not benefit immediately and directly from a decision acknowledging an infringement by a Member State. Still, their protection lies in the possibility of such provisions having direct effect. See Joined Cases 314 to 316/81 and 83/82, *Procureur de la République/Waterkeyn*, [1982] ECR 4337, para. 14-15. For further developments see MESQUITA, *Efeitos dos acordãos do Tribunal de Justiça das Comunidades Europeias proferidas no âmbito de uma acção por incumprimento*, 1997, at 64.

under *Köbler*, constitute basis for an action for damages against a Member State as they constitute proof of the illegality of the conduct at stake. In *Commission/Italy*¹³³³, the CJEU held that:

“[i]n the face of both a delay in the performance of an obligation and a definite refusal, a judgment by the Court under Articles 169 and 171 of the Treaty may be of *substantive interest as establishing the basis of a responsibility* that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties (emphasis added).”¹³³⁴

Later, in *Brasserie du Pêcheur*¹³³⁵ the CJEU held that “[o]n any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established.”¹³³⁶ However, the effectiveness of the *Köbler* action for damages is doubtful. In fact, the conditions for liability in damages established in the case-law seem to be too strict to make compensation likely.¹³³⁷ Moreover, an action for damages – or even its possibility – does not ensure *per se* the compliance of an obligation to refer and should not be considered an adequate alternative to judicial review.

In this context one should note that it is significant that despite the suggestions of some literature¹³³⁸ and some case-law of national courts, the CJEU has not conceived preliminary references as a *subjective right* enshrined in the right to effective judicial protection. In fact, this fundamental right includes the right to the lawful judge which means that individuals have the right to have a decision issued by the judge competent to decide their case.¹³³⁹ This right is established in the constitutions of several Member States¹³⁴⁰, in Article 47 of the Union Charter and Article 6 ECHR.¹³⁴¹ Furthermore, in *Solange II*¹³⁴² the German Constitutional Court saw the exclusive competence of the CJEU to declare an EU act invalid as a manifestation of the right to the *gesetzlicher Richter*, protected by Article 101(1) of the GG.¹³⁴³ Some decisions of the Spanish

¹³³³ Case 39/72, *Commission/Italy*, [1973] ECR 101.

¹³³⁴ Para. 11.

¹³³⁵ Joined Cases C-46 and 48/93, *Brasserie du pêcheur/Bundesrepublik Deutschland and The Queen/Secretary of State for Transport, ex parte Factortame and others*, [1996] ECR I-1029. See CONVERY, “State Liability in the United Kingdom after *Brasserie du Pêcheur*”, 1997, at 603 *et seq.*

¹³³⁶ Para. 57.

¹³³⁷ See *supra* Section 1.2.3(b).

¹³³⁸ RUIZ-JARABO COLOMER, *El juez nacional como juez comunitario*, 1993, at 93; PICOD, “Le droit au juge en droit communautaire”, 1998, at 160 *et seq.*; QUADROS, *A Função Subjectiva da Competência Prejudicial do Tribunal de Justiça das Comunidades Europeias*, 2006, at 131.

¹³³⁹ See *supra* Section 1.2.2(b).

¹³⁴⁰ See Articles 92 and 101(1) of the German Constitution; Article 24(2) and 117(6) of the Spanish Constitution; Articles 20 and 202 of the Portuguese Constitution; Articles 64-66 of the French Constitution; Article 83(2) of the Austrian Constitution; Articles 13 and 152-159 of the Belgian Constitution; Articles 25(1) and 102(2) of the Italian Constitution; Article 17 of the Constitution of the Netherlands; Articles 13 and 86 of the Luxembourg Constitution; Article 45 of the Polish Constitution; Articles 9, 11(1) and 20(6), Chapter 2, of the Swedish Constitution; Article 21 of the Finnish Constitution.

¹³⁴¹ See *infra* Part II, Chapter 1.

¹³⁴² BVerfGE, 73, 339, *Solange II*.

¹³⁴³ In Germany a breach of Article 101(1) § 2 may ground a constitutional complaint. This doctrine was in several other decisions of the Court. See CLASSEN, “German *Bundesverfassungsgericht*”, 2002, at 641-652. However, a mere procedural error does not constitute a breach of the right to the lawful judge. There must be an element of arbitrariness. Hence, “failure to make the reference must (...) on a reasonable assessment, be inexplicable and manifestly untenable.” Hence, the legal protection of individuals lies in the threshold the Constitutional Court decides to apply regarding preliminary references on validity, which at least in cases of constitutional conflicts, should not be expected to be very demanding. See ALONSO GARCIA; BANO LEON, “El recurso de amparo frente a la negativa a plantear la cuestión prejudicial ante el Tribunal de Justicia de la Comunidad Europea”, 1990, at 200 *et seq.*; LENZ, “The Role and Mechanism of the Preliminary Ruling Procedure”, 1994-1995, at 398; JIMENO BULNES, *La cuestión prejudicial del*

Constitutional Court have also given some latitude to the use of the constitutional complaint as a means to remedy a possible breach of the obligation to refer.¹³⁴⁴ The Austrian constitutional court also accepted a constitutional complaint based on the breach of the right to the natural judge protected under Article 83(2) of the national constitution.¹³⁴⁵ In Portugal, PIÇARRA has suggested that private parties can bring an appeal to the constitutional court on the basis of the breach of the right to the “*juiz legal*.”¹³⁴⁶ Even the EctHR has held in *Divagsa*¹³⁴⁷ that “there may be certain circumstances in which the refusal of a national court called upon to give a ruling at final instance might infringe the principle of the fairness of judicial proceedings as set forth in Article 6 para. 1 of the Convention, particularly when such refusal appears to be arbitrary.”¹³⁴⁸

In light of these considerations, if a national court breaches an obligation to refer a question to the CJEU and decides the case without involving the Union courts in the national proceedings, it is deemed to be violating the individual’s legal right to the natural judge. This understanding could lead to the establishment of more efficient and *individual*-oriented enforcement mechanisms of the obligation to refer. These alternatives although having been explored by scholars and national courts, have not yet been considered by the CJEU, once again confirming that the latter remains attached to a *predominantly objectivist* view regarding the preliminary rulings mechanism.

IV. Summing up, as BEBR has put it:

“[t]his indirect legal remedy available before national courts, however, may not obscure the true nature and functions of a reference for review of the validity of Community acts as a constitutional review initiated by national courts. It is primarily a remedy in nature of an objective control for ensuring a rule of law within the Community from which individuals may, however indirectly, benefit.”¹³⁴⁹

artículo 177 TCE, 1996, at 324 *et seq.*; ROUHETTE, “Quelques aspects de l’application du mecanisme du renvoi préjudiciel”, 1997, at 19. Noting that orders of reference can be enforced only “if the limits of arbitrariness are exceeded in cases where right to one’s lawful judge is denied” see CALLIESS, “The Charter of Fundamental Rights of the European Union”, 2007, at 536. On the scope of the right to the *gesetzlicher Richter* see PECHSTEIN, “La constitutionnalisation du droit au juge en Allemagne”, 1998, at 561 *et seq.*

¹³⁴⁴ See e.g., Decision no. 111/1993, 25/3/1993, BOE, 27/4/1993. Admitting the application of such remedy in Spain see JIMENO BULNES, *La cuestión prejudicial del artículo 177 TCE*, 1996, at 327, 328; ALONSO GARCIA; BANO LEON, “El recurso de amparo frente a la negativa a plantear la cuestión prejudicial ante el Tribunal de Justicia de la Comunidad Europea”, 1990 at 209 *et seq.* The latter authors consider that non-compliance of the obligation to refer breaches Article 24(1) which establishes the right to a effective judicial protection (“*puesto que implica una alteración de la ordenación sobre el control de normas y, por tanto, sobre el sistema de Fuentes, constituye el primer supuesto de violación de la tutela judicial efectiva recurrible ante el TC por la vía de amparo*”) and of Article 24(2) of the national constitution (in so far as it involves a breach of the CJEU’s competences).

¹³⁴⁵ In a Judgement from 11/12/1995, VfSlg. 14.390/1995. See MARKTLER, “The European Court of Justice as lawful judge”, 2008, at 294-300. In another case (VfSlg. 14.889/1997) the Austrian Constitutional Court stated explicitly that *all* violation, not just gross violation, of the duty to make a preliminary reference leads to a breach of the right to a lawful judge, which is different from the approach first adopted by the German Federal Constitutional Court.

¹³⁴⁶ PIÇARRA, *O Tribunal de Justiça das Comunidades Europeias como Juiz Legal e o Processo do artigo 177.º do Tratado CEE*, 1991, at 99, 100.

¹³⁴⁷ *Divagsa Company v. Spain*, Application no. 20631/92, Decision of 12/05/1993. See also *Fritz and Nana v. France*, Application no. 15669/89, Decision of 28/06/1993; *Dotta v. Italy*, Application no. 38399/97, Judgement of 07/09/1999; *Desmots v. France*, Application no. 41358/98, Judgement of 02/07/2002.

¹³⁴⁸ *Divagsa Company v. Spain*, Application no. 20631/92, Decision of 12/05/1993, at 279. See *infra* Part II, Chapter 1, Section 1.3.3(b).

¹³⁴⁹ BEBR, “The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty”, 1988, at 691. *Per contra*, see QUADROS, *A Função Subjectiva da Competência Prejudicial do Tribunal de Justiça das Comunidades Europeias*, 2006, at 128, 129, considering preliminary references as a *legitimate interest* of private parties which corresponds to a “*poder-dever*” of national courts.

The CJEU's case-law on the purpose, functions, and legal regime of the preliminary rulings mechanism is dominated by *objectivist* and *systemic* concerns with ensuring the effectiveness of Union law. It is submitted that it is precisely this approach that does not allow preliminary references to compensate for the restrictive approach to the direct access to the CJEU by individuals. The fact that preliminary rulings are not conceived as an individual *right of appeal* to the CJEU, but rather as a means of constitutional review aimed at preserving the uniform application of Union law and the integrity of its own judicial system, does not make it possible to affirm that questions on validity will be referred “*with certainty and in all circumstances*” whenever an action for annulment is not available to private parties.¹³⁵⁰

1.3 Caught in between: the *TWD* and *Nachi* “Guillotines”

I. Article 263(6) TFEU establishes a period of two months counting from “the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be”¹³⁵¹ for initiating an action for annulment.¹³⁵² This time limit applies to all applicants, either privileged or not. In the absence of *force majeure* circumstances the time limit is mandatory, *i.e.* not subject to the discretion of the parties or the CJEU.¹³⁵³ Furthermore, the CJEU is empowered to examine “on its own motion”¹³⁵⁴, and in the course of the proceedings¹³⁵⁵, whether the time limit (...) has been complied with.”¹³⁵⁶ The party who alleges that the application has been lodged in breach of the time limit has the burden of proof of such fact.¹³⁵⁷

The CJEU considers that “a decision which has not been challenged by the addressee within the time limit laid down in Article 173 of the EC Treaty becomes definitive against him.”¹³⁵⁸ This means that the decision is valid with regard to this person even though the CJEU might have

¹³⁵⁰ Noting that the absence of a right to a reference of the Union courts with respect to validity proceedings remains disturbing when there is no improvement on Article 263(4) TFEU rights of access to a court see WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 219.

¹³⁵¹ The criterion of the knowledge is subsidiary to the criteria of publication or notification. See Case T-296/97, *Alitalia/Commission*, [2000] ECR II-3871, para 61; Case T-17/02, *Olsen/Commission*, [2005] ECR II-2031, para. 73. Knowledge refers only to the essential content of the act. See Joined Cases T-485, 491 and 494/93 and 61/98, *Dreyfus/Commission*, [1996] ECR II-1101, para. 49, but must enable the exercise of the right of action. See Case T-17/02, *Olsen/Commission*, [2005] ECR II-2031, para. 73; Case C-403/05, *Parliament/Commission*, [2007] ECR I-9045, para. 28. However, if the Union institution has committed itself to the publication of the measure in the official journal, time will run from that date, and not from an earlier date on which the person might have become aware of such act. See Case T-296/97, *Alitalia/Commission*, [2000] ECR II-3871; Case T-190/00, *Regione Siciliana/Commission*, [2003] ECR II-5015.

¹³⁵² The rules for the calculation of the time limit are set out in Articles 80 and 81 of the Rules of Procedure of the CJ and Articles 101 and 102 of the Rules of Procedure of the GC. See also Article 37(3) of the Rules of Procedure of the CJ and Article 43(3) of the Statute of the CJEU.

¹³⁵³ For further developments see WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 265.

¹³⁵⁴ See Article 113 of the Rules of Procedure of the GC. The principle applies irrespective of Article 48(2) of the same Rules.

¹³⁵⁵ Case T-119/95, *Hauer/Council and Commission*, [1998] ECR II-2713, para. 22; Case T-68/96, *Polyvios/Commission*, [1998] ECR II-153; Case T-263/97, *GAL Penisola Sorrentina/Commission*, [2000] ECR II-2041, para. 40; Case T-347/03, *Branco/Commission*, [2005] ECR II-2555.

¹³⁵⁶ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 266.

¹³⁵⁷ Joined Cases 193 and 194/87, *Maurissen and Union syndicale/Court of Auditors*, [1989] ECR 1045, para. 46; Joined Cases T-70 and 71/92, *Florimex and VGB/Commission*, [1997] ECR II-693, para. 74; Case T-94/92, *X/Commission*, [1994] ECR-SC II-481, para. 22; Case T-263/97, *GAL Penisola Sorrentina/Commission*, [2000] ECR II-2041, para. 47; T-347/03, *Branco/Commission*, [2005] ECR II-2555.

¹³⁵⁸ Case C-310/97 P, *Commission/AssiDomän Kraft Products and others*, [1999] ECR I-5363, para. 57; Case T-186/98, *Inpesca/Commission*, [2001] ECR II-557, para. 40.

annulled it with regard to other persons.¹³⁵⁹ Consequently, the addressee of an individual decision may not plead its invalidity indirectly.¹³⁶⁰ Hence, a Union act *which has become definitive* is no longer challengeable through the preliminary references mechanism¹³⁶¹, on the basis of Article 277 TFEU¹³⁶², in the context of proceedings brought against a Member State¹³⁶³ or within an action for damages which would lead to the same financial end as an action under Article 263 TFEU.¹³⁶⁴ On the contrary, a person *who is not the addressee* of an individual act and does not have standing to challenge it directly may in principle challenge it indirectly.¹³⁶⁵

Until 1994 this seems to have held true also for those cases where individuals making the indirect challenge could have challenged the act directly before the CJEU as they were *directly and individually concerned*.¹³⁶⁶ In 1988, BEBR commenting the *Berlin Butter*¹³⁶⁷ cases – where an action for annulment had been declared inadmissible in the very same day that the CJEU admitted the preliminary reference on validity – affirmed that an individual may challenge the validity of a Union act “regardless of whether or not he could have impugned the act, in due time, before the Court.”¹³⁶⁸ However, in 1994, the CJEU introduced a limitation to this possibility, and “reduced its generosity.”¹³⁶⁹ In fact, according to the *TWD*¹³⁷⁰ ruling, a decision will *also* become definitive against a *third party*, where the latter could have “undoubtedly” challenged such act.¹³⁷¹ This means

¹³⁵⁹ TÜRK, *Judicial Review in EU Law*, 2009, at 105.

¹³⁶⁰ Case 21/64, *Macchiorlati Dalmás e Figli/ECSC High Authority*, [1965] ECR 175; Case 41/85, *Sideradria/Commission*, [1986] ECR 3917. The issue is clear regarding Member States. See e.g., Case 3/59, *Germany/ECSC High Authority*, [1960] ECR 53; Case 156/77, *Commission/Belgium*, [1978] ECR 1881; Case C-183/91, *Commission/Greece*, [1993] ECR I-3131.

¹³⁶¹ Case C-188/92, *TWD/Bundesrepublik Deutschland*, [1994] ECR I-833; Case C-239/99, *Nachi Europe*, [2001] ECR I-1197; Case C-241/01, *National Farmers' Union*, [2002] ECR I-9079; Case C-232/05, *Commission/France*, [2006] ECR I-10071. For further developments see TÜRK, *Judicial Review in EU Law*, 2009, at 105.

¹³⁶² Case C-183/91, *Commission/Greece*, [1993] ECR I-3131, para. 10; Case T-299/04, *Selmani/Council and Commission*, [2005] ECR II-20.

¹³⁶³ Case C-404/97, *Commission/Portugal*, [2000] ECR I-4897; Case C-53/05, *Commission/Portugal*, [2006] ECR I-6215, para. 30.

¹³⁶⁴ Case 175/84, *Krohn/Commission*, [1986] ECR 753.

¹³⁶⁵ See e.g., Case 55/72, *Gesellschaft für Getreidehandel/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1973] ECR 15.

¹³⁶⁶ Case 216/82, *Universität Hamburg/Hauptzollamt Hamburg-Kehrwieder*, [1983] ECR 2771; Joined Cases 133 to 136/85, *Rau/BALM*, [1987] ECR 2289; Case C-197/91, *Frutticoltori Associati Cuneesi/Associazione tra Produttori Ortofrutticoli Piemontesi*, [1993] ECR I-2639; and under the TECSC see Case 168/82, *ECSC/Ferriere Sant'Anna*, [1983] ECR 1681. Noting that the issue has been discussed since the 1960s (TOMUSCHAT, *Die gerichtliche Vorabentscheidung nach den Verträgen über die Europäischen Gemeinschaft*, 1964) see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 358, note 815. See also HARDING, “The Impact of Article 177 of the EEC Treaty on the Review of Community Action”, 1981, at 93-113; BEBR, “Direct and Indirect Judicial Control of Community Acts in Practice”, 1983-84, at 1233-1235; BEBR, “The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty”, 1988, at 689, 690. This understanding was based on the idea that private parties could not be aware of the possibilities of challenge the act directly before the CJEU and was based on the idea that preliminary references should not be refused on any grounds. See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 306.

¹³⁶⁷ Case 112/83, *Produits de Maïs/Administration des douanes et droits indirects*, [1985] ECR 719 and Joined Cases 133 to 136/85, *Rau/BALM*, [1987] ECR 2289.

¹³⁶⁸ BEBR, “The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty”, 1988, at 689.

¹³⁶⁹ SCHEPEL; BLANKENBURG; “Mobilizing the European Court of Justice”, 2001, at 29.

¹³⁷⁰ Case C-188/92, *TWD/Bundesrepublik Deutschland*, [1994] ECR I-833. The case involved a reference for a preliminary ruling on the definitive nature of a Commission decision on aid granted by the Federal Republic of Germany and the Land of Bavaria to a producer of polyamide and polyester yarn situated in Deggendorf *vis-à-vis* the recipient of the aid to which it relates, after the expiry of the time limit prescribed in Article 173 TEEC.

¹³⁷¹ According to the CJEU's case-law doubts can arise from an uncertain scope or content of the contested Union measure (Joined Cases T-228, 229, 242, 243, 245 to 248, 250, 252, 256 to 259, 265, 267, 268, 271, 274 to 276, 281, 287 and 296/00, *Gruppo omeggatori del porto di Venezia/Commission*, [2005] ECR II-787, paras. 30-33; Case C-343/07, *Bavaria and Bavaria Italia*, [2009] ECR I-5491, paras. 43-45) and if the case-law on standing does not allow a clear, *beyond*

that in such a case the validity of the act cannot be challenged indirectly through either the plea of illegality or the preliminary references procedure.¹³⁷² The CJEU extended this approach in *Wiljo*¹³⁷³ to the general policies of the Union and later, in *Nachi Europe*¹³⁷⁴, to anti-dumping regulations. In the latter case, the Court stated that a regulation could become definitive against an individual “in regard to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under Article 230.”¹³⁷⁵ In combination with the ruling in *Simmenthal*¹³⁷⁶, the current approach of the CJEU means that a private applicant cannot contest *via* national courts the invalidity of a Union measure, *whichever the form under which it is adopted*, in so far as such measure could have been challenged directly before the GC. Therefore, scholars noted that individuals are put under a “*constant vigilance processuel*”¹³⁷⁷ in order to be able to challenge the validity of Union acts.

II. Given the uncertainty surrounding the standing of individuals to bring an action for annulment the *TWD* and *Nachi* “*guillotines*”¹³⁷⁸ represent an additional obstacle to challenges against Union acts, as it may be hard to determine when an individual could have *undoubtedly* contested the act directly, especially in the case of regulations.¹³⁷⁹ In fact, “it seems doubtful (...) whether it will always be possible to distinguish clearly between cases where the admissibility of proceedings under Article 173 is self-evident and cases where it is less apparent.”¹³⁸⁰

It could be argued that in *Nachi*, the Court considered that, as far as the applicant is concerned, the anti-dumping regulation should be treated *as a decision*. However, as seen above this is far from clear. Some commentators concluded that when subjecting a regulation to legality

doubt, answer (e.g., Case C-241/95, *The Queen/Intervention Board for Agricultural Produce, ex parte Accrington Beef*, [1996] ECR I-6699, paras. 15-16, and Case C-408/95, *Eurotunnel and others/SeaFrance*, [1997] ECR I-6315, paras. 28-32). See Opinion of AG JACOBS in Joined Cases C-261 and 262/01, *van Calster and Cleeren*, [2003] ECR I-12249, paras. 53-59.

¹³⁷² Reacting with surprise to the Court’s decision see HOSKINS, “Case C- 188/92, *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland*”, 1994, at 1399 *et seq.*; WYATT, “The Relationship between Actions for Annulment and References on Validity after *TWD Deggendorf*”, 1997, at 55 *et seq.* Approving the decision, provided that the CJEU clarifies its case-law on standing of private parties under the action for annulment see AMBANELLI, “La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Twd Textilwerke* e *Wiljo*”, 1998, at 123 *et seq.*; CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 311 *et seq.* Suggesting that the national route should be closed for those who used the direct one, without further explanation see DUFFY, “Quelles réformes pour le recours en annulation?”, 1995, at 559. Noting that this approach turned indirect challenge into a residual rather than complementary mean of action see MARQUES, *A Excepção de Ilegalidade no Contencioso da União Europeia*, 2008, at 63.

¹³⁷³ Case C-178/95, *Wiljo/Belgische Staat*, [1997] ECR I-585. See AMBANELLI, “La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Twd Textilwerke* e *Wiljo*”, 1998, at 144.

¹³⁷⁴ Case C-239/99, *Nachi Europe*, [2001] ECR I-1197. *Nachi* provided that a failure by an importer of dumped products who was associated with the producer of those products and whose export prices were ultimately used in setting the anti-dumping duty to challenge the anti-dumping regulation directly precludes indirect challenge *via* national courts and a preliminary reference on validity. See MOLONEY, “Case C-239/99, *Nachi Europe GmbH v. Hauptzollamt Krefeld*”, 2002, at 393 *et seq.*

¹³⁷⁵ Para. 37.

¹³⁷⁶ Case 92/78, *Simmenthal/Commission*, [1979] ECR 777.

¹³⁷⁷ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 316.

¹³⁷⁸ MOLONEY, “Case C-239/99, *Nachi Europe GmbH v. Hauptzollamt Krefeld*”, 2002, at 393.

¹³⁷⁹ Noting that this will be the case of a recipient of a state aid which the Commission found incompatible with the common market in a decision addressed to the Member State see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 359, note 817. See Case T-198/01 R, *Technische Glaswerke Illmenau/Commission*, [2002] ECR II-2153, para. 54.

¹³⁸⁰ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 44, noting that *TWD* underlines the need for the Court to deal with standing requirements as clearly as possible.

review under Article 263(4) TFEU the CJEU was indeed correcting the act's designation and re-qualifying it as a "true" decision.¹³⁸¹ However, later case-law showed such analysis to be ill-founded. In *Allied Corporation* the CJEU expressly stated that anti-dumping measures may "in fact, as regards their nature and scope, [be] of a legislative character,"¹³⁸² and yet the same provisions "may none the less be of direct and individual concern"¹³⁸³ to some of the persons affected by the regulation.¹³⁸⁴

Moreover, considering the *uncertain legal nature* of some Union decisions, the application of the TWD principle may prove problematic. Notably, decisions addressed to Member States can have a "varying impact"¹³⁸⁵ on the legal sphere of individuals. For instance, VOGT has noted that decisions addressed to all Member States that alter, supplement or implement provisions of regulations or directives work as a means of normative law-making within a framework that could be described as a "legislative-administrative compound", and are no less general than the regulations or directives they relate to.¹³⁸⁶

Hence, scholars have generally noticed that the CJEU's approach in TWD and *Nachi* is "problematic because of the notorious uncertainties surrounding direct and individual concern."¹³⁸⁷ Surely, the Court has been more willing to admit an indirect challenge where it was unclear if the applicant would have standing, as the cases of *Accrington Beef*¹³⁸⁸ regarding regulations, and *Eurotunnel*¹³⁸⁹ regarding directives show. The CJEU has also been more lenient where the applicant did not know the relevant measure in time to challenge it directly, as happened in *Universität Hamburg*.¹³⁹⁰ In *Atzeni*¹³⁹¹, the Court seems to have raised the "without a doubt" threshold, by considering that:

"[u]nlike the circumstances giving rise to the judgment in *TWD Textilwerke Deggendorf*, it was not self-evident that an action for annulment brought against the contested decision (...)

¹³⁸¹ See GREAVES, "The Nature and Binding Effect of Decisions under Article 189 EC", 1996, at 5.

¹³⁸² Para. 11.

¹³⁸³ *Ibid.*

¹³⁸⁴ See *supra* Section 1.1.3(c).

¹³⁸⁵ VOGT, "Indirect Judicial Protection in EC Law", 2006, at 373.

¹³⁸⁶ *Ibid.*, concluding that while there is no need for review under the plea of illegality with respect to individual measures, an indirect challenge of normative decisions with a clearly general and abstract scope should be made available.

¹³⁸⁷ TÜRK, *Judicial Review in EU Law*, 2009, at 217, noting that regarding regulations this would be the exception. Considering that the TWD avenues are far from unlikely in view of the inconsistent case-law of the CJEU on standing see HARTLEY, *The Foundations of European Union Law*, 2010, at 415.

¹³⁸⁸ Case C-241/95, *The Queen/Intervention Board for Agricultural Produce*, *ex parte Accrington Beef*, [1996] ECR I-6699, para. 15. See also Case C-390/98, *Banks*, [2001] ECR I-6117, paras. 111-113.

¹³⁸⁹ Case C-408/95, *Eurotunnel and others/SeaFrance*, [1997] ECR I-6315, paras. 29-30. See STANLEY, "Case C-408/95, *Eurotunnel S.A. and others v. Sea France, Court of Justice*", 1998, at 1205-1213; AMBANELLI, "La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Twd Textilwerke* e *Wiljo*", 1998, at 145 *et seq.* See also Joined Cases T-228, 229, 242, 243, 245 to 248, 250, 252, 256 to 259, 265, 267, 268, 271, 274 to 276, 281, 287 and 296/00, *Gruppo omeggianti del porto di Venezia/Commission*, [2005] ECR II-787, paras. 30-32.

¹³⁹⁰ Case 216/82, *Universität Hamburg/Hauptzollamt Hamburg-Kehrwieder*, [1983] ECR 2771. It follows from the CJEU's case-law that applicants must have had the opportunity to learn of the contested measure and of its being of direct and individual concern to them (*Universität Hamburg*) but need not be informed of the legal remedies available (*Wiljo*). The mere publication in the Official Journal may not be sufficient (*Atzeni*), but the notification by a Member State or the involvement in the proceedings leading up to the adoption of the act would suffice (*TWD*, *Nachi Europe*). See SCHWENSFEIER, "The TWD Principle post-Lisbon", at 164.

¹³⁹¹ Joined Cases C-346 and 529/03, *Atzeni and others*, [2006] ECR I-1875. See also Case C-390/98, *Banks*, [2001] ECR I-6117, para. 111, where the CJEU used the word "undoubtedly."

would have been admissible” (emphasis added).¹³⁹²

Hence, the CJEU considered that the limitation would not apply if the individual was not somehow identified in the contested act and would *clearly* have standing to challenge it.¹³⁹³ Notwithstanding, in this case, AG RUIZ-JARABO COLOMER was very critical of the TWD doctrine. Briefly put, the AG considered that:

- (i) the principle of legal certainty does not rank the two remedies hierarchically and it does not always take precedence over the principle of legality, as the possibility established in Article 277 TFEU clearly shows;
- (ii) the TWD doctrine makes no distinction between general provisions and implementing measures;
- (iii) TWD forces individuals to bring an action for annulment, even as an interim measure, but does not provide them with an absolute guarantee as to the admissibility of the action on account of the restrictions imposed on *locus standi* by case-law of the CJEU;
- (iv) it somehow conflicts with the judgments in *Foto-Frost*, *Binder*¹³⁹⁴ and *Behn Verpackungsbedarf*¹³⁹⁵, in which the references for a preliminary ruling were admitted without debate, despite the fact that the claimants in the main proceedings could have brought direct actions against the Commission decisions¹³⁹⁶;
- (v) such an approach requires national courts to analyze the *locus standi* of the individual concerned to bring an action for annulment before the Union courts, which contradicts the ruling in *Rau and others*¹³⁹⁷;
- (vi) if the national court has doubts regarding the standing of the applicant it would have to refer a question on interpretation, – the outcome of which would determine whether or not a reference for a preliminary ruling on validity could be made – which is an excessively complicated and artificial system, creating more disadvantages than advantages¹³⁹⁸;
- (vii) lastly, TWD disregards the basis and nature of the preliminary references

¹³⁹² Para. 34. See WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 323, considering that this innovation is desirable, although the TWD principle continues to create difficulties. In fact, given that indirect collateral review may be barred at a later stage, applicants should probably try to challenge the measure before the GC firstly and in case of a negative decision try to bring suit in national courts.

¹³⁹³ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 160.

¹³⁹⁴ Case 161/88, *Binder/Hauptzollamt Bad Reichenhall*, [1989] ECR 2415.

¹³⁹⁵ Case C-80/89, *Behn Verpackungsbedarf/Hauptzollamt Itzehoe*, [1990] ECR I-2659.

¹³⁹⁶ See WYATT, “The Relationship between Actions for Annulment and References on Validity after TWD *Deggendorf*”, 1997, at 57, 58. Noting that TWD would have been problematic if adopted under the TECSC see USHER, “Direct and Individual Concern”, 2003, at 591. Indeed, in Case 168/82, *ECSC/Ferriere Sant’Anna*, [1983] ECR 1681, the the Court admitted the question without an issue of admissibility being raised. See also BEBR, “Direct and Indirect Judicial Control of Community Acts in Practice”, 1983-84, at 1235.

¹³⁹⁷ Joined Cases 133 to 136/85, *Rau/BALM*, [1987] ECR 2289.

¹³⁹⁸ Also noting this difficulty see BEBR, “The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty”, 1988, at 690. AG JACOBS in *Nachi* also admitted that “where, however, a national court feels itself unable to make the necessary determination, it should seek guidance from this Court (para. 77).” Also considering such double reference feasible see AMBANELLI, “La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Twd Textilwerke* e *Wiljo*”, 1998, at 152.

procedure as an instrument of judicial cooperation, since, where the party concerned is unable to find a ground for bringing an action for annulment, the national court cannot engage in a dialogue with the CJEU, even if it considers that the Union measure is unlawful.¹³⁹⁹

III. I tend to follow AG RUIZ-JARABO COLOMER's conclusions. In my view, *TWD* and *Nachi* should be read strictly on their facts. This means that the assessment to be made regarding the articulation of a direct challenge and an indirect challenge must be done on a case-by-case basis. In fact, the case-law in this respect does not appear very consistent. WYATT noted that before *TWD* it had not been the practice of the CJEU to reject references on validity just because it appeared from the file that the act might have been challenged through an action for annulment.¹⁴⁰⁰ In fact, the CJEU had held in *Rau and others*¹⁴⁰¹ that:

“[t]here is *nothing in Community law* to prevent an action from being brought before a national court against a measure implementing a decision adopted by a Community institution where the conditions laid down by national law are satisfied. When such an action is brought, if the outcome of the dispute depends on the validity of that decision the national court may submit questions to the Court of Justice by way of a reference for a preliminary ruling, *without there being any need to ascertain whether or not the plaintiff in the main proceedings has the possibility of challenging the decision directly before the Court* (emphasis added).”¹⁴⁰²

Hence, the possibility of directly challenging the decision adopted by a Union institution does not *in principle* “preclude the possibility of bringing an action in a national court against a measure adopted by a national authority for the implementation of that decision on the ground that the latter decision is unlawful.”¹⁴⁰³ Furthermore, in *Universität Hamburg* the Court recognized that the rejection of an application by an authority of the Member State was the only measure addressed to the individual “of which [he] has necessarily been informed in good time and which [he] may challenge in the courts without encountering any difficulty in demonstrating [his] interest in bringing proceedings.” Thus, “in proceedings brought under national law (...) the applicant must be able to plead the illegality of the Commission’s decision on which the national decision

¹³⁹⁹ Para. 88. Noting that such case-law is “*peu respectueuse des prérogatives du juge national dans le cadre de la procédure préjudicielle*” See also BARAV, “Le droit au juge devant le Tribunal de première instance et la Cour de justice des Communautés européennes”, 1998, 212.

¹⁴⁰⁰ WYATT, “The Relationship between Actions for Annulment and References on Validity after *TWD Deggendorf*”, 1997, at 56.

¹⁴⁰¹ Joined Cases 133 to 136/85, *Rau/BALM*, [1987] ECR 2289.

¹⁴⁰² Paras. 11-12. *Rau* had initiated an action for annulment which had been held inadmissible by judgement rendered in the same day, which distinguished the case from *TWD*. See Case 97/85, *Deutsche Lebensmittelwerke/Commission*, [1987] ECR 2265. Thus, *TWD* does not apply if a parallel action for annulment is still pending (*Rau*) or has been rejected as inadmissible (Joined Cases T-228, 229, 242, 243, 245 to 248, 250, 252, 256 to 259, 265, 267, 268, 271, 274 to 276, 281, 287 and 296/00, *Gruppo omeggianti del porto di Venezia/Commission*, [2005] ECR II-787). Once an act has become *res judicata*, *TWD* applies as Case T-276/04, *Compagnie maritime belge/Commission*, [2008] ECR II-1277 indicates. However, the decisions in Case T-34/02 R, *B/Commission*, ECR 2002 II-2803 and Case T-181/02 R, *Neue Erba Lautex/Commission*, [2002] ECR II-5081 suggest that the mere fact of having brought an action for annulment would allow eternal reference on validity even after the act has become *res judicata*.

¹⁴⁰³ Para. 12.

adopted in his regard is based.”¹⁴⁰⁴ This decision was based on the fact that the University might not have been aware of the decision before the expiration of the time limit set out in the Treaty. In his Opinion in *TWD*, AG JACOBS distinguished the latter case from *TWD*:

“[i]nasmuch as the decision at issue in that case was addressed to all the Member States and was of a general nature: it was intended to apply to all importations of the type of scientific instrument in question, not just to the importation effected by Hamburg University. The decision at issue in the present case was addressed to a single Member State and was concerned exclusively with aid granted to a single undertaking.”¹⁴⁰⁵

The facts were indeed different and could have determined different outcomes, but the question of principle was the same, *i.e.* to know if a preliminary ruling on validity should be admitted when individuals could have challenged a Union act directly. I would argue that *as a matter of principle* the action for annulment and the preliminary references procedure should be understood as autonomous means of action, each being subject to its own conditions of admissibility. Nothing in the Treaties suggests otherwise. Hence, *as a rule*, a failure to mount a direct challenge against a Union act should not preclude a party from challenging it indirectly in the CJEU. The possibility of *any party* to plea the illegality incidentally of a Union act should be deemed a *general principle of law*.¹⁴⁰⁶ As *TWD* had argued in the case:

“[o]therwise, the paradoxical result would be that a person who was directly and individually concerned by a decision would be forced to use the more difficult and more costly remedy established by Article 173, which is moreover subject to a two-month time limit, whereas a person who was not directly and individually concerned by a decision would be able to pursue a simpler and less costly remedy under Article 177, which is not subject to any time limit.”

This paradox has not been addressed by the CJEU until this date.¹⁴⁰⁷ Moreover, there seem to be at least two deviations to the general approach of the CJEU in *TWD* and *Nachi*. Firstly, in *Associação dos Refinadores de Açúcar Portugueses*¹⁴⁰⁸, the GC, in deciding whether the plea of illegality applied in circumstances in which an individual grant was directly based on a general Commission decision that might have been the subject of an action for annulment brought by natural or legal persons with standing to institute proceedings, stated that:

“[i]n those circumstances — *regardless of whether the applicants could have been recognised as having standing* to contest the decision of 3 July 1991 — *effective judicial protection of their rights*

¹⁴⁰⁴ Para. 10. Noting that the fact that proceedings were clandestine also applied to the cases of *Binder*, *Foto-Frost* and *Behn* see SCHWENSFEIER, “The *TWD* Principle post-Lisbon”, 2012, at 160.

¹⁴⁰⁵ Opinion of AG JACOBS in *TWD*, para. 12. The CJ also distinguished the two cases (paras. 22, 23). Noting the consistency in the CJEU’s case-law AMBANELLI, “La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Twd Textilwerke* e *Wiljo*”, 1998, at 134 *et seq.*

¹⁴⁰⁶ Case 92/78, *Simmmenthal/Commission*, [1979] ECR 777, para. 39. Under the TECSC, the right to make an indirect challenge was not dependent of any Treaty provision: it flowed from a general principle of law. See Case 9/56, *Meroni/ECSC High Authority*, [1957-1958] ECR 133; Case 10/56, *Meroni/ECSC High Authority*, [1957-1958] ECR 157; Case 15/57, *Compagnie des hauts fourneaux de Chasse/ECSC High Authority*, [1957-1958] ECR 211.

¹⁴⁰⁷ Also noting the paradox see AMBANELLI, “La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Twd Textilwerke* e *Wiljo*”, 1998, at 150, 151.

¹⁴⁰⁸ Case T-82/96, *ARAP and others/Commission*, [1999] ECR II-1889. See also Case T-60/92, *Noonan/Commission*, [1993] ECR II-911.

is in any event assured only if they have an opportunity to raise an objection alleging the irregularity of that decision in proceedings challenging the Commission decision relating to the individual aid, which alone allows them to determine precisely the extent to which their individual interests are affected (emphasis added).¹⁴⁰⁹

Secondly, in staff cases, the CJEU has somehow been sensible to the French theory of “*opérations complexes*.”¹⁴¹⁰ In the context of Article 91 of the Staff Regulations it held that:

“[i]n the case of a measure of a general nature designed to be implemented by means of a series of individual decisions affecting all or a large proportion of the officials of an institution, an official taken individually *cannot be deprived of his right to invoke the illegality of that measure* in order to attack the individual decision which alone allows him certain knowledge of the manner in which and the extent to which his individual interests are affected (emphasis added).”¹⁴¹¹

Moreover, the approach favoured in *TWD* contradicts the general approach of the CJEU which favours the recourse to national courts to indirectly access the Union courts. In fact, *TWD* does not fit well with the CJEU’s case-law which continues to rely on national courts to counter the problems posed by the strict interpretation of Article 263(4) TFEU.¹⁴¹²

TWD and its “either-or” approach regarding direct and indirect challenges seem also questionable in light of Member State legal traditions. In discussing the issue regarding the plea of illegality, VOGT argues that “a comparison with national laws shows that the principle of legal certainty does not necessarily require a normative legal act to become immune to indirect challenge after the limitation period for a direct review.” In fact, although “German and French law restrict direct challenges of normative acts to a fixed period, thus providing for a desirable degree of legal certainty (...) when it comes to judicial protection against individual acts based on illegal normative acts, both legal systems make available procedures to establish the inapplicability of these underlying measures.”¹⁴¹³ Moreover, “the defects appertaining to a general regulation, however, often do not clearly emerge until the Regulation is applied to a particular case.”¹⁴¹⁴ In these cases, only an indirect review, initiated in connection with certain difficulties in applying a measure, is capable of revealing specific defects in the relevant Union legislation.

Additionally, one may argue that faced with a conflict between the principle of legality and that of legal certainty the CJEU should favour the former, especially in cases of serious defects. The issue is particularly relevant with regard to regulations which can continue to produce legal effects. Here, it is far from clear that “the legal certainty interest prioritized by the Court is served by the

¹⁴⁰⁹ Para. 49.

¹⁴¹⁰ CHAPUS, *Droit du contentieux administratif*, 2008, at 692 et seq.

¹⁴¹¹ Joined Cases 44, 46 and 49/74, *Acton and others/Commission*, [1975] ECR 383. Moreover, the CJEU has held that a “failure to challenge a notice of competition within the time limit laid down does not prevent an applicant from relying on *irregularities occurring in the course of the competition*, even if the origin of those irregularities may be found in the wording of the notice of competition.” See also Case 16/64, *Rauch/Commission of the EEC*, [1965] ECR 135; Joined Cases 64, 71 to 73 and 78/86, *Sergio/Commission*, [1988] ECR 1399. See also Case 164/87, *Simonella/Commission*, [1988] ECR 3807. For further developments see CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 293; and MARQUES, *A Excepção de Ilegalidade no Contencioso da União Europeia*, 2008, at 56.

¹⁴¹² WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 323.

¹⁴¹³ VOGT, “Indirect Judicial Protection in EC Law”, 2006, at 368, 369.

¹⁴¹⁴ *Ibid.*, at 369.

continued application of such measure.”¹⁴¹⁵ In these cases, neither the legal certainty nor procedural integrity of the system of judicial review should blindly prevail over the sanity of the legal framework. By accepting to decide the question of validity the Court would be favouring legal certainty for the future, while enhancing legality, clarifying the (un)lawfulness of Union acts in light of Union law and avoiding unlawful acts from producing legal effects indeterminately. This approach would also send the right signals to the European Union legal order and its actors. Legal certainty could be, for instance, ensured by limiting the temporal effects of the judgment.¹⁴¹⁶

Lastly, the current approach of the CJEU does not distinguish between voidable, null, and inexistent acts. One could argue that, at the least, null or inexistent acts – either of an individual or general nature – should not be subject to the *TWD* rule as they do not produce legal effects and should be open to challenge at any time. HARTLEY has argued that the non-existence of a given act can be asserted even by its addressee in *any proceedings at any time*.¹⁴¹⁷

IV. For purposes of the present study, one should note that *TWD* and *Nachi* – which in practice introduced a limitation to the *Foto-Frost* duty –, suggest an *objectivist* approach to judicial review in so far as they significantly curtail the right of action of private parties. Furthermore, these cases were mostly decided on objectivist grounds, notably the need to ensure legal certainty.¹⁴¹⁸ Surely, the CJEU felt the need to differentiate the case from *Rau* and *Universität Hamburg*, thereby implying that *TWD* was an *exceptional case*.¹⁴¹⁹ However, in delineating the scope of *such exception* the CJEU argued exclusively on the basis of *legal certainty*, without taking into account the broader question of knowing if its own case-law on standing of individuals should be considered sufficiently straightforward in order to impose such a general limitation on the admissibility of a preliminary reference.¹⁴²⁰ AG JACOBS grounded his analysis in *TWD* also in concerns with the *coherence* of the CJEU’s case-law by holding that the case “should be treated *as analogous* to a case in which an individual measure is contested by the person to whom it is addressed.”¹⁴²¹

Moreover, the decision in *Nachi Europe* went without saying that it was delivered also by reasons of coherence with previous case-law.¹⁴²² In fact, the CJEU considered that anti-dumping regulations could become definitive against an individual *because* according to the CJEU’s case-law, by virtue of their dual nature as acts of a legislative nature and acts liable to be of direct and individual concern to certain traders, individuals can challenge such acts directly.¹⁴²³ Hence, as the

¹⁴¹⁵ MOLONEY, “Case C-239/99, *Nachi Europe GmbH v. Hauptzollamt Krefeld*”, 2002, at 402.

¹⁴¹⁶ Article 264(2) TFEU. See also “Direct and Indirect Judicial Control of Community Acts in Practice”, 1983-84, at 1234.

¹⁴¹⁷ Although the CJEU would deny jurisdiction *ratione materiae* as there would be no reviewable act. Indirect challenge would thus be the more adequate mean to contest the *existence* of an act. See HARTLEY, *The Foundations of European Union Law*, 2010, at 419. See also MARTÍNEZ CAPDEVILA, “The Action for Annulment, the Preliminary Reference on Validity and the Plea of Illegality”, 2006, at 460-463.

¹⁴¹⁸ See Case C-188/92, *TWD/Bundesrepublik Deutschland*, [1994] ECR I-833, paras. 16-17.

¹⁴¹⁹ Paras. 19-23.

¹⁴²⁰ The CJ merely recalled its previous case-law on the subject (para. 14). See Case 730/79 *Philip Morris/Commission* [1980] ECR 2671).

¹⁴²¹ Opinion of AG JACOBS in *TWD*, para. 16.

¹⁴²² Noting the coherence argument in *TWD* see BERTEA, “Looking for Coherence within the European Community”, 2005, at 162.

¹⁴²³ Para 21.

case involved an import/export relationship between Nachi Europe, the plaintiff in the main proceedings, and Nachi Fujikoshi, whose resale prices for the goods in question were used to construct the export price applied by the anti-dumping regulation, Nachi Europe would have standing to challenge the regulation directly.¹⁴²⁴ Consequently, the *coherence of the legal system* required that Nachi should be considered in the same position as TWD. AG JACOBS had been more assertive in highlighting the *coherence* argument by drawing a parallel with current Article 277 TFEU.¹⁴²⁵ Again, this approach ignored the fact that the case-law on standing by private parties is far from being clear-cut for allowing for such solutions in the abstract. BERROT considered that such an approach “*conduit à bouleverser l’architecture des voies de droit du traité, sans qu’il existe de raisons valables de protéger une soi-disant cohérence des voies de droit au détriment d’une protection efficace de l’individu.*”¹⁴²⁶

Thus, put briefly, the TWD and Nachi doctrines are grounded in a *global* and *systemic approach* to the system of judicial review, and do not favour the *subjective* dimension of the right to effective judicial protection. As SINANIOTIS has put it, the TWD doctrine shows that “national courts are not effectively protecting the individual’s rights when the latter challenge the validity of a Community measure.”¹⁴²⁷ In so far as individuals are concerned these rulings create nothing but ambiguity. The risks are considerable: individuals may decide not to file a direct action taking into account the probability of being unsuccessful and later discover through the preliminary references procedures that they should have done it.

V. More significantly, the fact that this case-law does not apply to Member States in the context of Article 277 TFEU reinforces the predominantly *objectivist* and *institutional* approach adopted by the CJEU regarding the Union’s system of judicial protection. As a matter of fact, when institutional conflicts are at stake the CJEU has not hesitated to adopt a more liberal perspective.¹⁴²⁸

In this context, the issue seemed more complex. In fact, if the *rationale* behind the plea of illegality is to ensure that a party who could not bring an action for annulment directly must be in a position to challenge such act indirectly – where the latter forms the legal basis of a measure which that party is entitled to challenge – then privileged applicants would never be able to use current Article 277 TFEU as they *always* have standing to challenge any act directly.¹⁴²⁹ This position

¹⁴²⁴ Para. 38.

¹⁴²⁵ Opinion of AG JACOBS in *Nachi*, para. 69: “[s]ince the principle which applies in an indirect challenge to the validity of a Community measure in the national courts, involving a reference to this Court, is the same as that embodied in Article 241, the same limitations must apply also in that context. If that were not so, the time limit in Article 230 would become for practical purposes a dead letter as regards measures of direct and individual concern to natural or legal persons.”

¹⁴²⁶ BERROT, *La systématique des voies de droit communautaires*, 2003, at 828-830.

¹⁴²⁷ SINANIOTIS, *The Interim Protection of Individuals before the European and National Courts*, 2006, at 135. Or as DOUGAN has put it “such cases in which the Court’s understanding of ‘effectiveness’ does not correspond to the interests of the citizen, might lead one to suspect that Community intervention in national remedies and procedural rules has less to do with the protection of individual rights than with the effective execution of Community policies: where they coincide, the former enjoys the incidental benefits; but where they conflict, the latter will prevail.” See DOUGAN, *National Remedies before the Court of Justice*, 2004, at 51.

¹⁴²⁸ For an overview of Member States standing to invoke the plea see MARQUES, *A Excepção de Ilegalidade no Contexto da União Europeia*, 2008, at 29 *et seq.*

¹⁴²⁹ See SINANIOTIS, “The Plea of Illegality in EC Law”, 2001, at 106-109; TÜRK, *Judicial Review in EU Law*,

would also be justified on grounds of *legal certainty* given that if privileged applicants could use the plea of illegality they could circumvent the two months time limit set forth in Article 263(6) TFEU. Such possibility could even encourage dilatory tactics on the part of privileged applicants.¹⁴³⁰

However, several AGs have defended in the past the right of privileged applicants to plead Article 277 TFEU.¹⁴³¹ The wording of such provision – which mentions *any party* in proceedings brought before the CJEU – was deemed *definitive* of such possibility. More significantly, AGs argued that the defects of a measure may come to light after some time, notably after the period of two months established in the Treaties.¹⁴³² AG DARMON pointed also to considerations of judicial policy, as depriving Member States of the possibility of raising an objection of illegality against a regulation would involve a real risk of an increase in direct actions which are purely “preventive”, which would not be beneficial for the CJEU’s workload.¹⁴³³ The CJEU, despite having denied the possibility of Member States to plead Article 277 TFEU against decisions addressed to them¹⁴³⁴, for many years left open the question of pleading the illegality of other measures.¹⁴³⁵ In *Comission/ECB*¹⁴³⁶ the Court confirmed that a decision adopted by the Community institutions which has not been challenged by its addressee within the time limit becomes definitive as against that person¹⁴³⁷, holding, however, that the TWD and *Nachi* principles:

“[d]o not in any way affect the rule laid down by Article 241 EC, which provides that any party may, in proceedings in which a regulation of the kind referred to in Article 241 is at issue, plead the grounds specified in the second paragraph of Article 230 EC in order to invoke before the Court of Justice the inapplicability of that regulation (emphasis added).”¹⁴³⁸

Hence, the CJEU considered that the plea of illegality could be invoked by semi-privileged applicants regardless of the fact that they could have challenged Union acts under the action for

2009, at 211.

¹⁴³⁰ Or as AG JACOBS has put in Case C-11/00, *Commission/ECB*, [2003] ECR I-7147: “[t]he time limit for instituting proceedings laid down in the fifth paragraph of Article 230 EC aims to guarantee legal certainty within the Community. To interpret Article 241 EC as opening up an additional possibility of review for applicants who would have been able to institute proceedings for annulment as of right, but have omitted to do so, would run counter to that aim and might encourage delaying tactics.” The AG would, nonetheless, come to the conclusion that the wording of Article 241 EC, “which creates a remedy (if only an incidental one)” implied the admissibility of the plea and that it was irrelevant “whether not the ECB was aware that the Regulation applied to it.” In fact, “there is no basis in the text of Article 241 EC for limiting its scope by reference to the subjective knowledge of the person, Member State, institution or body seeking to invoke it, and that would, in any event, be a difficult test to apply in practice.” See paras. 191-194 of the Opinion. See also Case C-135/93, *Spain/Commission*, [1995] ECR I-1651.

¹⁴³¹ See Opinions of AG ROEMER in Case 32/65, *Italy/Council of the EEC and Commission of the EEC*, [1966] ECR 389; AG SLYNN in Case 181/85, *France/Commission*, [1987] ECR 689; AG MANCINI in Case 204/86, *Greece/Council*, [1988] ECR 5323; AG DARMON in Case C-258/89, *Commission/Spain*, [1991] ECR I-3977; AG JACOBS in Case C-11/00, *Commission/ECB*, [2003] ECR I-7147. See DUBOIS, “L’exception d’illégalité devant la Cour de justice des Communautés européennes”, 1978, at 411 *et seq.*

¹⁴³² See Opinion of AG SLYNN in Case 181/85, *France/Commission*, [1987] ECR 689, at 702-702; of AG MANCINI in Case 204/86, *Greece/Council*, [1988] ECR 5323, para. 6; AG DARMON in Case C-258/89, *Commission/Spain*, [1991] ECR I-3977, para. 30.

¹⁴³³ AG DARMON in Case C-258/89, *Commission/Spain*, [1991] ECR I-3977, para. 30. For an example, see Case T-137/96, *Valio Oy/Commission, Removed from the register*.

¹⁴³⁴ Case C-183/91, *Commission/Greece*, [1993] ECR I-3131.

¹⁴³⁵ Case 32/65, *Italy/Council of the EEC and Commission of the EEC*, [1966] ECR 389; Case 181/85, *France/Commission*, [1987] ECR 689; Case 204/86, *Greece/Council*, [1988] ECR 5323, where the Court did not address the admissibility of the plea.

¹⁴³⁶ Case C-11/00, *Commission/ECB*, [2003] ECR I-7147. See also DUARTE, “O Banco Central Europeu e o Sistema Judicial da União Europeia”, 2006, at 162, 163.

¹⁴³⁷ Case C-241/01, *National Farmers' Union*, [2002] ECR I-9079, para. 34.

¹⁴³⁸ Para. 76.

annulment.¹⁴³⁹ This approach was later confirmed in *Spain/Council*¹⁴⁴⁰ regarding privileged applicants. This means that privileged applicants can *indeed* circumvent the time limit established in Article 263(6) TFEU and legal certainty does not prevail over the interests of institutional actors to challenge Union acts.¹⁴⁴¹ As a result, *TWD* and *Nachi* make indirect challenge of Union measures more difficult to private parties than Article 277 TFEU allows it for Member States or the Union bodies, disclosing once more the *institutional preference* underlying the CJEU's views on the Union's system of judicial protection.

VI. Read together, *TWD* and *Nachi* reveal the “need to balance individual interests and legal certainty/procedural integrity interests in setting the boundaries of the Community's judicial review system.”¹⁴⁴² However, from the individuals' perspective this case-law is not fair or reasonable, especially considering the uncertainty regarding the *locus standi* to bring direct actions before the Union courts. Hence, the “effectiveness of indirect challenge as a remedy against the harshness of the Article 230 EC regime, particularly for less economically powerful and, arguably, less well-advised parties (...) who may inadvertently find themselves time-barred, will depend on a considerable extent on how national courts will characterize these terms and apply the standing rules to particular fact patterns.”¹⁴⁴³

From a practical point of view this approach does not help national courts either. In fact, under *TWD* national courts are expected to control the *locus standi* of individuals before the Union courts before making a preliminary reference, which is a highly technical question even for the Union courts to decide.¹⁴⁴⁴ Furthermore, “to distinguish between cases where there is *no doubt* and cases where there may be *difficulties* requires a preliminary investigation of the same sort, particularly since the relevant case-law has not been marked by total consistency.”¹⁴⁴⁵ If by any chance, the national court gets it wrong, the individual will have no access to the CJEU.¹⁴⁴⁶ Hence, scholars note that this case-law “introduces some of the problems of admissibility which have beset direct actions before the Court and which had previously been remarkably lacking in references for preliminary rulings, and necessarily requires the Court of Justice to go behind the national court's reference to investigate the situation of the parties and the factual background.”¹⁴⁴⁷

In my view, *as a matter of principle*, it seems that preliminary rulings on validity should be admitted regardless of standing to bring a direct action. These mechanisms should be considered

¹⁴³⁹ Case C-11/00, *Commission/ECB*, [2003] ECR I-7147.

¹⁴⁴⁰ Case C-442/04, *Spain/Council*, [2008] ECR I-3517.

¹⁴⁴¹ See Opinion of AG JACOBS in Case C-11/00, *Commission/ECB*, [2003] ECR I-7147. Noting that Member States may always use the plea of illegality regarding any act whereas individuals may only use it against acts regarding which they had not standing, see CRAIG; BURCA, *EU Law*, 2011, at 517.

¹⁴⁴² MOLONEY, “Case C-239/99, *Nachi Europe GmbH v. Hauptzollamt Krefeld*”, 2002, at 404.

¹⁴⁴³ *Ibid.*

¹⁴⁴⁴ See also BEBR, “Direct and Indirect Judicial Control of Community Acts in Practice”, 1983-84, at 1234.

¹⁴⁴⁵ USHER, “Direct and Individual Concern”, 2003, at 590. CASSIA disregards the argument on the ground that Article 263 TFEU should be interpreted by national courts as any other Treaty provision. See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 311.

¹⁴⁴⁶ Mentioning a case in Ireland where that has happened (High Court, 2 October 1987, *Patrick Lawlor v. The Minister for Agriculture*) see CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 310, note 3.

¹⁴⁴⁷ USHER, “Direct and Individual Concern”, 2003, at 591.

autonomous. Neither should the possibility to challenge an act directly be jeopardized by the possibility of doing it indirectly nor should the reverse hold true. There are no good reasons to censure, as a matter of principle, procedural choices between the two mechanisms. Thus, as SCHWENSFEIER has put it, the *rationale* underlying the TWD case-law should be understood as follows: “persons who undoubtedly had standing to bring an action for annulment and who *could have been expected to be diligent enough* to safeguard their rights through an action for annulment but failed to do so within good time cannot subsequently be allowed to avoid the application to them of that Union measure.”¹⁴⁴⁸ In fact, whether the plaintiff had standing to bring an action for annulment is not the only criterion for TWD to apply. This can be said to follow from the distinction of *Universität Hamburg*, and supports the distinction from *Behn Verpackungsbedarf, Binder* and *Foto-Frost*. The CJEU has recently confirmed in *Bolton Alimentari*¹⁴⁴⁹ that the possibility to know of the contested measure and of its being of direct and individual concern is required. In fact, “if knowledge for the purpose of the application of the TWD case-law could be inferred from the fact that an act has been published in the Official Journal alone, this would impose a disproportionately heavy burden on private parties.”¹⁴⁵⁰

In light of the above, the preclusive effect of the time limit should apply, *as a rule*, only to those acts directly addressed to the individual, where standing requirements are *absolutely* clear.¹⁴⁵¹ This approach does not, however, preclude the CJEU from taking into account *exceptional* situations of *abuse of process* or *abuse of procedural rights* by private applicants¹⁴⁵² – which may have been the case in TWD and possibly in *Nachi*.¹⁴⁵³ This approach also fits well with the nature of

¹⁴⁴⁸ See SCHWENSFEIER, “The TWD Principle post-Lisbon”, 2012, at 168, noting that in spite of the criticism in legal writing, the TWD case-law is consistent with this *rationale*, except for the requirement to plead the illegality of a measure in a national court for TWD to apply. Furthermore, explicitly endorsing this understanding as the underlying *rationale* of TWD would also allow the Court to take account of the nature of the proceedings before the referring national court. It might find that Union law requires that questions as to the validity of some Union measures have to be answered in spite of TWD if their infringement would entail criminal prosecution.

¹⁴⁴⁹ Case C-494/09, *Bolton Alimentari*, nyr, para. 24.

¹⁴⁵⁰ In TWD the applicant was informed of the possibility to challenge the act directly, which seems to have been a determinant factor in the CJEU’s decision. See WYATT, “The Relationship between Actions for Annulment and References on Validity after TWD *Deggendorf*”, 1997, at 64. Nonetheless, DOUGAN notes that the case-law has sent mixed messages whether the test contains merely objective (clear standing) or also subjective (self-awareness and knowledge by the applicant) elements. See DOUGAN, *National Remedies before the Court of Justice*, 2004, at 327. See also AMBANELLI, “La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Twd Textilwerke* e *Wiljo*”, 1998, at 146. Moreover, the mere publication of the act does not seem to ensure *effective knowledge* which the CJEU seems to have clarified in *Universität Hamburg*. However, according to *Wiljo* the individual does not have to be informed of its remedies. See GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 501. *Per contra*, considering that the obligation to indicate remedies flows from *Accrington Beef* see BERROD, *La systématique des voies de droit communautaires*, 2003, at 830. It must nonetheless be noted that TWD does not take account of the personal reasons that may have led a person not to challenge a Union measure. See SCHWENSFEIER, “The TWD Principle post-Lisbon”, 2012, at 167, 168.

¹⁴⁵¹ Also considering that the two months time limit can claim absolute priority only with respect to individual legal acts, while normative measures with general applicability must remain indirectly challengeable in later proceedings at any time, see VOGT, “Indirect Judicial Protection in EC Law”, 2006, at 377. Also considering that TWD should be restricted to acts of individual application see TÜRK, *Judicial Review in EU Law*, 2009, at 238. QUADROS and MARTINS consider that regarding regulations, indirect challenge should always be admitted even if they are disguised decisions. See QUADROS; GUERRA MARTINS, *Contencioso da União Europeia*, 2007, at 178.

¹⁴⁵² In this respect see Opinion of AG KOKOTT in Case C-63/04, *Centralan Property*, [2005] ECR I-11087, paras. 60-61; WYATT, “The Relationship between Actions for Annulment and References on Validity after TWD *Deggendorf*”, 1997, at 65; KOUTRAKOS, “The Emsland-Strärke Abuse of Law Test in the Law of Agriculture and Free Movement of Goods”, 2011, at 203.

¹⁴⁵³ Considering also that it might thus be said that considerations of abuse guide the teleological reduction of the right to raise preliminary questions as enshrined in the TWD case-law see SCHWENSFEIER, “The TWD Principle post-Lisbon”, 2012, at 168.

preliminary references. In *Cassa di Risparmio di Firenze*¹⁴⁵⁴ – a case where the CJ held the question admissible in so far as it had not been raised by the parties but by the national court *moto proprio* – AG JACOBS argued that there was no “potential abuse of procedure by a party who should have challenged the decision directly before the Court but did not, which in my view lies at the heart of the TWD case-law, is here absent.”¹⁴⁵⁵ The proposed interpretation does not require a change in the Court’s case-law – provided that TWD and *Nachi* are read strictly on their own facts – as abuse of rights is a general principle of law common to the legal traditions of Member States. Furthermore, one should note that the limitation of the scope of TWD and *Nachi* became more imperative after the entry into force of the Lisbon Treaty which extended standing of individuals to the challenge of regulatory acts not entailing implementing measures.¹⁴⁵⁶ For the moment it is however enough to stress that these rulings show once more the CJEU’s *objectivist, institutional* and *systemic* approach to the system of judicial protection of private parties in the European Union.

2. THE CJEU’S JURISDICTION OVER THE INTERGOVERNMENTAL PILLARS: ARTICLES 6(2), 46 AND 47 TEU

2.1 The Jurisdiction of the CJEU under the Treaties

I. Since the creation of the CFSP and the Justice and Home Affairs (JHA) policy by the Maastricht Treaty commentators have resented “something of the night”¹⁴⁵⁷ insofar as the respect for the principle of the rule of law in the European Union is concerned. Taking into account the intergovernmental nature of the policies included therein, the jurisdiction of the CJEU faced substantial limitations since the very beginning of the Union’s life. Notwithstanding, the CJEU did not lose its nature as a common institution to the Community and the Union.¹⁴⁵⁸

II. The CFSP finds its origins in Article 30 of the Single European Act (SEA) that provided for a European Co-Operation in the sphere of Foreign Policy, within the framework of the so-called European Political Cooperation (EPC).¹⁴⁵⁹ The latter was not part of the Community legal order and was developed under the classic mechanisms of International law.¹⁴⁶⁰ The Court’s jurisdiction was, therefore, entirely excluded.¹⁴⁶¹ Only the provisions of the SEA amending the

¹⁴⁵⁴ Case C-222/04, *Cassa di Risparmio di Firenze and others*, [2006] ECR I-289.

¹⁴⁵⁵ Opinion of AG JACOBS in *Cassa di Risparmio di Firenze and others*, para. 63. In Case C-390/98, *Banks*, [2001] ECR I-6117, the CJ stated that TWD would not apply to references under the old TECSC because the plaintiff had not called into question the validity of the Commission decision. The point raises the question of knowing if TWD is also made dependent on the fact that the parties, and not the national court, raised the question. See SCHWENSFEIER, “The TWD Principle post-Lisbon”, 2012, at 163, considering that this factor is inconsistent with the possibility of measures becoming definitive. Furthermore, this requirement conflicts with the *rationale* of TWD, which is to make sure that people do not sleep on their rights. *Ibid.*, at 168.

¹⁴⁵⁶ See *infra* Part II, Chapter 2, Section 2.1.7.

¹⁴⁵⁷ PEERS, “Who’s Judging the Watchmen?”, 1998, at 337.

¹⁴⁵⁸ Pursuant to Article 3 TEU (Nice) there was a single institutional framework.

¹⁴⁵⁹ OJ L 169, 29/6/1987, p. 13.

¹⁴⁶⁰ TIETJE, “The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy”, 1997, at 218.

¹⁴⁶¹ Article 31 SEA.

Rome Treaty had an effect on the Community legal order. The other provisions should be understood as having the effect of ordinary international agreements. Internal criticism on its weak institutional framework and effectiveness and pressures from the international community pushed the Member States to reform the EPC.¹⁴⁶²

The Maastricht Treaty introduced substantial reforms in this respect, having created the CFSP as the second pillar on which the Union was to be based.¹⁴⁶³ It was included mostly in Article J TEU, but also referred in Articles A and C TEU.¹⁴⁶⁴ The CFSP was much more institutionally and legally developed than the former EPC which could easily be perceived by the reading of Articles J.1 to J.18 TEU.¹⁴⁶⁵ However, the CJEU's jurisdiction over the CFSP was excluded, with few limited exceptions pursuant to Article L of the TEU. The Amsterdam and Nice Treaties left untouched the jurisdiction of the Court over the second pillar.¹⁴⁶⁶ Article L became Article 46 TEU, following the general renumbering of the Treaties pursuant to Article 12 of the revision Treaty. The Nice Treaty left untouched the *acquis* in Article 46 TEU and added one more reference to "the purely procedural stipulations in Article 7, with the Court acting at the request of the Member State concerned within one month from the date of the determination by the Council provided for in that Article."¹⁴⁶⁷ Hence, before the Lisbon Treaty entered into force the jurisdiction of the CJEU over the CFSP was *generally* excluded with the sole exceptions provided for in Article 46 TEU.¹⁴⁶⁸

III. Regarding the third pillar, which under Maastricht extended to the whole area of JHA, the CJEU was given limited jurisdiction.¹⁴⁶⁹ In reality, the Court started playing a significant role in JHA since 1971 as it was given jurisdiction by the Member States over specific Protocols and Conventions.¹⁴⁷⁰ The Maastricht Treaty through Article K.3(2)(c) acknowledged this practice, by establishing that the Council could draw up conventions which it recommended to the Member States for adoption in accordance with their respective constitutional requirements. Such conventions could stipulate that the CJEU had jurisdiction to interpret their provisions and to rule on any disputes regarding their application.¹⁴⁷¹ The Court was also given the power to police the boundaries between the first and third pillar pursuant to Article L and M of the amendment Treaty.

¹⁴⁶² For further developments see "The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy", 1997, at 218 *seq.*

¹⁴⁶³ See DEMARET, "Le Traité de Maastricht ou les voies diverses de L'Union", 1993, at 37-48; DEWOST, "Les problèmes posés par la structure du Traité", 1993, at 63-65.

¹⁴⁶⁴ OJ C 191, 29/7/1992.

¹⁴⁶⁵ See NUTTHALL, "The Foreign and Security Policy Provisions of the Maastricht Treaty", 1993, at 133-138; TERVARENT, "L'introduction d'une politique extérieure et de sécurité commune", 1993, at 129-132.

¹⁴⁶⁶ See ALBORS-LLORENS, "Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam", 1998, at 1276 *et seq.*; FERNANDEZ FERNÁNDEZ, "El Tratado de Amsterdam y la política exterior y de seguridad común de la Unión", 1998, at 79-111.

¹⁴⁶⁷ Section (e) of Article 46 TEU (Nice).

¹⁴⁶⁸ See BONO, "Some Reflections on the CFSP", 2006, at 347 *et seq.*

¹⁴⁶⁹ For a comprehensive analysis of evolution of the third pillar see MONAR, *Justice and Home Affairs in the European Union*, 1991; WEYEMBERGH; RICCI, "Le Traité de Lisbonne et le contrôle juridictionnel sur le droit pénal de l'Union européenne", 2009, at 226 *seq.*

¹⁴⁷⁰ HINAREJOS, *Judicial Control in the European Union*, 2009, at 55.

¹⁴⁷¹ For further developments see PEERS, *EU Justice and Home Affairs Law*, 2006, at 17-18.

The Amsterdam Treaty “broke open the JHA pillar”¹⁴⁷² and brought important changes in this respect, as it partially integrated some third pillar policies into the TEC.¹⁴⁷³ Hence, on the one hand, the jurisdiction of the CJEU was extended to all policies included in Title IV TEC – visas, immigration and asylum – pursuant to Articles 64 and 68 TEC. On the other hand, the remaining third pillar policies included in Title VI TEU became subject to the jurisdiction of the Union courts under the conditions foreseen in Article 35 TEU. Together these policies constituted the newly created “Area of Freedom, Security and Justice” (AFSJ).¹⁴⁷⁴ The CJEU’s competences differed, however, under the two Treaties. Scholars spoke here about “fragmentation and complication of legal remedies”¹⁴⁷⁵ and “variable geometry in judicial remedies.”¹⁴⁷⁶

On the one hand, pursuant to Article 68 TEC the Court’s jurisdiction over Title IV TEC was different from the general jurisdiction foreseen in Articles 220 TEC *seq.*, especially in what the preliminary reference procedure was concerned.¹⁴⁷⁷ Firstly, only national courts against whose decisions there was no judicial remedy under national law could send a reference to the CJ.¹⁴⁷⁸ It was open for discussion if the *Foto-Frost* case-law applied here.¹⁴⁷⁹ If applicable, one could question the extent of such application. Truly, *Foto-Frost* involved two central dimensions: on the one hand, the *incompetence* of national courts to declare Union acts invalid and, on the other hand, the *obligation to refer* questions of invalidity to the CJEU. However, under Article 68 TEC it was not clear whether Member States wanted also to curtail references on *invalidity* to lower courts. In fact, it was possible to argue that Article 68 TEC did not compromise in *anyway* the *Foto-Frost* case-law: thus, all national courts would still be considered under an obligation to refer all questions on *invalidity* of Union law. It was also possible to argue that *Foto-Frost* remained *partially in force*, in so far as lower courts could not invalidate an EU act, although they could not make a reference to the CJEU. This was the main trend in the literature.¹⁴⁸⁰ In this scenario, individuals would have to

¹⁴⁷² WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 20.

¹⁴⁷³ For a detailed analysis of these changes see ALBORS-LLORENS, “Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam”, 1998, at 1273-1294; HAILBRONNER, “European Immigration and Asylum Law under the Amsterdam Treaty”, 1998, at 1047-1067; MONAR, “Justice and Home Affairs in the Treaty of Amsterdam”, 1998, at 320-335; PEERS, “Who’s Judging the Watchmen?”, 1998, at 351 *et seq.*; ARNULL, “Taming the Beast?”, 1999, at 109-122; EECKHOUT, “The European Court of Justice and the Area of Freedom, Security and Justice”, 2000, at 153-166; PIÇARRA, “O Tribunal de Justiça das Comunidades Europeias e o novo Espaço de Liberdade, de Segurança e de Justiça”, 2000, at 81-125; BIEBER; DOUGLASSCOTT, “The Rule of Law in the EU”, 2004, at 219-242; KUIJPER, “The Evolution of the Third Pillar from Maastricht to the European Constitution”, 2004, at 609-626; ARNULL, *The European Union and its Court of Justice*, 2006, at 131-137.

¹⁴⁷⁴ See KOSTAKOPOULOU, “The Area of Freedom, Security and Justice and the European Union’s Constitutional Dialogue”, 2007, at 153-191; PIÇARRA, “A União Europeia enquanto Espaço de Liberdade, Segurança e Justiça”, 2007, at 317-336.

¹⁴⁷⁵ See WARD, “The Limits of the Uniform Application of Community law and Effective Judicial Review”, 2000, at 214.

¹⁴⁷⁶ *Ibid.*, at 227. TRIDIMAS noted that one of the major challenges of the CJEU was to preserve the integrity and coherence of the Union legal order in “an era where diversity was the prevailing political model.” See TRIDIMAS, “Knocking on Heaven’s Door”, 2003, at 15, 16.

¹⁴⁷⁷ See GAJA, “The Growing Variety of Procedures Concerning Preliminary Rulings”, 2000, at 146-148; For a critical overview see GIRERD, “L’article 68 CE”, 1999, at 239-260.

¹⁴⁷⁸ Noting that this limitation was said to be inspired by caseload concerns see EECKHOUT, “The European Court of Justice and the ‘Area of Freedom, Security and Justice’”, 2000, at 155.

¹⁴⁷⁹ See USHER, “Direct and Individual Concern”, 2003, at 588; DOUGAN, *National Remedies before the Court of Justice*, 2004, at 319, note 33, noting that the jurisdictional principles established in *Foto-Frost* should be adapted with regard to Title IV TEC; QUADROS, *A Função Subjectiva da Competência Prejudicial do Tribunal de Justiça das Comunidades Europeias*, 2006, at 115 *et seq.*

¹⁴⁸⁰ In contrast, EECKHOUT considered that lower courts could declare Title VI acts invalid and on appeal last instance courts would be obliged to refer. See EECKHOUT, “The European Court of Justice and the ‘Area of Freedom,

appeal the case to the last instance court and wait for the reference to be made there. Hence, courts other than those of last instance were not in a position to grant individuals *any remedy* as they could not set aside a Union act they deemed invalid and could not refer the question to the CJEU.¹⁴⁸¹ This system was said to be an “arduous one indeed, perhaps to a degree that renders rights of access thereto impractical and ineffective, in breach of Articles 6 and 13 of the ECHR”¹⁴⁸² and to imply a “*déficit accru de la protection juridictionnelle des particuliers*.”¹⁴⁸³ TRIDIMAS noted that the system was not a good one as it restricted access to justice and contradicted the CJEU's views on preliminary references according to which preliminary references should be made available to all national courts.¹⁴⁸⁴ Moreover, leaving the possibility to refer open to all lower courts would mitigate the adverse effects of an incorrect decision of a last instance court not to refer. Hence, for instance, the references in *Kreil*¹⁴⁸⁵, *Becker*¹⁴⁸⁶ and *ED/Italo Fenocchio*¹⁴⁸⁷ were made on issues in relation to which higher courts had held that Union law was not applicable.¹⁴⁸⁸ What is more, this limitation could have a spill-over effect in case of “mixed-questions” involving Title IV policies and other EC policies, as lower instance courts could feel tempted not to refer *any questions*, leaving the decision in the hands of last instance courts.¹⁴⁸⁹ Lastly, such limitations were particularly relevant in the context of Title IV TEC as legislative measures adopted thereto would not be challengeable directly through an action for annulment. In fact, not only standing requirements would not allow for such challenge, but also as EECKHOUT noted, one could “hardly require a potential future immigrant to challenge Community legislation within the two months period of Article 230 TEC, if the person concerned does not even know yet, at the time when the Community act is adopted, that he or she is going to move to the European Union and may face legal obstacles there.”¹⁴⁹⁰

In addition to these procedural hurdles, pursuant to Article 68(2) TEC the CJEU did not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) TEC relating to the maintenance of law and order and the safeguarding of internal security.¹⁴⁹¹ Nevertheless, the Council, the Commission or a Member State could request the CJ to give a ruling on a question of

Security and Justice”, 2000, at 158.

¹⁴⁸¹ TÜRK, *Judicial Review in EU Law*, 2009, at 226. The author suggested one of two solutions: (i) either to disregard *Foto-Frost* and allow the national court to disapply the contested Union act or to (ii) allow the national court to grant interim relief until a reference is made. Noting that interim relief would not be possible as the case-law of the Court requires a reference on validity to be made see EECKHOUT, “The European Court of Justice and the ‘Area of Freedom, Security and Justice’”, 2000, at 159.

¹⁴⁸² WARD, “Access to Justice”, 2004, at 136. See also ALBORS-LLORENS, “Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam”, 1998, at 1288; NASCIMBENE, “Community Courts in the Area of Judicial Cooperation”, 2005, at 496; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 352.

¹⁴⁸³ GIRERD, “L’article 68 CE”, 1999, at 244. See also MARTINS, “A protecção jurisdicional dos direitos fundamentais no espaço de liberdade, de segurança e de justiça”, 2008, at 540 *et seq.*

¹⁴⁸⁴ TRIDIMAS, “Knocking on Heaven’s Door”, 2003, at 14, 15. See Report of CJEU on Certain Aspects of the Application of the Treaty on the European Union, May 1995, reproduced in the Court’s Annual Report 1995, at 19-30, at 25.

¹⁴⁸⁵ Case C-285/98, *Kreil*, [2000] ECR I-69.

¹⁴⁸⁶ Case 8/81, *Becker*, [1982] ECR 53.

¹⁴⁸⁷ Case C-412/97, *ED*, [1999] ECR I-3845.

¹⁴⁸⁸ TRIDIMAS, “Knocking on Heaven’s Door”, 2003, at 15.

¹⁴⁸⁹ *Ibid.*

¹⁴⁹⁰ EECKHOUT, “The European Court of Justice and the ‘Area of Freedom, Security and Justice’”, 2000, at 158.

¹⁴⁹¹ Contrary to what happened with Article 35(5) TEU it was not clear whether this prohibition extended to Member State action or applied only to Union action.

interpretation “of this title or of acts of the institutions of the Community based on this title”, which would apply to judgments of national courts which had become *res judicata*.¹⁴⁹²

On the other hand, jurisdiction of the CJEU over the PJCCM was exercised pursuant to Article 35 TEU. This provision included an *à la carte* jurisdiction-clause, allowing Member States to choose between different regimes regarding the preliminary rulings procedure.¹⁴⁹³ Hence, the functioning of this mechanism was *entirely optional* and it was *not automatic*: it was made dependent upon a system of triple declarations issued by the Member States. Firstly, Member States had to choose if they accepted the CJEU's jurisdiction in the first place. Secondly, they had to choose which national courts could send questions to the CJ.¹⁴⁹⁴ Thirdly, Member States could reserve the right of establishing in national legislation an obligation to refer for courts of last resort.¹⁴⁹⁵ In fact, under Article 35 TEU there was apparently *no obligation to refer any preliminary questions* to the CJ as questions on the validity of Union law were also dependent on the concrete assessment made by national courts on whether a ruling of the CJ was necessary to enable the court to give judgment – raising once more the question of the applicability of the *Foto-Frost* case-law in this domain.¹⁴⁹⁶ Furthermore, it should also be noted that common positions were excluded from the jurisdiction of the CJEU to give preliminary rulings. Nonetheless, any Member State, whether or not it had made the referred declaration, could submit statements of case or written observations to the CJ in preliminary references made in these matters.

¹⁴⁹² Noting that the major difficulty underlying this possibility lied in the framing of the questions without an actual factual and legal context see EECKHOUT, “The European Court of Justice and the ‘Area of Freedom, Security and Justice’”, 2000, at 162. Before the entry into force of the Lisbon Treaty the Commission brought a proposal to align the provisions of Title IV TEC with the general jurisdiction of the Court under Article 67(2) TEC. See COM(2006) 346 final. For further developments see EDITORIAL COMMENTS, “Preliminary Rulings and the Area of Freedom, Security and Justice”, 2007, at 2 *et seq.*

¹⁴⁹³ Noting that Article 35(3) left Member States with mainly four options which ranged from no power for national courts to refer, to give power to all courts along the lines of Article 234 TEC see WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 21.

¹⁴⁹⁴ Until the entry into force of the Lisbon Treaty, seventeen Member States accepted the jurisdiction of the CJEU (the exceptions were the United Kingdom, Ireland, Denmark, Bulgaria, Slovakia, Estonia, Malta, Cyprus, Romania and Poland). From the ones which accepted, only Spain restricted acceptance to courts of last resort. See Council information concerning the declarations by the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania and the Republic of Slovenia on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union, OJ L 70, 14/3/2008, p. 23. After the entry into force of the Lisbon Treaty, Cyprus and Romania accepted the jurisdiction of the Court under Article 35(2) and (3)(b). See Council Information concerning the declarations by the Republic of Cyprus and Romania on their acceptance of the jurisdiction of the Court of Justice of the European Union to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union, OJ L 56, 6/3/2010, p. 14.

¹⁴⁹⁵ Declaration 10 attached to the Amsterdam Treaty. Until the entry into force of the Lisbon Treaty, only ten Member States reserved the right to oblige national courts of last resort to refer (except Finland, Greece, Portugal, Sweden, Hungary, Latvia and Lithuania).

¹⁴⁹⁶ It was also doubtful that the *Foto-Frost* principle applied within the context of the former third pillar. See WARD, “The Limits of the Uniform Application of Community Law and Effective Judicial Review”, 2000, at 222-223; ARNULL, *The European Union and its Court of Justice*, 2006, at 134-136; CLOOTS, “Germs of Pluralist Judicial Adjudication”, 2010, at 652. AG MENGOSI considered in the *Segi* case that *Foto-Frost* should not apply to the third pillar because of the need to ensure proper judicial protection. According to the AG, the two assumptions on which the Court based its interpretation in the *Foto-Frost* did not apply in the context of Title VI TEU. Following the AG, national courts should be able to review the validity of third pillar measures. However, they should do it according to EU and not national standards of protection. See Opinion, paras. 121-138. Considering that where the CJEU cannot be reached with a preliminary question, the responsibility of national courts to ensure effective judicial protection should translate into their empowerment to review EU secondary law, see LECZYKIEWICZ, “Effective Judicial Protection of Human Rights After Lisbon”, 2010, at 342 *seq.* Noting the difficulties arising from the lack of jurisdiction of the CJEU in certain Member States to review third pillar measures and the need for national courts to step in maybe applying *Pupino*, see FAHEY, “How to be a Third Pillar Guardian of Fundamental Rights?”, 2008, at 563-576. Some scholars argue that due to the limited jurisdiction of the Court over the second pillar, the *Foto-Frost* principle should preferably not apply in the second pillar. See HINAREJOS, *Judicial Control in the European Union*, 2009, at 127.

Moreover, pursuant to Article 35(6) TEU only Member States or the Commission could initiate annulment proceedings against framework decisions or decisions (not common positions) adopted under Title VI TEU. The Council would only have passive *locus standi* as it was the only institution which could adopt such acts pursuant to Article 34 TEU. Regarding infringements proceedings, the Court's jurisdiction was also not automatic or direct, pursuant to Article 35(7) TEU.¹⁴⁹⁷ Furthermore, in any case, the CJ could review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, pursuant to Article 35(5) TEU. Finally, the Schengen Protocol established the Court's jurisdiction over the Schengen Convention and its implementing measures adopted within the field of the third pillar.¹⁴⁹⁸ It was not clear if the Court had competence to control the *validity* of international treaties concluded in the field of application of the third pillar, but the CJ decided, for instance, that it had competence to *interpret* the treaty which associated Norway and Iceland to the Schengen *acquis*.¹⁴⁹⁹

In light of the above, one has to acknowledge that the judicial architecture of the AFSJ offered *limited possibilities* for private parties under Union law.¹⁵⁰⁰ In fact, in the field of Title IV TEC, although both institutions and individuals could challenge the validity of Community acts under ex-Article 230 TEC, such review did not extend to measures or decisions relating to the maintenance of law and order and the safeguarding of internal security pursuant to Article 68(2) TEC. Hence, the CJEU was precluded from reviewing these measures. However, under *Foto-Frost* national courts could not review them either, which meant that *there would be no avenue of judicial review* to assess the legality of these rules.¹⁵⁰¹ Moreover, only courts of last resort could refer questions to the CJEU which would entail extra delays and expenses uncommon under the general jurisdiction of the CJEU.

In the field of the third pillar individuals faced even more tenacious difficulties. Both individuals and the European Parliament were in general precluded from petitioning the Court to defend their interests.¹⁵⁰² Articles 35(6) and (7) merely allowed the Commission and Member States to bring annulment proceedings. Moreover, none of the alternative means of indirect access available under the TEC were extended to the TEU. Neither the plea of illegality nor the action for damages operated here, and preliminary references on validity could be precluded by choice of Member States.¹⁵⁰³ If *Foto-Frost* applied, this would mean that individuals did *not have access* to the

¹⁴⁹⁷ This procedure only applied to conventions, and not to decisions, framework decisions and common positions.

¹⁴⁹⁸ The situation was further complicated because of the *opt-ins* and *opt-outs* to the Schengen arrangements agreed with Ireland, the UK and Denmark, which inevitably compromised the uniformity of Union law. See HAILBRONNER, "European Immigration and Asylum under the Amsterdam Treaty", 1998, at 1047 *et seq.*

¹⁴⁹⁹ Case C-436/04, *Van Esbroeck*, [2006] ECR I-2333. See PEERS, "Salvation Outside the Church", 2007, at 887.

¹⁵⁰⁰ See also VAN DEN BERGHE, "The EU and Issues of Human Rights Protection", 2010, at 141 noting that the variety of systems of judicial review raised concerns regarding effective judicial protection of private parties and the uniformity and transparency of EU law.

¹⁵⁰¹ WARD, "The Limits of the Uniform Application of Community Law and Effective Judicial Review", 2000, at 221, considering that a reference to the CJ should be made and accepted pursuant to the *Johnston's* principle.

¹⁵⁰² Noting that this could nonetheless have led the CJEU to extend jurisdiction in order to accept Parliament's standing in light of the *Chemobyl* case-law see WARD, "The Limits of the Uniform Application of Community Law and Effective Judicial Review", 2000, at 219.

¹⁵⁰³ See ALBORS-LLORENS, "Changes in the Jurisdiction of the European Court of Justice under the Treaty of

judge competent to declare the contested Union act invalid by *any* means available. Thus, these acts would be immune to any kind of judicial review. Some scholars pointed to review grounded on Member States' administrative and constitutional law as the only available remedy. However, this would go without saying that *supremacy* would not fully operate within the third pillar. Lastly, also under Article 35(5) TEU national courts would retain jurisdiction over certain measures.¹⁵⁰⁴ PEERS noted emblematically that the legal system established in the third pillar could neither ensure an effective and uniform application of Union law nor an adequate system of judicial control of the legality of Union measures. Thus "salvation" would have to be found "outside the Church", *i.e.* in the EC legal order.¹⁵⁰⁵

IV. To put it briefly, although one cannot ignore the progressive expansion of the Court's jurisdiction in the several amendments to the Treaties thus far, under the Nice version of the Union Treaties the jurisdiction of the CJEU over the intergovernmental pillars was *generally excluded*, extending only to the (i) provisions amending the Community Treaties (Titles II-IV, Articles 8 to 10 TEU); (ii) the provisions on the PJCCM (Title VI, Articles 29 to 42 TEU) under the conditions provided for by Article 35 TEU; (iii) the provisions on Enhanced Cooperation (Title VII, Articles 43 to 45 TEU) under the conditions provided for by Articles 11 and 11a TEC, and Article 40 TEU; (iv) the final provisions of the TEU (Title VIII, Articles 46 to 53 TEU); (v) and partially to Articles 6 and 7 TEU.

The jurisdiction of the Court did not extend to Articles 1 to 7 TEU, which set out the common provisions on which the Union was based, nor to actions undertaken by the Member States in the field of the CFSP. The lack of jurisdiction as regards the so-called common provisions was confirmed by the CJ in the *Grau Gomis*¹⁵⁰⁶ case. The CJEU dismissed a request for a preliminary ruling concerning the obligations of the Member States under Article 2 TEU on the grounds that pursuant to Article 46 TEU it clearly had no jurisdiction to interpret that Article in the context of such proceedings. Nonetheless, it has been argued that these provisions can work as an *interpretative subsidy* to the aims and scope of the Union action and some case-law of the Union courts seem to confirm such indication.¹⁵⁰⁷ Curiously, one could say that the principle of the rule of law, established in former Article 6 TEU escaped its own application, as it was excluded from the CJEU's jurisdiction.¹⁵⁰⁸ In a significant move, the new Article 2 TEU became justiciable under

Amsterdam", 1998, at 1283.

¹⁵⁰⁴ See WARD, "The Limits of the Uniform Application of Community Law and Effective Judicial Review", 2000, at 223.

¹⁵⁰⁵ PEERS, "Salvation Outside the Church", 2007, at 885.

¹⁵⁰⁶ Case C-167/94, *Grau-Comis*, [1995] ECR I-1023.

¹⁵⁰⁷ On Article F(1) TUE see Case C-473/93, *Commission/Luxembourg*, [1996] ECR I-3207; on Article 1 see Case C-105/03, *Pupino*, [2005] ECR I-5285; on Articles 2 and 6(1) see Case C-303/05, *Advocaten voor de Wereld*, [2006] ECR I-3663; on Article 3 TUE see Case T-306/01, *Yusuf and Al Barakaat International Foundation/Council and Commission* [2005], ECR II-3533 and Case T-315/01, *Kadi/Council and Commission*, [2005] ECR II-3649; on Article 5 see Case T-338/02, *Segi and others/Council* [2004] ECR II-1647. PEERS notes that the CJEU interprets these provisions when it is necessary to effectively exercise jurisdiction which was already conferred upon the Court. See PEERS, "Salvation Outside the Church", 2007, at 909.

¹⁵⁰⁸ Noting that such exclusion should not preclude the CJEU from interpreting Article 6(1) TEU, and that the drafters' intent to refuse the Union courts' jurisdiction to interpret any Treaty provision purporting to guarantee the rule of law is "worthy of a Monty Python script" see PEERS, "Salvation Outside the Church", 2007, at 909.

the Lisbon Treaty, which should not be regarded without consequences.¹⁵⁰⁹

2.2 The Case-Law of the CJEU and the Gaps of the System of Judicial Review

2.2.1 General Remarks

Although the jurisdiction of the Union courts in the area of the CFSP and PJCCM was either excluded or limited under the TEU, case-law over the past years indicated a “constitutional role”¹⁵¹⁰ for the CJEU beyond the former Community legal order. Indeed, the CJEU showed some willingness to apply some of the classic “Community reasoning” on a Union-wide basis irrespective of its absence of jurisdiction in this field.¹⁵¹¹ Possibly aware of the existing gaps of judicial protection under the former TEU, the CJEU tried to *push* the rule of law into the intergovernmental pillars, both from the angle of ensuring the respect for the institutional balance and of protecting the individuals’ rights in the Union legal order. Thus, one can affirm that the action of the Union institutions and the Member States under the former TEU did completely escape judicial supervision by the Union courts.

This attitude of the CJEU should not come as a surprise considering the importance and the implications of the principle of the rule of law in the construction of the European legal order. However, one can say that the CJEU stopped short. In fact, not only is the case-law not always clear-cut, but also some *lacunae* may be said to remain, threatening the coherence of the Union legal order and raising concerns from the perspective of the *Rechtsgemeinschaft* the European Union is said to be. Notably, regarding judicial review of Union acts, it is submitted that the CJEU has not elaborated on the avenues offered by the combined application of Articles 6(2) TEU and Articles 46 and 47 TEU, and their interpretation in light of Article 220 TEC.

As is well known, Article 220 TEC conferred on the CJEU the mission of ensuring that in the application and interpretation of the Treaty “the law is observed.” Articles 6(2) and 46 TEU conferred on the CJEU jurisdiction to review the “conformity of actions of EU institutions with fundamental rights in the Community legal order, whether acting in the context of the Community or Union policy making.”¹⁵¹² Moreover, Article 47 TEU established that *subject* to the TEC, *nothing* in the TEU “shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.” This could have meant that despite the limitations to the CJEU’s jurisdiction *some*, even if *minimum*, review of Union acts under the TEU might have taken place. Such review could have been grounded on the need to ensure fundamental rights protection, as Article 6(2) TEU was subject to the jurisdiction of the CJEU. However, Article 6(2) TEU did not serve in the case-law of the Court as a basis for the extension of the Court’s jurisdiction over the TEU.¹⁵¹³ This meant that the avenues offered by

¹⁵⁰⁹ See *infra* Part II, Chapter 2, Section 2.2.

¹⁵¹⁰ WESSEL, “The Constitutional Unity of the European Union”, 2009, at 298.

¹⁵¹¹ *Ibid.*

¹⁵¹² See PEERS, “Human Rights and the Third Pillar”, 1999, at 167; WARD, “The Limits of the Uniform Application of Community Law and Effective Judicial Review”, 2000, at 214.

¹⁵¹³ Case T-338/02, *Segi and others/Council* [2004] ECR II-1647, paras. 36-37. See CARRUTHERS, “The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home

Article 47 TEU remained limited to institutional disputes among Union institutions and the Member States, without further impact on the protection of individuals' rights.¹⁵¹⁴ It is also significant in this respect that the CJEU did not hesitate to enhance judicial review of *Member State action* in order to ensure effective judicial protection of private parties under the TEU. Such review remains however limited to Member States' acts not extending to the initial Union acts which based the former. Hence, the trend in the case-law confirms once more that the CJEU remains attached to a predominantly *objectivist, institutional and systemic* view of the Union's judicial system, which although favouring judicial review in institutional conflicts, significantly immunizes Union acts from review at the initiative of individuals.

2.2.2 On the Institutional Balance between the Union and the Member States: from *Air Transport Visa* to the *Small Arms* Case

I. Under the Nice version of the TEU, judicial review was initially pushed into the intergovernmental pillars through the combined application of Articles 46 and 47 TEU. In fact, a literal and strict interpretation of Article 46 TEU seemed difficult to accept from the perspective of the rule of law and did not serve the integration process which the Court openly promoted since the first years of the European integration. Consequently, the CJEU favoured a *non-restrictive* interpretation of that provision and Article 46 TEU, despite preventing *direct* justiciability of the TEU, did not preclude the CJEU from applying *indirectly* certain provisions therein included.¹⁵¹⁵

In the first place, it became clear that Article 46 TEU did not prevent the CJEU's jurisdiction regarding matters integrated in the first pillar even when associated with second or third pillar measures. In the *Svenska Journalistförbundet*¹⁵¹⁶ case, the GC adopted this understanding regarding third pillar measures and the provisions on access to documents, although one can argue that as the action was initiated pursuant to ex-Article 230 TEC it did not actually test the limits of the Court's jurisdiction under the intergovernmental pillars. Nevertheless, the same understanding was confirmed with regard to second pillar measures in the case of *Hautala*.¹⁵¹⁷ Hence, *first pillar jurisdiction* would apply to measures which were *expressly made applicable* to the intergovernmental pillars by either ex-Articles 28 or 41 TEU respectively. This is also the case of third pillar funding charged to the EC budget.¹⁵¹⁸ Thus, all of the financial provisions of the TEC were applicable to the third pillar funding *mutatis mutandis*.¹⁵¹⁹

Secondly, the Court extended *first pillar jurisdiction* to third pillar measures even in the

Affairs", 2009, at 787 *seq.* The author further notes that even in respect of pre-Lisbon JHA measures over which the CJEU had jurisdiction under Article 35 TEU, the narrow formulation of Article 6(2) TEU resulted in it being treated by the CJEU as an affirmation of its existing case-law on human rights as general principles rather than providing an enhanced normative status for rights under the ECHR and the common constitutional principles.

¹⁵¹⁴ Noting that the CJEU could have applied the *Johnston* principle and accept validity references even in the absence of a provision of the TEU allowing it to do so see WARD, "The Limits of the Uniform Application of Community Law and Effective Judicial Review", 2000, at 225.

¹⁵¹⁵ KETVEL, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy", 2006, at 83.

¹⁵¹⁶ Case T-174/95, *Svenska Journalistförbundet*, [1998] ECR II-2289.

¹⁵¹⁷ Case T-14/98, *Hautala*, [1999] ECR II-2489 and Case C-353/99 P, *Council/Hautala*, [2001,] ECR I-9565.

¹⁵¹⁸ Case T-231/04, *Greece/Commission*, [2007] ECR II-63, paras. 73-74.

¹⁵¹⁹ PEERS, "Salvation Outside the Church", 2007, at 905.

absence of a reference to the relevant provisions in Articles 28 or 41 TEU. This was the case of *Spain/Eurojust*, regarding staff cases, as neither ex-Articles 236 and 283 TEC were mentioned in Article 41 TEU.¹⁵²⁰ In contrast, the absence of a reference in said provision to Article 230 TEC precluded the Court's jurisdiction.¹⁵²¹

Thirdly, the CJEU exercised its *first pillar jurisdiction* when it considered that EU measures should have been adopted under the TEC. The litigation on the determination of the correct legal basis of Union action proves the point. This case-law was based in Article 47 TEU which according to Article 46(f) TEU was made justiciable. Hence, both actions for annulment and preliminary rulings on validity were held admissible on the grounds of a breach of Article 47 TEU, *i.e.* that the measure at stake encroached upon the Community competences. However, the reliance on Article 47 remained limited to the issue of competences, although it could be argued that the wording of said provision allowed for its application in other instances.

II. Determining the correct legal basis of a Union measure is a constitutional question: it has significant consequences regarding the instruments to be adopted, the legal effects of such acts, the competent institutions, the decision-making procedures, and the available enforcement and implementation mechanisms.¹⁵²² Article 47 TEU had two important implications¹⁵²³: (i) it avoided the application of the rule pursuant to which a later treaty revoked a previous treaty in the same matter, acting as a subordination clause pursuant to Article 30(2) of the Vienna Convention¹⁵²⁴; and (ii) it preserved the integrity of the *acquis communautaire*, as a fundamental objective of the Union (Article 2 TEU).¹⁵²⁵ It was, therefore, made justiciable.

The first relevant case where the Court directly addressed the application of Article 47 TEU was the *Airport Transit Visa*¹⁵²⁶ case. In this case, the Commission brought an action for annulment against a Council's joint action on airport transit arrangements. The Commission sought a declaration that, by adopting such act on the basis of Article K.3(2)(b) TEU, the Council had acted in breach of Article 100c TEC. Following the Opinion of AG FENNELLY, the CJEU dismissed the allegation by the United Kingdom that it lacked jurisdiction to review a Title VI measure and held that it could exercise its powers under Article 47 TEU "to ensure that acts which, according to the Council, fall within the scope of [Title VI] of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community".¹⁵²⁷ This understanding was

¹⁵²⁰ See *infra* Section 2.2.3.

¹⁵²¹ PEERS, "Salvation Outside the Church", 2007, at 906.

¹⁵²² See *e.g.*, BRADLEY, "The European Court and the Legal Basis of Community Legislation", 1988, at 379-402; CRAIG, "Competence", 2004, at 323-344; LANGLET, "Dual Legal Basis for Adoption and Implementation of the Rotterdam Convention", 2006, at 495-504; LAVRANOS, "On the Legal Basis of the EC's Data Retention Directive", 2009, at XIXVI.

¹⁵²³ KETVEL, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy", 2006, at 86.

¹⁵²⁴ Vienna Convention on the Law of Treaties, 23/5/1969.

¹⁵²⁵ Noting that Article 47 TEU was "aimed at avoiding undue interference" with the EC policies, see EECKHOUT, "The EU's Common Foreign and Security Policy after Lisbon", 2012 at 269.

¹⁵²⁶ Case C-170/96, *Commission/Council (Air Transport Visa)*, [1998] I-2763.

¹⁵²⁷ Para. 16. However, the judges found that the Council action was justified in choosing Title VI TEU as the relevant decision-making framework for adopting the measure under review, since the situation governed by the joint action did not entail the crossing of Member States' external borders by third country nationals, a domain that was

later confirmed in the *Environmental Penalties*¹⁵²⁸ and *Maritime Pollution*¹⁵²⁹ cases, both related with framework decisions adopted under the third pillar.

In all these cases the application of Article 47 TEU required a *procedural vehicle* which according to Article 46 TEU would be found in the TEC. It was, therefore, firstly under Article 230 TEC that the Court decided on the application of Article 47 TEU.¹⁵³⁰ Subsequently, however, when the Court was given jurisdiction under Article 35 TEU, the direct action established in para. 6 of said provision was used.¹⁵³¹ Nonetheless, scholars considered that the use of this *lex specialis* did not preclude the use of the *lex generalis* of the TEC when a procedural avenue under TEU was not available.¹⁵³² Accordingly, in *Segi* the CJEU would later decide on an action for damages brought under Articles 235 and 288 TEC to the extent that such damages were caused by a breach of Article 47 TEU. This possibility was even more obvious regarding the CFSP where the Court *totally* lacked jurisdiction and consequently Articles 230 and 241 TEC were used to control the boundaries between the pillars.¹⁵³³ Hence, one would have to conclude that it would have been possible for national courts to ask for a preliminary ruling on the validity of measures adopted under the TEU for breach of Article 47 TEU, regardless of the acceptance of jurisdiction under Article 35 TEU.¹⁵³⁴

Furthermore, one could argue that Article 47 TEU aimed exclusively to protect the *acquis communautaire* as it allowed the Court to ensure that intergovernmental measures did not encroach on Community competences. Nonetheless, under Article 230 TEC the Court could also ensure that EC measures did not encroach on EU competences, by making sure that such measures were adopted under the correct legal basis. Hence, first and third pillar litigation also took place without involving the application of Article 47 TEU, when the contested act had been adopted under the TEC and was consequently challenged under Article 230 TEC. The case involving the agreement entered into by the European Community and the USA on the transfer of data on air travellers (“passenger name records” or “PNR” case) constitutes a good example.¹⁵³⁵ Also in the case which

covered by Community competence.

¹⁵²⁸ Case C-176/03, *European Commission and European Parliament/European Council (Environmental Penalties)* [2005] ECR I-7879. In this case, the CJEU annulled a Council framework decision establishing environmental offences, in respect of which the Member States were required to lay down criminal penalties, considering that on account of both its aim and content such act could have been properly adopted on the basis of Article 175 EC. Thus, the framework decision encroached upon the powers conferred upon the Community, infringing Article 47 TEC. Noting that the reasoning of the Court was not strong leaving doubts as to the articulation of Article 308 TEC and the third pillar provisions see CHALMERS, “The Court of Justice and the Third pillar”, 2005, at 774. See also WASMEIER; THWAITES, “The ‘Battle of the Pillars’”, 2004, at 616 *et seq.*

¹⁵²⁹ Case C-440/05, *Commission/Council (Maritime Pollution)*, [2007] ECR I-9097. In this case the CJEU considered that although the establishment of criminal offences in a framework decision was necessary to ensure the efficacy of the rules adopted in the field of maritime pollution and could have been validly adopted on the basis of Article 80(2) TEC, “the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence (para. 70).” Consequently, those provisions were not adopted in infringement of Article 47 TEU. However, as they were also inextricably linked to other provisions of the framework decision, the latter was considered indivisible, and annulled in its entirety.

¹⁵³⁰ Case C-170/96, *Commission/Council (Air Transport Visa)*, [1998] I-2763.

¹⁵³¹ Case C-176/03, *European Commission and European Parliament/European Council (Environmental Penalties)* [2005] ECR I-7879.

¹⁵³² HINAREJOS, *Judicial Control in the European Union*, 2009, at 87.

¹⁵³³ See *supra* Section 2.2.2.

¹⁵³⁴ VAN OOIK, “Cross-Pillar Litigation before the ECJ”, 2008, at 405-406. See e.g., Joined Cases C-64 and 65/96, *Land Nordrhein-Westfalen/Uecker and JACQUÉ/Land Nordrhein-Westfalen*, [1997] ECR I-3171, para. 23.

¹⁵³⁵ Joined Cases C-317 and 318/04, *Parliament/Council (PNR)*, [2005] ECR I-2457. In this case the CJEU

opposed the Parliament and the Commission where the Parliament successfully sought the annulment of a Commission decision applying the EC's development policy legislation to fund anti-terrorist measures in the Philippines as being *ultra vires*¹⁵³⁶, and the challenge brought by Ireland against the validity of Directive 2006/04/EC on Data Retention are emblematic of that exercise.¹⁵³⁷

In sum, the CJEU has played an important role in policing the borders between the first and third pillar either under the TEU or the 230 TEC depending on the legal basis of the contested act. In this context, the Court applied its "centre of gravity test" which leaves it a wide margin of discretion.¹⁵³⁸ One can say that in most cases the CJEU has decided in favour of the first pillar but there are a few exceptions.¹⁵³⁹ Also, in the Court's case-law regarding third pillar measures challenged under Article 47 TEU the Court came to the conclusion that the measure pursued only one main aim, pertaining to the first pillar. Consequently, the Court did not elaborate in this field on the hierarchy between the pillars as it did in the first case regarding the encroachment of EC competences by second pillar acts.

III. Commentators had argued that the reasoning applied to first and third pillar litigation would apply, *mutatis mutandis*, to the second pillar.¹⁵⁴⁰ After the missed opportunity offered by the case of *Miskovic and Karic*¹⁵⁴¹, the CJEU had a chance to clarify the point in the so-called *Small Arms* (ECOWAS) case.¹⁵⁴²

Determining the correct legal basis of a given Union action is especially important in the field of external relations where the interaction of the CFSP with the other Union policies has inevitable implications.¹⁵⁴³ AG JACOBS' words in the *Centro-Com*¹⁵⁴⁴ case are particularly illustrative:

"[m]any measures of commercial policy may have a more general foreign or security policy

considered that Article 95 TEC did not constitute an appropriate legal basis for the Council decision on the conclusion of such agreement, as it did not have as its objective and subject-matter the establishment and functioning of the internal market by contributing to the removal of obstacles to the freedom to provide services and it did not contain provisions designed to achieve such an objective. Moreover, Article 95 TEC could not justify Community competence to conclude such agreement, as the latter relates to data processing operations which were excluded from the scope of the EC directive on the same subject matter. The new PNR agreement was later adopted pursuant to Articles 24 and 39 TEU. See Council Decision 2006/729/CFSP/JHA.

¹⁵³⁶ Case C-403/05, *Parliament/Commission*, [2007] ECR I-9045. The CJEU considered that indeed the contested decision pursued an objective concerning the fight against terrorism and international crime which fell outside the framework of the development cooperation policy, and consequently the Commission had exceeded its implementing powers.

¹⁵³⁷ Case C-301/06, *Ireland/Parliament and Council*, [2009] ECR I-593. The Directive had been adopted under Article 95 TEC and Ireland argued that the sole objective or, at least, the main or predominant objective of said directive was to facilitate the investigation, detection and prosecution of crime, including terrorism. Therefore, the only legal basis on which those measures could be validly adopted was Title VI TEU, in particular Articles 30, 31(1)(c) and 34(2)(b) TEU. The Court considered however that the main aim of the measure was to enable the functioning of the single market and it upheld the act.

¹⁵³⁸ On the application of this test see Case C-300/89, *Commission/Council (Titanium dioxide)*, [1991] ECR I-2867.

¹⁵³⁹ Case C-170/96, *Commission/Council (Air Transport Visa)*, [1998] I-2763; and Joined Cases C-317 and 318/04, *Parliament/Council (PNR)*, [2005] ECR I-2457.

¹⁵⁴⁰ KETVEL, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy", 2006, at 88.

¹⁵⁴¹ Joined Cases T-349 and 350/99, *Miskovic and Karic*, Removed from the register.

¹⁵⁴² Case C-91/05, *Commission/Council (Small Arms/ECOWAS)* [2008], ECR I-3651.

¹⁵⁴³ See KOUTRAKOS, "Legal Basis and Delimitation of Competence in EU External Relations", 2008, at 171-198.

¹⁵⁴⁴ Case C-124/95, *Centro-Com*, [1997] ECR I-81.

dimension. When for example the Community concludes a trade agreement with Russia, it is obvious that that agreement cannot be dissociated from the broader political context of the relations between the European Union, its Member States, and Russia”.¹⁵⁴⁵

Moreover, by definition, the CFSP is deemed to include “all matters and questions” of foreign policy – an affirmation still valid under the Lisbon Treaty.¹⁵⁴⁶ This means that it includes not only the economic but also all other aspects of the external relations of the Union for which the instruments of action are to be found in different Union policies, and formerly, in the TEC. Hence, determining the borders between the pillars and the limits of the legislator’s discretion in choosing the correct legal basis for a given external action became a fundamental issue for the Union courts to decide.

The subject was firstly discussed, before the Maastricht Treaty, in connection with the adoption by the United Kingdom of economic sanctions against the Federal Republic of Yugoslavia, which were more restrictive than those imposed by the Community at that time.¹⁵⁴⁷ The United Kingdom submitted that the national measures adopted were covered by national competence in foreign and security policy matters, and their validity could not be affected by the exclusive competence enjoyed by the Community under the Common Commercial Policy. The CJ disagreed and held instead that the powers retained by Member States had to be exercised “in a manner consistent with Community law”¹⁵⁴⁸, which meant that any additional national measures even in matters of foreign and security policy had to respect Community rules adopted under Article 133 TEC.¹⁵⁴⁹

The issue was also object of a long debate on the import of dual-use goods.¹⁵⁵⁰ The first regime for dual-use items and technology exports was based on both first and second pillar measures which were intended to establish a rigid separation between the political and economic aspects of the system.¹⁵⁵¹ The Court, which had already found dual-use goods to fall within the scope of Community law¹⁵⁵², established the applicability of Article 133 TEC to export control on dual-use goods, holding that a measure, the effect of which was to prevent or restrict the export of certain products, could not be deemed to fall outside the scope of the Common Commercial Policy on the ground that it had foreign policy and security objectives.¹⁵⁵³ Since then, the subject of dual-use goods has been re-allocated to the economic pillar and the new regime was based

¹⁵⁴⁵ Para. 41. See also CANOR, “Can Two Walk Together, Except They Be Agreed?”, 1998, at 138.

¹⁵⁴⁶ Currently Article 24(1) TEU.

¹⁵⁴⁷ Case C-124/95, *Centro-Com*, [1997] ECR I-81.

¹⁵⁴⁸ Para. 25.

¹⁵⁴⁹ Currently Article 207 TFEU.

¹⁵⁵⁰ For further developments see, e.g., GOVAERE; EECKHOUT, “On Dual Use Goods and Dualist Case Law”, 1992, at 941-965; KÖHNCKE; SCHROEDER, “Community Regime for the Control of Exports of Dual-Use Goods”, 1995, at 101 *et seq.*; EMILIOU, “Restrictions on Strategic Exports”, 1997, at 68-75; KOUTRAKOS, “Exports of Dual-Use Goods under the Law of the European Union”, 1998, at 235-251; KOUTRAKOS, *Trade, Foreign Policy & Defence in EU Constitutional Law*, 2001, at 113 *et seq.*; WEIDEL, “The Community Export Control System for Dual Use Goods”, 2002, at 419-444.

¹⁵⁵¹ A uniform system of export controls was set out in a Community regulation on the basis of Article 133 TEC while measures regarded by the Member States as having a strategic nature were the object of a joint action adopted pursuant to Article 14 TEU.

¹⁵⁵² Case C-367/89, *Criminal proceedings against Richardt*, [1991] ECR I-4621.

¹⁵⁵³ Case C-70/94, *Werner*, [1995] ECR I-3189.

exclusively on the TEC.

The *Small Arms* case was, however, the first occasion where the CJEU had to expressly address the question of knowing where to draw the line between the TEC and Title V TEU on the basis of Article 47 TEU.¹⁵⁵⁴ HINAREJOS noted that the case is particularly illuminating for three kinds of reasons: (i) firstly, it was the first case of cross-pillar litigation between the second and first pillar brought before the Court; (ii) secondly, the case illustrates the extent to which the Court was willing to apply its “centre of gravity test” in this kind of cross-pillar litigation and the role of Article 47 TEU; and (iii) thirdly, it was the first time the Court addressed the issue of the type of competence that would trigger the application of Article 47 TEU.¹⁵⁵⁵

Regarding the first point, the CJEU decided that it had jurisdiction to rule on the pleas filed under the procedural mechanisms of Articles 230 TEC and 241 TEC against joint actions as long as they concerned a possible breach of Article 47 TEU. Since the Court had considered in *Segi* that it was competent to rule on an action for damages to the extent that a breach of Article 47 TEU was at stake, and in *OMPI*¹⁵⁵⁶ and *Selmani*¹⁵⁵⁷ that individuals were allowed to bring an action for annulment against a common position on the grounds of a violation of Article 47 TEU, one should assume that a preliminary ruling on the validity of a CFSP measure would also be considered admissible if the national court considered that there was a given second pillar act which encroached on the Community’s competences.

Secondly, this was the first case where the Court, applying its “centre of gravity test”, found that the CFSP act had two equally central aims or components which could not be dissociated. Under the first pillar, the solution would have been to adopt a dual legal basis. In fact, the case-law of the CJEU under the TEC concerning the choice of a legal basis for a measure with several objectives and/or components was already well settled.¹⁵⁵⁸ According to such case-law, if a measure pursued several purposes or had several components and if one of those was identifiable as the main or predominant purpose or component, whereas the others were merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.¹⁵⁵⁹ Only exceptionally, if the measure simultaneously pursued a number of objectives or had several components that were inextricably linked, without one being secondary and indirect in relation to the other, the act would have to be founded on the various corresponding legal bases.¹⁵⁶⁰ However, in *Small Arms* the Court rejected such possibility and established a *hierarchy rule*

¹⁵⁵⁴ In this case, the CJEU had to decide a dispute between the Commission and the Council on whether a financing measure for West Africa had to be undertaken within the Community’s development policy or rather within the CFSP. For a case comment see DASHWOOD, “The Law and Practice of CFSP Joint Actions”, 2008, at 65-77; KOUTRAKOS, “Development and Foreign Policy” 2008, at 289, 290; HILLION; WESSEL, “Competence Distribution in EU External Relations after ECOWAS”, 2009, at 551-586; VAN VOOREN, “The Small Arms Judgment in an Age of Constitutional Turmoil”, 2009, at 231-248; EECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 270-276.

¹⁵⁵⁵ HINAREJOS, *Judicial Control in the European Union*, 2009, at 130.

¹⁵⁵⁶ Case T-228/02, *Organization des Modjahedines du Peuple d’Iran/Council*, [2006] ECR II-4665.

¹⁵⁵⁷ Case T-299/04, *Selmani/Council and Commission*, [2005] ECR II-20.

¹⁵⁵⁸ See Case C-300/89, *Commission/Council (Titanium dioxide)*, [1991] ECR I-2867, para. 10; Case C-268/94, *Portugal/Council*, [1996] ECR I-6177, para. 22; Case C-94/03, *Commission/Council*, [2006] ECR I-I, paras. 34-36.

¹⁵⁵⁹ Case C-36/98, *Spain/Council*, [2001] ECR I-779, para. 59; Case C-211/01, *Commission/Council*, [2003] ECR I-8913, para. 39; and Case C-338/01, *Commission/Council*, [2004] ECR I-4829, para. 55.

¹⁵⁶⁰ See Case C-336/00, *Huber*, [2002] ECR I-7699, para. 31; and Case C-211/01, *Commission/Council*, [2003] ECR

according to which in such cases the legal basis of the first pillar would prevail. The Court considered that Article 47 TEU meant that whenever a given measure envisaged by the Union's institutions could be taken on the basis of the TEC the measure concerned must not be taken on the basis of the TEU.¹⁵⁶¹ While the Court had not elaborated in detail on the purpose of Article 47 TEU in the past, AGs had argued a number of times that such provision established “the primacy of Community law”¹⁵⁶²; or “the primacy of Community action under the EC Treaty over activities undertaken on the basis of Title V or Title VI of the EU Treaty”¹⁵⁶³; or that “its primary purpose is to protect the *acquis communautaire* from being affected by the provisions of, and decisions taken under Title V and Title VI of the EU Treaty.”¹⁵⁶⁴ This interpretation was confirmed in the *Small Arms* case by both the AG and the CJEU. Referring, for the first time, to former Articles 2 and 3(1) TEU, the Court confirmed that the objective of Article 47 TEU was “to maintain and build on the ‘*acquis communautaire*’.”¹⁵⁶⁵ In the Court’s view, said provision did not “work both ways” between the TEC and the TEU but established what could be considered “essentially a one-way street.”¹⁵⁶⁶ Accordingly, having found that the contested measure had two main aims/components, the CJEU decided that the Community competence prevailed.¹⁵⁶⁷

Finally, the Court considered that the nature of the EC competence at stake had no relevance on the application of Article 47 TEU: that assessment depended on the attribution, *i.e.* the very existence of that competence, and not its exclusive or shared nature.¹⁵⁶⁸ As a general proposition, this is probably in line with the two earlier judgments where the CJ found there to be a violation of Article 47 TEU – the *Environmental Penalties* and *Maritime Pollution* cases referred to above – both areas where the Community’s competence was not exclusive. In those cases, however, the issue concerning the significance of the nature of competence was not argued or at least not addressed by the CJEU.

Summing up, the CJEU considered that where there was a competence of the Community, an action by the Union was precluded. However, this did not preclude an action by Member States outside of the Union framework. In other words: there was no horizontal subsidiarity between the EC and the EU. The Court suggested that the horizontal (EU/EC) and the vertical (MS-EU/EC) distribution of competence differed in terms of principles.¹⁵⁶⁹ The nature of the competence was

I-8913, para. 40.

¹⁵⁶¹ HELISKOSKI, “Small Arms and Light Weapons within the Union’s Pillar Structure”, 2008, at 900.

¹⁵⁶² Opinion of AG RUIZ-JARABO COLOMER in *Environmental Penalties*.

¹⁵⁶³ Opinion of AG MAJÁK in *Maritime Pollution*.

¹⁵⁶⁴ Opinion of AG SHARPSTON in Case C-212/06, *Government of the French Community v Flemish Government*, [2008] ECR [2008] I-1683.

¹⁵⁶⁵ Para. 59.

¹⁵⁶⁶ HELISKOSKI, “Small Arms and Light Weapons within the Union’s Pillar Structure”, 2008, at 904.

¹⁵⁶⁷ It has been suggested that this case represents a Lisbon-type solution *avant-la-lettre*. See VAN VOOREN, “The Small Arms Judgment in an Age of Constitutional Turmoil”, 2009, at 247-248. See *infra* Part II, Chapter 2, Section 2.2.3(c).

¹⁵⁶⁸ See ECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 271, 272, noting that the according to the ECOWAS decision, Article 47 “protected all EC competences, be they exclusive or shared.”

¹⁵⁶⁹ This case-law is certainly cherished by those who regarded the so-called Community method as the cornerstone of the development of the Union. However, the decision has been largely criticized on the grounds that it may have jeopardized the overall unity and consistency of the Union’s external action. For a critical analysis, see HILLION; WESSEL, “Competence Distribution in EU External Relations after ECOWAS”, 2009, at 580 *et seq.* Indeed, in practice, the concrete solution therein adopted by the CJ may have turned CFSP into a residual policy of the Union. See also HILLION; WESSEL, “Restraining External Competences of EU Member States under the CFSP”, 2008, at 79 *et*

irrelevant to define such relationships.¹⁵⁷⁰ It became clear that, insofar as “pillar-crossing” measures with both Community and Union objectives and/or components were concerned there could not be a measure which pursued objectives of the EC and the EU at the same time. Both AG MENGOZZI and the Court considered it impossible to have recourse to a dual legal basis “across the pillars” without breaching Article 47 TEU.¹⁵⁷¹

For purposes of the present study one should highlight that the *Small Arms* ruling confirmed a trend in the development of the case-law of the CJEU regarding Article 47 TEU. In fact, the CJEU has never dismissed an action based on that provision. By having provided an opportunity for the CJEU to rule on the interpretation of Article 47 TEU in a cross-pillar case involving first and second pillar measures, the *Small Arms* case allowed the Court to protect the *acquis communautaire* also in relation to conflicting CFSP acts. Possibly more importantly, the CJEU pointed to the interrelationship between instruments in different pillars and even to the possible need to implement CFSP instruments through other Union acts. The resulting expansion of the CJEU’s jurisdiction is self-evident.

2.2.3. On the Effective Judicial Protection of Private Parties: from *Pupino* to the Fight against Terrorism

I. The CJEU’s jurisdiction over the intergovernmental pillars was also tested in cases involving the protection of rights of private parties. The question, here, is not competence-related, but rights-related, as it regards the CJEU’s jurisdiction with regard to the protection of individuals’ rights, *maxime* fundamental rights, when these conflict with a certain CFSP or PJCCM act. The Court held clearly that it did not have jurisdiction under Articles 35 and 46 TEU to assess the legality of an act which came within the scope of the CFSP or the JHA/PJCCM and that its powers were listed *exhaustively* in Article 46 TEU.¹⁵⁷² Moreover, the Court acknowledged that the jurisdiction under the TEU was “less extensive”¹⁵⁷³ than under the TEC. The mere fact that there was “no complete system of actions and procedures designed to ensure the legality of the acts of the institutions”¹⁵⁷⁴ in the context of the TEU could not justify an extended interpretation of the Court’s jurisdiction on the grounds of the need to ensure protection of individual rights.

seq.; VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 1003.

¹⁵⁷⁰ HELISKOSKI, “Small Arms and Light Weapons within the Union’s Pillar Structure”, 2008, at 906.

¹⁵⁷¹ *Ibid.*, at 909; EECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 272. The *Small Arms* judgment could, in addition, be seen as a *pause* in the development of the unity of the Union legal order. In fact, the Court did not exclude the possibility of a dual legal basis on the basis of the obvious procedural differences between the two policies at stake but based on a constitutional priority rule embedded in Article 47 TEU, which clearly pointed to the *separate nature* of the EC and the EU legal orders. See VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 1003. Hence, whereas in the cases of *Pupino*, *Segi*, *Advocaten voor de Wereld* the CJ suggested that the EU was developing as a legal order based on some *common key principles*, partially imported from the EC, in *ECOWAS* the CJ suggested that the new legal order remained in the EC. Some commentators considered, therefore, that the *ECOWAS* decision could be read as a “halt in the judicial process of unification of the proverbial Union of ‘bits and pieces’”. See HILLION; WESSEL, “Competence Distribution in EU External Relations after *ECOWAS*”, 2009, at 582.

¹⁵⁷² Case T-338/02, *Segi and others/Council* [2004] ECR II-1647, para. 19.

¹⁵⁷³ Case C-105/03, *Pupino*, [2005] ECR I-5285, para. 35. In Case T-228/02, *Organization des Modjahedines du Peuple d’Iran/Council*, [2006] ECR II-4665, the GC stated that: “[t]he EU Treaty has, in relation to acts adopted on the basis of Titles V and VI thereof, established a limited system of judicial review, certain areas being outside the scope of that review and certain legal remedies not being available (para. 54).”

¹⁵⁷⁴ Case C-105/03, *Pupino*, [2005] ECR I-5285, para. 35.

II. In the field of the third pillar the most obvious gap in the the availability of judicial remedies arose with regard to those Member States who had not accepted the jurisdiction of the CJEU. Hence, as USHER as put it:

“[a]n alleged money launderer, for example, who wished to challenge the transmission of information under the framework decision would no doubt raise the issue before a national court. Such a court would presumably give judgment. However, there was no possibility for the courts of such Member States to make a reference on possible questions of validity to the CJEU. In that circumstance it might respectfully be submitted that those Member States failed to provide an effective remedy as required under Articles 6 and 13 of the ECHR.”¹⁵⁷⁵

Nonetheless, the CJEU tried to push some of its *first pillar case-law* to the realm of the third pillar, and it did it with a certain degree of success.¹⁵⁷⁶ As illustrated by the *Pupino* judgment, the CJEU did not hesitate to seek inspiration in the principles of *interpretation* adopted in the context of the former TEC to interpret similar provisions included in the intergovernmental pillars.¹⁵⁷⁷ In fact, in this case, the CJEU not only made an explicit comparison between third pillar framework decisions and Community directives in terms of their legal effects, but also suggested that typical Community principles – in this case the principle of loyal cooperation – could have a transpillar application. Unconvinced by the Italian and United Kingdom Governments’ argument that the TEU contained no obligation similar to that laid down in former Article 10 TEC, the Court held that the principle of loyal cooperation binds the Member States also in relation to the Union, for reasons of *effectiveness of EU law*.¹⁵⁷⁸ Moreover, the lack of direct effect of framework decisions proved to be irrelevant and did not stop the Court from extending the principle of indirect effect to third pillar legislation. One should note that the CJEU reached these conclusions in the field of the former third pillar – where the jurisdiction of the CJEU was not completely excluded – by looking at the similarities between framework decisions and directives. With regard to CFSP instruments, such comparison would be much more difficult to achieve.¹⁵⁷⁹

Scholars noted that *Pupino* carried “the potential for significant Member State court involvement in the effective enforcement of inter-governmental EU law.”¹⁵⁸⁰ It was also noticed that this decision opened the door for *comprehensive* Member State and CJEU review of PJCCM

¹⁵⁷⁵ USHER, “Direct and Individual Concern”, 2003, at 594.

¹⁵⁷⁶ See LENAERTS, “The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice”, 2010, at 298-301.

¹⁵⁷⁷ See FLETCHER, “Extending Indirect Effect’ to the Third pillar”, 2005, at 862-877; SPAVENTA, “Opening Pandora’s Box”, 2007, at 9 *seq.*; PEERS, “Salvation Outside the Church”, 2007, at 909 *et seq.*

¹⁵⁷⁸ Para. 41.

¹⁵⁷⁹ WESSEL, “The Constitutional Unity of the European Union”, 2009, at 304.

¹⁵⁸⁰ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 23. Following the reasoning of the CJ in *Pupino* and suggesting the extension of the *Francovich* doctrine to the third pillar also on the basis of Article 10 TEC see RAFARACI; BELFIORE, “Judicial Protection under the Third Pillar of the European Union”, 2007, at 13 *et seq.* Also in this regard considering *Pupino* as a bridge to allow the transference of first pillar principles to the TEU see SPAVENTA, “Opening Pandora’s Box”, 2007, at 18 *seq.* Noting that the prohibition of direct effect did not extend to conventions under Article 35(2)(d) which could have mean that the CJEU could have acknowledged direct effect of such conventions as it occurs with international agreements under the TEC pillar see WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 22.

measures in light of fundamental rights.¹⁵⁸¹ Moreover, in the case of remedial framework decisions – which address issues of standing in criminal proceedings¹⁵⁸², confiscation of the proceeds of a crime¹⁵⁸³, the European Arrest Warrant¹⁵⁸⁴ and orders of freezing property or evidence¹⁵⁸⁵ – *Pupino* could have “lead the way to the dismantling of the fractious remedial landscape generated by the three pillar structure.”¹⁵⁸⁶ The potential of the principle of *effet utile* in the building of *effective remedies* at the national level is considerably high, notably regarding the obligation of national courts to disapply possibly conflicting national procedural and remedial rules.¹⁵⁸⁷ However, one should note that the heart of *Pupino* lies with enforcing Union law *against Member States* and not against the Union itself. Hence, the invocation of the principles of effectiveness of EU law and indirect effect is of little help for individuals wishing to challenge the validity of Union acts.¹⁵⁸⁸

Notwithstanding, in *Pupino*, before answering the substantive issues raised by the national court, the CJEU had to reject some admissibility claims put forward by some of the intervening Member States. In doing so, the Court made clear that the preliminary procedure provided for by Article 35 TEU was governed by the *same interpretative* rules as those of Article 234 TEC, the “mother of all preliminary rulings.”¹⁵⁸⁹ This was afterwards confirmed in *Gasparini*¹⁵⁹⁰ and *Van Straaten*¹⁵⁹¹ where the Court applied its case-law on Article 234 TEC to Article 35 TEU.¹⁵⁹² Later, in *Segi and Gestoras pro Amnistia*¹⁵⁹³ the CJEU drew also from the logic of Article 234 TEC in order to extend the scope of the preliminary procedure provided for by Article 35 TEU.

Notwithstanding, far more spectacular in this respect was the judgment in *Advocaten voor de Wereld*¹⁵⁹⁴, where the Court upheld the validity of the Council’s framework decision which established the European Arrest Warrant. As seen above, unlike Article 234 TEC or even Article 68 TEC, Article 35 TEU only provided for the interpretation by the Court, of secondary legislation and not of the Treaties themselves. Hence, the Czech Government deemed the preliminary question inadmissible in that it (indirectly) required the Court “to examine Article 34(2)(b) EU, which is a provision of primary law not reviewable by the Court.” The Court remained unconvinced by this argument, as well as by the difference in the wording of the above-mentioned Treaty provisions. It held that:

“[u]nder Article 35(1) EU, the Court has jurisdiction, subject to the conditions laid down

¹⁵⁸¹ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 23. See paras. 59-60 of the decision.

¹⁵⁸² Council Framework Decision 2001/220/JHA.

¹⁵⁸³ Council Framework Decision 2001/500/JHA.

¹⁵⁸⁴ Council Framework Decision 2002/584/JHA.

¹⁵⁸⁵ Council Framework Decision 2003/577/JHA.

¹⁵⁸⁶ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 24.

¹⁵⁸⁷ *Ibid.*, at 103, noting that the CJEU has imposed the obligation for Member States to provide an effective remedy in cases where direct effect was precluded, as triangular situations and horizontal situations. Moreover, the CJEU has generated a body of remedial case-law under the Brussels Convention which could have been transposed to the third pillar.

¹⁵⁸⁸ See *supra* Chapter 1, Section 1.2.3(a).

¹⁵⁸⁹ Paras. 28-38. See also EECKHOUT, “The European Court of Justice and the ‘Area of Freedom, Security and Justice’”, 2000, at 160; PEERS, “Salvation Outside the Church”, 2007, at 888; HATZOPOULOS, “With or Without You...”, 2008, at 50.

¹⁵⁹⁰ Case C-467/04, *Gasparini and others*, [2006] I-9199, paras. 41-45.

¹⁵⁹¹ Case C-150/05, *van Straaten*, [2006] I-9327, paras. 31-39.

¹⁵⁹² See also Opinion of AG SHARPSTON in Case C-288/05, *Kretzinger*, [2007] ECR I-6441, paras. 79-80.

¹⁵⁹³ Case C-354/04 P, *Gestoras Pro Amnistia and others/Council*, [2007] ECR I-1579.

¹⁵⁹⁴ Case C-303/05, *Advocaten voor de Wereld*, [2006] ECR I-3663.

in that Article, to give preliminary rulings on the interpretation and validity of, *inter alia*, framework decisions, *which necessarily implies that it can, even if there is no express power to that effect, be called upon to interpret provisions of primary law*, such as Article 34(2)(b) EU where, as in the case in the main proceedings, the Court is being asked to examine whether a framework decision has been properly adopted on the basis of that latter provision” (emphasis added).¹⁵⁹⁵

Hence, the Court reshaped its preliminary competence in the third pillar in parallel with that of the first. By doing this, it extended its jurisdiction to all acts of secondary legislation (*Segi/Gestoras pro Amnistia*) and it interpreted the Treaty provisions themselves (*Advocaten voor de Wereld*).¹⁵⁹⁶ Once again, the CJEU did not hesitate to adopt a broad reading of its jurisdiction to ensure private enforcement of EU law *against Member States*.

Nonetheless, the “bigger question”¹⁵⁹⁷ was to know whether Union courts could exercise jurisdiction over the third pillar *beyond the limits* of Article 35 TEU, and more specifically over *Union acts*. The issue was discussed in *Spain/Eurojust*. The case concerned the control of validity of eight calls for applications with a view to establishing reserve lists for Eurojust temporary staff. Spain brought an action for annulment against parts of those acts such as the fact that persons submitting their applications in other European languages had nonetheless to hand in some documents in English and several points regarding the candidates’ qualifications in respect of knowledge of languages. Eurojust, a third pillar agency, was not referred to in Article 230 TEC or Article 35 TEU. Notwithstanding, AG MADURO recalling the *Les Verts* decision, defended the need for the Court to assume jurisdiction to rule on the case. The AG considered that the principle of effective judicial protection should not be limited to the TEC but should *extend to all areas of the Union intervention*, trumping any eventual limitations to the Court’s jurisdiction. This assumption was based on two kinds of arguments. First, the AG noticed that, in the past, the CJEU had consistently held that Community bodies, vested with legal personality by the TEC were also amenable to its jurisdiction, as any other solution would be contrary to the principle that every Community decision having an adverse effect, wherever it emanates from, must be amenable to effective judicial review.¹⁵⁹⁸ Second, in the context of Article 220 TEC, the Court sees its mission as requiring it to ensure compliance with the law in accordance with the criteria of a Community governed by the rule of law. Pursuant to Article 46 TEU it was, therefore, incumbent on the CJEU to *ensure the observance of legality in the context of the TEU in accordance with the same criteria*. This was the *logical implication* of a Union based on the rule of law, as referred to in Article 6 TEU. Consequently, it was essential for measures of Union institutions and bodies to be amenable to review by the CJEU, as long as they were intended to produce legal effects *vis-à-vis* third parties.¹⁵⁹⁹

The Court disregarded these considerations and dismissed the action on the ground that the

¹⁵⁹⁵ Para. 18.

¹⁵⁹⁶ HATZOPOULOS, “With or Without You...”, 2008, at 51.

¹⁵⁹⁷ PEERS, “Salvation Outside the Church, 2007, at 888.

¹⁵⁹⁸ Para. 16.

¹⁵⁹⁹ Para. 17.

contested acts were not Community measures. It considered that Article 230 TEC was not applicable to Eurojust and that Article 41 TEU did not make such provision applicable to the third pillar, “the jurisdiction of the Court in such matters being defined in Article 35 EU, to which Article 46(b) EU refers.”¹⁶⁰⁰ Hence, an action brought under Article 230 TEC would have to be dismissed. The Court denied, however, the existence of a lack of protection, as Eurojust staff was to be subject to the rules and regulations applicable to officials and other servants of the European Communities. The main parties concerned, notably the candidates for the various positions in the contested calls for applications, had access to the Union courts under the conditions laid down in Article 91 of the Staff Regulations. Moreover, in the event of such an action, Member States would be entitled to intervene in the proceedings in accordance with Article 40 of the Statute of the CJEU and could appeal against the judgment of the GC.¹⁶⁰¹

One should note that the CJEU did not reply to the argument according to which the rule of law requires review of all Union measures.¹⁶⁰² Nor did it explore the parallels between Article 230 TEC and Article 35 TEU as it did in *Pupino* between the latter provision and Article 234 TEC. Under the Lisbon Treaty situations such as this became covered by the new wording of Article 263 TFEU.¹⁶⁰³ Nonetheless, it seems worth noticing that the reasoning underlying the Opinion of AG MADURO could be imported to other instances, where the limits to the jurisdiction of the CJEU threaten the *completeness* and *coherence* of the system of judicial review at the Union level, notably when the protection of individuals’ rights is at stake.

III. The so-called “war on terror cases” and the adoption by the EU and Member States of “black lists”¹⁶⁰⁴ would later raise important questions regarding the protection of fundamental rights within the EU, notably the need to find the right balance between the protection of those rights and restrictions introduced on grounds of public interest, public order, national and international security, and the maintenance of international relations. A detailed analysis of the implications of the judgments falls outside the scope of this dissertation.¹⁶⁰⁵ Nonetheless, in so far as these cases tested the limits of the CJEU’s jurisdiction it is worth to put forward some considerations.

At the outset, one may question the adoption by the United Nations (UN) organs of measures which impose obligations directly on individuals, especially considering the absence of effective judicial remedies at the national, supranational or international level. In fact, the only

¹⁶⁰⁰ Paras. 35-40.

¹⁶⁰¹ Noting that the potential implication of this judgement was the application of other secondary EC rules to the third pillar, besides the Staff Regulations, as for instance the rules on privileges and immunities, which would be brought under the CJEU’s jurisdiction see PEERS, “Salvation Outside the Church”, 2007, at 889, 890.

¹⁶⁰² *Ibid.*, at 890.

¹⁶⁰³ See *infra* Part II, Chapter 2, Section 2.1.1.

¹⁶⁰⁴ LABAYLE; MEDHI, “Le contrôle juridictionnel de la lutte contre le terrorisme”, 2009, at 231.

¹⁶⁰⁵ For a detailed analysis of the most significant CJEU’s decisions see e.g. TOMUSCHAT, “Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*”, 2006, at 537-551; ECKES, “Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council and UK (OMPI)*”, 2007, at 1117-1129; EECKHOUT, “Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions”, 2007, at 183-206; HINAREJOS, “Recent Human Rights Developments in the EU Courts”, 2007, at 80 *et seq.*; LABAYLE; MEDHI, “Le contrôle juridictionnel de la lutte contre le terrorisme”, 2009, at 231-265; TRIDIMAS, “Terrorism and the ECJ”, 2009, at 103 *et seq.*

means available to individuals for challenging measures of the UN Security Council is before the Council itself, through the government of the State of which the applicants are nationals or in the territory of which they reside.¹⁶⁰⁶ In the context of the debate on the reform of the UN institutional arrangements, the judgments of the CJEU worked as a “reminder that the system is, in this respect, flawed”¹⁶⁰⁷ and should constitute an opportunity of reform.¹⁶⁰⁸ Faced with this important *lacuna* of judicial protection, it is noteworthy that the CJEU has conceived the Union jurisdictional system as a mechanism for the enforcement of fundamental rights when the implementation of international obligations is at stake. Here, the strong constitutionalist approach adopted by the CJ represents a serious attempt to extend the jurisdiction of the CJEU based on the need to ensure human rights protection at the EU level, and should be welcomed. Thus, it has been suggested that these cases show a “paradigm shift”¹⁶⁰⁹ in the Court’s case-law, by which the CJEU forces itself to “follow UN obligations and pay allegiance to its own principles at the same time.”¹⁶¹⁰

Notwithstanding, regarding the functioning of the Union’s system of judicial review, these cases illustrate the difficulty to ensure the respect for the rule of law within a complete system of judicial remedies. In fact, as VITSENTZATOS has put it:

“[i]n cases where the action of the Union or its representatives is not, or is partially, subject to judicial scrutiny or remedy, the issue for review is much more than enlarging admissibility – it is about access to justice.... When [individuals] attempt action before national courts, given that the acts are a result of direct applicability of EC measures, direct action before the CJ is the more appropriate way forward. On the EU side the objection is that the Community has no discretion but to implement whatever the CFSP act requires it to do, autonomously or upon mandatory request of the UNSC, and the Court has no power to control CFSP acts.”¹⁶¹¹

Truly, when such EU acts require implementation at the national level, private parties should be allowed to initiate proceedings before a national court, which should then have the possibility, or be under a duty, to make a reference to the CJ for a ruling on the interpretation or validity of the CFSP measure. Moreover, where the relevant provisions are directly applicable – as it was the case of the anti-terrorist legislation – direct access to the Union courts should be provided. However, under the TEU, neither actions brought against CFSP acts imposing sanctions to individuals which did not require implementation by means of other EC acts and/or national measures, nor preliminary references on the validity of such acts were inadmissible before the Union courts. Moreover, as preliminary rulings were made *optional* under the third pillar, not even

¹⁶⁰⁶ NETTESHEIM, “U.N. Sanctions against Individuals”, 2007, at 568-569; HALBERSTAM; STEIN, “The United Nations, The European Union, and the King of Sweden”, 2009, at 28 *et seq.*

¹⁶⁰⁷ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 112.

¹⁶⁰⁸ ZIEGLER, “Strengthening the Rule of Law, but Fragmenting International Law”, 2009, at 304.

¹⁶⁰⁹ NETTESHEIM, “U.N. Sanctions against Individuals”, 2007, at 567 *et seq.*

¹⁶¹⁰ WESSEL, “The Constitutional Unity of the European Union”, 2009, at 304.

¹⁶¹¹ VITSENTZATOS, “The EU as an International Actor” *apud* KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 112.

regarding PJCCM acts it could be said that judicial review was *always* indirectly ensured.

The case-law on sanctions imposed against individuals in the fight against terrorism confirms the *unwillingness* of the CJEU to annul CFSP (and PJCCM) common positions, notably on the grounds of the violation of fundamental rights.¹⁶¹² Most cases on the war on terrorism concerned a challenge to the Community implementation of a CFSP common position. For instance, in *Sison*¹⁶¹³ and *AlAqsa*¹⁶¹⁴ the GC merely annulled the Community regulation, and not the common position on which the regulation was based. The CJ did the same in *Kadi*¹⁶¹⁵ as in all other well-known cases.¹⁶¹⁶ In *OMPI* and *Selmani* the GC was asked *exclusively* to review the legality of a common position directly. The Court considered itself to have jurisdiction *only insofar* as a breach of Article 47 TEU was at stake. As the measure had been properly adopted under the CFSP no further review followed, and *no other alternative remedy* was offered. The GC reached the same conclusion in *Segi* and *Gestoras pro Amnistia*.

One should note, however, that although not annulled by the Union courts, the interpretation of CFSP acts played an important part in the CJEU's rulings. In fact, the CJEU took the scope and meaning of the CFSP acts into consideration when it came to a final decision on the cases. Irrespective of the formal exclusion of its jurisdiction over CFSP matters, the Court did not ignore what had been decided in the non-Community pillars, and it acknowledged the existence of a relationship between the pillars. This was already clear in the *Yusuf*¹⁶¹⁷ and *Kadi* cases, in which the GC not only addressed the vertical hierarchy between the national, the EU and the UN legal order, but also the so-called "constitutional architecture of the pillars."¹⁶¹⁸ In the same case the CJ acknowledged the "coexistence of the Union and the Community as integrated but separate legal orders."¹⁶¹⁹ In relation to the imposition of economic and financial sanctions to individuals both Union courts held that the Union's objectives could only be attained by making use of Community competences, even if they reached different conclusions regarding the legal basis of such action: the Community could only adopt EC regulations after the adoption of a common position or a joint action under the CFSP. This is said to be a "clear example of an explicit subordination of the Community to CFSP decision-making and an indication that the unity of the Union's legal order cannot be neglected by the Court."¹⁶²⁰ However, this still merely reflects the "indirect adjudication" on CFSP provisions, referred to above.¹⁶²¹

¹⁶¹² WESSEL, "The Constitutional Unity of the European Union", 2009, at 301.

¹⁶¹³ Case T-47/03, *Sison/Council and Commission*, [2003] ECR II-2047.

¹⁶¹⁴ Case T-327/03, *Al Aqsa/Council*, [2007] ECR II-79.

¹⁶¹⁵ Joined Cases C-402 and 415/05 P, *Kadi and Al Barakaat International Foundation/Council and Commission*, [2008] ECR I-6351.

¹⁶¹⁶ See Joined Cases C-399 and 403/06 P, *Hassan and Ayadi/Council and Commission*, [2009]. See HELISKOSKI, "Case T-253/02, *Chafiq Ayadi v. Council* and Case T-49/04, *Faraj Hassan v. Council and Commission*", 2007, at 1143-1157. For a contextual analysis of the adoption of the sanctions regime see VLCEK, "Acts to Combat the Financing of Terrorism", 2006, at 493 *et seq.*; HARPAZ, "Judicial Review by the European Court of Justice of UN 'Smart Sanctions' against Terror in the *Kadi* Dispute", 2009, at 73 *et seq.*

¹⁶¹⁷ Case T-306/01, *Yusuf and Al Barakaat International Foundation/Council and Commission* [2005], ECR II-3533.

¹⁶¹⁸ WESSEL, "The Constitutional Unity of the European Union", 2009, at 301. See Case T-315/01, *Kadi/Council and Commission*, [2005] ECR II-3649.

¹⁶¹⁹ Para. 125.

¹⁶²⁰ WESSEL, "The Constitutional Unity of the European Union", 2009, at 302.

¹⁶²¹ See *supra* Section 2.2.2.

The difficulties encountered by private parties in this respect can be illustrated by reference to the cases of *Segi* and *Gestoras pro Amnistia*. The applicants brought an action against the Council, seeking compensation for damages allegedly suffered as a result of their names being included in a list of terrorist persons, groups and bodies, pursuant to a Council common position adopted jointly on the basis of Titles V and VI TEU. *Segi* and *Gestoras* belonged to the group of the so-called domestic terrorists and thus their assets were not frozen pursuant to EC acts but by Member States.¹⁶²² Notwithstanding, in the absence of implementing measures, they could not challenge the legality of the measures before national courts. Equally, as they were inserted in a CFSP act, those measures could not be challenged before the Union courts. Consequently, the insertion of the list in an instrument adopted in the framework of intergovernmental cooperation *effectively deprived them of a legal remedy*. Nonetheless, *Segi* and *Gestoras* contested the legality of their inclusion in the Union lists and asked for compensation in damages.¹⁶²³

The GC considered that the only provision of the contested act from which the alleged damage to the applicants could flow was based on the Title VI and noted that, pursuant to Article 35 TEU an action for damages was not provided for in the context of the third pillar. The GC confirmed that the “powers of the Court of Justice are listed *exhaustively* in Article 46 TEU” and that Article 46(d) EU gave the CJEU no further competence as to the protection of fundamental rights referred to in Article 6(2) TEU. Moreover, the Court acknowledged that “indeed probably no effective judicial remedy” was available to applicants, whether before the Union courts or national courts. In fact, contrary to the Council’s submissions, “it would not be of any use for the applicants to seek to establish the individual liability of each Member State for the national measures enacted pursuant to Common Position 2001/931, as a means to try to obtain compensation for the damage allegedly sustained on account of the inclusion of *Segi* in the annex to that common position.”¹⁶²⁴ Indeed, such an action was likely to be of little effect. Moreover, it was also not possible to challenge the legality of the inclusion of *Segi* in the Union listing, in particular through a reference for a preliminary ruling on validity, because of the choice of a common position. Nonetheless, repeating a well-established *dictum* the GC considered that:

“[t]he absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU.”¹⁶²⁵

¹⁶²² In the autonomous European sanctions regime the Council distinguished internal terrorist suspects and external terrorist suspects. *Segi* fell in the former group. This meant that although it was listed in the CFSP common position its assets were not frozen by the EC but by the Member States, as it was not clear whether the EC had competence to adopt sanctions against these individuals directly. See ECKES, “Sanctions against Individuals”, 2008, at 211.

¹⁶²³ Previously in *Royal Olympic Cruises* case a number of Greek companies brought an application for compensation against the Union before the GC for the loss allegedly suffered as a result of the imposition of sanctions against the Federal Republic of Yugoslavia (FRY), indirectly questioning the legality of measures adopted on the basis of Title V TEU. The GC dismissed the action holding that the conditions necessary for giving rise to non-contractual liability of the Community were not satisfied, not without clarifying that the action was admissible under the TEC *only*. The CJ dismissed the action on appeal as manifestly unfounded for lack of causation: only a contribution of the institutions to the intervention by the Union might potentially have been considered to constitute a sufficiently direct causal link between the wrongdoing and the damage suffered. The adoption of the contested regulations did not in itself have any direct relationship with such intervention and the purported loss. See Case T-201/99, *Royal Olympic Cruises and others/Council and Commission*, [2000] ECR II-4005, and Case C-49/01, *Royal Olympic Cruises and others/Council and Commission*, Unpublished.

¹⁶²⁴ Case T-338/02, *Segi and others/Council* [2004] ECR II-1647, para. 38.

¹⁶²⁵ *Ibid.*, paras. 36-40. The applicants further invoked a Council declaration concerning the right to compensation,

Lastly, the GC dismissed the applicants' alternative claim requesting a declaration that the Council had infringed the general principles of Union law stating that there was "no remedy whereby the Court can adopt a position by means of a general declaration on a matter which exceeds the scope of the main proceedings."¹⁶²⁶

The CJ eventually confirmed both rulings on appeal¹⁶²⁷ which was more serious, as the application brought before the ECtHR by the two Basque associations had been equally unsuccessful.¹⁶²⁸ Nonetheless, there are a few points of the CJ's decision that are worth mentioning. First, the CJ confirmed that Article 41 TEU did not mention Articles 235 or 288(2) TEC which meant that an action for damages was not admissible within the third pillar. Second, the Court reaffirmed its *UPA dictum* according to which "while a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the Treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU."¹⁶²⁹ Third, the CJ recalled the obligation imposed on Member States and, in particular, their courts and tribunals, to "interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the *lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union* or to its application to them and to seek compensation for any loss suffered."¹⁶³⁰ Last but not least, the CJ pointed to the existence of an *alternative remedy* by focusing on the possibility of a preliminary reference on the validity of common positions that affect the rights of third parties. In this context, the CJEU extended its substance over form approach to the categorisation of legislative acts under the TEC to PJCCM common positions. The CJEU held that a common position adopted under Article 34(2)(a) TEU was "not supposed to produce of itself legal effects in relation to third parties."¹⁶³¹ Subsequently, the Court extended the *scope of acts* capable of being referred for a preliminary reference under Article 35(1) TEU to include "all measures adopted by the Council, *whatever their nature or form*,

which provided that "in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress." The GC disregarded the value of such act. In *OMPI* the GC left open the door of possible alternative remedies. See Case T-228/02, *Organization des Modjahedines du Peuple d'Iran/Council*, [2006] ECR II-4665, para. 55.

¹⁶²⁶ Case T-338/02, *Segi and others/Council* [2004] ECR II-1647, para. 48.

¹⁶²⁷ AG MENGIOZZI considered, however, that under Union law the appellants enjoyed the right to compensation in the national courts for possible infringement of their (fundamental) rights caused by the common positions at stake. Nonetheless, the AG noted the difficulties of such a challenge before the national judiciaries, notably regarding the choice of jurisdiction, the defendant, the applicable law and the possibility of immunity of the Union. See paras. 144-154 of the Opinion in *Segi*.

¹⁶²⁸ *Segi and Gestoras Pro-Amnistía and others v. Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, The United Kingdom and Sweden (dec.)*, Applications nos. 6422/02; 9916/02, Decision of 23/05/2002. The Strasbourg Court noted that the applicants had not produced reasonable and convincing evidence of the likelihood that a violation affecting them personally would occur. Given that the common position in question was not directly applicable in the Member States, and could not form the direct basis for any criminal or administrative proceedings against individuals, it did not give rise to legally binding obligations for the applicants. For further developments see CARRUTHERS, "The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs", 2009, at 795 et seq.

¹⁶²⁹ Para. 50.

¹⁶³⁰ Para. 56. Considering that this obligation would entail the need for the national courts allowed to make references to the CJEU to admit actions initiated by individuals residing in other Member States who did not accept the jurisdiction of the CJEU to review third pillar acts see PEERS, "Salvation Outside the Church", 2007, at 899. The Author notes however that the CJ could have elaborated on this duty as it is not clear if it draws from the duty imposed on national courts under the TEC.

¹⁶³¹ Para. 52.

which are intended to have legal effects in relation to third parties.”¹⁶³² Hence, if a national court was in doubt as to whether a common position *is intended* to produce legal effects *vis-à-vis* third parties it could refer the issue to the CJ. If the latter concluded that the common position did produce such effects it could rule on the interpretation or validity of the act. With this construction the CJ ended up introducing a new category of PJCCM acts into Article 35(1) TEU that should be treated on the same basis as framework decisions and decisions.¹⁶³³ LABAYLE and MEDHI noted that this operation of “*requalification*” was not neutral. In fact, “*elle constitue sans doute un écho discret aux critiques estimant que l’usage des positions communes par les Etats dans la lutte anti-terroriste répondait à un souci d’échapper à tout contrôle juridictionnel.*”¹⁶³⁴ Thus, the use of common positions to change the legal position of individuals implied the acceptance of judicial control. Some scholars have also considered that although it appears that in the case of *Segi* the individual was left without any judicial protection, the CJEU acknowledged that the nature of Union law had changed and that the exclusion of judicial review by the CJEU was no longer justifiable in light of the rule of law. In fact, the right of access to justice was *made depended upon the legal effects of the measures on the position of the individual*.

Despite the importance of such approach from the point of view of the protection of rights of individuals, the CJEU should probably have been more assertive in stating that a common position with those features would automatically be invalid for breach of the procedural requirement to hear the European Parliament.¹⁶³⁵ Moreover, the *Segi* ruling remained vague on how actions leading to such preliminary rulings could be initiated before national courts, which was particularly significant as individuals were not informed on which country instigated the listing.¹⁶³⁶ Furthermore, the ruling ignored that in a significant number of Member States preliminary rulings were not available *at all*. More significantly, the extent to which this reasoning was applicable to second pillar common positions was also unclear. One could say that even though CFSP measures are not supposed to have a direct impact on the rights of individuals, if lists identifying certain individuals entail legal effects regarding them, they have to be subject to judicial review.¹⁶³⁷ However, scholars have noted that the CJEU’s analysis on third pillar common positions should have been based on the idea that these acts were *not binding* except when Article 37 TEU so provided, which was not clearly the case of second pillar common positions adopted pursuant to Article 15 TEU.¹⁶³⁸ Lastly, as preliminary references were not made available under the second pillar, such measures seemed to escape *any kind* of judicial review *as a matter of Union law*.

¹⁶³² See paras. 51-54.

¹⁶³³ See CARRUTHERS, “The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs”, 2009, at 790.

¹⁶³⁴ LABAYLE; MEDHI, “Le contrôle juridictionnel de la lutte contre le terrorisme”, 2009, at 251.

¹⁶³⁵ PEERS, “Salvation Outside the Church”, 2007, at 901.

¹⁶³⁶ Hence, ECKES asked: “[w]hich national courts should individuals address for protection? Should they simply bring an action in the courts of their own citizenship or residence? Would the national court in question then potentially have to assess the legality of another member state’s listing request?” See ECKES, “Sanctions against Individuals”, 2008, at 212.

¹⁶³⁷ *Ibid.*, at 213.

¹⁶³⁸ PEERS, “Salvation Outside the Church”, 2007, at 925.

IV. In summary, the above mentioned cases confronted the CJEU with the issue of the protection of individuals' rights in the field of the intergovernmental pillars, which did not provide for the same legal protection as the former Community legal order. In some of them, the CJEU either interpreted the non-Communitarian provisions in light of overall Union law (*Yusuf/Kadi*), or it used Community analogy to establish the outcome it considered necessary from a constitutional point of view (*Pupino/Segi*).¹⁶³⁹ However, contrary to what happened with the case-law on institutional conflicts, the CJEU did not adopt a flexible interpretation of its jurisdiction under Articles 46 and 47 TEU when the validity of Union acts was involved, particularly due to a breach of fundamental rights of private parties. The avenues offered by the combined interpretation of said provisions with Articles 220 TEC and 6(2) TEU were not explored nor were the arguments based on the *unity* of the EU legal system or the *supremacy* of the *Community method* and the general principles of Community law.¹⁶⁴⁰ Surely, the CJEU had to reconcile the wording of the TEU with the need to ensure effective judicial protection. Under the TEU, individuals did not have the choice between a direct action for annulment and the alternative provided for preliminary rulings on validity. Neither the plea of illegality nor the action for damages were made available. Moreover, besides the shortcomings involving indirect challenge to Union acts through preliminary references, such possibility was restricted to third pillar acts, curtailed in ten Member States, and limited to last instance courts in one of them. Notwithstanding, the TEU escaped both the *Chernobyl* and the *Les Verts* approaches.¹⁶⁴¹ Accordingly, the resulting gaps of judicial protection are not consistent with the *dicta* included in most of the rulings delivered in this regard according to which “by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights” and its institutions “are *subject to review* of the conformity of their acts with the Treaties and the *general principles of law, just like the Member States* when they implement the law of the Union.”¹⁶⁴²

3. THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION AS AN INSTITUTIONAL GUARANTEE

3.1 The Objective, Institutional and Systemic Elements in the CJEU's Case-Law: Summary of the CJEU's Views on the Union's System of Judicial Review

I. It follows from the foregoing that individuals have been, as a rule, precluded from challenging directly the validity of Union acts. To begin with, the CJEU held that only acts which are capable of producing *legally binding effects* are reviewable, which excludes from judicial review acts unquestionably *faisant grief*. Furthermore, a strict reading of ex-Article 173(2) TEEC limited direct challenges at the initiative of individuals to decisions. Accordingly, the CJEU considered

¹⁶³⁹ WESSEL, “The Constitutional Unity of the European Union”, 2009, at 304.

¹⁶⁴⁰ Speaking of a “*protection pilarisée*” see BERROD, *La systématique des voies de droit communautaires*, 2003, at 1000.

¹⁶⁴¹ PEERS, “Salvation Outside the Church”, 2007, at 898.

¹⁶⁴² E.g., Case C-354/04 P, *Gestoras Pro Amnistia and others/Council*, [2007] ECR I-0000, para. 51, and Case C-355/04 P, *Segi and others/Council*, [2007] ECR I-0000, para. 51; Case C-303/05, *Advocaten voor de Wereld*, [2006] ECR I-3663, para. 45.

that challenges against acts of general application brought by private parties were, as a rule, inadmissible. Over time, the CJEU accepted, albeit limitedly, the so-called “hybridity theory” put forward by some AGs, and accepted that a certain act could have a double nature: that of a regulation regarding the public in general, and that of a decision regarding certain groups of individuals. Later, in what could be identified as a third generation of the case-law, the CJEU admitted that individuals could bring an action for annulment against “true regulations.” However, as the *UPA* case demonstrated this approach was far from being straightforward.¹⁶⁴³

Additionally, the case-law on direct and individual concern has successfully “closed the doors” of Union courts. Despite some exceptional cases, the general application of the so-called *Plaumann* formula has “effectively prevented virtually all direct actions brought by private parties to challenge decisions addressed to others.”¹⁶⁴⁴ Hence, if a Union measure is drafted in abstract and general terms even if it is possible to determine the number and identity of the persons which it affects the CJEU will nonetheless deny standing.

HARDING has noted that “what has defeated most of these ‘champions’ of judicial review has been (...) the peculiarities of the Treaty’s system of legal protection.”¹⁶⁴⁵ These peculiarities include at least two important assumptions which appear to have been consistently reflected in the Court’s case-law: first, that the authors of the Treaties chose to restrict the right of action of individuals against Union measures; and secondly, and closely related, that the Treaty did not set out to guarantee to *interested* individuals a complete and direct legal protection.¹⁶⁴⁶ Thus, *Producteurs* and *Plaumann* combined became “classic authorities on the right of individuals to bring annulment proceedings under Article 173 and for many years had the effect of making it extremely difficult for such applicants to challenge any Community acts other than decisions addressed to them.”¹⁶⁴⁷ Scholars have referred to the possibilities of success as being “purely hypothetical.”¹⁶⁴⁸ It is submitted that this restrictive approach to the conditions under which private parties may challenge the legality of Union acts discloses an *objectivist* trend in the CJEU’s case-law which limits the scope and impact of *subjective* control of legality in the EU.

Also illustrative of such trend is the fact that the CJEU *resists* the argument founded on the need to ensure effective judicial protection of private parties. A breach of this fundamental right, *even if proven*, does not allow for a more flexible approach to standing requirements. Hence, even if an individual shows that he/she could not bring an action before national courts or any court for that respect, such *impossibility* is not enough to acknowledge him/her standing to challenge directly the validity of Union acts. Hence, an *identified* and fully *acknowledged* breach of the right to effective judicial protection does compel the CJEU to adopt a more flexible approach to standing of individuals. Instead, the CJEU *puts* the right to effective judicial protection into the “complete system of legal remedies and procedures” established in *Les Verts* and refuses to question the

¹⁶⁴³ C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 36. See CASSIA, “Quelles perspectives pour la recevabilité du recours en annulation des particuliers?”, 2002, at 2828.

¹⁶⁴⁴ CRAIG; BÚRCA, *EU Law*, 2011, at 495.

¹⁶⁴⁵ HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 15.

¹⁶⁴⁶ *Ibid.*

¹⁶⁴⁷ ARNULL, “The Action for Annulment”, 2000, at 180.

¹⁶⁴⁸ *Ibid.*, at 185.

effectiveness and adequacy of the existing system of judicial review. The right to effective judicial protection is thus considered from a *systemic* perspective which immunizes Union acts from attack at the initiative of individuals and favours *objective* legality within the EU.

The severity of *locus standi* requirements of private parties becomes particularly evident when compared with the case-law involving privileged and semi-privileged applicants. Here, the CJEU has not hesitated to interpret generously the so-called objective dimension of the principle of the rule of law, which translates into the preservation of the institutional balance between Member States and the Union. Hence, the rule of law has been a central device e.g., in (i) establishing the constitutionality and legality principles by identifying a “constitutional block of norms” inherent to the Treaties¹⁶⁴⁹; (ii) in affirming the exclusive, independent and mandatory jurisdiction of the CJEU which limits the jurisdiction of other courts and tribunals¹⁶⁵⁰; (iii) in extending the competence of the CJEU in the field of TECSC regarding preliminary questions of interpretation¹⁶⁵¹; (iv) in reinforcing the duties of loyal cooperation of Member States¹⁶⁵², notable the obligations imposed on national courts in ensuring protection of rights conferred by EU law; in (v) in establishing the exclusive competence of the CJEU to declare the invalidity of Union acts¹⁶⁵³; and (vi) in admitting the passive and active *locus standi* of the European Parliament regarding actions for annulment.¹⁶⁵⁴ In this context, the rule of law implied that the CJEU could fill in possible procedural *lacunae* beyond the wording of the Treaties.¹⁶⁵⁵ In fact, the CJEU has not hesitated to adopt a liberal interpretation of the Treaties when objective control of Union acts by institutional actors is at stake. On the contrary, the *subjective* dimension of the rule of law has not enabled the CJEU to reinforce the protection of individual’s rights at the Union level. Hence, although (i) the *purpose* of Article 263 TFEU, (ii) the *spirit* and the *system* of the Treaties, (iii) the fundamental interest in the maintenance and observance of the *institutional balance* laid down in the Treaties, (iv) the need for a *complete* and *consistent* review of legality, (v) and even the principle of *democracy* have all served to broaden the admissibility of actions for annulment brought by institutional actors, the need to ensure effective judicial protection of private parties has not been a determinant argument in the CJEU’s case-law in this respect. This is said to reflect a long lasting resistance of the CJEU to adopt a more *subjectivist* view of the system of judicial protection. Thus, as GUNDEL has put it:

“[d]irect access to Community Courts in order to provide a complete judicial protection has so far only been extended in such cases which were not concerned with the protection of individual rights, but with the relationship among the Community institutions. In the categories of the German constitutional proceedings, this would rather be assigned to the

¹⁶⁴⁹ Case 46/87, *Hoechst/Commission*, [1989] ECR 2859.

¹⁶⁵⁰ Opinion 1/91, [1991] ECR I-6079 and Opinion 1/92, [1992] ECR I-2821.

¹⁶⁵¹ Case 221/88, *ECSC/Busseni*, [1990] ECR I-495.

¹⁶⁵² Case 272/86, *Commission/Greece*, [1988] ECR 4875; Case 2/88, *Criminal proceedings against Zwartveld and others*, [1990] ECR I-3365.

¹⁶⁵³ Case 314/85, *Foto-Frost/Hauptzollamt Lübeck-Ost*, [1987] ECR 4199.

¹⁶⁵⁴ Case C-314/91, *Weber/Parliament*, [1993] ECR I-1093.

¹⁶⁵⁵ See FERNANDEZ ESTEBAN, *The Rule of Law in the European Constitution*, 1999, at 112.

*Organstreitverfahren.*¹⁶⁵⁶

This *objectivist* and *institutional* approach is confirmed by the *TWD* and *Nachi* doctrines and the “procedural exclusivity”¹⁶⁵⁷ these cases established. In fact, the preclusive effect of such decisions entails does not apply either to the institutions or to Member States within the context of Article 277 TFEU. These rulings further show that the system of judicial review is not conceived to allow a *maximization* of the protection conferred to private parties. The *TWD clause de forclusion* prevents individuals from choosing between the available remedies. Thus, the existence of two mechanisms of judicial review in the Treaties does not ensure “*completa intercambiabilità*” between them.¹⁶⁵⁸ The CJEU’s case-law is based on an “either-or” approach, which significantly curtails the chances of successfully bringing a challenge against Union measures. LENAERTS described it as a system of “communicating vessels”, whereby the jurisdiction of the Community courts normally excludes the jurisdiction of national courts and *viceversa*.¹⁶⁵⁹ There is no room for a duplication of means of redress.

Lastly, the preference for an *institutional* and *objective* control of legality is also clear within the field of the intergovernmental pillars. In this context, the CJEU has applied ex-Articles 46 and 47 TEU to effectively control the exercise of EC/EU competences and solve institutional conflicts, although the avenues offered by the TEC could have been deemed sufficient to pursue such exercise. *Per contra*, the possibilities offered by the combined interpretation of those provisions with Articles 6(2) TEU and 220 TEC have not served to *push* effective judicial protection to the intergovernmental pillars. Hence, on the one hand, individuals have been fully precluded from challenging the validity of CFSP acts, and on the other hand, the case-law on ex-Article 35 TEU confirmed the strict boundaries of the CJEU’s jurisdiction when the need to protect individuals’ rights is at stake.

II. Further to this generally deemed objectivist and institutional approach, the CJEU’s case-law on direct access is said to be grounded on a *systemic* view of the Union’s judicial system. The CJEU considers that the possible *lacunae* and *deficits* of the judicial protection of private parties must be analysed taking into account *all* mechanisms of judicial review established in the Treaties. Consequently, the CJEU *insists* on the need to use *indirect* or *alternative* judicial review mechanisms. The CJEU’s case-law which encourages individual applicants to bring issues of validity of Union measures indirectly before the CJ *via* national courts was born in *Les Verts*.¹⁶⁶⁰ Since then, the case-law has put the focus of judicial protection of individuals on the existence of a “*complémentarité des voies de recours*”¹⁶⁶¹ in the EU. This *complementarity* was reiterated throughout the case-law.¹⁶⁶² In

¹⁶⁵⁶ GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 502.

¹⁶⁵⁷ WYATT, “The Relationship between Actions for Annulment and References on Validity after *TWD Deggendorf*”, 1997, at 57.

¹⁶⁵⁸ AMBANELLI, “La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Twd Textilwerke e Wiljo*”, 1998, at 138.

¹⁶⁵⁹ LENAERTS, “The Legal Protection of Private Parties under the EC Treaty”, 1998, at 595.

¹⁶⁶⁰ ALEMANNO, “What Has Been, and What Could Be, Thirty Years after *Les Verts*/European Parliament”, 2010, at 326.

¹⁶⁶¹ See also CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 82.

¹⁶⁶² Case 294/83, *Les Verts*/European Parliament, [1986] ECR 1339, para. 23; Case C-314/91, *Weber*/Parliament,

fact, *Les Verts* “generated a powerful rhetoric of *completeness* which has enlightened (and still does) the Court’s discourse in relation to the interpretation of the scope of the different Community legal remedies and the relationship among them.”¹⁶⁶³ AG VAN GERVEN noted in *Chernobyl* that:

“[a]nyone who has followed the case-law of the Court of Justice from the moment of the entry into force of the EEC Treaty will undoubtedly have noticed to what extent the Court has concentrated, and still does concentrate, on ensuring, in many different ways, that there is an adequate and coherent *system of legal protection* (emphasis added).”¹⁶⁶⁴

The idea of a *complete system* of remedies is grounded on the existence of *alternative* remedies to direct actions. Thus, the CJEU considers that it can hold inadmissible direct challenges to Union acts *in so far* as other remedies are available to private applicants. The doctrine of “alternative remedies” has relied upon the plea of illegality, the preliminary references procedure, and the action for damages.¹⁶⁶⁵ Nonetheless, given the limited applicability of the plea and the different purpose of the action for damages, the CJEU focuses mainly on the avenues offered by the combination of the competences of national courts to enforce Union law and preliminary references on validity. Thus, for instance, in *Berthu*¹⁶⁶⁶, where an applicant contested the validity of a Council regulation on certain provisions relating to the introduction of the Euro the GC held that the action was inadmissible, but that the applicant could “always have recourse to the other legal remedies provided for in the Treaty which are designed to ensure judicial review of Community acts”¹⁶⁶⁷ notably to a preliminary reference on validity. In *Federolio*¹⁶⁶⁸, the Court held that “the procedure laid down in Article 177 of the Treaty specifically enables legal and natural persons to challenge the validity of acts of the institutions when they are not entitled to bring an action for annulment under Article 173 of the Treaty, whilst avoiding the risk of conflicting decisions from the various national courts.”¹⁶⁶⁹ Accordingly, in *UPA* the Court held that, in accordance with the principle of sincere cooperation, it is for national courts to interpret and apply national procedural rules governing the exercise of rights of action, *as far as possible*, “in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by

[1993] ECR I-1093, para. 8. See also Case 314/85, *Foto-Frost*, [1987] ECR 4199, para. 16; Case 2/88, *Criminal proceedings against Zwartveld and others*, [1990] ECR I-3365, para. 16; and Opinion 1/91, [1991] ECR I-6079, para. 21.

¹⁶⁶³ See ALEMANN, “What Has Been, and What Could Be, Thirty Years after *Les Verts*/European Parliament”, 2010, at 327.

¹⁶⁶⁴ Opinion of AG in Case 70/88, *Parliament/Council (Chernobyl)*, [1990] ECR I-2041, para. 5.

¹⁶⁶⁵ Similarly, in the order in Case T-148/97, *Keeling/OHIM*, [1998] ECR II 2217, the GC did not confine itself to stating, in para. 32, that the Office for Harmonisation in the Internal Market (Trade Marks and Designs) was not one of the institutions of the Community listed in Article 4 TEC and was not mentioned in Article 173(1) of the TEC, but also observed, in para. 33, that other remedies were potentially available against the contested decision of the President of OHIM, mentioning, *inter alia*, Article 179 TEC. That order therefore does not preclude an action lying under Article 230 TEC against a decision of a Community body not mentioned in that article.

¹⁶⁶⁶ Case T-207/97, *Berthu/Council*, [1998] ECR II-509.

¹⁶⁶⁷ Para. 29. This case is also interesting because the Court expressly stated that the applicant had not explained why such indirect protection would be diminished if the application were declared inadmissible. Hence, it seems that the Court leaves the door opened for individual applicants to argue that indirect protection is not sufficient, which *could* have consequences in the admissibility of the direct action. Nonetheless, this has not been the trend in the case-law. See *supra* Chapter 1, Section 1.1.4.

¹⁶⁶⁸ Case T-122/96, *Federolio/Commission*, [1997] ECR II-1559. See also Case T-87/92, *Knudvat/Commission*, [1996] ECR II-1931, para. 75.

¹⁶⁶⁹ Para. 80.

pleading the invalidity of such an act.”¹⁶⁷⁰ Such *dictum* would be fully repeated in *Segi*, extending therefore also to the field of the intergovernmental pillars. In light of the foregoing, scholars spoke of a tendency to “send the applicants back to the national judge (...) in the name of the ‘global’ system of Community jurisdictional protection.”¹⁶⁷¹ Here, in a certain way, the *Johnston* principle could still be seen as a “stretch of the philosophy of completeness initiated in *Les Verts*.”¹⁶⁷² This combination of forms of action – described in terms of “*complémentarité fonctionnelle*”¹⁶⁷³ – applies to all kinds of Union acts¹⁶⁷⁴ and is said to put the discussion on the judicial protection of individuals “dans une perspective générale se rattachant sur le système des voies de droit.”¹⁶⁷⁵

However, this “holistic remedial vision has not materialised for a litany of reasons”¹⁶⁷⁶ summarized by AG JACOBS in *UPA*. As demonstrated above, the system of alternative review based on national courts and preliminary references on validity does not – and cannot – work properly in order to ensure in the CJEU’s own words “a complete and effective judicial protection.”¹⁶⁷⁷ On the one hand, the principle of national procedural autonomy does not ensure an effective right of access to justice *as a matter of Union law*. On the other hand, the deep *objectivist* nature of preliminary references does not allow for such mechanism to function adequately as an alternative means of judicial review. As a result, the sum of national courts competences plus preliminary references does not compensate for the *imbalance* created by the Court’s restrictive approach to *locus standi* requirements under current Article 263(4) TFEU. Although according to the CJEU’s case-law direct access to Union courts should be understood “dans la globalité du système contentieux communautaire”¹⁶⁷⁸, the concrete functioning of the system of judicial review as built and relied upon by the CJEU does not ensure “with certainty and in all circumstances”¹⁶⁷⁹ that judicial review of Union acts which affect individuals may take place at their initiative.

¹⁶⁷⁰ Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 42.

¹⁶⁷¹ BERNAT, “The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community”, 2003, at 30.

¹⁶⁷² ALEMANNO, “What Has Been, and What Could Be, Thirty Years after *Les Verts*/European Parliament”, 2010, at 327.

¹⁶⁷³ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 224.

¹⁶⁷⁴ For regulations see Case C-209/94 P, *Buralux and others/Council*, [1996] ECR I-615, paras. 35-36; for directives, see Case C-10/95 P, *Asocame/Council*, [1995] ECR I-4149, para. 97; for decisions addressed to Member States, see Case 97/85, *Deutsche Lebensmittelwerke/Commission*, [1985] ECR 1331, para. 12; and for decisions addressed to third parties see Case T-87/92, *Knuidvat/Commission*, [1996] ECR II-1931, para. 75.

¹⁶⁷⁵ PICOD, “Le droit au juge en droit communautaire”, 1998, at 147. This systemic approach has also been adopted with regard to other forms of action. Hence in Case 143/77, *Koninklijke Scholten-Honig/Council and Commission*, [1979] ECR 3583, the CJEU applied it to the action for damages: “[e]ven though an action for damages under Articles 178 and 215 of the treaty constitutes an independent action, it must nevertheless be assessed having regard to the *whole of the system of legal protection of individuals set up by the Treaty*. If an individual takes the view that he is injured by a Community legislative measure which he regards as illegal he has the opportunity, when the implementation of the measure is entrusted to national authorities, to contest the validity of the measure, at the time of its implementation, before a national court in an action against the national authority. Such a court may, or even must, in pursuance of Article 177, refer to the Court of Justice a question on the validity of the community measure in question. The existence of such an action is by itself of such a nature as to ensure the *efficient protection* of the individuals concerned (para. 11).” See also Joined Cases 116, 124 and 143/77, *Amylum/Council and Commission*, [1978] ECR 893. In contrast, see Case 43/72, *Merkur/Commission*, [1973] ECR 1055, paras. 5-6. Such reasoning also applies when the infringement of EU law by a Member State is at stake. See Case 20/64, *SARL Albatros/SOPECO*, [1965] ECR 29, para. 10; Case 244/80, *Foglia/Novello*, [1981] ECR 3045, para. 26; Case C-97/91, *Oleificio Borelli/Commission*, [1992] ECR I-6313, para. 13.

¹⁶⁷⁶ HEFFERNAN, “Effective Judicial Remedies”, 2006, at 288.

¹⁶⁷⁷ Case C-393/96, P(R), *Antonissen/Council and Commission*, [1997] ECR I-441, para. 36.

¹⁶⁷⁸ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 7.

¹⁶⁷⁹ This was the threshold established for institutional conflicts. See Case 70/88, *Parliament/Council*, [1991] ECR I-4529, para. 20.

Lastly, this systemic approach to the system of judicial review is confirmed by what appears to be the main underlying reason for the CJEU's restrictive approach to direct access by individuals to the Union courts. In fact, the CJEU seems to be building a system of judicial review which, by integrating national courts — already *in situ* and thus less expensive —, relies on them as the primary enforcers of Union law. Such an approach serves not only the purpose of decentralizing litigation and reinforcing jurisdictional subsidiarity, but also of safeguarding the CJEU's jurisdiction, notably by limiting caseload and paving the way for the CJEU to become a kind of “Supreme” or “Constitutional Court” for the Union.

III. In this framework, scholars note that the Union's judicial system is designed to ensure just a “*minimum of protection*”¹⁶⁸⁰ of individual rights. In fact, it seems clear that the Court has not been keen to protect the rights of individuals where the result would be to interfere with the activities of the institutions and disrupt the functioning of the Union.¹⁶⁸¹ In contrast, where the consequence is to enforce compliance by Member States with their obligations the CJEU has seemed particularly enthusiastic about upholding the rights of individuals.¹⁶⁸² Scholars have spoken in this regard in a “*preference pour l'Europe*”¹⁶⁸³ and CARANTA has affirmed that the Union “has taken for itself immunities which used to belong to the State and has become the new King who can do no wrong.”¹⁶⁸⁴

Surely, facing the wording of the European Treaties, the CJEU “found itself dealing with novel notions and had to try to strike a balance between the need for effective administration within the EC (not hindered by an avalanche of applications) and the need to respect the principle of legality and judicial protection for EC nationals.”¹⁶⁸⁵ However, in trying to find an appropriate balance the CJEU created a system of legal remedies and procedures which although said to be coherent and complete does not ensure comprehensive judicial protection of private parties. Thus, individuals dispose only of an *imperfect combination* of means of action to challenge the validity of Union acts.¹⁶⁸⁶ As seen above, the CJEU's approach to alternative remedies is a “top-down position” taking as a starting point the system of remedies as a whole, “and how it would come to work satisfactorily one day, based on national courts as the main forums of Community law.”¹⁶⁸⁷ In contrast, AG JACOBS' approach in *UPA* was a “bottom-up analysis departing from how it currently is, and therefore having a more critical approach to each of the remedies at hand, rather than the way they eventually tie together.”¹⁶⁸⁸

One should note that in itself a doctrine of “alternative remedies” makes sense: it is

¹⁶⁸⁰ LOUIS, “Le droit pour les particuliers d'agir en annulation selon le traité du marché commun”, 1964, at 255.

¹⁶⁸¹ ARNULL, “The Action for Annulment”, 2000, at 188.

¹⁶⁸² *Ibid.*

¹⁶⁸³ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 197.

¹⁶⁸⁴ CARANTA, “Judicial Protection against Member States”, 1995, at 725.

¹⁶⁸⁵ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 27.

¹⁶⁸⁶ KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 73.

¹⁶⁸⁷ BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*”, 2004, at 1654, mentioning the existence of a “systemic flaw.”

¹⁶⁸⁸ *Ibid.*

imperative that persons who do not have access to another remedy should be given the opportunity of judicial review if there is a possibility that their rights are being infringed.¹⁶⁸⁹ However, why there should be a doctrine of the alternative remedy “in reverse”, i.e. why the circumstance of the existence of an alternative remedy should act as a restriction to the standing of individuals whose rights could have been infringed, is more difficult to understand. As NEUWHAL has stated:

“[s]uch a strategy is not inherent in Article 173. It is the *result of policy considerations* by the Court of Justice, in particular, its *intention to focus on questions of the uniform interpretation and application of Community Law* (emphasis added).”

Thus, it has been suggested that, *probably*, the only way of achieving comprehensive judicial protection in the EU is to allow some overlapping of the available remedies.¹⁶⁹⁰ In fact, it is submitted that if a given system of judicial review although in its institutional framework, *in abstracto*, seems complete and coherent but does not allow for the protection of individual rights in a given case, the fundamental right to effective judicial protection should prevail over any *objectivist*, *institutional* or *systemic* considerations. As a matter of fact, “the principle of legality is not well served when the lawfulness of Community acts cannot be adjudicated upon because those with a real interest in such adjudication have, in the majority of cases, no standing to bring an action.”¹⁶⁹¹ In these circumstances, not only the protection of individual interests is inadequate, but also objective justice is ill-served by infrequent consideration of the merits of these cases.¹⁶⁹²

3.2 Echoes of Institutional Guarantees in the CJEU’s Case-Law

I. The approach adopted by the CJEU regarding the principle of effective judicial protection in the EU echoes the idea of fundamental rights as institutional guarantees. The *endless* references to the “complete system of legal remedies and procedures”¹⁶⁹³ – or as AMBANELLI has called it, to the “*insieme dei rimedi giurisdizionali*”¹⁶⁹⁴ – along with a deeply *objective* and *institutional preference* in legality review contrasts vividly with the lack of impact in the CJEU’s case-law of the finding of a breach of the *subjective right* to effective judicial protection. Thus, the CJEU’s approach brings to the fore the objective dimension of the right to effective judicial protection put in evidence in the legal institute of institutional guarantees.

The essential feature of institutional guarantees lies with their *objective* dimension, apart

¹⁶⁸⁹ NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 30. The idea of alternative remedies is not exclusive of the Union judicial system. The ECtHR has also taken it into consideration. See *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgement of 18/02/1999. CASSIA notes that several Member States courts refer to the protection conferred under alternative means of action. See CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 226-230. However, in Member States legal orders such “*alternativity*” has to provide for an *effective* remedy.

¹⁶⁹⁰ USHER, “Direct and Individual Concern”, 2003, at 595.

¹⁶⁹¹ HARDING, “Decisions Addressed to Member States and Article 173 of the Treaty of Rome”, 1976, at 34.

¹⁶⁹² *Ibid.*; CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 246. Thus, the Commission’s victory in *Plaumann* was more complete than the judgment in the case suggests.

¹⁶⁹³ See BÉRROD, *La systématique des voies de droit communautaires*, 2003, at 5 *et seq.*

¹⁶⁹⁴ AMBANELLI, “La giurisprudenza della Corte di Giustizia interna di rapporti fra azione in annullamento e rinvio pregiudiziale di validità dopo le sentenze *Twd Textilwerke* e *Wiljo*”, 1998, at 132.

from the *subjective* aspect of entitlement of individual rights.¹⁶⁹⁵ These two dimensions are said to be autonomous.¹⁶⁹⁶ Hence, for instance, in Germany, several provisions included in the national constitution have been identified as encompassing not *subjektive Rechten*, but as establishing objective conditions and guarantees of the set of abilities and legal positions which are protected under such norms.¹⁶⁹⁷ These “*deveres sem direitos*”¹⁶⁹⁸ may either impose duties on the legislator, determine the legal regime applicable to certain individual rights, or perform organizational functions among others. Thus, institutional guarantees protect rights as “*realidades objectivas complexas*.”¹⁶⁹⁹ The main distinct “ingredient” of these norms is that they *do not necessarily involve a subjective dimension*, which grants rights to individuals.¹⁷⁰⁰

The distinction between the objective and subjective dimension of fundamental rights can easily be demonstrated by the example of the right to property. In fact, when a given provision in a constitutional text protects the right to property, it is most likely not protecting only the individual private right to property, understood for instance as the complete and absolute dominium over one thing (*ius in re* or *ius ad rem*). The right to property is also protected at the *institutional level*, meaning that such constitutional norm aims to protect a *certain legal and economic system* where property relationships between the individual and the state are not made dependent on the free will of the legislator. Hence, the constitutional protection of the right to property forbids certain kinds of legislative interventions which compromise the fundamental legal principles on property relationships and imposes certain duties on the legislator, notably to protect those relationships and create a procedural and organizational framework which enables such protection to be effective.¹⁷⁰¹ Scholars speak of a “*defesa global e objectiva*” as opposed to a “*defesa individual e subjectiva*.”¹⁷⁰² Institutional guarantees correspond to the former kind of defence and limit the autonomy of the legislator: the *essential content* of the right to property may not be eliminated by means of an ordinary law. This understanding allows for an extension of the scope of the constitutional protection of fundamental rights.

II. In their modern understanding, institutional guarantees seem to be associated with the idea of a *de minimis* protection of rights which cannot be suppressed by the legislator. This line of thought appeals to the very own routes of this notion. In fact, originally, under the Weimar constitution, due to the lack of a system of constitutional review, institutional guarantees served mainly to control the intervention of the legislator in some fundamental rights issues. Such guarantees aimed to preserve a number of institutions established in the national constitution.

¹⁶⁹⁵ MARTINS, *Contributo para a Compreensão da Figura das Garantias Institucionais*, 2007, at 23 et seq.

¹⁶⁹⁶ SCHMIDT, “*Freiheitsrechte und institutionelle Garantien der Reichsverfassung*”, 1985, at 141.

¹⁶⁹⁷ These provisions have been identified as *Schutzgegenstand* or *Schutzbereich*. See ALEXANDRINO, *A estruturação do sistema de direitos, liberdades e garantias na Constituição Portuguesa*, 2006, at 155.

¹⁶⁹⁸ ANDRADE, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 2012, at 134.

¹⁶⁹⁹ *Ibid.*, at 136.

¹⁷⁰⁰ See CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 2011, at 397; ANDRADE, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 2012, at 134; MIRANDA, *Manual de Direito Constitucional*, 2012, at 88 et seq.

¹⁷⁰¹ ALEXANDRINO, *A estruturação do sistema de direitos, liberdades e garantias na Constituição Portuguesa*, 2006, at 671.

¹⁷⁰² CORREIA, *Responsabilidade do Estado e dever de indemnizar do legislador*, 1998, at 112.

WALDECKER was the first author to mention the existence of guarantees of public law institutions by reference to the status of civil servants under the Weimar constitution.¹⁷⁰³ SMEND would use such expression with reference to the freedom of education enshrined in Article 142 of said constitution to identify the protection of a certain institution of the German University, which was not an individual right in the traditional liberal sense of fundamental rights, *i.e.* rights to be protected from state interventions.

Notwithstanding, SCHMIDT was clearly the main advocate of the theory of institutional guarantees.¹⁷⁰⁴ This author associated this concept with the so-called relative fundamental rights, *i.e.* rights which could not be attributed to an individual but were instead granted to a group of persons or a community. These rights protected certain realities created by the state – and thus required state intervention – but did not involve the recognition of “spaces” of individual freedoms pre-existent to the constitution. Hence, these were mere “appearances of fundamental rights”, and could not limit the autonomy of the legislator under the same terms as the so-called absolute fundamental rights. In SCHMIDT’s construction, the guarantee of the lawful judge would be of this kind.¹⁷⁰⁵ However, as the recognition of these realities created certain duties and limitations imposed on the legislatures they could not be regarded as mere relative fundamental rights. Here, SCHMIDT identified an *objective* dimension to fundamental rights and noted that institutional guarantees did not involve the attribution of individual legal positions.¹⁷⁰⁶ A given norm could include both a fundamental right and an institutional guarantee. If that was the case, the latter prevailed over the former.¹⁷⁰⁷ However, according to SCHMIDT, institutional guarantees were instrumental *vis-à-vis* fundamental rights protection as they served to limit the intervention of the legislator when deciding on fundamental rights issues.¹⁷⁰⁸ This was, thus, mainly a *jusfundamentalist* approach to fundamental rights.

SCHMIDT’s doctrine had a major impact on the development of the doctrine of fundamental rights in Germany as it allowed for the identification of an objective and institutional dimension of fundamental rights.¹⁷⁰⁹ In fact, in so far as fundamental rights were considered as *pure* individual rights, the rules protecting them could not mirror the organizational and procedural component such rights required. HÜBER would later consider that this dimension was determinant as it delineated the *organizational framework* where fundamental rights could operate.¹⁷¹⁰ According to HÜBER fundamental rights provisions may have both a subjective and an objective dimension. The latter was associated with certain institutions which constituted the substrate of rights and the

¹⁷⁰³ WALDECKER, “Entwicklungstendenzen im deutschen Beamtenrecht”, 1924, at 129 *et seq.*

¹⁷⁰⁴ See *e.g.*, SCHMIDT, “Freiheitsrechte und institutionelle Garantien der Reichsverfassung”, 1985, at 140 *et seq.*

¹⁷⁰⁵ Also considering such principle as an institutional guarantee, as it requires that courts must be established and their jurisdiction to be fixed by law see STEINBERGER, “Judicial Protection of Human Rights at the National Level”, 1991, at 152.

¹⁷⁰⁶ MARTINS, *Contributo para a Compreensão da Figura das Garantias Institucionais*, 2007, at 36. The existence of institutional guarantees was not uncontroversial in Germany. STIER-SOMLO considered that such category did not exist as all constitutional provisions contained fundamental rights. ANSCHÜTZ questioned the usefulness of such category. See *ibid.*, at 44.

¹⁷⁰⁷ *Ibid.*, at 49.

¹⁷⁰⁸ *Ibid.*, at 59.

¹⁷⁰⁹ *Ibid.*, at 55.

¹⁷¹⁰ HÜBER, “Bedeutungswandel der Grundrechte”, 1933, at 13. See also MARTINS, *Contributo para a Compreensão da Figura das Garantias Institucionais*, 2007, at 56 *et seq.*

“privileged space” for their exercise.¹⁷¹¹ Also HÜBER argued for the submission of the individual dimension to the institutional one. He advocated, thus, an *institutionalist* approach to fundamental rights: here, individual freedom is no longer considered to be unlimited but *organized* and *institutionalized*.¹⁷¹²

HÄBERLE would see beyond the institutional guarantees doctrine and would draw attention to the duty imposed on the legislator by certain constitutional provisions to conform and implement the realities protected by the constitution in order to allow the exercise of the corresponding individual freedoms. Overcoming the dichotomy between institutional guarantees and fundamental rights, HÄBERLE concluded that all fundamental rights inherently possess an objective and institutional dimension.¹⁷¹³ This dimension must serve as an additional protection for the respective subjective right. It aims to protect the corresponding individual right mainly by providing stability to its legal framework. In this conception, the subjective and objective dimensions merge. Fundamental rights have, thus, a double constitutional scope and meaning: they guarantee individual rights as legally regulated and determined realities.¹⁷¹⁴ It has been noticed that the *Bundesverfassungsgericht* seems to acknowledge this construction by considering that certain fundamental rights have to be considered from an objective perspective since they pursue some kind of social need.¹⁷¹⁵

Nowadays, the question of knowing if institutional guarantees may be considered an autonomous category *vis-à-vis* fundamental rights is not without controversy in Germany. Notwithstanding, the literature continues to mention the existence of institutional guarantees under the *Grundgesetz* and does not hesitate to expand its catalogue by finding objective elements in constitutional provisions not included in the section of the *Grundgesetz* dedicated to fundamental rights.¹⁷¹⁶ Hence, for instance SCHEUNER defended that institutional guarantees corresponded to the acknowledgement by the constitution of certain *objective values* which fundamental rights must respect.¹⁷¹⁷ KÖTTGEN saw fundamental rights – notably the freedom of education – as encompassing an individual and *institutional* dimension.¹⁷¹⁸ The latter should be considered to be more than a complement to the former: the “freedom-dimension” of fundamental rights could not be separated from their “institutional-dimension.” Finally, DÜRIG also accepted the category of institutional guarantees although considering that their primary purpose had already been fulfilled by Articles 19(2) and 79(3) of the *Grundgesetz*.¹⁷¹⁹

¹⁷¹¹ MARTINS, *Contributo para a Compreensão da Figura das Garantias Institucionais*, 2007, at 57.

¹⁷¹² *Ibid.*, at 59, noting that HAURIUO was the French reference of the institutionalist approach to Law, and that SAVIGNY and PUCHTA also adopted the notion of legal institutions in the realm of private law.

¹⁷¹³ See NOVAIS, *As restrições aos Direitos Fundamentais não expressamente autorizadas pela Constituição*, 2010, at 59 *et seq.*

¹⁷¹⁴ HÄBERLE, *La garantía del contenido esencial de los derechos fundamentales en la Ley Fundamental de Bonn*, 2003, at 93 *et seq.*

¹⁷¹⁵ MARTINS, *Contributo para a Compreensão da Figura das Garantias Institucionais*, 2007, at 89.

¹⁷¹⁶ *Ibid.*, at 93 *et seq.*, citing KLEIN, SASSE and SCHMIDT-JORTZIG.

¹⁷¹⁷ SCHEUNER, “Die institutionellen Garantien des Grundgesetzes”, 1953, at 92-98.

¹⁷¹⁸ KÖTTGEN, *Das Grundrecht der deutschen Universität*, 1959, at 19 *et seq.*

¹⁷¹⁹ MAUNZ; DÜRIG, *Grundgesetz Kommentar*, 2003, at 46. Article 19(2) GG states that “in no case may the essence of a basic right be affected” and Article 79(3) establishes that “amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”

In sum, institutional guarantees reflect fundamental rights not only as pure individual rights but as encompassing values and decisions of objective law established in the constitution, which are binding on every public authority.¹⁷²⁰ The “protective effect” of institutional guarantees is limited to the *essential core* of the corresponding institutions.¹⁷²¹ Consequently, institutional guarantees do not prohibit or limit every kind of intervention by the legislator, but solely the ones which compromise the *essential nucleus* of a given institution. Or as KLEIN has put it, they avoid “*substanzielle Eingriffe*”¹⁷²² in a certain institution. Some authors have also considered institutional guarantees as performing not only a negative function but also a positive one. Hence, such guarantees impose *duties of protection* on the legislator, who may be under an obligation to provide for a certain legal, organizational or structural framework. Here, fundamental rights are deemed to encompass not only a mere ability (*dürfen*) but also a competence/duty (*können*).¹⁷²³

III. In light of the above, scholars have considered that the right to effective judicial protection should be understood as encompassing an institutional guarantee.¹⁷²⁴ In fact, to acknowledge the existence of an institutional guarantee one should be able to identify (i) an *objective* element and (ii) a reference to an *institution*. The principle of effective judicial protection encompasses on the one hand an objective element in so far as it includes a *set of rights* which should be taken and considered *as a whole*. On the other hand, it involves the recognition of an institution, understood as a “legal complex subject to common principles which regulate certain social relationships and which correspond to a constitutional fundamental option.”¹⁷²⁵ Hence, in Germany, Article 19(4) GG, which establishes the right of access to courts, has been referred to as encompassing not only a fundamental right but also an institutional guarantee.¹⁷²⁶ The articulation of this provision with Article 97 GG, which establishes the independence of the judiciary, and with Article 92 GG which foresees two different jurisdictions and the existence of a *Bundesverfassungsgericht*, has led scholars to conclude that such institutional guarantee implies the existence of a separate administrative jurisdiction composed by judges belonging to the judicial power (*rechtprenchende Gewalt*). The latter is entrusted with state and federal judges. Thus, the constitutional provision establishing the need to ensure effective judicial protection should be considered an institutional guarantee in so far as it implies the obligation for the legislator to establish a *system of judicial protection* which respects the *global set of guarantees* established in the constitution. Such system of judicial protection must have certain *minimum* features which are foreseen in the constitution. Hence, the will of the legislator is limited regarding certain procedural

¹⁷²⁰ STEINBERGER, “Judicial Protection of Human Rights at the National Level”, 1991, at 141.

¹⁷²¹ MARTINS, *Contributo para a Compreensão da Figura das Garantias Institucionais*, 2011, at 93 *et seq.*; MARTINS, “Caracterização do artigo 22.º da Constituição como uma garantia institucional e algumas notas sobre o regime das garantias institucionais”, 2011, at 599.

¹⁷²² KLEIN, *Institutionellen Garantien und Reichtinstitutsgarantien*, 1934, at 136.

¹⁷²³ MARTINS, *Contributo para a Compreensão da Figura das Garantias Institucionais*, 2007, at 97, quoting MANGOLDT, KLEIN and STARCK.

¹⁷²⁴ CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 2011, at 496.

¹⁷²⁵ MARTINS, *Contributo para a Compreensão da Figura das Garantias Institucionais*, 2007, at 189 *et seq.*, following SASSE and STERN.

¹⁷²⁶ PECHSTEIN, “La constitutionnalisation du droit au juge en Allemagne”, 1998, at 59-67. It has also been considered a reflex of the *Rechtsstaatsprinzip*. See SOBOTA, *Das Prinzip Rechtsstaat*, 1997, at 201, 202.

and organizational aspects of the legal system.

Nonetheless, it is undisputed in Germany that said Article 19(4) GG encompasses also a *subjective* fundamental right of access to courts. The scope of the constitutional protection extends to both the objective and subjective dimension of such fundamental right. The latter dimension encompasses the individuals' *subjektive Recht* to effective judicial protection. Thus, private parties are entitled to an individual right to court protection. Conversely, whilst the objective dimension of the right to effective judicial protection emerges clearly from the CJEU's case-law, the subjective dimension is significantly undervalued therein.

As a matter of fact, there are elements in the CJEU's case-law on the principle of effective judicial protection that support the analogy with institutional guarantees, in so far as the latter reflect the objective dimension of fundamental rights, bind primarily the legislator and ensure a *de minimis* protection of rights. As seen above, the case-law of the CJEU on the principle of effective judicial protection is based on the idea of a complete *system* of legal remedies and is dominated by *systemic* concerns with the *global effectiveness* of the EU legal order considered *as a whole*. The procedural protection of individual rights is secondary in this case-law. Such an approach has given rise to difficulties in the building of a *genuinely* complete and coherent system of judicial review.¹⁷²⁷ In contrast, the importance attached to the idea of a "complete system of remedies and procedures" can hardly be overestimated. It has been reiterated in several instances. In *Lütticke*¹⁷²⁸, while dealing with the autonomous nature of the action for damages *vis-à-vis* the action for annulment, the CJEU mentioned the "efficacy of the general *system of forms of action* created by the Treaty."¹⁷²⁹ In *Union syndicale*¹⁷³⁰, in reiterating the definition of individual concern, the Court mentioned the "the *system of forms of action* laid down by the Treaty."¹⁷³¹ In *Alusuisse*, while stressing that the distinction between a regulation and a decision must be based "only on the nature of the measure itself and the legal effects which it produces and not on the procedures for its adoption", the CJEU stated that such solution was "in conformity with the *system of remedies* provided for by Community law since [the applicants] may contest before the national courts individual measures taken by the national authorities in application of the Community regulations."¹⁷³² In *Danielson*¹⁷³³ where the applicants brought an action against a Commission decision which concluded that the nuclear tests in French Polynesia did not present a perceptible risk of significant exposure for workers or the general public, the GC dismissed the action for lack of individual concern, stating that:

¹⁷²⁷ SIERRA noted that: "[t]here is a tendency to limit the analysis of the right to effective court protection to specific instances. This analysis relates to the direct effect of directives, or to theories concerning effective court protection from an *organic perspective*, where individual elements are of little or no importance. Only in a number of specific cases the question has been treated strictly from the point of view of the protection of individuals." See SIERRA, "Provisional Court Protection in Administrative Disputes in Europe", 2004, at 50. For more individual-oriented studies see SZYSZCZAK, "Making Europe Relevant to its Citizens", 1996, at 351; RUFFERT, "Rights and Remedies in European Community Law", 1997, at 307.

¹⁷²⁸ Case 4/69, *Lütticke/Commission*, [1971] ECR 325.

¹⁷²⁹ Para. 6.

¹⁷³⁰ Case 72/74, *Union syndicale and others/Council*, [1975] ECR 401.

¹⁷³¹ Para. 16.

¹⁷³² Para. 13.

¹⁷³³ Case T-219/95 R, *Danielsson and others/Commission*, [1995] ECR II-3051.

“[t]hat conclusion is not incompatible with their right of access to the courts, since the judicial protection of individuals is ensured, in the *Community system of remedies*, not only by the various rights of direct action which they enjoy before the Community judicature under the conditions laid down in the Treaty but also by the procedure for seeking a preliminary ruling under Article 150 of the Treaty in the context of actions brought before the national courts, which are the ordinary courts of Community law (emphasis added).”¹⁷³⁴

Furthermore, as fully demonstrated above, in this framework the right of action deserves a *minimum* protection, without being fully ensured through either of the routes available. As SCHWARZE has put it, although the Union’s system of legal protection is based on the premise that the individual must *in general* not be denied judicial protection, and that no act is excluded from judicial review altogether, “it is not necessary that judicial protection is *in every case* granted to the *largest possible extent* (emphasis added).”¹⁷³⁵

Lastly, in the CJEU’s case-law the principle of effective judicial protection seems to bind primarily Member States, who should review the system as it stands. *Per contra*, such principle is not deemed directly applicable in the cases brought before the CJEU. In fact, effective judicial protection as a general principle of Union law does not *fully* bind the Union judiciary. Hence, although the CJEU seems to *implicitly* acknowledge that the Union’s system of judicial protection implies the existence of *lacunae* and *insufficiencies*, it refuses to fill in those gaps in light of the *individual* right to effective judicial protection. Accordingly, the Court considers that, in so far as such fundamental right may be in jeopardy, it is for Member States to introduce the necessary reforms. By refusing direct applicability to the right to effective judicial protection as a fundamental right, the CJEU submits it to the logic of institutional guarantees.¹⁷³⁶ In fact, one of the major distinctions between fundamental rights norms and institutional guarantees lies with the possibility of the former to be directly applicable without the need for the adoption of intermediate rules, and notably legislative provisions. In contrast, institutional guarantees require legislative intervention in order to produce all their potential effects.¹⁷³⁷ As seen above, the main function of institutional guarantees is to ensure that a certain legal set of constitutional rules is not eliminated, de-characterised or compromised by the legislator. However, they are by definition *incomplete* and require legislative intermediation to be fully applicable. In light of these considerations it is submitted that, by requiring legislative action in order to fill in gaps of judicial protection the CJEU subjects the right to effective judicial protection to the logic of institutional guarantees. The *subjective* dimension of such right which translates into the possibilities of being invoked directly by individuals without the need for intermediate rules is absent from the CJEU’s case-law. This case-law has prevented the maximization of the *subjective* dimension of the right to effective judicial

¹⁷³⁴ Para. 77.

¹⁷³⁵ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 290. See also NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 29 *et seq.*

¹⁷³⁶ MARTINS, “Caracterização do artigo 22.º da Constituição como uma garantia institucional e algumas notas sobre o regime das garantias institucionais”, 2011, at 601, 602, noting that as institutional guarantees are directed at the legislator, they do not confer directly enforceable rights to individuals.

¹⁷³⁷ *Ibid.*, at 578.

protection. Regardless of the institutional guarantee it implies, it is clear that such fundamental right involves the entitlement of *individual* rights. The scope of the constitutional protection of such principle includes both its objective and subjective dimension. Hence, individuals whose rights have been breached must have a *genuine* and *effective* possibility to address a court of law which is competent to decide their case.

In light of the foregoing, it is submitted that a more *subjectivist* approach to the Union's judicial system is still missing. Such an approach would be more in line with both Member States' common constitutional traditions and the renewed system of fundamental rights established by the Lisbon Treaty. In fact, if the determination of standing of individuals to challenge the validity of Union action depends upon certain more general assumptions as to the role which individuals should generally have in public law it seems that the Treaty of Lisbon involved a significant *paradigm shift* in this respect. The *formal constitutionalization* of the right to effective judicial protection combined with the perspective of accession to the ECHR reinforced the duties of the CJEU to contribute to the improvement of the system of remedies and procedures established under the Treaties in light of fundamental rights protection. The entry into force of the Lisbon Treaty must thus have a significant impact on the procedural framework of EU law and in the CJEU's views on the Union's judicial system. The image of judges as "*bouche que prononce les paroles de la loi, d'être inanimés qui n'en peuvent modérer ni la force ni la rigueur*"¹⁷³⁸ is far from fitting into the current legal landscape.¹⁷³⁹ The duty of the CJEU is to bring coherence to the articulation of principles and rules and contribute to the construction of the normative system.¹⁷⁴⁰ Or as PESCATORE has declared a few years ago:

"[c]e n'est pas le législateur mais la Cour de Justice qui détermine en fin de compte l'idée de droit en vigueur dans la Communauté."¹⁷⁴¹

¹⁷³⁸ MONTESQUIEU, *De l'esprit des lois*, Livre XI, Chapitre VI.

¹⁷³⁹ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 162.

¹⁷⁴⁰ CONSTANTINESCO, "The ECJ as a Law-Maker", 2000, at 79.

¹⁷⁴¹ PESCATORE, "Article 164", 1992, at 967.

PART II – A NEW CONCEPTUAL APPROACH AFTER THE LISBON TREATY: THE IMPACT OF THE *JOHNSTON* PRINCIPLE ON THE UNION'S SYSTEM OF JUDICIAL PROTECTION

1. THE RIGHT OF ACCESS TO JUSTICE WITHIN THE UNION'S JUDICIAL SYSTEM IN LIGHT OF THE RENEWED SYSTEM OF FUNDAMENTAL RIGHTS PROTECTION

1.1 General Remarks

I. The Lisbon Treaty is said to have established a renewed system of fundamental rights protection.¹ In fact, Article 6 TEU establishes the most far-reaching provision in this respect ever included in the European Treaties: (i) it grants the Charter of Fundamental Rights the same legal value as the Treaties², (ii) it foresees the legal basis for accession to the ECHR³, and (iii) it acknowledges the protection of fundamental rights as general principles of law, following the CJEU's case-law in this matter. Fundamental rights are, therefore, expressly protected in the Treaties at three different levels. It remains to be seen how the CJEU will deal with this "triple layer of human rights protection"⁴ under the Lisbon Treaty. Notwithstanding, the Treaty of Lisbon "human rights package"⁵ is impressive and Article 6 TEU represents unquestionably a *quality leap* in the field of fundamental rights protection within the European Union.

It is submitted that the improved protection of fundamental rights *wanted* by the Member States under the Lisbon Treaty must have a *procedural impact*. The protection of fundamental rights cannot be restricted to the substantive level. It is a given fact that a "right without a remedy is no right at all."⁶ Hence, the insufficiencies regarding access to judicial review by private parties within the Union's judicial system are more difficult to justify in light of the reinforced protection of fundamental rights, notably procedural rights, within the Union legal order.

II. The right of access to justice, also referred to as the right to a judicial action or the right to a court, – "*garantie ultime de l'effectivité des droits*"⁷ – is commonly considered one of the most important dimensions of the right to effective judicial protection. It is included in the main international treaties and national legal texts on fundamental rights and has been acknowledged by

¹ In the CJEU's own words: "[t]he Treaty of Lisbon, which entered into force on 1 December 2009, represents a *major step* in the development of the protection of fundamental rights in Europe. (...) By consolidating in this way the legal framework for the protection of fundamental rights at Union level, that protection, the first judicial foundations of which were laid more than forty years ago, is *reaffirmed* and *reinforced*." See Discussion Document of the CJEU on Certain Aspects of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5/5/2010, para. 2.

² Nonetheless, one should take into consideration Protocol no. 30, and Declarations no. 1, no. 53, no. 61 and no. 62 issued by some Member States attached to the Lisbon Treaty. See BARENTS, "The Court of Justice after the Treaty of Lisbon", 2010, at 720 *et seq.*; ANDERSON; MURPHY, "The Charter of Fundamental Rights", 2012, at 166 *et seq.*; Joined Cases C-411 and 493/10, *N. S. and others*, [2011].

³ See also Articles 218(6) and (8) TFEU, Protocol 8 and Declaration no. 2 to the Lisbon Treaty.

⁴ WEISS, "Human Rights in the EU", 2011, at 66.

⁵ DOUGAN, "The Treaty of Lisbon 2007", 2008, at 663.

⁶ See TROCKER, "La Carta dei diritti fondamentali dell'Unione Europea ed il processo civile", 2002, at 1171 *seq.* Noting that fundamental rights are still missing adequate remedies at the Union level see COMOGLIO, "L'effettività della tutela giurisdizionale nella Carta dei Diritti Fondamentali dell'Unione europea", 2001, at 471 *et seq.*; FENGE, "Fundamental Rights in the European Union", 2001, at 49 *et seq.* See *infra* Chapter 2, Section 2.1.5(a).

⁷ GREWE, "L'accès au juge", 2003, at 36.

national and international courts. It is also mentioned in the constitutions of most Member States as an “*instrument de protection de tous les droits, comme une garantie d’effectivité de ces derniers*.”⁸ Scholars note that “contrary to the minor degree of distinction that used to exist between substantive and procedural law – as was the case in Roman and older common law – the nineteenth century witnessed a shift of the focus on ‘actions’ (without differentiation between procedural and substantive law) to the focus on law and rights in a substantive sense.”⁹ Since then it has been possible to distinguish between a right and its judicial protection, both in continental Europe and in common law. However, the twentieth century would bring along a *revalorisation of the procedural dimension of rights* and of the need to ensure their effective judicial protection.

Hence, in Germany, the *Bundesverfassungsgericht* has deduced from Article 19(4) GG – in JELLINEK’s words the “*königliche Artikel*” – the “principle of the effectiveness of judicial protection”¹⁰ as implying “*une obligation générale de garantir le droit d’agir en justice*.”¹¹ Such right is conceived therein as a subjective public right and it implies the existence of a *complete* judicial protection. Thus, under the German constitution the system of judicial review must ensure legal protection of individuals *without any procedural lacunae*.¹²

In France, as is well known, the 1958 Constitution resembles the EU Treaties in being “a Constitution without a Bill of Rights”¹³, which even at the time of its adoption was an anomaly among European constitutions. There are only a few references to rights in the constitutional text, and apart from that the preamble refers to the Declaration on the Rights of Man and of the Citizen and to the preamble of the 1946 Constitution. Nonetheless, the *Conseil Constitutionnel* would consider that the latter are part of the *principes généraux du droit* which have supra-legislative value and are binding on all public authorities.¹⁴ In its famous decision *Liberté d’association*¹⁵, the *Conseil* held that it could review legislation for breach of fundamental rights.¹⁶ Hence, the *Conseil Constitutionnel* has, since the 1970s, progressively integrated the preamble of the 1946 Constitution as well as the Declaration in the so-called “*bloc de constitutionnalité*.”¹⁷ Hence, the constitutionalization of the so-called “*droit au juge*”¹⁸ is mostly judge made law. The *Conseil*

⁸ *Ibid.*, at 34. See e.g., Article 19(4) of the German Constitution; Articles 64-66 of the French Constitution; Article 24 of the Italian Constitution; Article 83(2) of the Austrian Constitution; Article 17 of the Constitution of the Netherlands; Article 13 of the Luxembourgish Constitution; Article 45 of the Polish Constitution; Article 9 of Chapter 2 of the Swedish Constitution; Section 21 of the Finnish Constitution; Article 24(1) of the Spanish Constitution; and Article 20 of the Portuguese Constitution.

⁹ BELJIN, “Rights in EU Law”, 2008, at 95.

¹⁰ STEINBERGER, “Judicial Protection of Human Rights at the National Level”, 1991, at 149.

¹¹ PECHSTEIN, “La constitutionnalisation du droit au juge en Allemagne”, 1998, at 59.

¹² Germany adopted one of the most complete and effective codes of administrative justice, i.e. the *Verwaltungsgerichtsordnung* (VwGO) of 1960. In particular, Article 40 establishes the principle of non-typicality of forms of actions. For further developments see SILVA, *O Contencioso Administrativo no Divã da Psicanálise*, 2009, at 96 et seq.

¹³ WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 865.

¹⁴ CROSSLAND, “Rights of the Individual to Challenge Administrative Action before Administrative Courts in France and Germany”, 1975, at 727.

¹⁵ *Décision* no. 71-44 DC, 16/7/1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d’association*.

¹⁶ For further developments see WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 865, 866.

¹⁷ FAVOREU, “La protection juridictionnelle des droits de l’homme au niveau interne”, 1991, at 107.

¹⁸ Noting that this expression reflects better the link between the procedural action and the substantive rights see GREWE, “L’accès au juge”, 2003, at 30.

Constitutionnel and the Conseil d'État have construed broadly the notions of “*droit d'agir en justice*” or “*droit de saisir la juridiction*”, mainly on the basis of Article 16 of said Declaration, which has been incorporated into the current French Constitution.¹⁹ Moreover, with two important decisions issued in the 1980s, the Conseil Constitutionnel established that the principle of judicial independence has constitutional value and that the annulment of administrative measures is a fundamental principle of the laws of the Republic.²⁰ Later decisions acknowledged the right to bring an action before a court based on Article 16²¹, and the relationship of said provision with the right to effective remedies before a court of law.²² Hence, the right of access to justice was increasingly conceived as an individual fundamental right associated with the status of citizenship²³, and it has been considered according to some scholars as having *supra-constitutional* value.²⁴ The *recours pour excès de pouvoir* has contributed to widen the access to justice in the field of administrative law by allowing an action based on the entitlement of a *mere interest*.²⁵

Further south, in Italy, the right of access to courts was developed on the basis of Article 24(1) of the national constitution.²⁶ The case-law of administrative courts and of the Corte Costituzionale contributed to clarify the spirit of the constitutional guarantees enshrined in Articles 24 and 113 of the Italian constitutional text, and focused on the *subjective* dimension of system of administrative justice, regarding the protection of the general interest as secondary.²⁷ In Spain the guarantee established in Article 24 of the national constitution is said to constitute “*un droit fondamental de premier rang, il jouit ce faisant d'une protection maximale*.”²⁸ The Spanish system of administrative justice is said to have a “*carácter pleno*” and “*necesariamente subjetivo*.”²⁹ The right to effective judicial protection emerged as the new paradigm of the system of administrative justice. The legislative reforms which followed the new constitution were seen as corollary of the new constitutional approach.³⁰ Similarly, in Portugal, Article 20 of the Constitution establishes the “*direito a uma tutela jurisdiccional efectiva*”³¹; the current drafting of Article 268(4) and (5) of the

¹⁹ See RAINAUD, “Le droit au juge devant les juridictions administratives”, 1998, at 36 *et seq.*; RENOUX, “La constitutionnalisation du droit au juge en France”, 1998, at 113 *et seq.*; GREWE, “L'accès au juge”, 2003, at 39 *et seq.*

²⁰ See *Décision* no. 80-119 DC, 22/7/1980, *Loi portant validation d'actes administratifs*; and *Décision* no. 86-224 DC, 23/1/1987, *Loi transférant à la juridiction judiciaire le contentieux des décisions du Conseil de la concurrence*.

²¹ *Décision* no. 93-335 DC, 21/1/1994, *Loi portant diverses dispositions en matière d'urbanisme et de construction*.

²² *Décision* no. 96-373 DC, 9/4/1996, *Loi organique portant statut d'autonomie de la Polynésie française*; *Décision* no. 99-416 DC, 23/7/1999, *Loi portant création d'une couverture maladie universelle*.

²³ Noting that these ideas were given concrete application in ordinary legislation, see SILVA, *O Contencioso Administrativo no Divã da Psicanálise*, 2009, at 90.

²⁴ GREWE, “L'accès au juge”, 2003, at 40.

²⁵ See RAINAUD, “Le droit au juge devant les juridictions administratives”, 1998, at 33 *et seq.* See *infra*, Chapter 2, Section 2.1.4.

²⁶ For further developments see LUCIANI, “La constitutionnalisation du droit au juge en Italie”, 1998, at 124-126.

²⁷ CLARICH, “La Giustizia”, 2000, at 1713, 1714. See also COMOGLIO, “Giurisdizione e processo nel quadro delle garanzie costituzionali”, 1994, at 1063-1111. CAIANIELLO, “Riflessioni sull' art.111 della costituzione”, 2001, at 42-63.

²⁸ BURGOGUE-LARSEN, “La constitutionnalisation du droit au juge en Espagne”, 1998, at 69.

²⁹ GARCÍA DE ENTERRÍA; FERNÁNDEZ, *Curso de Derecho Administrativo*, 2000, at 577 *et seq.* In Spain, Article 24 of the Constitution is subdivided into two paragraphs: whereas the first refers to right of access to justice, the second embodies the principle of the right to a fair trial. See also BANDRES SANCHEZ-CRUZAT, *El derecho fundamental al proceso debido y el Tribunal Constitucional*, 1992; CHAMORRO BERNAL, *La tutela judicial efectiva*, 1994; Díez-PICAZO, “Notas sobre el derecho a la tutela judicial efectiva”, 2000, at 41-49.

³⁰ For further developments see e.g., SILVA, *O Contencioso Administrativo no Divã da Psicanálise*, 2009, at 99 *seq.*

³¹ MIRANDA; MEDEIROS, *Constituição Portuguesa Anotada*, 2010, at 415 *et seq.*; CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 2011, at 495 *et seq.*

constitution state that the main purpose of the system of administrative justice is the effective judicial protection of individuals; and the major legislative reform of 2002 is said to have adopted a complete system of judicial protection in conformity with the spirit of the constitution.³²

In light of the above, scholars note that the main difference between the declarations of rights of the nineteenth century and those included in current European constitutions lies with the existence of procedural remedies destined to ensure respect for individual rights. In the words of FAVOREU:

“[l]es auteurs des Constitutions européennes contemporaines ne font plus confiance à la sagesse des législateurs; ils on prévu eux-mêmes les instruments destinés à assurer l’effectivité des règles et principes qu’ils posaient.”³³

By doing this, these constitutional models became closer to the Anglo-Saxon systems, where remedies are more important than the proclamation of rights. In the United Kingdom, the right of access to justice is said to find its origins in the middle ages, in the *Magna Charta Libertatum*.³⁴ However, judicial review of Parliament acts was long contested within a system deeply rooted in parliamentary sovereignty. More recently, the adoption of the *Human Rights Act* of 1998 introduced the logic of protection of individual rights before the legislator and the administration.³⁵ Under its modern understanding, the principle of the rule of law is said to imply the protection of both a democratic society and the rights and freedoms of individuals.³⁶ Accordingly, scholars note that there has been a transition from a monist sovereignty of Parliament to a dualist sovereignty of Parliament and courts.³⁷ Judges have also contributed widely to change the system of judicial review in order to allow for a more extensive control of administrative action.³⁸ Furthermore, the establishment of the Queen’s Bench Division of the High Court, the creation of a new form of action allowing for judicial review of administrative action and the adoption of the *Tribunals and Inquiries Act* of 1992 – which is said to have adopted a comprehensive system of administrative and judicial guarantees – completed the movement towards a more *subjectivist* approach to judicial review.³⁹

III. In light of the foregoing, it was only natural that the European catalogue of fundamental rights included a reference to the right of access to a court. Hence, Article 47 of the Charter, which foresees the right to effective judicial protection, mentions the right of access to justice in its para.

³² For a comparative overview see FAVOREU, “La protection juridictionnelle des droits de l’homme au niveau interne”, 1991, at 107 *et seq.*

³³ *Ibid.*, at 108.

³⁴ For further developments see MARTINS, *Da Proclamação à Garantia Efectiva dos Direitos Fundamentais*, 2007, at 85 *et seq.*

³⁵ See e.g., GARTH, “Judicial Protection of Human Rights at the National Level”, 1991, at 211-214; MORGAN, “Questioning the True Effect of the Human Rights Act”, 2002, at 259 *et seq.*

³⁶ CORREIA, *Direito do Contencioso Administrativo*, 2005, at 294, noting that the previous *ultra vires* doctrine became insufficient to explain the system of judicial review.

³⁷ As LORD BRIDGE OF HARWICH has put it: “[i]n our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen’s courts in interpreting and applying the law.”

³⁸ BRADLEY; EWING, *Constitutional and Administrative Law*, 2011, at 704 *et seq.*

³⁹ For further developments see also GARTH, “Judicial Protection of Human Rights at the National Level”, 1991, at 211 *et seq.*

1. The latter right opens a procedural catalogue which includes a significant set of guarantees: (i) the right of access to a court, (ii) the right to a fair and (iii) public hearing, (iv) the right to a decision in a reasonable time taken by an (v) independent and (vi) impartial tribunal previously (vii) established by law, and (viii) the right to legal advice and (ix) representation.

As is well known, the right of access to justice is also established in the ECHR, which “can justly be considered a part of the cultural self-definition of European civilisation.”⁴⁰ This Convention has worked as an important “test tube” regarding issues of procedural protection of rights, both at the international and national levels. Truly, the ECHR constitutes “the most advanced and effective regional human rights regime in the world.”⁴¹ Articles 6 and 13 of said Convention have contributed decisively to the creation of a *European model of administration of justice* by national and European courts.⁴² The CJEU has long considered the ECHR as “one of the primary sources of fundamental rights whose observance is guaranteed in the Community legal order.”⁴³ In fact, the CJEU has acknowledged the “special significance”⁴⁴ of the Convention, whose principles “must be taken in consideration”⁴⁵ in Union law⁴⁶, and has not hesitated to “borrow rights” from the ECHR.⁴⁷ Articles 6 and 13 have thus been mentioned in a number of cases brought before the Union courts.⁴⁸ Also, accession to the ECHR was object of a long debate within the EU until its formal recognition in current Article 6 TEU.⁴⁹ Additionally, the difficulties

⁴⁰ CURTIN, “The ‘EU Human Rights Charter’ and the Union Legal Order”, 2000, at 317. Noting that the ECHR “*quale parametro di tipo costituzionale è destinata ad emergere*” regardless of its status in EU law see BATTARINO, “Dalla tutela dei diritti dell’uomo alla giustizia costituzionale europea”, 1999, at 541. For an historical overview see WALTER, “History and Development of European Fundamental Rights and Fundamental Freedoms”, 2007, at 3 *et seq.*

⁴¹ HARPAZ, “The European Court of Justice and its Relations with the European Court of Human Rights”, 2009, at 106.

⁴² See e.g., FARINHA, “O processo equitativo garantido na Convenção Europeia dos Direitos do Homem”, 1990, at 239 *et seq.*

⁴³ TRIDIMAS, *The General Principles of EU Law*, 2006, at 341. See Case 4/73, *Nold KG/Commission*, [1974] ECR 491, para. 13. The ECHR was firstly directly mentioned in Case 36/75, *Rutili/Ministre de l’intérieur*, [1975] ECR 1219, para. 32. In time, general references to the Convention gave way to detailed analysis of its provisions. Scholars consider that the Convention ended up being incorporated into the EU legal order. For recent references see, *inter alia*, Case C-260/89, *ERT*, [1991] ECR I-2925, para. 41; Case C-274/99 P, *Connolly/Commission*, [2001] ECR I-1611, para. 37; Case C-60/00, *Carpenter*, [2002] ECR I-6279, paras. 41-42; C-94/00, *Roquette Frères*, [2002] ECR I-9011, para. 25; Case C-112/00, *Schmidberger*, [2003] ECR I-5659, para. 71; Case C-36/02, *Omega*, [2004] ECR I-9609, para. 33. For an overview of the Luxembourg’s case-law on the ECHR see FOSTER, “The European Court of Justice and the European Convention for the Protection of Human Rights”, 1987, at 240 *et seq.*; SAGGIO, *A Protecção dos Direitos Fundamentais na Ordem Jurídica Comunitária*, 1993, at 79 *et seq.*; GUILD; LESIEUR, *The European Court of Justice on the European Convention on Human Rights*, 1998, at 47 *et seq.*; RIDEAU; RENUCCI, “Dualité de la protection juridictionnelle européenne des droits fondamentaux”, 1997, at 97 *et seq.* The CJEU does not hesitate to mention the EcHR’s case-law as well. See e.g., Case C-465/07, *Elgafaji*, [2009] ECR I-921, para. 28; Case C-199/92 P, *Hüls/Commission*, [1999] ECR I-4287, para. 150.

⁴⁴ Joined Cases 46/87 and 227/88, *Hoechst/Commission*, [1989] ECR 2859, para. 13; Case C-260/89, *ERT/DEP*, [1991] ECR I-2925, para. 41; Case C-274/99 P, *Connolly/Commission*, [2001] ECR I-1611, para. 37; Case C-94/00, *Roquette Frères*, [2002] ECR I-9011, para. 23.

⁴⁵ Case 98/79, *Pecastaing/Belgian State*, [1980] ECR 691, para. 7; Case 222/84, *Johnston/Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para. 18; Case 222/86, *Unectef/Heylens*, [1987] ECR 4097, para. 14.

⁴⁶ Noting that the ECHR applies in the EU legal order “*médiatisée, sinon revue et corrigé par le juge communautaire via les principes généraux*” see ZAMPINI, “La Cour de justice des Communautés européennes, gardienne des droits fondamentaux dans le cadre du droit communautaire”, 1999, at 681.

⁴⁷ SCHEECK, “The Relationship between the European Courts and Integration through Human Rights”, 2005, at 850.

⁴⁸ See e.g., Joined Cases 209 to 215 and 218/78, *Van Landuyck/Commission*, [1980] ECR 3125, para. 81; Case 98/79, *Pecastaing/Belgian State*, [1980] ECR 691, paras. 21-22; Joined Cases 100 to 103/80, *Musique Diffusion française/Commission*, [1983] ECR 1825, paras. 7-8; Case T-11/89, *Shell/Commission*, [1992] ECR II-757, para. 39; Joined Cases T-377, 379 and 380/00, and 260 and 272/01, *Philip Morris International/Commission*, [2003] ECR II-1, para. 121.

⁴⁹ The status of the ECHR under Lisbon is however uncertain. In fact, it can be argued that Article 52(3) incorporated the Convention as *primary law*. Further, pursuant to Article 6(2) the ECHR will apply as a *international treaty* in the Union legal order, and it may also work as a *source of inspiration* for the general principles of EU law under

regarding the functioning of the system of judicial control established under the Convention – notably, the possibility of individuals to directly access the EctHR – and the solutions introduced thus far to reform such system⁵⁰, constitute an important source of inspiration to some of the challenges that the European Union faces in this respect.⁵¹

Finally, the recognition in the Treaties of fundamental rights as *general principles of law*, the respect of which the CJEU is said to ensure, also represents an important acknowledgement of the Courts' jurisdiction in the field of fundamental rights protection, which reinforces the need to ensure a more extensive protection of such rights, both at a substantive and a procedural level.⁵²

1.2 Article 6(1) TEU: the Binding Legal Value of the Charter of Fundamental Rights

1.2.1 The Protection of Fundamental Rights within the European Union: from *Substance to Procedure*

I. The *solemn proclamation* of the Charter of Fundamental Rights in 2000 did not constitute the beginning of fundamental rights protection in the EU.⁵³ On the contrary, the adoption of a Union catalogue of fundamental rights is said to constitute the *ultimate stage* of a process initiated by the CJEU in the sixties. Truly, the protection of fundamental rights in the EU has been almost entirely a product of case-law. This still remains the case despite the fact that there are references in the Treaties to such protection and the Union has adopted a catalogue of fundamental rights.⁵⁴

The *praetorian* recognition of the need to ensure protection of fundamental rights at the Union level was considered by scholars one of the “most cherished”⁵⁵ jurisprudential creations of

Article 6(3). For further developments see WEISS, “Human Rights in the EU, (2011) at 64 *et seq.* See *infra* Section 1.3.

⁵⁰ Notably through Protocols no. 11 and 14 to the Convention. See ROWE; SCHLETTE, “The Protection of Human Rights in Europe after the Eleventh Protocol to the ECHR”, 1998, at 3-16; ALVAREZ-OSSORIO MICHEO, “Perfecciones e imperfecciones en el protocolo 11 al Convenio Europeo de Derechos Humanos y otros comentarios a proposito de su entrada en vigor”, 1999, at 135-162; LEANZA, “Il Protocollo no. 11 alla Convenzione Europea dei Diritti dell’Uomo”, 1999, at 357-371; MARTINS, *Da Proclamação à Garantia Efectiva dos Direitos Fundamentais*, 2006, at 161 *et seq.*

⁵¹ See *infra* Chapter 3, Section 3.2.

⁵² Noting that the CJEU did not distinguish fundamental rights from other general principles of Union law see WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 860. In face of Article 6 TEU the CJEU may have difficulties in reconciling the application of the Charter as *primary law* of the Union, of the ECHR as an *international treaty*, and of fundamental rights as *general principles of Union law*. It is, for instance, questionable whether the case-law on the direct effect of international treaties will play a role regarding the ECHR (See EECKHOUT, *External Relations of the European Union*, 2011, at 323 *et seq.*). Moreover, the Charter as primary Union law prevails over international treaties. However, the so-called horizontal provisions of the Charter (Articles 51-54) may determine another outcome. Finally, the role of fundamental rights as general principles of Union law is unclear. Most probably, it will be better to avoid a hierarchical approach to the three sources of fundamental rights and deal with potential normative conflicts through mechanisms of interpretation. This has been also the technique used by several constitutional courts of Member States in which the ECHR is afforded the same legal value as the national constitution and primacy of EU law is acknowledged. Here, the principle of consistent interpretation along with the horizontal provisions of the Charter will play a decisive role. See LEMMENS, “The Relation between the Charter of Fundamental Rights of the EU and the European Convention on Human Rights”, 2001, at 49-67; YOUNG, “The Charter, Constitution and Human Rights”, 2005, at 223 *et seq.*

⁵³ LENAERTS; DE SMIJTER, “A ‘Bill of Rights’ for the European Union”, 2001, at 273. On the drafting of the Charter see e.g., EICKE, “The European Charter of Fundamental Rights”, 2000, at 280 *et seq.*; BÚRCA, “The Drafting of the European Union Charter of Fundamental Rights”, 2001, at 126-138; SACERDOTI, “The European Charter of Fundamental Rights”, 2002, at 41 *et seq.*; BÚRCA; ASCHENBRENNER, “The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights”, 2002-2003, at 356 *et seq.*; DOUGLAS-SCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 40 *et seq.*; SCHÖNLAU, *Drafting the EU Charter*, 2005.

⁵⁴ TRIDIMAS, *The General Principles of EU Law*, 2006, at 298.

⁵⁵ EVERLING, “On the Judge-Made-Law of the European Community’s Courts”, 2000, at 33.

the Union courts⁵⁶, and is said to have determined the most significant transformation of *all times* in the European legal order.⁵⁷ In fact, the absence of fundamental rights in the original version of the Treaties did not prevent the CJEU from affirming the respect for such rights as part of the “legal heritage”⁵⁸ of the Union. In time, the Court successfully fulfilled which was deemed to be an intolerable *lacuna* in the European legal order.⁵⁹

II. It is commonly noted that the *specific* (economic) nature of the European integration process determined the lack of a reference to fundamental rights in the Treaties.⁶⁰ Apart from an “oblique reference”⁶¹ in the preamble, the Treaty of Rome did not mention the protection of fundamental rights.⁶² Facing this constitutional *vacuum*, the CJEU started by adopting a conservative approach regarding the protection of fundamental rights.⁶³ However, it would not take long for it to recognize that the Community/Union is bound by fundamental rights.⁶⁴ The *deficit* of fundamental rights protection at the Union level contrasted with the degree of protection individuals enjoyed in their national legal orders, a fact that along with the expansion of the Union competences insulated the resistances of national courts to the principle of supremacy.⁶⁵ Furthermore, protection of fundamental rights was said to be “part of the renewed calls for accountability, transparency and legitimacy”⁶⁶ of the Union. In fact, in modern democratic societies, respect for human rights “is viewed not only as a *sine qua non* of legality but as the most

⁵⁶ For further developments see KÜHLING, “Fundamental Rights”, 2009, at 479 *et seq.*; SOARES, *A Carta dos Direitos Fundamentais da União Europeia*, 2002, at 12 *et seq.*

⁵⁷ MENENDEZ, “Constituting Rights on Their Own Right”, 2002, at 398.

⁵⁸ CURTIN, “The ‘EU Human Rights Charter’ and the Union Legal Order”, 2000, at 308.

⁵⁹ Noting the uncertainties surrounding the notion of fundamental rights in the CJEU’s case-law see e.g., DUBOUIS, “Le rôle de la Cour de Justice des Communautés européennes”, 1982, at 431 *et seq.*; WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 860; TRIDIMAS, *The General Principles of EU Law*, 2006, at 307 *et seq.*

⁶⁰ See e.g., BIGLINO CAMPOS, “De que hablamos en Europa cuando hablamos de derechos fundamentales”, 1997, at 85. For discussion see WEILER, “Methods of Protection of Fundamental Human Rights in the European Community”, 1992, at 572 *et seq.*; VILAÇA, “A protecção dos direitos fundamentais na ordem jurídica comunitária”, 2001, at 413 *et seq.* In contrast, a reference to fundamental rights was included in the European Defence Community Treaty (Article 3) and in the Draft Treaty on the European Political Community (Article 3). For further developments see BÚRCA, “The Evolution of Human Rights Law”, 2011, 465-497.

⁶¹ TRIDIMAS, *The General Principles of EU Law*, 2006, at 300.

⁶² Nonetheless, there were some provisions in the original version of the Treaties which were fundamental rights-related, for instance, Articles 12 and 119 TEEC. On this point see DAUSES, “La protection des droits fondamentaux dans l’ordre juridique des Communautés européennes”, 1990, at 11, 12; MANCINI, “Safeguarding Human Rights”, 1991, at 498; LENAERTS; DE SMIJTER, “A ‘Bill of Rights’ for the European Union”, 2001, at 274 *et seq.*

⁶³ This line in the case-law can be illustrated by the decisions in Case 1/58, *Stork & Cie./ECSC High Authority*, [1959] ECR 17; Joined Cases 36 and 37/58, and 38 and 40/59, *Präsident Ruhrkohlen-Verkaufsgesellschaft and others/ECSC High Authority*, [1960] ECR 423; Case 13/60, *Geitling Ruhrkohlen-Verkaufsgesellschaft and others/ECSC High Authority*, [1962] ECR 83; Case 40/64, *Sgarlata and others/Commission of the EEC*, [1965] ECR 215. Noting that the early case-law of the Court “created the impression of lack of sensitivity towards the issue of human rights protection” see WALTER, “History and Development of European Fundamental Rights and Fundamental Freedoms”, 2007, at 11. This stage in the Court’s case-law was qualified as being of “*agnosticismo valorativo*.” See DUARTE, “A União Europeia e os Direitos Fundamentais”, 2000, at 19.

⁶⁴ Case 29/69, *Stauder/Stadt Ulm*, [1969] ECR 419, para. 7; Case 11/70, *Internationale Handelsgesellschaft mbH/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, para. 14. See RAMOS, “A Carta dos Direitos Fundamentais da União Europeia e a protecção dos direitos fundamentais”, 2001, at 969 *et seq.*; MENENDEZ, “Constituting Rights on Their Own Right”, 2002, at 403 *et seq.*

⁶⁵ Noting that this process took place “at the instigation of member state courts” see BÚRCA, “Human Rights”, 2001, at 9. For further developments see LASAGABASTER HERRARTE, “Las Comunidades Europeas y los derechos fundamentales”, 1986, at 53-56; DUARTE, “O Tratado da União Europeia e a garantia da Constituição”, 2006, at 18 *et seq.*; MARTINS, *O Princípio do Primado do Direito Comunitário sobre as Normas Constitucionais dos Estados-Membros*, 2006, at 80 *et seq.*; MARTINS, “Um ‘Supremo Tribunal’ para a União?”, 2011, at 121, *et seq.*

⁶⁶ TRIDIMAS, *The General Principles of EU Law*, 2006, at 299.

important yardstick in assessing a polity's democratic credentials."⁶⁷ Some scholars noted that by not protecting human rights the CJEU breached the Treaties themselves, notably current Article 19 TEU which conceives the Court as the *guarantor* of the Law. Indeed, by historic legacy and by force of the modern constitutional experience, the *idea of Law* encompasses the idea of freedom and the proclamation and effective protection of fundamental rights.⁶⁸ As a result, "having been halted at the doorway to the Community legal order, fundamental rights would have knocked on the windows until they were let in."⁶⁹

Thus, eventually, the CJEU settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures.⁷⁰ The story has been told so many times as it to obviate the need for an extensive recapitulation.⁷¹ In a nutshell, the CJEU "broke the silence of the Treaty"⁷² in *Stauder*⁷³, where it "hinted at the unwritten general principle of fundamental rights protection as a basic foundation of Community law."⁷⁴ In *Internationale*⁷⁵ it held that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice."⁷⁶ However, "whilst inspired by the constitutional traditions common to the Member States" such protection "must be ensured within the framework of the structure and objectives of the Community."⁷⁷ In *Nold*⁷⁸ the Court began to establish the Union standard of protection based on essentially "two pillars"⁷⁹ holding that:

"[i]n safeguarding these rights, the Court is bound to draw inspiration from *constitutional*

⁶⁷ *Ibid.*

⁶⁸ DUARTE, "A União Europeia e os Direitos Fundamentais", 2000, at 20. Noting that Article 164 TEEC imposed the observance of the *law*, which includes the general principles of law that might fill in gaps of legal protection see LASAGABASTER HERRARTE, "Las Comunidades Europeas y los derechos fundamentales", 1986, at 57.

⁶⁹ MANCINI, "Safeguarding Human Rights", 1991, at 500.

⁷⁰ Case 44/79, *Hauer/Land Rheinland-Pfalz*, [1979] ECR 3727, para. 15; Case 5/88, *Wachauf/Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609, para. 17; Case C-274/99 P, *Connolly/Commission*, [2001] ECR I-1611, para. 17; Case C-94/00, *Roquette Frères*, [2002] ECR I-9011, para. 23.

⁷¹ See HILF, "The protection of fundamental rights in the Community", 1976, 145-160; RIDEAU, "Le rôle de la Cour de Justice des Communautés européennes", 1982, at 419, 420; DUBOUI, "Le rôle de la Cour de Justice des Communautés européennes", 1982, at 430 *et seq.*; LASAGABASTER HERRARTE, "Las Comunidades Europeas y los derechos fundamentales", 1986, at 58 *et seq.*; DAUSES, "La protection des droits fondamentaux dans l'ordre juridique des Communautés européennes", 1990, at 14 *et seq.*; MANCINI, "Safeguarding Human Rights", 1991, at 500 *et seq.*; WEILER, "Methods of Protection of Fundamental Human Rights in the European Community", 1992, at 575 *et seq.*; SAGGIO, *A Protecção dos Direitos Fundamentais na Ordem Jurídica Comunitária*, 1993, at 69 *et seq.*; MEEHAN, "(Un)Chartered waters", 2000, at 82-91; JACOBS, "Human Rights in the European Union", 2001, at 332 *et seq.*; FRAGOLA, "Sovranità degli stati membri e garanzie a protezioni dei diritti umani nell'ordinamento comunitario", 2001, at 1461 *et seq.*; RIZZO, "Il problema della tutela dei diritti fondamentali nell'Unione Europea", 2001, at 60 *et seq.*; VILAÇA, "A protecção dos direitos fundamentais na ordem jurídica comunitária", 2001, at 418 *et seq.*; KÜHLING, "Fundamental Rights", 2009, at 479 *et seq.*; MARTINS, *O Princípio do Primado do Direito Comunitário sobre as Normas Constitucionais dos Estados-Membros*, 2006, at 117 *et seq.*; EHLERS, "The Fundamental Rights of the European Union", 2007, at 371-398; MARTINS, *Da Proclamação à Garantia Efectiva dos Direitos Fundamentais*, 2007, at 25 *et seq.*; WALTER, "History and Development of European Fundamental Rights and Fundamental Freedoms", 2007, at 11 *et seq.*; BRYDE, "The ECJ's Fundamental Rights Jurisprudence", 2010, 119 *et seq.*; KUMM, "Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm", 2010, at 106 *et seq.*; QUADROS, *Direito da União Europeia*, 2012, at 126 *et seq.*

⁷² WITTE, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", 1999, at 867.

⁷³ Case 29/69, *Stauder/Stadt Ulm*, [1969] ECR 419.

⁷⁴ MENENDEZ, "Constituting Rights on Their Own Right", 2002, at 403.

⁷⁵ Case 11/70, *Internationale Handelsgesellschaft mbH/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

⁷⁶ Para. 4.

⁷⁷ *Ibid.*

⁷⁸ Case 4/73, *Nold KG/Commission*, [1974] ECR 491.

⁷⁹ EICKE, "Human Rights in the European Community", 1997, at LIII. See also GRECO, "I diritti fondamentali nella Costituzione Europea", 2001, at 191 *et seq.* For an overview of the main fundamental rights protection instruments of Member States see WILLEMART, "La valorisation formelle des droits fondamentaux", 1997, at 384 *et seq.*

traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the *constitutions of those states*.

Similarly, *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 (emphasis added).⁸⁰

In *Hauer*⁸¹, the Court reiterated this approach and highlighted for the first time the particular significance of the ECHR in the European legal order.⁸² In all these decisions the Court made clear that the content of a Union fundamental right could be different from the one established in national constitutions.⁸³

Over the years, the Court reinforced the protection of fundamental rights.⁸⁴ Scholars spoke of a “judge-made Bill of Rights”⁸⁵ in this respect, which the CJEU created in “a process of constantly perfecting itself”⁸⁶, not only by expanding the catalogue⁸⁷ – which currently includes basic civil and political rights as well as considerable social rights – but also by broadening the scope of protection. Thus, the CJEU extended judicial review on grounds of fundamental rights to *Member State action* within the scope of Union law, *i.e.* when Member States implement Union acts⁸⁸, derogate from Union law⁸⁹, or interpret Union law.⁹⁰ The decision in *Karner*⁹¹ seemed to

⁸⁰ Para. 13.

⁸¹ Case 44/79, *Hauer/Land Rheinland-Pfalz*, [1979] ECR 3727.

⁸² See paras. 15-17. The first mention to the ECHR was made in Case 36/75, *Rutili/Ministre de l'intérieur*, [1975] ECR 1219.

⁸³ This could lead to the emergence of constitutional conflicts. Discussing the standard of protection that the CJEU should apply see *e.g.*, WEILER, “The Jurisprudence of Human Rights in the European Union”, 1996; BESSELINK, “Entrapped by the Maximum Standard”, 1998, at 629-680.

⁸⁴ This jurisprudential trend was followed by some legislative initiatives adopted either by the Member States who progressively introduced human rights references in the Treaties (the most notorious one being former Article 6(2) TEU), and by the Union institutions which adopted solemn declarations on fundamental rights, the most emblematic being the Joint Declaration of 5 April 1977 (OJ 1977, C 103, 27/4/1977, p. 1) and the Parliament’s Resolution adopting the Declaration of fundamental rights and freedoms of 12 April 1989 (OJ 1989, C 120, 16/5/1989, p. 51). For further developments see JALLES, “Os direitos da pessoa na Comunidade Europeia”, 1981, at 30 *et seq.*; LASAGABASTER HERRARTE, “Las Comunidades Europeas y los derechos fundamentales”, 1986, at 66 *et seq.*; LENAERTS, “Respect for Fundamental Rights as a Constitutional Principle of the European Union”, 2000, at 2 *et seq.*; LENAERTS; DE SMIJTER, “A ‘Bill of Rights’ for the European Union”, 2001, at 276; VILAÇA, “A protecção dos direitos fundamentais na ordem jurídica comunitária”, 2001, at 430 *et seq.*; SOARES, *A Carta dos Direitos fundamentais da União Europeia*, 2002, at 30 *et seq.*; ROCHÈRE, “The EU and the Individual”, 2004, at 347. DUARTE spoke about “uma certa retórica dos direitos que ganhou lugar na agenda política europeia.” See DUARTE, “A Carta dos Direitos Fundamentais da União Europeia”, 2006, at 257.

⁸⁵ See KNOOK, “The Court, the Charter, and the Vertical Division of Powers in the European Union”, 2005, at 367.

⁸⁶ CALLIESS, “The Charter of Fundamental Rights of the European Union”, 2007, at 518.

⁸⁷ Noting that the Court has seldom refused to include an alleged right into its “capacious bag” but it has been more cautious in finding an actual violation of those rights see WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 869.

⁸⁸ Regarding regulations see *e.g.*, Joined Cases 201 and 202/85, *Klensch/Secrétaire d'État*, [1986] ECR 3477; Case 5/88, *Wachauf/Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609; Case C-2/92, *The Queen/Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*, [1994] ECR I-955. On directives see *e.g.*, Joined Cases C-20 and 64/00, *Booker Aquaculture and Hydro Seafood*, [2003] ECR I-7411.

⁸⁹ Case C-260/89, *ERT/DEP*, [1991] ECR I-2925; Case C-368/95, *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH/Bauer Verlag*, [1997] ECR I-368; Case C-60/00, *Carpenter*, [2002] ECR I-6279; Joined Cases C-482 and 493/01, *Orfanopoulos and Oliveri*, [2004] ECR I-5257.

⁹⁰ Case C-105/03, *Pupino*, [2005] ECR I-5285. Scholars have considered that regardless of the wording of Article 51(1) of the Charter, the case-law of the CJEU on the incorporation of fundamental rights *vis-à-vis* Member States should remain intact. See *e.g.*, ALONSO GARCÍA, “The General Provisions of the Charter of Fundamental Rights of the European Union”, 2002, at 495 *et seq.*

⁹¹ Case C-71/02, *Karner*, [2004] ECR I-3025. See STUYCK, “Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*”, 2004, at 1683-1700. See also Opinion of AG JACOBS in Case C-168/91,

have conferred the CJEU universal jurisdiction over *all national measures* enforcing Union law. Although it would maintain the idea that the protection of fundamental rights is limited to the field of Union competences – in conformity with the principle of conferral⁹² –, the Court developed a process of *incorporation* of fundamental rights protection, similar to the one that took place in the U.S.A. regarding the invocability of the Bill of Rights against federate states.⁹³ Thus, scholars noted that the CJEU became the “*arquitecto engenhoso*”⁹⁴ of an effective and complete system of fundamental rights protection at the Union level.⁹⁵ In sum, although initially ignored, fundamental rights “have gradually shifted into focus as a possible force of European integration.”⁹⁶ With the common market largely achieved, fundamental rights are said to “provide a fresh focus for European integration in a new millennium.”⁹⁷

III. The fundamental right to effective judicial protection emerged in the context of ensuring Member States compliance with Union law. As mentioned above, given the peculiarities of the Union’s judicial system – which entrusts national courts with the enforcement of Union rights – this fundamental right was “forged” in the context of the national application of Union law.⁹⁸

As is well known, in the first years of European integration, the CJEU started by admitting the possibility of individuals to invoke rights conferred by Union law in national legal orders.⁹⁹

Konstantinidis/Stadt Altensteig and Landratsamt Calw, [1993] ECR I-1191; Case C-413/99, *Baumbast and R*, [2002] ECR I-7091; Case C-109/01, *Akrich*, [2003] ECR I-9607; Joined Cases C-465/00 and C-138 and 139/01, *Österreichischer Rundfunk and others*, [2003] ECR I-4989; Case C-101/01, *Lindqvist*, [2003] ECR I-12971.

⁹² Joined Cases 60 and 61/84, *Cinéthèque/Fédération nationale des cinémas français*, [1985] ECR 2605; Case 12/86, *Demirel/Stadt Schwäbisch Gmünd*, [1987] ECR 3719; Case C-159/90, *Society for the Protection of Unborn Children Ireland/Grogan and others*, [1991] ECR I-4685; Case C-144/95, *Maurin*, [1996] ECR I-2909; Case C-299/95, *Kremzow/Republik Österreich*, [1997] ECR I-2629; Case C-309/96, *Annibaldi/Sindaco del Comune di Guidonia and Presidente Regione Lazio*, [1997] ECR I-7493; Case C-328/04, *Vajnai*, [2005] ECR I-8577. The scope of application of the Charter under Article 51 is also involved in controversy and has been addressed in the AGs Opinions in Case C-108/10, *Scattolon*, [2011], paras. 116-121; Joined Cases C-483/09 and 1/10, *Gueye and Salmerón Sánchez*, [2011] para. 77.

⁹³ On the incorporation of the Bill of Rights in the U.S.A. see e.g., MYKKELTVEDT, *The Nationalization of the Bill of Rights*, 1983; CURTIS, *No State Shall Abridge*, 1986. For further developments regarding this issue in the EU see WEILER “Eurocracy and Distrust”, 1986, at 1136 *et seq.*; WEILER, “Methods of Protection of Fundamental Human Rights in the European Community”, 1992, at 595 *et seq.*; BINDER, “The European Court of Justice and the Protection of Fundamental Rights in the European Community”, 1995; WEILER, “The Jurisprudence of Human Rights in the European Union”, 1996; BIGLINO CAMPOS, “De que hablamos en Europa cuando hablamos de derechos fundamentales”, 1997, at 90 *et seq.*; ZAMPINI, “La Cour de justice des Communautés européennes, gardienne des droits fondamentaux dans le cadre du droit communautaire”, 1999, at 665 *et seq.*; LENAERTS, “Fundamental Rights in the European Union”, 2000, at 591; LENAERTS, “Respect for Fundamental Rights as a Constitutional Principle of the European Union”, 2000, at 18 *et seq.*; JACOBS, “Human Rights in the European Union”, 2001, at 333 *et seq.*; BESSELINK, “The Member States, the National Constitutions and the Scope of the Charter”, 2001, at 76 *et seq.*; EECKHOUT, “The EU Charter of Fundamental Rights and the Federal Question”, 2002, at 946 *et seq.*; DOUGLAS-SCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 48 *et seq.*, speaking about the “federalizing” effect of the Charter; KNOOK, “The Court, the Charter, and the Vertical Division of Powers in the European Union”, 2005, at 374 *et seq.*; KÜHLING, “Fundamental Rights”, 2009, at 479-514; WALTER, “History and Development of European Fundamental Rights and Fundamental Freedoms”, 2007, at 16-17.

⁹⁴ DUARTE, “A Carta dos Direitos Fundamentais da União Europeia”, 2006, at 258.

⁹⁵ WEILER pointed to the classic risk of a “*gouvernement des juges*.” See WEILER, “Eurocracy and Distrust”, 1986, at 1115. Comparing the creation of an unwritten catalogue by the CJEU with the approach of the U.S. Supreme Court in *Griswold v. Connecticut*, 381 US 479 (1965) and *Roe v. Wade*, 410 US 113 (1973) see KNOOK, “The Court, the Charter, and the Vertical Division of Powers in the European Union”, 2005, at 370. By contrast, considering that no such parallel can be drawn as it cannot be said that the CJEU has been called upon to consider the most significant cultural and social needs see MANCINI, “Safeguarding Human Rights”, 1991, at 512.

⁹⁶ DOUGLAS-SCOTT, “A Tale of Two Courts”, 2006, at 630.

⁹⁷ *Ibid.*

⁹⁸ See *supra* Introduction and Part I, Chapter 1, Section 1.2.3(a).

⁹⁹ See e.g., VAN GERVEN, “The Legal Protection of Private Parties in the Law of the European Economic Community”, 1976, at 4 *et seq.*, noting that the doctrine of direct effect is a good example of how the CJEU has considerably enlarged the legal protection of individuals; O’KEEFFE, “Judicial Protection of the Individual by the

The principle of direct effect was thus referred to as the “big bang” in the development of the EC as a legal community.¹⁰⁰ This was surely one major advance in the process of autonomization of EU law from International law¹⁰¹, and was unquestionably a “vibrant success story.”¹⁰² However, the simple notion of invocability established in *Van Gend en Loos*, would soon prove insufficient in the construction of an integrated system of protection of rights of private parties. Subsequent case-law would clarify the difference between the protection of subjective rights and the principle of direct effect¹⁰³, failing however to determine the scope and meaning of the rights derived from the direct effect of Union law measures. It was not clear if Union rights were equipped with “more offensive weapons”¹⁰⁴, notably if the entitlement of a substantive right implied the existence of remedies and causes of action which would enable the judicial enforcement of the former.¹⁰⁵ These difficulties may be explained on the ground that in the first years of integration, this *procedural dimension* of rights was not contentious, as the CJEU was mainly asked to decide cases involving the application of the principle of direct effect of EU norms. The question of knowing if an individual was entitled to a *proceeding* or to a certain *right of action* was not usually an issue in the first cases which arose before the CJEU.¹⁰⁶ In these first cases, the CJEU had typically to decide if the national court was under an obligation to apply directly the norm at stake and if the individual could rely upon that provision.¹⁰⁷ Moreover, the protection of subjective rights was not a priority in the CJEU’s agenda at the time. The CJEU was mostly focused on the *objective* dimension of EU law, *i.e.* in ensuring that national courts actually applied Union law and that individuals could trust that these courts would do so. The primary purpose of the doctrines of direct effect and supremacy was clearly to reinforce the efficacy – effectiveness or *effet utile* – of Union law.¹⁰⁸ In this context, the *Costa* principle represented an ambitious step forward.¹⁰⁹ Read together, *Van Gend* and *Costa*

European Court of Justice”, 1995/1996, at 901-914.

¹⁰⁰ LIMBACH, “Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe”, 2000, at 335.

¹⁰¹ See VAN GERVEN, “Bridging up the Gap between Community and National Laws”, 1995, at 680; RUFFERT, “Rights and Remedies in European Community Law”, 1997, at 310 *et seq.*; KILPATRICK, “Turning Remedies Around”, 2001, at 143-176.

¹⁰² WEATHERILL, “Addressing Problems of Imbalanced Implementation in EC Law”, 2000, at 100.

¹⁰³ RUFFERT, “Rights and Remedies in European Community Law”, 1997, at 312 *et seq.*

¹⁰⁴ EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1204.

¹⁰⁵ Also the identification of Union rights proved itself to be not so easy an exercise. See WEATHERILL, “Addressing Problems of Imbalanced Implementation in EC Law”, 2000, at 101. See *e.g.*, Case C-236/92, *Comitato di coordinamento per la difesa della Cava and others/Regione Lombardia and others*, [1994] ECR I-483, where the Court could not find provisions creating rights relating to environmental protection susceptible to be safeguarded by national courts. The author notes that it is far easier to identify rights to integration than rights to (re-)regulation.

¹⁰⁶ EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1204.

¹⁰⁷ *Ibid.*

¹⁰⁸ See *ibid.*; RUFFERT, “Rights and Remedies in European Community Law”, 1997, at 316. Noting that “apart from the poetic passage dealing with the new legal order, in *Van Gend en Loos* the CJEU expressly referred to direct effect as an instrument to increase the effective application of the newly born legal system” see BIONDI, “How to Go Ahead as an EU Law National Judge”, 2009, at 227. The adoption of this teleological interpretation together with the further references that “all that is fundamental in the system must have real effect for the citizen”, may be seen as casting the shadow of previous rulings on the subsequent reliance on the argument of the *effet utile*. See PESCATORE, “The Doctrine of Direct Effect”, 1983, at 155-157; PRECHAL, *Directives in European Community Law*, 1995, at 246 *et seq.*; PRECHAL, “Does Direct Effect Still Matter?”, 2000, at 1047-1069; “Direct Effect Reconsidered, Redefined And Rejected”, 2002, at 1741; PESCATORE, “*Van Gend en Loos*, 3 February 1963”, 2010, at 6; MAYER, “*Van Gend en Loos*”, 2010, at 20. Noting that *Van Gend* was mostly about the CJEU safeguarding its jurisdiction, see WITTE, “The Continuous Significance of *Van Gend en Loos*”, 2010, at 10; MAYER, “*Van Gend en Loos*”, 2010, at 22.

¹⁰⁹ Scholarship has used emblematic expressions to characterize the Court’s attitude in *Costa*. RASMUSSEN spoke about a “revolution in European law” (RASMUSSEN, *From Costa v ENEL to the Treaties of Rome*, 2010, at 69). FENNELLY called the authors of these rulings “visionaries” (FENNELLY, “The European Court of Justice and the

were said to have constituted a true “juridical *coup d’État*.”¹¹⁰

However, an EU right restricted to a “mere invocation entitlement”¹¹¹ had somewhat a “modest content”¹¹² from the perspective of the individual, as it basically ensured that courts did what they were already supposed to do: to apply the law to a given case (*jura novit curia*). In this context, the CJEU considered that the EU legal order conferred rights to individuals *in general*, or to any individual who had *an interest* in the performance of the duties thus laid down.¹¹³ In the context of the application of the principles of direct effect and supremacy, and in order to ensure the maximum application of EU law, no limitation *ratione personae* was necessary or convenient: “the more often this occurs, the better it is.”¹¹⁴ This pragmatic vision was also uncontested from a conceptual point of view. Since the attribution of a right was limited to its invocation in a judicial proceeding, there was no objection to its generous conferral. It was not surprising that Union law broadly granted rights to individuals as it did so with a limited content. Only, when and if such subjective rights were “to be provided with the means of enforcement by way of offensive remedies and appropriate causes of action”¹¹⁵ did the concern with the consequences of the need to ensure their effective protection arise, notably the “scary vision of an *actio popularis*.”¹¹⁶ In other words, only when *substance* turned into *process*, did the effective judicial protection of rights of private parties become a problem in the construction and interpretation of the system of judicial protection established under the Treaties.¹¹⁷

Over time, possibly more aware of the potential vulnerability of these “naked rights”, *i.e.* rights without remedies, the CJEU *jumped* from this “invokability stage” expressly assuming the need to protect rights through remedies, and developing a body of case-law focused directly on the need to protect subjective rights and on the creation of the necessary and adequate means of action. The rulings on the *Simmenthal*¹¹⁸, *Factortame*, *Johnston*, *Peterbroeck* and *Kühne* cases were delivered with this concern in mind.¹¹⁹ The *invokability* dimension was promoted also by another

Doctrine of Supremacy”, 2010, at 44). The literature on *Costa/ENEL* is extensive. For recent commentaries see *e.g.*, FENNELLY, “The European Court of Justice and the Doctrine of Supremacy”, 2010, at 3946; HOFMANN, “Conflicts and Integration”, 2010, at 60-68; PERNICE, “*Costa v ENEL* and *Simmenthal*”, 2010, at 47-59; RASMUSSEN, “From *Costa v ENEL* to the Treaties of Rome”, 2010, at 69-85; MARTINS, “Comentário ao Acórdão do Tribunal de Justiça de 15 de Julho de 1964, Proc. 6/64, *Costa c. ENEL*”, 2011, at 39-58.

¹¹⁰ SWEET, “The Juridical *Coup d’État* and the Problem of Authority”, 2010, at 206.

¹¹¹ EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1205.

¹¹² *Ibid.*

¹¹³ See Case 43/75, *Defrenne/SABENA*, [1976] ECR 455.

¹¹⁴ EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1205; PRECHAL, “Protection of Rights”, 2008, at 156.

¹¹⁵ EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1206.

¹¹⁶ *Ibid.*

¹¹⁷ There is another reasonable explanation for the lack of reference to remedies in the initial case-law of the CJEU. In fact, the first decisions on this issue aimed mainly at ensuring the liberalization of the application of EU law, by eliminating the obstacles to the exercise of rights by individuals. In these cases, offensive remedies are typically not required. These rights can be exercised by exercising the liberalized acts. The application of internal market rules constitutes the best example of this case-law. For further developments see *ibid.*, at 1216 *et seq.*

¹¹⁸ Case 106/77, *Amministrazione delle finanze dello Stato/Simmenthal*, [1978] ECR 629.

¹¹⁹ These cases focused primarily on ensuring direct effect and supremacy of EU law through the improvement of the possibilities to invoke Union rights. They did not, however, contribute to clarify the exact content of subjective rights of individuals. Nonetheless, these decisions represent a more advance stage of case-law in so far as they contributed to clarify the need to ensure and effective judicial protection of rights of individuals, in cases where a procedural provision of national law impaired the application of EU law. This is probably the reason why in some literature they are mentioned as examples of a second generation of case-law. See EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1207. See also O’KEEFFE, “Judicial Protection of the Individual by the European

series of cases which acknowledged the *right to judicial review* of administrative decisions which enforce EU law. Here, the *Johnston* case paved the way.

In the latter case one finds probably the first reference to the *procedural dimension* of rights granted by EU law. Surely, the statement in *Johnston* “gives little guidance as to the specific contents of that right, the constraints to which it may be subject, and the way it is to be balanced with other, conflicting interests.”¹²⁰ Generally speaking, it includes the right of *access to courts* and the right to *judicial review*. This is too little to say in the discussion on the type of remedies that have to be available before national courts. Moreover, one should note that the right of action was acknowledged in *Johnston* on the basis of the interpretation of a provision included in a directive, and not as a direct corollary of the principle of effective judicial protection *per se* – as a directly applicable general principle of law requiring the creation of adequate remedies and procedures.¹²¹ Notwithstanding, for purposes of the present study, it is important to stress that with the *Johnston* ruling the CJEU acknowledged the idea that “rights as values necessarily entail rights as means.”¹²² Or as DE LA ROCHÈRE has put it: “il est impossible de distinguer la dimension ‘instrument’ de la dimension ‘valeur’”¹²³ of individual rights. *Johnston* shows that the CJEU became aware of the need to ensure *effective judicial protection* of rights of private parties. The latter should have access to a judicial remedy against a decision of a national authority which breaches or denies a right conferred by Union law. This idea was equally acknowledged later in the field of freedom of persons¹²⁴, progressively enlarged to other areas, and finally confirmed as a general principle of Union law.¹²⁵

The so-called procedural dimension of Union rights arose subtly in this case-law. Given the fact that Union law is applied mostly by national authorities and that in the *current status of Union law* the EU is still missing harmonized procedural rules, national courts were put under an obligation to ensure effective judicial protection of rights conferred under Union law, in national legal orders, *i.e.* within national judicial proceedings. In this context, the CJEU dealt with the avenues opened by the principle of national procedural autonomy of Member States and the possibilities available to individuals to challenge *Member State action* in breach of Union law. Here, when the *substance* of EU rights was jeopardized by national *procedural* rules, the case-law of the CJEU focused on eliminating possible obstacles to the *full effectiveness* of Union law, and the right to effective judicial protection emerged as a valuable and powerful tool.

Court of Justice”, 1995/1996, at 911 *et seq.*; TRIDIMAS, “Enforcing Community Rights in National Courts”, 2000, at 36; KILPATRICK, “Turning Remedies Around”, 2001, at 145; TRIDIMAS, *The General Principles of EU Law*, 2006, at 421.

¹²⁰ TRIDIMAS, *The General Principles of EU Law*, 2006, at 443. See also RUFFERT, “Rights and Remedies in European Community Law”, 1997, at 330.

¹²¹ See *infra* Section 1.2.2.

¹²² DELICOSTOPOULOS, “Towards European procedural primacy in national legal systems”, 2003, at 613.

¹²³ ROCHÈRE, “Droit au juge”, 1996, at 124.

¹²⁴ Case 222/86, *Unectef/Heylens*, [1987] ECR 4097; Case C-340/89, *Vlassopoulou/Ministerium für Justiz, Bundes-u. Europaangelegenheiten Baden-Württemberg*, [1991] ECR I-2357.

¹²⁵ Case 178/84, *Commission/Germany*, [1987] ECR 1227; Case C-97/91, *Oleificio Borelli/Commission*, [1992] ECR I-6313; Case C-95/01, *Greenham and Abel*, [2004] ECR I-1333. See EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1210.

1.2.2 The *Johnston* Principle: the Right to Effective Judicial Protection and the Effectiveness of Union Law

I. In *Johnston* the CJEU affirmed that access to courts is one of the *essential* elements of a Union based on the rule of law and is guaranteed in the legal order based on the Treaties, which is said to have established “a complete system of legal remedies and procedures” designed to permit the CJEU to review the legality of acts of the institutions and of Member States.¹²⁶ The Court stated that the “right to a judge” is a fundamental constituent of modern democratic states, and should be understood as a fundamental right of European citizens.¹²⁷ Thus, in this case the Court not only showed that Union law provides individuals with rights *and* remedies, but it also associated for the future the principle of effectiveness of Union law with the principle of effective judicial protection.¹²⁸

In *Johnston*, the right to effective judicial protection was seen as an emanation of a *general principle of EU law* which should be considered at the same normative level as the Treaties themselves and, thus, as an essential part of the European Union *constitution*.¹²⁹ As mentioned above, the CJEU held in this case that the requirement of judicial control stipulated in Article 6 of Directive 76/207 reflects a general principle of law which underlies the constitutional traditions common to the Member States and is laid down in Articles 6 and 13 ECHR.¹³⁰ This idea would be reiterated in several other rulings of the Union courts.

One should note that *Johnston* involved the determination of the meaning and scope of provisions of secondary Union law which imposed on Member States the duty to provide for certain procedural guarantees.¹³¹ The same would happen in subsequent cases. Hence, for instance, in *Stadt Halle*¹³², the Court interpreted the so-called remedies-directive¹³³ in the field of public procurement, and considered that a decision not to initiate an award procedure must be considered as amenable to judicial review.¹³⁴ In fact, the *wording of the directive* assumed, “that *every decision* of a contracting authority falling under the Community rules in the field of public

¹²⁶ Case 294/83, *Les Verts/Parliament*, [1986] I-1339, para. 23.

¹²⁷ ROCHERE, “Droit au juge”, 1996, at 124.

¹²⁸ TRIDIMAS, *The General Principles of EU Law*, 2006, at 444, noting that the judgment is particularly significant as the exclusion of recourse to the court pertained to matters of national security, an area not easily susceptible to judicial scrutiny.

¹²⁹ TROCKER, “La Carta dei diritti fondamentali dell'Unione Europea ed il processo civile”, 2002, at 1193. On the role and place of EU law principles protecting individuals see RIDEAU, “Le rôle de la Cour de Justice des Communautés européennes”, 1982, 411-427.

¹³⁰ See also Case C-185/97, *Coote/Granada Hospitality*, [1998] ECR I-5199, para. 21; Case C-380/01, *Schneider*, [2004] ECR I-1389.

¹³¹ In time, several directives began to include remedial provisions. Just to name a few, see Article 4 Directive 90/313; Article 8(2) of Directive 89/48/EEC; Article 12(2) of Directive 92/51/EEC; Article 9 of Directive 98/5/EC; Article 12 and 22(3) of Directive 73/239/EEC; Article 7 of Directive 96/57/EEC; Article 33 of Directive 2000/12/EC; Article 6 of Directive 76/207/EEC; Article 9 of Directive 98/49/EC; Article 18(1) of Directive 2000/31/EC. More detailed provisions are included in some fields as consumer protection (Directive 84/450/EC, and Directive 92/28/EC) and public procurement (Directive 2004/17/EC and Directives 2004/18/EC, where entirely procedural directives were adopted). Some regulations also have an impact on national procedural rules. See Regulation 2913/92; Regulation 40/94; and Regulation 2100/94. For an overview of some of these measures see ARNULL, “The Principle of Effective Judicial Protection in EU Law”, 2011, at 63-68. Considering that the approach of the Union legislature in the harmonisation of national procedural rules gives an impression “of fragmentation and of an *ad hoc* approach” see HEUKELS; TIB, “Towards Homogeneity in the Field of Legal Remedies”, 2002, at 127.

¹³² Case C-26/03, *Stadt Halle and RPL Lochau*, [2005] ECR I-1.

¹³³ Council Directive 89/665/EEC.

¹³⁴ Paras. 35-36.

procurement and liable to infringe them *is subject to the judicial review* provided for in Article 2(1)(a) and (b) of that directive.”¹³⁵ In *Coote*¹³⁶, interpreting Directive 76/207, the Court held that:

“[t]he *principle of effective judicial control* laid down in Article 6 of the Directive would be deprived of an essential part of its effectiveness if the protection which it provides did not cover measures which, as in the main proceedings in this case, an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where *no legal remedy is available against them*, might deter workers who considered themselves the victims of discrimination from pursuing their claims *by judicial process*, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive (emphasis added).”¹³⁷

In light of these rulings, one may wonder if the CJEU would have applied the principle of effective judicial protection directly in the absence of such remedial rules. The answer would have to be affirmative. In fact, the right to effective judicial protection was elevated to the constitutional level, to the category of *general principle of Union law*, which had deep repercussions in the construction of Union’s system of judicial review. In *Heylens*¹³⁸ the Court held that:

“[s]ince free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the *existence of a remedy of a judicial nature* against any decision of a national authority refusing the benefit of that right *is essential in order to secure for the individual effective protection for his right*.

(...) that requirement reflects a *general principle of Community law* which underlies the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (emphasis added).”¹³⁹

Scholars note that although this particular judgment was delivered within the context of the fundamental freedoms, regarding a national administrative act – *i.e.* of a concrete and individual nature –, its application to other areas should not be excluded.¹⁴⁰ Indeed, *all acts that produce legal effects*, either of a normative nature or not, which breach individuals’ rights under EU law, must be liable to be submitted to some kind of judicial control. One could say, at the most, that as the case of *Heylens* involved a breach of a fundamental right conferred directly by the Treaties – what could be considered as a *constitutional* fundamental right –, the obligations imposed on Member States by the principle of effective judicial protection should be enhanced. In fact, in this type of cases, it is especially important that individuals can defend themselves, in the Court’s own words, “under the

¹³⁵ Para. 28.

¹³⁶ Case C-185/97, *Coote/Granada Hospitality*, [1998] ECR I-5199. See also Joined Cases C-286/94, and 340 and 401/95, and 47/96, *Garage Molenheide and others/Belgische Staat*, [1997] ECR I-7281, paras. 53-57. See also WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 59 *et seq.*

¹³⁷ Para. 24.

¹³⁸ Case 222/86, *UNECTEF/Heylens*, [1987] ECR 4097.

¹³⁹ Para. 14. Involving the application of Treaties provisions and the need to ensure effective judicial protection see also Case C-340/89, *Vlassopoulou/Ministerium für Justiz, Bundesu. Europaangelegenheiten Baden-Württemberg*, [1991] ECR I-2357; Case C-104/91, *Aguirre Borrell and others*, [1992] ECR I-3003.

¹⁴⁰ PICOD, “Le droit au juge en droit communautaire”, 1998, at 151.

best possible conditions” and that they “have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts.”¹⁴¹ Hence, in the particular circumstances of the case, the competent national authority was deemed under a duty to inform the individuals of the reasons on which its refusal was based, either on the decision itself or on a subsequent communication made at their request. It was not enough that the judge competent to decide the case could ask for the notification of such reasons *a posteriori*, in the context of judicial proceedings.¹⁴² The Court followed the same approach regarding free movement of goods, affirming the need to ensure judicial control over the derogations allowed by the Treaties, in particular the compliance with the principle of proportionality.¹⁴³

Later, in *Borelli*, faced with a national decision which was bound on the Commission in the field of state aids, the Court adopted a formulation which would become *obiter dictum* in its subsequent judgments, stating that:

“(...) the requirement of judicial control of *any decision* of a national authority reflects a *general principle* of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (emphasis added).”¹⁴⁴

In this case, the CJEU held that national courts must do their utmost to provide an effective remedy at the national level and “to regard an action brought for that purpose as admissible *even if the domestic rules of procedure do not provide for this in such a case*.”¹⁴⁵ AG DARMON had mentioned in the case the “requirements of the principle of the ‘right to an effective judicial remedy’, which the case-law of the Court has recognized as being of *fundamental importance* in the Community legal order” and which implied that “an individual who considers himself wronged by a measure which deprives him of a right or advantage under Community rules must be able to have access to a remedy against that measure and obtain *complete judicial protection*.”¹⁴⁶ The centrality of such fundamental right was also stressed by AG RUIZ JARABO-COLOMER in the case of *Shingara*¹⁴⁷, where the AG stated that:

“[t]he doctrine expounded by the Court of Justice has raised the right of citizens to judicial protection to the status of *an essential guarantee* within the Community legal order. In

¹⁴¹ Para. 15.

¹⁴² Considering that in this case the Court acknowledged the “irradiant effect” of fundamental rights, notably of the right of access to a court, over national administrative procedures see CORREIA, *Direito do Contencioso Administrativo*, 2005, at 358.

¹⁴³ TRIDIMAS, *The General Principles of EU Law*, 2006, at 445. See Case 178/84, *Commission/Germany*, [1987] ECR 1227; Case 8/88, *RTT/GB-Inno-BM*, [1991] ECR I-5941; Case 174/88, *The Queen/Dairy Produce Quota Tribunal for England and Wales, ex parte Hall & Sons*, [1990] ECR I-2237; Joined Cases C-46/90 and -93/91, *Procureur du Roi/Lagauche and others*, [1993] ECR I-5267. It would also demand judicial review of restrictions to fundamental freedoms. See Case C-19/92, *Kraus/Land Baden-Württemberg*, [1993] ECR I-1663; Case C-7/98, *Krombach*, [2000] ECR I-1935; Case C-228/98, *Dounias*, [2000] ECR I-577; Case C-54/99, *Église de scientology*, [2000] ECR I-1335;

¹⁴⁴ Para. 14. See also Case C-1/99, *Kofisa Italia*, [2001] ECR I-207, para. 46; Case C-226/99, *Siples* [2001], ECR I-277, para. 17.

¹⁴⁵ Para. 13. Discussing the decision see GARCÍA DE ENTERRÍA, “The Extension of the Jurisdiction of National Courts by Community Law”, 1993, at 19 *et seq.*

¹⁴⁶ Para. 31.

¹⁴⁷ Joined Cases C-65 and 111/95, *The Queen/Secretary of State for the Home Department, ex parte Shingara and Radiom*, [1997] ECR I-3343. See also Case-98/79, *Pecastaing/Belgian State*, [1980] ECR 691.

contrast to the position in relation to Article 6 of the European Human Rights Convention, the requirement of effective judicial protection, in the Community sphere, is not limited merely to ‘civil rights’ but extends to all rights deriving from the provisions of Community law (emphasis added).¹⁴⁸

In this case, the Court made clear that “the obligation incumbent on the Member States is to make available to nationals of other Member States the same remedies as those provided against acts of the administration generally.”¹⁴⁹ Although not having clarified the content of such remedies, the Court held that they should provide *full and effective protection* and that the directive at state merely imposed *minimum procedural guarantees* for the persons concerned.¹⁵⁰ The AG had considered that in English law the requirements of the directive would be satisfied by allowing the person to apply for judicial review proceedings. However, he added that if such course of action did not allow for a *complete and effective judicial examination* of the administrative decisions, including review of substance, than Union law would require such restrictions to be set aside.¹⁵¹ As ZAMPINI has put it, in this case-law Articles 6 and 13 ECHR have been “*maîtrisés et adaptés*” by the CJEU to grow to be the right to an *effective remedy* and the right to a *complete and effective legal protection*.¹⁵²

II. In the context of this *national* application of Union law, the right to effective judicial protection was construed broadly and as imposing extensive duties on national authorities. ARNULL referred to such principle as one “unruly horse”: once one gets astride it one never knows where it will carry oneself.¹⁵³

Hence, Member States must ensure access to an independent and impartial tribunal.¹⁵⁴ This right of access to justice must provide the individual with a *real* and *effective* opportunity to commence all the available proceedings.¹⁵⁵ In *Van der Wal*¹⁵⁶, anticipating almost literally the wording of Article 47(2) of the Charter the Court held that:

“[t]he general principle of Community law under which every person has a right to a fair

¹⁴⁸ Para. 75. Hence, the EU procedural rights apply in administrative proceedings. See e.g., Case T-348/94, *Enso Española/Commission*, [1998] ECR II-1875, para. 80. See also Opinion of AG ALBER in Case C-63/01, *Evans*, [2003] ECR I-14447; GARCÍA DE ENTERRÍA, “The Extension of the Jurisdiction of National Administrative Courts by Community Law”, 1993, at 19 *et seq.*; HARLOW, “Access to Justice as a Human Right”, 1999, at 202; LUZZATTO, “Note sul diritto dei singoli a una tutela giurisdizionale piena ed effettiva contro la violazioni del diritto comunitario”, 1999, at 374; ROCHÈRE, “La charte de droits fondamentaux de l’Union européenne”, 2000, at 676; MARTÍN DÍZ, “Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea”, 2003, at 230; DOUGAN, *National Remedies before de Court of Justice*, 2004, at 5, noting that the Union principle of the right of access to judicial control “applies to all rights and obligation deriving from the Treaty, and thus administrative in nature”; GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 491; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 174. Accordingly, Article 47 of the Charter grants the right to a fair trial to everyone *whose rights or freedoms guaranteed by the law of the Union are violated*. See *infra* Section 1.2.4.

¹⁴⁹ TRIDIMAS, *The General Principles of EU Law*, 2006, at 447.

¹⁵⁰ *Ibid.*

¹⁵¹ Opinion of AG RUIZ JARABO-COLOMER in *Shingara*, para. 64.

¹⁵² ZAMPINI, “La Cour de Justice des Communautés européennes, gardienne des droits fondamentaux dans le cadre du droit communautaire”, 1999, at 681.

¹⁵³ ARNULL, “The Principle of Effective Judicial Protection in EU Law”, 2011, at 51.

¹⁵⁴ Case C-424/99, *Commission/Austria*, [2001] ECR I-9285.

¹⁵⁵ PICOD, “Le droit ao juge en droit communautaire”, 1998, at 147.

¹⁵⁶ Joined Cases C-174 and 189/98 P, *Netherlands and Van der Wal/Commission*, [2000] ECR I-1. The notion of a court or tribunal was mostly elaborated within the context of Article 267 TFEU. See Case C-54/96, *Dorsch Consult Ingenieurgesellschaft/Bundesbaugesellschaft Berlin*, [1997] ECR I-4961.

trial, inspired by Article 6 of the ECHR (...), comprises the right to a tribunal that is independent of the executive power (...).¹⁵⁷

Moreover, according to the CJEU the right of access to justice should not be impaired by *excessive procedural hurdles*. It is not enough to guarantee the existence of a given form of action. The right to a judge implies the right to *effectively* access the courts, i.e. “*le droit d’‘exercer utilement’ les voies de droits*.”¹⁵⁸ In this regard, the CJEU issued important decisions in matters of evidence¹⁵⁹, time limits¹⁶⁰, *locus standi*¹⁶¹ and rights of defence before national courts.¹⁶² Also the right to effective judicial protection must ensure the possibility for the national court to use the preliminary references procedure which cannot be compromised by the right of appeal of the national decision.¹⁶³ Moreover, such right implies the prospect and, if and when the case arises, the *obligation* of national courts to grant interim relief even if national laws do not provide for such possibility.¹⁶⁴ Furthermore, effective judicial protection affects the scope and intensity of review applied by national courts, although the latter may vary according to the circumstances of the case and the margin of appreciation left to national authorities.¹⁶⁵ Notwithstanding, as seen above, it remains unclear whether Member States are under an obligation to create entirely new remedies and forms of action in national legal orders.¹⁶⁶

In the process of determining the duties imposed on Member States by the right to effective judicial protection the CJEU has adopted a predominantly *substantialistic* approach, which following the model of judicial protection in force in common law countries translates not so much in the ability to initiate a judicial action, but mostly into the individual’s right that a judicial action provides an *adequate remedy* which ensures full satisfaction of his/her interests. Hence, for

¹⁵⁷ Para. 17. See also *De Wilde, Ooms and Versyp (“Vagrancy”) v. Belgium*, Applications nos. 2832/66; 2835/66; 2899/66, Judgement of 18/06/1971, para. 78.

¹⁵⁸ PICOD, “Le droit au juge en droit communautaire”, 1998, at 147.

¹⁵⁹ E.g., Case 199/82, *Amministrazione delle finanze dello Stato/San Giorgio*, [1983] ECR 3595; Joined Cases 205 to 215/82, *Deutsche Milchkontor GmbH*, [1983] ECR 2633.

¹⁶⁰ E.g., Case 33/76, *Rewe/Landwirtschaftskammer für das Saarland*, [1976] ECR 1989; Case C-208/90, *Emmott/Minister for Social Welfare and Attorney General*, [1991] ECR I-4269; Case C-338/91, *Steenhorst-Neerings/Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, [1993] ECR I-5475.

¹⁶¹ Joined Cases C-87 to 89/90, *Verholen and others*, [1991] ECR I-3757; Case C-13/01, *Safalero*, [2003] ECR I-8679.

¹⁶² For a comprehensive overview of the duties imposed on national courts see PICOD, “Le droit au juge en droit communautaire”, 1998, 149 *et seq.*; TRIDIMAS, *The General Principles of EU Law*, 2006, at 420 *et seq.*; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 110 *et seq.*

¹⁶³ Case 166/73, *Rheinmühlen Düsseldorf/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1974] ECR 33.

¹⁶⁴ Joined Cases 143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest/Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, [1991] ECR I-415; Case C-213/89, *The Queen/Secretary of State for Transport, ex parte Factortame*, [1990] ECR I-2433; Case C-465/93, *Atlanta Fruchthandelsgesellschaft and others (I)/Bundesamt für Ernährung und Forstwirtschaft*, [1995] ECR I-3761. On interim relief see VIVIANI, “Diritto comunitario e potestà cautelare dei giudici nazionali”, 1993, at 579 *et seq.*; SOBRINO HEREDIA, “La incidencia del derecho comunitario sobre la facultad de los órganos jurisdiccionales nacionales de adoptar medidas cautelares de contenido positivo”, 1996, at 779 *et seq.*; VILAÇA, “A protecção jurisdicional dos particulares mediante as medidas provisórias em direito comunitário da concorrência”, 1998, at 1281-1382; BARAV, “A aplicação do direito comunitário pelos tribunais nacionais”, 1999, at 48 *et seq.*; VILAÇA, “O sistema judicial comunitário e a protecção dos particulares”, 1999, at 48, 49. See *supra* Part I, note 1192.

¹⁶⁵ Case C-120/97, *Upjohn*, [1999] ECR I-223; Case C-462/99, *Connect Austria*, [2003] ECR I-5197; Case C-92/00, *HI*, [2002] ECR I-5553; Case C-94/00, *Roquette Frères*, [2002] ECR I-9011; Case C-63/01, *Evans*, [2003] ECR I-14447; Case C-380/01, *Schneider*, [2004] ECR I-1389. According to the case-law of the Court when the Union institutions are called upon to make complex assessments in the exercise of broad discretionary powers, judicial review is limited to ascertaining the accuracy of facts, manifest errors, misuse of power and clear excess of discretion. See TRIDIMAS, *The General Principles of EU Law*, 2006, at 448 *et seq.*; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 175 *et seq.*

¹⁶⁶ Case C-432/05, *Unibet*, [2007] ECR I-2271. See *supra* Part I, Chapter 1, Section 1.2.3(a).

the CJEU, the right to an adequate remedy is the “*componente essenziale e qualificante*”¹⁶⁷ of the right to effective judicial protection. This understanding grows from the awareness that issues of effective judicial protection cannot be satisfactorily dealt with from the single perspective of the concept of “*azione*”¹⁶⁸, understood as the mere possibility of invoking a substantive legal positions before a judge. The normative and cultural environment in which such rulings were delivered led scholars to consider the relationship between substantive and procedural law in terms of a “*Klagerecht*.”¹⁶⁹ Hence, the concretization of the right to effective judicial protection, “*elevato a principio generale dell’ordenamento comunitario*”¹⁷⁰ takes place mostly at the level of remedies, which are construed according to the several types of individual *subjective* legal positions and the protection they imply in face of each violation. In light of these considerations, the CJEU held that national courts are under an obligation to grant interim relief¹⁷¹; established the principle of reparation in case of moral damages¹⁷² and the principle of state liability¹⁷³; and acknowledged the need for restitutory actions in cases of unduly paid taxes.¹⁷⁴

This process appeared as a natural consequence of the configuration given to national procedural autonomy. Contrary to the *strictly* procedural dimensions of the right to effective judicial protection which are a matter of national law, the determination of the remedies that have to be available in national legal orders to protect Union rights can be conceived as a corollary from the scope and content of the right as established and defined in Union legislation. Thus, the CJEU developed the notion of effective judicial protection by interpreting the scope of Union rights, in order to ensure that remedies were available in national legal orders.¹⁷⁵ Here, the need to ensure the procedural protection of Union rights ended up redefining the substance of such rights¹⁷⁶ and scholars noted the “relativization between substance and procedure”¹⁷⁷ and the intricacy of rights, remedies and procedures.¹⁷⁸

III. One should not lose sight, nonetheless, that this *generous* case-law of the CJEU on the scope of the right to effective judicial protection was developed when the validity of *Member States* acts under EU law was being questioned by private parties. Here, Union rights worked as a

¹⁶⁷ TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1197.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Joined Cases 143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest/Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, [1991] ECR I-415; Case C-465/93, *Atlanta Fruchthandelsgesellschaft and others (I)/Bundesamt für Ernährung und Forstwirtschaft*, [1995] ECR I-3761.

¹⁷² Case 177/88, *Dekker/Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941; Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891; Case C-271/91, *Marshall/Southampton and South West Hampshire Area Health Authority*, [1993] ECR I-4367.

¹⁷³ Joined Cases C-6 and 9/90, *Francovich and Bonifaci/Italy*, [1991] ECR I-5357; Joined Cases C-46 and 48/93, *Brasserie du pêcheur/Bundesrepublik Deutschland and The Queen/Secretary of State for Transport, ex parte Factortame and others*, [1996] ECR I-1029.

¹⁷⁴ Case 199/82, *Amministrazione delle finanze dello Stato/San Giorgio*, [1983] ECR 3595.

¹⁷⁵ On the relationship between rights and remedies see e.g., BOCH; LANE, “European Community Law in National Courts”, 1992, at 172 *et seq.*; BELJIN, “Rights in EU Law”, 2008, at 110 *et seq.*

¹⁷⁶ EILMANSEBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1199-1246.

¹⁷⁷ TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1220.

¹⁷⁸ Noting that the notion of effective remedy has a broad meaning including rights, remedies and procedures, except for purposes of current Article 263(4) TFEU see HARLOW, “A Common European Law of Remedies”, 2000, at 72 *et seq.*

“powerful device”¹⁷⁹ and the CJEU benefited from the “language of rights” to ensure that the requirements imposed by the *effectiveness of Union law* were more readily accepted by national courts. Thus, in this context, the right to effective judicial protection reinforced the demands of the principle of effectiveness of Union law.¹⁸⁰

Effectiveness works “both as a principle followed by the courts in enforcing the law and the measure of its performance.”¹⁸¹ It is usually uncontested within a single legal order as states have in themselves the authority to approve laws and enforce their application. Consequently, this aspect of the rule of law tends to be marginal or self-evident. The same does not hold true for the EU, which was created in the realm of International Law where effectiveness is, for in of itself, an issue.¹⁸² In this context, effectiveness is presented as a requirement underlying the very *existence* of Union law, which would not *survive* if rights and obligations established therein were not real and effective.¹⁸³ In fact, the success of Union law depends largely on the measure of its application. Effectiveness is a pre-condition and a guarantee of success of any legal order.¹⁸⁴ Thus, effectiveness is a fundamental principle of Union law because it is *crucial* for its legal authority: “the existence and functioning of the Union legal order is predicated upon its observance”¹⁸⁵ – the more the better. It is not surprising therefore that effectiveness is also a major concern in the CJEU’s case-law. Accordingly, European Union rules need to be interpreted and applied in light of the principle of effectiveness.

Furthermore, as seen above, in a quiet revolution the CJEU created a “federal-type constitutional framework”¹⁸⁶ which closely integrated the Union and national legal orders and established a hierarchy of norms with Union law on top. In this context, “the principle of effectiveness as a structural feature is essential for the functioning of the European Union.”¹⁸⁷ In most cases, the Union does not have its own agents to enforce Union law: it has to rely instead on decentralised, indirect administration through the Member States. Effectiveness of Union law includes thus implementation, enforcement and compliance.¹⁸⁸

As in the majority of cases, Member States are entrusted with the application of Union law its effectiveness is by large dependent upon the forms of action and the remedies available in

¹⁷⁹ PRECHAL, “Protection of Rights”, 2008, at 155.

¹⁸⁰ Noting that effectiveness can determine “both the point at which EC law intervenes and the extent of remedial action required from the national court” see ROSS, “Effectiveness in the European Legal Order(s)”, 2006, at 495.

¹⁸¹ ACCETTO; ZLEPTING, “The Principle of Effectiveness”, 2005, at 379.

¹⁸² In this respect, it has been considered that the Union is *only* a “Union of law”, meaning that it does not have in itself the necessary means of coercion. Hence, it is more dependent on the rule of law than the nation-state. Here, the existence of a law common to citizens, along with a common history, language and culture, constitute an undeniable integration factor. See VON BOGDANDY, “Founding Principles”, 2009, at 16, 17.

¹⁸³ In *Costa*, supremacy and effectiveness were presented as requirements associated to the very *existence* of the EU legal order, *i.e.* the latter would not have any meaning of existence if it could not prevail over conflicting national law. As someone has put it without supremacy the Treaty would “rapidly have become a dead letter and in all probability the Community would have been dissolved long ago” (KEELING, “In Praise of Judicial Activism”, 1998, at 505-536) and if another vision had prevailed “the entire system envisaged by the Treaty would be set at naught” (FENNELLY, “The European Court of Justice and the Doctrine of Supremacy”, 2010, at 45). Thus, reasoning from the desired result is an “extreme example of the doctrine of *effet utile*”. See also PERNICE, “*Costa v ENEL* and *Simmmenthal*”, 2010, at 49.

¹⁸⁴ ACCETTO; ZLEPTING, “The Principle of Effectiveness”, 2005, at 375.

¹⁸⁵ *Ibid.*, at 379.

¹⁸⁶ WEILER, *The Constitution of Europe*, 1999, at 191.

¹⁸⁷ ACCETTO; ZLEPTING, “The Principle of Effectiveness”, 2005, at 380.

¹⁸⁸ *Ibid.*, at 387.

national courts.¹⁸⁹ In this context, effectiveness of Union law may be impaired in several ways. There may be substantive and procedural obstacles to its application that range from subtle legal rules, to administrative practices, to systemic flaws in the national institutional set-out. This concern applies to administrative authorities, independent regulators as well as national courts.¹⁹⁰ In this framework, the principle of effectiveness works as a *limit* to national procedural autonomy. It shows up as a fundamental principle in the articulation of autonomous but separate legal orders, as it helps coordinating the relationship between concurrent systems, and mediating the tensions between *autonomy* and *cooperation*.¹⁹¹ ACCETTO and ZLEPTING noted that the principle of effectiveness appears to maintain an “uneasy hierarchy (mirrored by attribution of responsibility) between substance (EC law rights) and procedures (national rules) and demands intervention in the latter as part of the co-operative duties imposed by Article 10 EC upon national courts and organs of Member States.”¹⁹²

In this context, scholars (i) spoke about the “functional desire for greater effectiveness conveniently pointed in the same direction as the symbolism of effective judicial protection of rights of individuals in the construction of the Community”¹⁹³; (ii) mentioned effectiveness of Union law as having the same meaning as “effective protection as it became known in the 1980s”¹⁹⁴; and (iii) noted the close relationship between effectiveness of EU law and effective judicial protection of private parties¹⁹⁵, considering the latter to be the “the umbrella” of the former.¹⁹⁶ Indeed, in this context, one benefited from the other: reinforcing effective judicial protection would be advantageous for the effectiveness of Union law understood as a whole.¹⁹⁷

However, at this point, one arrives at the conceptual *difficulty* mentioned above.¹⁹⁸ In fact, regardless of the importance of *Johnston* and its successors in enforcing EU law against Member States, their impact on the contestability of Union acts has been, nonetheless, limited. This may be explained by the underlying *rationale* of those judgments. In fact, regarding the challenge to the validity of Union acts the need to ensure *full effectiveness* of Union law is surely misplaced. Here,

¹⁸⁹ HIMSWORTH, “Things Fall Apart”, 1997, at 291.

¹⁹⁰ ACCETTO; ZLEPTING, “The Principle of Effectiveness”, 2005, at 376; PICOD, “Le droit au juge en droit communautaire”, 1998, at 143.

¹⁹¹ *Ibid.*, at 382. Effectiveness works as a “gatekeeper” in the constant interaction and networking between the several actors and legal orders in a system of “partial constitutions”.

¹⁹² ROSS, “Effectiveness in the European Legal Order(s)”, 2006, at 480.

¹⁹³ KILPATRICK, “Turning Remedies Around”, 2001, at 143.

¹⁹⁴ TULIBACKA, “Europeanization of Civil Procedures”, 2009, at 1537.

¹⁹⁵ CARANTA, “Judicial Protection against Member States”, 1995, at 705. Effectiveness of Union law can however be dissociated from the existence of individual rights. This dissociation between direct effect and rights would become evident in later case-law which acknowledged the *effet de substitution* and the *effet d'exclusion* of EU norms. In these cases, direct effect is more clearly justified by reasons of effectiveness of EU law regardless of the protection of Union rights. See WITTE, “The Continuous Significance of *Van Gend en Loos*”, 2010, at 12. Hence, PRECHAL defines direct effect as being “the obligation of a court or another authority to apply the relevant provision of Community law, either as a norm which governs the case or as a standard for legal review.” See PRECHAL, “Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union”, 2007, at 37-38. Considering that also in the case-law on “incidental effect” of directives, effectiveness is the dominant *leitmotif* in judicial reasoning see ROSS, “Effectiveness in the European Legal Order(s)”, 2006, at 486.

¹⁹⁶ ROSS, “Effectiveness in the European Legal Order(s)”, 2006, at 479.

¹⁹⁷ See also PRECHAL, “Protection of Rights”, 2008, at 156 noting that the CJEU relies primarily on the effectiveness of Union law and not on the effective judicial protection of the individuals concerned and quoting Case C-253/00, *Muñoz and Superior Fruiticola*, [2002] ECR I-7289.

¹⁹⁸ See *supra* Part I, Chapter 1, Section 1.2.3(a).

effectiveness of Union law and effective judicial protection do not go hand in hand.¹⁹⁹ Hence, when issues of effective judicial protection arise in the context of application of Union law by Union institutions scholars point to a lesser degree of effective judicial protection.²⁰⁰ In fact, it seems that “the Court has been notoriously reluctant to permit private individuals to challenge the legality of Community measures or the exercise of discretion to take infringement proceedings by the Commission or to develop a generous system of Community liability in damages.”²⁰¹ The application of *double standards* became more and more apparent and scholars noted that “what was sauce for the Member State goose should be sauce for the Community gander.”²⁰² The contrast between the Court’s willingness to enforce Union law and protect individuals’ rights and interests under EU law against Member States infringements’ and when the Union is at fault was largely criticized among scholars.²⁰³

1.2.3 Beyond *Johnston*: Effective Judicial Protection *vis-à-vis* the European Union?

I. As seen above, in *Les Verts* the CJEU did not ground the admissibility of the action brought against Parliament’s acts on the right to effective judicial protection. It was the risk that such measures encroached on the powers of the Member States or of the other institutions, or exceeded the limits which had been set to the Parliament’s powers, “without it being possible to refer them for review by the Court”²⁰⁴, that dictated the admissibility of the action. Indeed, such a risk would be contrary both to the spirit of the Treaty and to its system. Thus, in *Les Verts*, the Court did not make a link to the immediately subsequent *Johnston*’s ruling. The absence of a clear *legal bridge* between the two judgments would become evident in later case-law and has been most probably the cause of the insufficiencies surrounding the procedural protection of private parties at the Union level.

Nonetheless, PLIAKOS noted that the difference between the two judgments constituted merely a “*différenciation subtile, propre à permettre à la Cour de Justice de défendre dans les meilleures conditions la poursuite de l’intégration européenne.*”²⁰⁵ Truth be told, in *Les Verts*, the Court based its views regarding the “complete system of legal remedies and procedures” on the idea that the Union was *based on the rule of law*.²⁰⁶ This idea is not very far from the one which served as a legal foundation of the right to effective judicial protection in *Johnston*, i.e. the common constitutional traditions of Member States. Thus, although very subtle it is still possible to find a link between the two decisions. Such bond would be reinforced by other decisions of the CJEU which mention *Les Verts* and *Johnston* together as the two ground-breaking verdicts on the principle of effective judicial protection at the Union level.

¹⁹⁹ KILPATRICK, “The Future of Remedies in Europe”, 2000, at 8.

²⁰⁰ *Ibid.*, at 8, 9.

²⁰¹ *Ibid.*

²⁰² CARANTA, “Judicial Protection against Member States”, 1995, at 724, 725. See also KILPATRICK, “The Future of Remedies in Europe”, 2000, at 9.

²⁰³ CARANTA, “Judicial Protection against Member States”, 1995, at 724.

²⁰⁴ Para. 25.

²⁰⁵ PLIAKOS, *Le principe général de la protection juridictionnelle efficace en droit communautaire*, 1997, at 73, 74.

²⁰⁶ See *supra* Introduction.

II. Surely, the extent of the judicial protection afforded to individuals *vis-à-vis* Union institutions lacks the sophistication of the CJEU's case-law on enforcement of Union law against Member States. Nonetheless, there have been indications that the Union is not immune to considerations regarding effective judicial protection of individuals.²⁰⁷

Curiously (or not), it was in the context of institutional conflicts that the Court firstly *hinted* the need to ensure judicial protection against Union acts. In the case *Commission/Germany*²⁰⁸, the CJEU held that the fact that the type of action brought by the applicants was not foreseen in the Treaties could not be regarded as “a *lacuna* which must be filled in order to ensure that persons concerned have *effective protection for their rights* (emphasis added).”²⁰⁹ More impressively, in *Chernobyl*, again a case involving institutional actors, AG VAN GERVEN stated that:

“[i]n a Community of law it must be possible for anyone with the capacity to perform legal acts to *assert their individual rights*, powers and prerogatives themselves, as and when they see fit, *before the courts*. That appears to me to be a *general principle of law*, that is to say, the expression of the *fundamental right* to legal protection (...) which, as just indicated, extends to public authorities and institutions provided that the institutional framework allows, as it does in the European Community, conflicts regarding the distribution of powers between the institutions to be brought before the courts (emphasis added).”²¹⁰

Nonetheless, it was again the need to ensure the institutional balance established in the Treaties that based the Court's decision to grant standing to the European Parliament. In the same year, within the context of an action for infringement brought by the Commission against Belgium²¹¹ on the grounds of a breach to ex-Article 30 TEEC the Court made express reference to the judgements in *Johnston* and *Heylens* holding that:

²⁰⁷ Procedural guarantees were also discussed with regard to the Union administrative and judicial proceedings. For a detailed analysis see LENAERTS; VANHAMME, “Procedural Rights of Private Parties in the Community Administrative Process”, 1997, at 531 *et seq.*; AMADEO, “Diritto amministrativo ed efficacia degli obblighi statuali di carattere procedimentale”, 1998, at 108 *et seq.*; SCHWARZE, “Judicial Review of European Administrative Procedure”, 2004, 146 *et seq.*; TRIDIMAS, *The General Principles of EU Law*, 2006, at 386 *et seq.*; GUNDEL, “Judicial and Procedural Fundamental Rights”, in 2007, at 494 *et seq.* Hence, the principle of *audiatur altera pars* must be acknowledged not only within the national proceedings but also in administrative proceedings before the Union institutions. See Case 32/62, *Alvis/Council*, ECR [1963] 49; Case 17/74, *Transocean Marine Paint/Commission*, ECR [1974] 1063; Case 85/76, *Hoffmann-La Roche/Commission*, ECR [1979] 461; Case T-450/93, *Lisrestal/Commission*, ECR [1994] II-1177. Also the principle of *ne bis in idem* was acknowledged in sanction proceedings initiated by the Commission as happens in for instance competition law (Joined Cases 18 and 35/65, *Gutmann/Commission of the EAEC*, [1966] ECR 103; Case 7/72, *Boehringer Mannheim/Commission*, [1972] ECR 1281; Joined Cases T-305 to 307, 313 to 316, 318, 325, 328, 329 and 335/94, *LVM/Commission*, [1999] II-931, paras. 93-94) and disciplinary proceedings (Case 141/84, *De Compte/Parliament*, [1985] ECR 1951). The principle of *nulla poena sine lege* was established regarding the retrospective application and restrictive interpretation of sanctioning provisions (Case 117/81, *Geist/Commission*, [1983] ECR 2191; Case 14/81, *Alpha Steel/Commission*, [1982] ECR 749). The need to respect the rights of defence of private parties was also acknowledged (see, e.g., Joined Cases 100 to 103/80, *Musique Diffusion française/Commission*, [1983] ECR 1825; Joined Cases 46/87 and 227/88, *Hoechst/Commission*, [1989] ECR 2859). In Case C-17/98, *Emesa Sugar*, [2000] ECR I-665 the Court discussed the principle of adversarial proceedings regarding the possibility of the parties to reply to the AG's Opinion. The right to justice within a reasonable time was also discussed at the Union level, firstly regarding the duration of administrative proceedings initiated by the Commission in matters of competition and state aids (Case 120/73, *Lorenz GmbH/Bundesrepublik Deutschland and others*, [1973] ECR 1471), and later regarding the duration of proceedings before the GC (Case C-185/95 P, *Baustahlgewebe/Commission*, [1998] ECR I-8417).

²⁰⁸ Case 44/81, *Germany/Commission*, [1982] ECR 1855.

²⁰⁹ Para. 7.

²¹⁰ Para. 12.

²¹¹ Case C-249/88, *Commission/ Belgium*, [1991] ECR I-1275.

“[o]ne of the general principles of Community law is that *any person* must be able to obtain effective judicial review before the national courts of national decisions which may infringe a right conferred by the Treaties (emphasis added).”²¹²

However, the express recognition of the *individuals’ right* to effective judicial protection against the Union institutions only took place almost ten years after *Les Verts* and *Johnston*. In 1996, the CJ when deciding on the limitation to the effects on past events of a declaration in a preliminary ruling proceeding holding that a Union regulation was invalid, stated in *FMC*²¹³ that:

“[w]hen it undertakes that assessment, the Court is concerned in particular to ensure that the persons concerned are not deprived of *the right to effective judicial protection in the event of a breach of Community law by the institutions* and that the practical effect of Article 177 is not jeopardized (emphasis added).”²¹⁴

More significantly, the Court would import the right to effective judicial protection to the context of actions for annulment.²¹⁵ Hence, such right was firstly mentioned in the context of the admissibility of an action for annulment in *Guérin Automobiles*²¹⁶ where the GC held that:

“[t]here is nothing (...) to prevent the applicant from obtaining a Commission decision on its complaint capable of forming the subject-matter of an action for annulment, in accordance with the general principle that *there is a right of access to effective judicial review* (emphasis added).”²¹⁷

Later, in *TF1*²¹⁸, a case involving a challenge to Member State action, when mentioning the right to obtain effective judicial review of decisions which may infringe a right conferred by the Treaties, the Court referred to the principle established in *Johnston*, *Commission/Belgium* and *Guérin Automobiles*, thereby indicating that the *same principle* would apply both to Member States and Union acts. Accordingly, the GC held in *Enso Espanola*²¹⁹ that:

“[t]he requirement for effective judicial review of *any Commission decision* that finds and punishes an infringement of (...) Community competition rules is a *general principle of Community law* which follows from the common constitutional traditions of the Member States (emphasis added).”²²⁰

In this case, in holding that it was unacceptable for persons to have to bring court proceedings in order to determine the details of the method of calculating the fine imposed by the

²¹² Para. 25.

²¹³ Case C-212/94, *FMC and others*, [1996] ECR I-389. The case involved the consequences of the Court’s ruling in Joined Cases C-38 and 151/90, *Lomas and others*, [1992] ECR. I-1781 where the Court declared a system of “claw-back” payments to be made on export of sheep meat from Great Britain invalid for abuse of power on the part of the Commission. For further developments see WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 343.

²¹⁴ Para. 58. See also Case C-228/92, *Roquette Frères/Hauptzollamt Geldern*, [1994] ECR I-1445, para. 27: “[a]n economic agent such as the plaintiff in the main proceedings would thereby be deprived of its right to effective judicial protection in the event of a breach of Community law by the institutions, and the practical effect of Article 177 of the Treaty would thereby be jeopardized.”

²¹⁵ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 218.

²¹⁶ Case T-186/94, *Guérin Automobiles/Commission*, [1995] ECR II-1753.

²¹⁷ Para. 23.

²¹⁸ Case T-17/96, *TF1/Commission*, [1999] ECR II-1757.

²¹⁹ Case T-348/94, *Enso Española/Commission*, [1998] ECR II-1875.

²²⁰ Para 60. See under the TECSC, Case T-156/94, *Aristrain/Commission*, [1999] ECR II-645, para. 29.

Commission²²¹, the Court laid down a general principle according to which sufficient information must be made available to the persons concerned to enable them to understand the method of calculation used. Such information should therefore be supplied, *a fortiori*, during the procedure before the Court. According to the CJEU, “the right to effective judicial review presupposes that undertakings are able to verify whether the undertakings accused jointly of participating in a collective, single and continuous infringement have been treated without discrimination.”²²²

The CJ has also made it clear that it will control, *on appeal*, if the GC complied with the right to a judicial remedy.²²³ In this regard, one should note that it was not until twenty eight years after *Internationale* that the CJEU found that an EU institution had violated fundamental rights. The case involved precisely a breach of the right to a fair trial which the CJ considered to have been committed by the GC.²²⁴

Moreover, regarding *interim relief* before Union courts, the CJEU has stated that the alleged unavailability of interim measures under the TECSC “would not be compatible with the general principle of Community law which gives individuals a *right to complete and effective judicial protection*”, which “requires that interim protection be available to individuals, if it is necessary for the full effectiveness of the definitive future decision, in order to ensure that there is *no lacuna* in the legal protection provided by the Court of Justice.”²²⁵

Furthermore, there have been indications in the Court’s case-law that the principle of effective judicial protection ranks higher than the Treaties themselves. In *Zuckerfabrik*, a case involving a challenge to the validity of Union law the Court stated that:

“[t]he provisions of the second paragraph of Article 189 of the Treaty cannot constitute an obstacle to the legal protection which Community law confers on individuals.”²²⁶

In *Siderúrgica Aristrain Madrid*²²⁷ the Court considered that its jurisdiction to review the contested act *pursuant the Treaty* is “consistent with the principle enshrined in Article 6(1) of the ECHR.”²²⁸ In *ITT Promedia*²²⁹ the Court referred to the “ability to assert one’s rights through the courts and the judicial control” as the expression of a *general principle of law* which underlies the constitutional traditions common to the Member States and which is also laid down in Articles 6 and 13 ECHR. Here, the CJEU mentioned the right of access to the Court as a “*fundamental right*

²²¹ Case T-148/89, *Tréfilunion/Commission*, [1995] ECR II-1063, para. 142.

²²² Para 239.

²²³ See e.g., Case C-12/95 P, *Transacciones Maritimas and others/Commission*, [1995] ECR I-467, para. 16: “[c]onsequently, in taking the view that he could require the appellants to lodge a bank guarantee in an amount exceeding that of their own funds, the President of the Court of First Instance did not contravene the principle of effective judicial protection”; and Case C-282/95, *Guérin automobiles/Commission*, [1997] ECR I-1503, para. 33: “[w]hen the Court of First Instance held that the notification under Article 6 of Regulation No 99/63 constituted a definition of position and could not be the subject-matter of an action for annulment, it did not breach the principle of the right to a judicial remedy.”

²²⁴ See Case C-185/95 P, *Baustahlgewebe/Commission*, [1998] ECR I-8417. For a case comment see EDITORIAL COMMENTS, “ECJ Applies ‘Reasonable Time’ Rule and Reduces Fine Imposed on Company”, 1999, at 4-5. See *supra* Part I, note 870.

²²⁵ Case C-399/95 R, *Germany/Commission*, [1996] ECR I-2441, para. 46.

²²⁶ Para 16. See OLIVER, “Interim Measures”, 1992, at 23, noting that the case amounted to an extension of the principle of effectiveness.

²²⁷ Case T-156/94, *Aristrain/Commission*, [1999] ECR II-645.

²²⁸ Para. 39.

²²⁹ Case T-111/96, *ITT Promedia/Commission*, [1998] ECR II-2937.

and a general principle ensuring the rule of law.”²³⁰ In light of this case-law, CASSIA noted that:

“[s]ans qu’il soit nécessaire de conclure à l’existence d’une supralégalité communautaire dans le cadre de l’examen de la recevabilité du recours en annulation, il faut souligner la supériorité ainsi accordée par la Cour et le Tribunal au principe de protection juridictionnelle: aucun article du traité ne saurait faire obstacle au principe du droit au juge (...).”²³¹

III. In particular, it is worth stressing that the CJEU has mentioned the need to ensure effective judicial protection of private parties *when deciding the admissibility of actions for annulment* brought by private parties. Hence, in *Regione autonoma Friuli-Venezia Giulia*²³² the GC stated emblematically that:

“[t]he question whether an action for annulment under the fourth paragraph of Article 173 of the Treaty is admissible can be determined only on the basis of the objectives specific to that provision *and of the principle of judicial protection* according to which it must be open to any natural or legal person to apply to the courts on his own initiative, that is to say in the exercise of his own judgment, in order to obtain review of an act which adversely affects that person (emphasis added).”²³³

More significantly, in *Rothley and others*²³⁴, a case decided two days before *Jégo-Quéré*, the CJEU stated that:

“[i]t must be borne in mind, as the Advocate General has noted in paragraph 62 of his Opinion, that the rules determining whether the Community Courts have jurisdiction, as regards either the commencement of direct actions before those Courts or where the Court is seized by way of a reference for a preliminary ruling made by a national court, *must be interpreted above all in the light of the principle of effective judicial protection* (emphasis added).”²³⁵

However, although the CJEU acknowledged the need to ensure effective judicial protection of private parties within the context of actions for annulment and indicated that the admissibility of such actions should be analysed *in light of* the right to effective judicial protection the scope of such affirmation has been compromised in some of its most famous rulings.²³⁶ In fact, the CJEU has limited the impact and scope of the right to effective judicial protection to the wording of the Treaties, notably to Article 263(4) TFEU and its case-law on direct and individual concern. Thus, for instance in *N/Commission*²³⁷, the Court held that the right to a fair hearing within the meaning

²³⁰ Para. 60.

²³¹ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 221.

²³² Case T-288/97, *Regione autonoma Friuli-Venezia Giulia/Commission*, [1999] ECR II-1871.

²³³ Para. 47. See also Case T-7/99, *Medici Grimm/Council*, [2000] ECR II-2671, para. 57: “[t]he admissibility of an action for annulment can only be determined by reference to the objectives of Article 173 and the *principle of the legal protection of individuals* (Case T-288/97 *Regione Autonoma Friuli Venezia Giulia* [1999] ECR II-0000, paragraph 47).” In Case C-48/96 P, *Windpark Groothuisen/Commission*, [1998] ECR I-2873, the Court seemed to take into account demands regarding effective judicial protection of private parties when deciding on the reviewability of the contested act (paras. 15-21).

²³⁴ Case C-167/02 P, *Rothley and others/Parliament*, [2004] ECR I-3149.

²³⁵ Para. 50.

²³⁶ See *supra* Part I, Chapter 1, Section 1.1.4.

²³⁷ Case T-97/94, *N/Commission*, [1998] ECR I-A-621, II-1879.

of Article 6 ECHR *did not preclude the application of the conditions laid down by the Treaties to the admissibility of an action.*²³⁸ More significantly, the finding of a breach of the right to effective judicial protection has not *in any case* justified a reading of the Treaties beyond the traditional case-law of the CJEU on direct and individual concern. Hence, although acknowledging that the requirements of direct and individual concern must be interpreted *in light of* the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually²³⁹, “such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.”²⁴⁰ Not even “the danger of an infringement of the principle of effective judicial protection can justify a departure from the system of judicial protection constituted by the Treaties.”²⁴¹

As seen above, in face of a *procedural lacuna* it is for national courts to fill in gaps of judicial protection, and not for the CJEU itself. Thus, for instance, in *Areacova* the applicants argued that if the action was held inadmissible, the fundamental right of access to justice would be undermined.²⁴² Since the contested regulation did not provide for the adoption of implementing measures by the Member States, there was no remedy available to them for challenging the legality of that regulation before the national courts. Thus, as it was impossible for them to bring the matter before any court at all in Spain, refusal to grant them standing to bring proceedings before the GC would deny them the means of defending themselves against the regulation. The Court considered that that was not the case, as it was opened to the applicants to apply to the Spanish authorities for the issue of new fishing permits, and if appropriate to bring the matter before the national courts in order to challenge the validity of any decisions made refusing those applications and to obtain the suspension of their operation. In the course of those proceedings, there would have been nothing preventing the applicants from putting in issue the validity of the Community legislation on the basis of which any decisions refusing applications would have been adopted and from requiring the national court to adjudicate on all the grounds of challenge formulated for that purpose, if necessary after a reference to the CJEU for a preliminary ruling as to the validity of the Union legislation at stake. Thus, there was no gap of protection as the national routes remained opened.²⁴³

It is not always the case that the Court analyses, *in casu*, the effectiveness of the avenues available in national legal orders. The cases of *UPA* and *Jégo-Quéré* are emblematic in this respect. However, what seems remarkable in this case-law is the fact that the recognition of gaps of judicial protection does not compel the CJEU to adopt a more liberal approach to the standing of private parties. According to the CJEU, such a circumstance, *even if proved, cannot warrant a change in the*

²³⁸ Para. 30.

²³⁹ See, e.g., Joined Cases 67, 68 and 70/85, *Van der Kooy/Commission*, [1988] ECR 219, para. 14; Case C-309/89, *Codomiu/Council*, [1994] ECR I-1853, para. 19; Case C-358/89, *Extramet/Council*, [1992] ECR I-3813, para. 13.

²⁴⁰ Para. 44.

²⁴¹ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 295.

²⁴² See Case T-194/95, *Areacova and others/Council*, [1999] ECR II-2271, para. 80.

²⁴³ See also Case T-154/94, *CSF and CSME/Commission*, [1996] ECR II-1377.

system of remedies and procedures established by the Treaties.²⁴⁴ As seen above, the CJEU puts the right to effective judicial protection into the “complete system of legal remedies and procedures”, instead of interpreting the system *in light of* the principle. One is left with the impression that the CJEU struggles to deny the existence of procedural *lacunae* by imposing on national courts the duties to “plug in the gaps.” Such reasoning is far from being convincing. More significantly, the case-law on the admissibility of actions for annulment is *whatever the effectiveness and success of those national routes* unaffected by the need to ensure effective judicial protection.

In light of the above, it is not surprising that scholars have noted that despite the increasing prominence of the principle of effective judicial protection, and although in theory it applies to both the Union judicature and to the national courts, it is the latter which have been, so far, most profoundly affected by it.²⁴⁵ It is submitted that the admissibility of direct actions should be *in reality* interpreted in light of the requirements of effective judicial protection. Such an approach should lead not only to the adoption of a broader interpretation of standing requirements, but also to a different approach regarding the existing of gaps of judicial protection within the EU.²⁴⁶ This alternative approach is fully in line with the 1960s *dictum* in *Plaumann* according to which “the provisions of the Treaty regarding the right of interested parties to bring an action *must not be interpreted restrictively*.”²⁴⁷ Truly, “where it is necessary to ensure, in accordance with Article 164 of the Treaty, that the law is observed, the Court has shown that it does not regard itself as constrained by the strict terms of Article 173.”²⁴⁸ Under the TECSC, the Court has also held in the 1970s that the provisions concerning the institution of proceedings before the Court “must be interpreted *widely in order to safeguard the legal protection of individuals*.”²⁴⁹ Hence, the principle of effective judicial protection firstly established in *Johnston* to ensure compliance of Union law by Member States, should be considered a central interpretative tool in the building of a genuinely effective system of judicial control of the acts of the Union institutions. In sum, *Les Verts* should be read in light of *Johnston*, and the system of judicial review in the EU must be construed in order to ensure the *maximization* of the principle of effective judicial protection of private parties.

1.2.4 Article 47 of the Charter of Fundamental Rights

I. The *ad hoc* recognition of fundamental rights through the CJEU’s case-law is said to have been more “*indolore, o comunque meno traumatizante*”²⁵⁰ than their formal inclusion in the Treaties. It had however the drawback of providing less visibility and less legal certainty to individual rights. Scholars criticized the “lack of comprehensiveness, specificity, clarity and predictability”²⁵¹ of such system. Thus, the adoption of a written catalogue was included in the EU’s agenda from an early

²⁴⁴ See *supra* Part I, Chapter 1, Section 1.1.4.

²⁴⁵ ARNULL, “The Principle of Effective Judicial Protection in EU Law”, 2011, at 51.

²⁴⁶ See *infra* Chapter 2, Section 2.1.6.

²⁴⁷ Case 25/62, *Plaumann/Commission of the EEC*, [1963] ECR 126, para. 2.

²⁴⁸ As AG JACOBS has put in his Opinion in *Extramet*, para. 50.

²⁴⁹ See Case 66/76, *CFDT/Council*, [1977] ECR 305, para. 8.

²⁵⁰ TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1239.

²⁵¹ HARPAZ, “The European Court of Justice and its Relations with the European Court of Human Rights”, 2009, at 107. See also DOUGLASSCOTT, “The EU Charter of Rights”, 2003, at 405.

stage, and in the year of 2000 the Charter of Fundamental Rights was finally adopted, precisely with the aim of granting *certainty*²⁵², *visibility*²⁵³ and *legitimacy*²⁵⁴ to the protection of fundamental rights. Although its necessity was not obvious among scholars²⁵⁵, it can be said that the Charter closed a gap “which was no longer acceptable in view of the status of integration and in terms of the rule of law.”²⁵⁶

As is well known, the Charter constitutes the first written catalogue of Union fundamental rights. It was considered to be a “snapshot of the emerging *ius commune europaeum*”²⁵⁷ and to lay a significant stone in the process of European constitutionalism.²⁵⁸ The Charter became referred to as a “Bill of Rights of a quasi-federal system”²⁵⁹ which by providing rights with a “lapidary formulation” was destined to constitute a “convenient point of reference.”²⁶⁰ Scholars referred to it as “an example of what JOHN RAWLS called an ‘overlapping consensus’”²⁶¹, or the “mixed commonwealth”²⁶² of the European Union, a possible vehicle for “constitutional patriotism”²⁶³:

²⁵² Stressing this aspect see e.g., LIMBACH, “Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe”, 2000, at 334; GRECO, “I diritti fondamentali nella Costituzione Europea”, 2001, at 217.

²⁵³ See § 4 of the Preamble of the Charter. Noting that the Charter would give fundamental rights a place which would make them more visible to Union citizens see LENAERTS; DE SMIJTER, “A ‘Bill of Rights’ for the European Union”, 2001, at 273 and 281; MEDEIROS, “A Carta dos Direitos Fundamentais da União Europeia, a Convenção Europeia dos Direitos do Homem e o Estado Português”, 2001, at 237; RAMOS, “A Carta dos Direitos Fundamentais da União Europeia e a protecção dos direitos fundamentais”, 2001, at 988; PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 7; LORD GOLDSMITH, “A Charter of Rights, Freedoms and Principles”, 2003, at 391. Noting that the Charter intends to give “*forma scritta e solenne a ciò che è ritenuto già patrimonio della Comunità*” see TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1172.

²⁵⁴ EECKHOUT, “The Proposed Charter”, 2000, at 102, noting that the Charter could constitute a more solid basis for the development of a human rights policy; EICKE, “The European Charter of Fundamental Rights” 2000, at 283. Noting that the decision to adopt the Charter was taken against the background of a legitimacy and credibility crisis of the EU culminating in the resignation of the Commission see LENAERTS, “Fundamental Rights in the European Union”, 2000, at 576.

²⁵⁵ Questioning the need for a Charter of Fundamental Rights see, e.g., WEILER, “Does the European Union Truly Need a Charter of Rights?”, 2000, at 95-97; MAYER, “La Charte des droits fondamentaux et la Constitution européenne”, 2003, at 180 *et seq.* *Per contra*, advocating such need see FERNANDEZ SOLA, “À quelle nécessité juridique répond la négociation d’une Charte des Droits Fondamentaux de l’Union Européenne?”, 2000, at 596; KIRKHOPE, “Charter of Fundamental Rights, the enhancement of humans and the curtailment of human rights?”, 2000, at 40, 41; SACERDOTI, “The European Charter of Fundamental Rights”, 2002, at 38 *et seq.* Preferring accession to the ECHR instead see e.g., MIRANDA, “Sobre a Carta dos Direitos Fundamentais da União Europeia”, 2000, at 18 *et seq.*

²⁵⁶ CALLIESS, “The Charter of Fundamental Rights of the European Union”, 2007, at 539. See also EDITORIAL COMMENTS, “The EU Charter of Fundamental Rights Still under Discussion”, 2001, at 1-6.

²⁵⁷ PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 8.

²⁵⁸ See e.g., FABIO, “A European Charter”, 2001, at 159-172; CASTIGLIONE, “From the Charter to the Constitution of Europe”, 2002; MARTINS, “Les valeurs communes et la place de la charte en Europe”, 2002, at 135 *et seq.*; BÚRCA; ASCHENBRENNER, “The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights”, 2002-2003, at 355-382. DE BÚRCA spoke of a possible “reorientation of the historic mission of the Community.” See BÚRCA, “Human Rights”, 2001, at 7. Seeing the Charter as an invitation to “engage into constitution-making” see ROCHÈRE, “Droits de l’homme”, 2001, at 2; MENENDEZ, “Constituting Rights on Their Own Right”, 2002, at 419; MAYER, “La Charte des droits fondamentaux et la Constitution européenne”, 2003, at 195.

²⁵⁹ ROCHÈRE, “The EU and the Individual”, 2004, at 348; QUADROS, *Direito da União Europeia*, 2012, at 176.

²⁶⁰ JACOBS, “Human Rights in the European Union”, 2001, at 339.

²⁶¹ DOUGLASSCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 37-50.

²⁶² MCCORMICK, “Sovereignty, Democracy and Subsidiarity”, 1995, at 95 *et seq.*

²⁶³ In 1973, DOLF STERNBERGER, a German political scientist, recorded a high consensus on German constitutional values, inventing a compound word: *Verfassungspatriotismus* (STERNBERGER, “Verfassungspatriotismus”, in *Frankfurter Allgemeine Zeitung*, 1979, at 1; STERNBERGER, *Verfassungspatriotismus*, 1990). Noting that this concept was later adopted by RALF DAHRENDORF and JÜRGEN HABERMAS, meaning basically diffuse support for the essentials of Western democracy, see DOUGLASSCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 38.

“something which European citizens may recognise as part of an existing heritage, but also as a force for a stronger attachment to the growing EU polity, bringing it closer to its citizens.”²⁶⁴ Nonetheless, the legal value of the Charter remained uncertain – in “*una sorta di limbo*”²⁶⁵ – both in the literature²⁶⁶ and in the case-law of the CJEU, despite the references to some of its provisions included therein.²⁶⁷ Such controversy is currently solved by Article 6(1) TEU which affords the Charter the *same legal value* as the Treaties. This means that fundamental rights are now protected in the European Union at the *constitutional* level.

II. The procedural guarantees protected by the Charter are established in Title VI, notably in Articles 47 *et seq.*, which establish “*un verdadero código de derechos fundamentales y principios procesales*.”²⁶⁸ These provisions aim to protect a significant number of procedural fundamental rights

²⁶⁴ DOUGLASSCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 38.

²⁶⁵ COMOGLIO, “L’effettività della tutela giurisdizionale nella Carta dei Diritti Fondamentali dell’Unione Europea”, 2001, at 471. Noting that the Charter remained “*un oggetto misterioso*” see BRAVO, “La tutela dei diritti in Europa”, 2001, at 37.

²⁶⁶ Considering that regardless of the legal effect of the proclamation the Charter will *tend* to have the same legal value to that of its insertion in the Treaties see LENAERTS; DE SMIJTER, “A ‘Bill of Rights’ for the European Union”, 2001, at 298. Considering that its solemn proclamation and its declarative values *is by itself legally relevant* see SACERDOTI, “The European Charter of Fundamental Rights”, 2002, at 49. Noting that the Charter remained *non-binding* see RAMOS, “A Carta dos Direitos Fundamentais da União Europeia e a protecção dos direitos fundamentais”, 2001, at 987; ROCHÈRE, “Droits de l’homme”, 2001, at 2; BÜRCA, ASCHENBRENNER, “The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights”, 2002-2003, at 380; MAYER, “La Charte des droits fondamentaux et la Constitution européenne”, 2003, at 176; PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 9; DOUGLASSCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 43; ROCHÈRE, “The EU and the Individual”, 2004, at 349; WARD, “Access to Justice”, 2004, at 126; MAUS, “La Charte des droits fondamentaux de l’Union européenne et la protection des droits de l’homme en Europe”, 2005, at 298; CALLIESS, “The Charter of Fundamental Rights of the European Union”, 2007, at 533. Noting that the Charter remained “soft law” see CURTIN; VAN OOI, “The Sting is Always in the Tail”, 2001, at 112. Considering that the lack of formal incorporation did not preclude the Charter from having *legal bite* see MENENDEZ, “Constituting Rights on Their Own Right”, 2002, at 408. Lastly, considering that the lack of legally binding force *does not imply the lack of legal effects* see ALONSO GARCÍA, “The General Provisions of the Charter of Fundamental Rights”, 2002, at 492. See also VITORINO, *Carta dos Direitos Fundamentais da União Europeia*, 2002, at 47 *et seq.*

²⁶⁷ The first mention to the Charter was made by AG ALBER in Case C-340/99, *TNT Traco*, [2001] ECR I-4109. See also Opinion of AG JACOBS in Case C-377/98, *Netherlands/Parliament and Council*, [2001] ECR I-7079 and Case C-270/99 P, *Z/Parliament*, [2001] ECR I-9197; AG MISCHO in Joined Cases C-122 and 125/99 P, *D and Sweden/Council*, [2001] ECR I-4319; AG STIX-HACKL in Case C-459/99, *MRAX*, [2002] ECR I-6591 and Case C-49/00, *Commission/Italy*, [2001] ECR I-8575; AG GEEHOED in Case C-313/99, *Mulligan and others*, [2002] ECR I-5719 and Case C-413/99, *Baumbast and R*, [2002] ECR I-7091; AG LÉGER in Case C-309/99, *Wouters and others*, [2002] ECR I-1577 and Case C-353/99 P, *Council/Hautala*, [2001] ECR I-9565; Opinion of AG MADURO in Case C-305/05, *Ordre des barreaux francophones et germanophone and others*, [2007] ECR I-5305. The boldest uses of the Charter are probably included in Opinion of AG TIZZANO, Case C-173/99, *BECTU*, [2001] ECR I-4881 at 26-28; AG MISCHO in Joined Cases C-20 and 64/00, *Booker Aquaculture and Hydro Seafood*, [2003] ECR I-7411, at 125-126; and Opinion of AG JACOBS in Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, at 39. The GC also mentioned the Charter in a set of cases. See e.g., Case T-54/99, *max.mobil/Commission* [2002] II-313; Case T-177/01, *Jégo-Quéré/Commission*, [2002] ECR II-2365. The CJ mentioned the Charter in Case C-540/03, *Parliament/Council*, [2006] ECR I-5769. Some legislative acts also included references to the Charter. See e.g., Regulation 1049/2002 and Decision 2002/187/JHA. The Charter was also mentioned by the ECtHR in *Goodwin v. The United Kingdom*, Application no. 28957/95, Judgement of 11/07/2002, in which such court upheld the right of transsexuals to marry and *Hatton and others v. The United Kingdom*, Application no. 36022/97, Judgement of 08/07/2003, on the issue of environmental rights. For further developments see ROCHÈRE, “Droits de l’homme”, 2001, at 5 *et seq.*; EECKHOUT, “The EU Charter of Fundamental Rights and the Federal Question”, 2002, at 947 *et seq.*; MENENDEZ, “Constituting Rights on Their Own Right”, 2002, at 410; DOUGLASSCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 43.

²⁶⁸ MARTÍN DÍZ, “Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea”, 2003, at 227. Article 47 should be articulated with Article 41 of the Charter which establishes procedural guarantees with regard to the Union administration. The distinction between rights in administrative procedures and judicial trial is said to constitute a considerable improvement in EU law. See GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 492, 493.

at the Union level, by establishing a set of *principles* intended to influence the “*modo di essere*”²⁶⁹ of the European justice system, i.e. the way Member States and the Union institutions protect individuals’ rights under Union law. In this regard, it is significant that a text which aspires to have a main role in the historic, political and legal future of the European Union has made reference to a batch of fundamental rights of a procedural nature. MARTÍN DIZ has noted that these guarantees constitute “*el núcleo y germen de un futuro Derecho comunitario constitucional procesal*.”²⁷⁰

Article 47 grants individuals whose Union rights and freedoms are violated²⁷¹: (i) the right to *an effective remedy* before a tribunal in compliance with the conditions laid down in this provision (para. 1); (ii) the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law (para. 2)²⁷²; (iii) the possibility of being advised, defended and represented in court (para. 2, *in fine*); and the (iv) right to legal aid for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice (para. 3).²⁷³ Contrary to the ECHR which limits the protection to “civil rights” and “criminal charges”, Article 47 enunciates a “general entitlement to a public hearing”²⁷⁴ similar to the constitutions of several Member States.

Scholars have questioned if the list included in Article 47 should be deemed to be exhaustive.²⁷⁵ It must be noted that, at least regarding procedural rights, the Charter aims to establish a set of indispensables *minima*, i.e. the most basic procedural guarantees. However, the Charter should be deemed a “living instrument.” Thus, the catalogue seems to be “*suficientemente genérico*”²⁷⁶ to cover several fundamental procedural rights and principles, and “*suficientemente elástico como para permitir, primordialmente a través de la labor interpretativo del TJCE, su actualización y regeneración*.”²⁷⁷

²⁶⁹ TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1183.

²⁷⁰ MARTÍN DIZ, “Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea”, 2003, at 220. The author notes that in this respect the Charter is “*redundante, poco imaginativa, derivada y restrictiva, sin apostar por ampliar el catálogo más allá de lo estrictamente necesario (...)*.”

²⁷¹ Noting that Article 47 applies to “*tutte le posizioni giuridiche individuali protette dal diritto comunitario*” regardless of the distinction between rights and interests, see TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1227. See *supra* Part I, Chapter 1, Section 1.1.3(c)(ii).

²⁷² This guarantee is in line with Article 6 ECHR and reproduces the principles which typify the right to a fair trial in Europe. This corresponds to a given model of a due process of law — adversarial, concentrated, public, and oral — which echoes the fundamental values and principles of the Anglo-American fair trial and due process of law models, and is also acknowledged in the procedural models pertaining to the civil law European tradition. For further developments see COMOGLIO, “I modelli di garanzia costituzionale del processo”, 1991, 673-741; “Le garanzie fondamentali del giusto processo”, 2000, 335-381; “L’effettività della tutela giurisdizionale nella Carta dei Diritti Fondamentali dell’Unione Europea”, 2001, at 481; “Il giusto processo civile nella dimensione comparatistica”, 2002, 702-759.

²⁷³ These two guarantees are not referred to in Article 6 ECHR. They reinforce and extend the set of the European procedural guarantees. According to the decision of the ECHR in *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979, legal aid must be provided when “such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory ... or by reason of the complexity of the procedure or of the case (para. 26).” On the issue of legal aid in the European Union see HARLOW, “Access to Justice as a Human Right”, 1999, at 189 *et seq.*

²⁷⁴ CALLIESS, “The Charter of Fundamental Rights of the European Union”, 2007, at 523.

²⁷⁵ MARTÍN DIZ, “Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea”, 2003, at 223-224. Considering that the Charter contains “a sample” albeit a “most impressive one” of the total range of fundamental rights whose respect is guaranteed by the CJEU see LENAERTS; DE SMIJTER, “A ‘Bill of Rights’ for the European Union”, 2001, at 281.

²⁷⁶ MARTÍN DIZ, “Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea”, 2003, at 224, and 244.

²⁷⁷ *Ibid.*

III. The inclusion of fundamental procedural guarantees in a Union instrument, common to a significant number of states with similar but divergent legal traditions required a global and comparative approach, which was found in the common constitutional traditions of Member States on fundamental rights and procedural issues. These legal traditions are also reflected in international treaties to which Member States are signatories, especially in the ECHR.²⁷⁸ Hence, despite the wording differences in the several language versions, it is not difficult to determine the sources of inspiration of Article 47.²⁷⁹ Its most immediate precedent is clearly Article 19 of the Declaration of Fundamental Rights and Freedoms adopted by the European Parliament, through the Resolution of 12 April 1989.²⁸⁰ At the international level, the *effectiveness* of the judicial remedies, in particular the possibility of accessing a judicial body which can effectively provide a remedy to the violated right is established in Article 8 of the Universal Declaration on Human Rights (UDHR).²⁸¹ The same idea is inserted in Article 13 ECHR and in Article 25(1) of the Inter-American Human Rights Convention.²⁸² Lastly, the existence of a *due process of law* — which regards the model or the type of proceedings that can be initiated by individuals before an independent and impartial judge, established by law — is protected by Articles 10 UDHR and 14(1) of the International Covenant on Civil and Political Rights (ICCPR)²⁸³, and Articles 6 ECHR and 8 of the Inter-American Convention.²⁸⁴

Article 47 encompasses a set of guarantees which constitute a true and unique European *due process of law*.²⁸⁵ For purposes of the present study it is important to highlight the guarantee established in Article 47(1). Scholars have considered that whereas Article 47(1) refers to Article 13 ECHR, *i.e.* the right to an effective remedy, Article 47(2) corresponds to Article 6(1) ECHR from

²⁷⁸ *Ibid.*, at 214, 215. Accordingly, noting that the Charter is a mere consolidation of existing rights and should thus work as “brake and not an accelerator” see LORD GOLDSMITH, “The Charter of Rights”, 2004, at 473.

²⁷⁹ See COMOGLIO, “L’effettività della tutela giurisdizionale nella Carta dei Diritti Fondamentali dell’Unione Europea”, 2001, at 473.

²⁸⁰ Which read as follows: “(Access to courts) 1. Anyone whose rights and freedoms have been infringed shall have the right to bring an action in a court or tribunal specified by law. 2. Everyone shall be entitled to have their case heard fairly, publicly and within a reasonable time by an independent and impartial court or tribunal established by law. 3. Access to justice shall be effective and shall involve the provision of legal aid to those who lack sufficient resources otherwise to afford legal representation (emphasis added).” See OJ C 120, 16/5/1989, p. 51 *et seq.*

²⁸¹ Article 8 UDHR states that: “[e]veryone has the right to an *effective remedy* by the competent national tribunals for acts violating the *fundamental rights* granted him by the constitution or by law (emphasis added).”

²⁸² Comparing the different language versions see COMOGLIO, “L’effettività della tutela giurisdizionale nella Carta dei Diritti Fondamentali dell’Unione Europea”, 2001, at 474, notes 16 to 22. Finally, to fully understand the procedural guarantees established in the Charter one has to take into account the CJEU’s interpretation of the so-called common constitutional traditions of Member States, which constitute general principles of law, with immediate applicability. *Ibid.* at 476.

²⁸³ Article 10 of the UDHR: “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Article 14(1) of the ICCPR: “[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (...).” See also MERTENS, “Origines et fondements du droit de recours interne en cas de violation d’une norme de droit international”, 1978, at 28 *et seq.*; PETTITI, “L’évolution de la défense et du droit de la défense à partir de la Déclaration Universelle des Droits de l’Homme”, 2000, at 5-10. In Case 374/87, *Orkem/Commission*, [1989] ECR 3283, para. 31, the CJEU mentioned the guarantees of the ICCPR.

²⁸⁴ Noting that procedural guarantees in the EU were modelled following mainly the ECHR see GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 490.

²⁸⁵ Noting that if a given procedural model is not strictly identical to the model established under Article 47, the former can notwithstanding be considered *fair* and *due* if the *minimum substantial content* of the procedural guarantees enshrined in the Charter is respected, see COMOGLIO, “L’effettività della tutela giurisdizionale nella Carta dei Diritti Fondamentali dell’Unione Europea”, 2001, at 481.

which the EctHR has derived the right of access to a court.²⁸⁶ It seems however that given the merging of Articles 6 and 13 in one single provision of the Charter, the right of access to justice and the right to judicial review is more clearly inferred from para. 1 than para. 2 of Article 47. Hence, although not formally acknowledged in the European Convention's correspondence lists, there seems to be a basic "*identidad sustantiva*"²⁸⁷ between Article 6(1) ECHR and Article 47(1) of the Charter, regardless of the fact that the latter is not restricted to civil rights and obligations.²⁸⁸

Taking into account the different language versions of the Charter the right established Article 47(1) may encompass different meanings.²⁸⁹ Hence, whereas the Italian version refers to a "*ricorso effettivo*", the French to a "*recours effectif*" and the Portuguese to a "*direito à acção*", which seems to put the emphasis in the individual right to initiate judicial proceedings — or as COMOGLIO has put it "*sull'effettività del diritto-potere di accesso alle corti, o se si preferisce, sull'effettività di esercizio del diritto-potere di azione*"²⁹⁰ —, the English "*right to an effective remedy*", the German "*recht auf einem wirksamen Rechtsbehelf*" and the Spanish "*derecho a la tutela judicial efectiva*" take the issue to a different level. In fact, the first group of versions seems to highlight the effectiveness of the right of accessing the courts, or the *right of action*, which translates into the execution of the initial procedural act by which one formally promotes or brings a case before a judge. These versions put the emphasis on the idea of the procedural "*azionabilità*" of the substantive legal positions, in line with civil law traditions which see the "*azione*" as the bridge between substantive law and procedural law. By contrast, the second group of versions focuses on the individual right to seek and obtain an *effective remedy*, understood as a certain type of remedial action that allows for full protection of an individual right. The main emphasis is put here in the effectiveness of the *available remedies* and not in the effectiveness of the right of access to justice.

Consequently, scholars note that the first group of language versions risks to express unclearly the articulation between the procedural forms of action and the remedies that he/she who addresses a court of law and initiates a judicial proceeding wishes to be granted, and which should provide for an effective and adequate satisfaction his/her rights. This idea is more clearly present in the second group of versions, more sensible to the principle *ubi ius, ibi remedium* typical of the common law traditions.²⁹¹ This difference may imply a considerable interpretative risk of limiting the content of the guarantee established in Article 47.²⁹² However, one should note that it

²⁸⁶ See LEMMENS, "The Relation between the Charter of Fundamental Rights of the EU and the European Convention on Human Rights", 2001, at 65; SHELTON, "Remedies and the Charter of Fundamental Rights", 2004 at 357.

²⁸⁷ MARTÍN DIZ, "Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea", 2003, at 236.

²⁸⁸ One should note that the Charter Convention established that "Article 47(2) and (3) correspond to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation." However, it did not mention Article 47(1) in neither of the correspondence lists for this purpose. See CHARTE 4473/00, at 49.

²⁸⁹ COMOGLIO, "L'effettività della tutela giurisdizionale nella Carta dei Diritti Fondamentali dell'Unione Europea", 2001, at 480. The same difficulties arose from the different language versions of Article 8 UDHR. The Italian and French versions referred clearly to the right of access to a court of law, but they did not seem to extend to the *remedies* that should be made available. By contrast, the latter were reflected in the English, German and Spanish versions of the same provision. *Ibid.*, note 43.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

is only natural that common constitutional traditions of Member States do not always coincide. To borrow WEILER's expression, the "menu and flavour"²⁹³ of human rights varies across Member States. Nonetheless, it is unquestionable that the right to effective judicial protection is a protected in all Member States and to a significant extent. Hence, the right to effective judicial protection at the Union level should not be understood strictly. It should be construed pursuant to a *unitary notion* of protection capable of synthesizing the dichotomy between *substance* and *procedure*. Thus, Article 47(1) should be read as encompassing not only the *procedural* forms of action that an individual may initiate – the "*mezzi processuali (di azione o difesa)*"²⁹⁴ – but also the *remedies* – the "*rimedi ed alle forme di tutela (quale che ne sia la variabile nature: cautelare, cognitoria o esecutiva)*"²⁹⁵ – that may be granted by a court of law.

IV. Furthermore, it is noticeable that the right to effective judicial protection established in the Charter encompasses both an *objective* and *subjective* dimension. The Charter ensures effective judicial protection as an institutional guarantee and as an individual right. Hence, on the one hand, it has been considered that, regardless of the wording of Article 51, the Charter binds the Union institutions and Member States in a *positive* manner. This means that Member States and the Union institutions are put under a *positive* obligation to create the adequate and necessary conditions to ensure effective judicial protection of Union rights, *maxime* fundamental rights, notably by creating forms of action which are accessible by individuals.²⁹⁶ As a matter of fact, the protection of fundamental rights "cannot simply be left to the devices of judicial protection"²⁹⁷: it requires political and legislative intervention.²⁹⁸ This *objective* dimension highlights also the nature of the right to effective judicial protection as a *Leitungsrecht*, i.e. a right to claim state performance, implying a duty of the Union legislature to promote judicial protection of individual rights.²⁹⁹ In fact, although according to JELLINEK fundamental rights define the individuals' *status negatives* – protecting rights from encroachments –, they also confer rights of active participation in the political process, i.e. the so-called *status positivus*.³⁰⁰ Hence, "fundamental rights allow positive claims

²⁹³ WEILER, "The Jurisprudence of Human Rights in the European Union", 1996, at 1.

²⁹⁴ COMOGLIO, "L'effettività della tutela giurisdizionale nella Carta dei Diritti Fondamentali dell'Unione Europea", 2001, at 481, 482.

²⁹⁵ *Ibid.*

²⁹⁶ On the duty to protect emanating from fundamental rights see GRIMM, "Constitutional Issues in Substantive Law", 2006, at 278, 279.

²⁹⁷ EECKHOUT, "The EU Charter of Fundamental Rights and the Federal Question", 2002, at 981.

²⁹⁸ One should note that pursuant to Article 51(2) "the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties." Scholars have questioned the scope of this provision. See e.g., VRANES, "The Final Clauses of the Charter of Fundamental Rights", 2003, at 3 *et seq.*; KNOOK, "The Court, the Charter, and the Vertical Division of Powers in the European Union", 2005, at 383 *et seq.* Questioning if the perspective endorsed in Article 51(1) can be maintained if the Charter is incorporated in the Treaties see BÜRCA, "Human Rights", 2001, at 12. Suggesting that the institutions may always include human rights provisions in specific acts adopted under the powers vested in them by the Treaties so as to ensure that fundamental rights are protected see EECKHOUT, "The EU Charter of Fundamental Rights and the Federal Question", 2002, at 981.

²⁹⁹ KÜHLING notes that the right to an effective remedy and the right to a fair trial included in Article 47(1) may be considered *derivative Teilhaberechte*, i.e. derived participatory rights, as the right of the individual may only be derived from the rights of a group. By contrast, Article 47(3) may be considered as *originäre Leistungsrechte*, i.e. it confers a claim to sovereign performance of a service even if this has previously not been provided for by law. Nonetheless, these so-called rights to performance have only a limited tradition in constitutional law of Member States. See KÜHLING, "Fundamental Rights", 2009, at 479 *et seq.*

³⁰⁰ TRIANTAFYLLOU, "The European Charter of Fundamental Rights and the 'Rule of Law'", 2002, at 54;

against government aimed at developing policies to ensure that the individual can effectively benefit from the freedoms and rights granted to him.”³⁰¹ Thus, without entering into the discussion on the adoption of a Union “human rights policy”³⁰² it suffices to say that Article 47 can be understood as encompassing not only traditional *Abwehrrechte* but also *Leitungsrechte*.

On the other hand, procedural rights and guarantees are established in the Charter as central norms of the Union legal order, with a legally binding force. They grant the beneficiaries of the Charter the *right* to claim protection of other rights established therein.³⁰³ Thus, Articles 47 *et seq.* establish genuine *subjective* fundamental rights³⁰⁴ that “no *precisan para ser invocados, de un posterior desarrollo, disfrutam de aplicabilidad directa.*”³⁰⁵

1.2.5 The Impact of the Charter on the Union’s System of Judicial Protection

I. In spite of the “cosmetic operation to reduce the visibility of the Charter”³⁰⁶ which eliminated its text from the Treaties, “the net result of Article 6(1) TEU is that it now constitutes an integral part of EU law.”³⁰⁷ Furthermore, in light of the above, it should be noted that although the CJEU has recognised the right to effective judicial protection in well-settled case-law, the Lisbon Treaty is the first Treaty which *expressly* protects this right, notably *ex vi* Article 6(1) TEU. Hence, “this express recognition could lead the ECJ to assign more importance to the right than it has done in the past when interpreting the rules on standing for private applicants in actions for annulment.”³⁰⁸

The concrete consequences of the proclamation of the right to effective judicial protection in the Treaties will be assessed in detail below.³⁰⁹ For now, one should draw attention to the fact that Member States probably perceived that the CJEU might have difficulties in reconciling Article 47 of the Charter with Article 263(4) TFEU. Hence, the explanations attached to the Charter seem like an “attempt to reconcile the two provisions.”³¹⁰ According to such explanations the

PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 6.

³⁰¹ PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 6.

³⁰² ALSTON; WEILER, “An ‘Ever Closer Union’ in Need of a Human Rights Policy”, 1998, at 658-723; VON BOGDANDY, “The European Union as a Human Rights Organization?”, 2000, at 1307-1338; EECKHOUT, “The EU Charter of Fundamental Rights and the Federal Question”, 2002, at 988; WILLIAMS, “The EU Human Rights Policy and the Convention on the Future of Europe”, 2003, at 794-813; WEILER, “The Essential (and Would-Be Essential) Jurisprudence of the European Court of Justice”, 2006, at 125, 126.

³⁰³ MARTÍN DIZ, “Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea”, 2003, at 222. Accordingly, the author notes that the guarantees established in Article 47 are acknowledged to all individuals regardless of their nationality (Article 21 of the Charter). Citizenship rights are naturally excluded as they are reserved to the citizens of the Union. See CURTIN; VAN OOIK, “The Sting is Always in the Tail”, 2001, at 102 *et seq.*, noting that it could be argued that not all Charter rights should apply to everyone within the Union’s jurisdiction. See also SOARES, *A Carta dos Direitos fundamentais da União Europeia*, 2002, at 47-50.

³⁰⁴ MARTÍN DIZ, “Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea”, 2003, at 221, 222.

³⁰⁵ *Ibid.*, at 227.

³⁰⁶ BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, at 720. DOUGAN referred to the Charter as “another victim of the European Council’s decision to abandon the ‘constitutional concept’.” See DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 662.

³⁰⁷ *Ibid.*

³⁰⁸ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 517.

³⁰⁹ See *infra* Chapter 2.

³¹⁰ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 517.

Charter does not aim to amend the system of judicial review established by the Treaties.³¹¹

How much weight the CJEU will give to such explanations remains to be seen.³¹² In fact, “the legal status of these explanations is not entirely clear.”³¹³ Contrary to what happened under the CT³¹⁴ the explanations have not been inserted in the Declaration on the Charter annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. The introductory remarks to the explanations state that although “they *do not as such have the status of law*, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.” Current Article 6(1) § 3 TEU stipulates that the Charter shall be interpreted “with *due regard* to the explanations referred to in the Charter, that set out the sources of those provisions.” A similar expression can be found in the fifth paragraph of the preamble to the Charter.

This suggests that, while the explanations *are not legally binding*, the courts are supposed to give them *due regard* when interpreting the Charter. However, what *giving due regard* involves is unclear.³¹⁵ Clearly, if the explanations are perceived to be in conflict with the language of the Treaties, “the courts will have to give preference to the provisions of the highest law, rather than to explanations which do not have the status of law.”³¹⁶ Thus, the Union courts may not assign much weight to the explanations if they believe that the balance struck in them between Article 47 of the Charter and Article 263(4) TFEU is incompatible with the Treaty itself.³¹⁷ Furthermore, the articulation of Article 47 and Articles 40 TEU and 275 TFEU may also be unclear. To borrow TOTH’s words, the Charter should not become a “fourth pillar” of the Union integration. It should extend to any provision of Union law and apply “right across the whole body of EU law.”³¹⁸ Therefore, the CJEU should take into consideration that the Charter extends to the interpretation and application of the Union legal order *in full* when interpreting the limits of its own jurisdiction. However, one should note that if the CJEU does not discover a direct conflict with the language of the Treaties, the explanations may contribute to preserving the *status quo* in the Courts’ approach

³¹¹ According to the explanation attached to Article 47: “[t]he inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union’s system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263.” See 2007/C 303/02. Noting that these explanations constitute a “limitation to the freedom of interpretation of the judges” see ROCHERE, “The EU and the Individual”, 2004 at 351. Also noting that these explanations should be considered “an essential and authoritative guide” see LORD GOLDSMITH, “The Charter of Rights”, 2004, at 477.

³¹² See ARNULL, “From Charter to Constitution and Beyond”, 2003, at 793. ARNULL also contended that the explanations of the Charter implicitly acknowledge that Article III-270(4) CT might be regarded as incompatible with Article II-47 of the Charter and seek to prevent that conclusion from being drawn. See Memorandum of the House of Lords European Union Committee, The Future Role of the European Court of Justice: Report with evidence, 6th Report of Session, 2003-2004, HLP 47, available at <http://www.publications.parliament.uk/>, at 40, 58-59.

³¹³ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 517.

³¹⁴ Declaration 12 annexed to the Final Act adopting the Constitution, OJ C 310, 16/12/2004, p. 424459.

³¹⁵ Noting that the explanations are “not just one point of reference” but should work as an authoritative interpretative tool, whose guiding force is confirmed three times in EU primary law (Article 6(1) TEU, the Preamble and Article 52(7) of the Charter) see WEISS, “Human Rights in the EU”, 2011, at 70, 71. The author considers that a deviation from the explanations may be possible “for mandatory reasons only” hardly envisageable.

³¹⁶ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 517. Noting that the explanations would not necessarily impede a dynamic interpretation of the rights proclaimed by the Charter see LOUIS, “The Court in the Constitution?”, 2006, at 138.

³¹⁷ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 517.

³¹⁸ TOTH, “The Charter of Fundamental Rights of the European Union”, 2002, at 187. See also EDITORIAL COMMENTS, “The EU Charter of Fundamental Rights Still under Discussion”, 2001, at 4.

to the interpretation of the standing rules for private applicants. If that is the case, the explanations may thus constitute one of the reasons why gaps in the effective judicial protection of individuals are perpetuated after Lisbon.³¹⁹

II. The Charter – which is said to have taken the EU into a “new stage of the European integration process”³²⁰ – was designed to improve the protection of human rights at the Union level – to grant them one “*grau mais elevado de protecção*”³²¹ –, and must therefore have a *significant impact* on the functioning and organization of the institutional architecture established in the Treaties. In fact, the adoption of the Charter discloses a *paradigm shift* in the protection of rights within the European legal order: “human rights are no longer on the periphery, but have moved to centre stage.”³²² Mainly on the grounds of previous Article 6 TUE, the Union legal order was developed based on rights, freedoms and principles. Following the praetorian adoption of a system of fundamental rights protection, Member States opted in Lisbon for a model of “*expressa enunciação normativa*”³²³ of fundamental rights in Treaties.³²⁴ These rights are now formally codified, elevated to the constitutional level and given full Treaty status. ANDERSON and MURPHY have noted that although “the Charter may never achieve in Europe the level of popular awareness enjoyed by the Bill of Rights in the United States”³²⁵ “the act and manner of codification is likely to give fresh impetus to human rights litigation”³²⁶ in the EU. In fact:

“[th]e best argument for the Charter is the simplest, and one which should appeal to Europhile and Europhile alike: the need for *robust* and *accessible judicial protection* for individuals against the ever-increasing powers of the Union and of the Member States when acting within the scope of Union law. It is thus a particular appropriate companion to perhaps the most important of all the Lisbon Treaty developments: the merging of the pillars and the extension of judicial control over such areas as asylum, immigration, national security and criminal justice.”³²⁷

More significantly, the right to effective judicial protection was included in the constitutional catalogue of rights. Although this right was “born” within the context of the national courts’ obligation to ensure the *effectiveness* of Union law *as whole*, its scope and meaning need to be reassessed in light of the new paradigm underlying the adoption of the Charter. Effective judicial

³¹⁹ Mentioning Articles 41 and 47 but considering that the CJEU is unlikely to change its case-law on standing rules considering the explanatory memorandum attached to the Charter see CRAIG; BÚRCA, *EU Law*, 2011, at 510. Questioning the significance and value of the explanations the Charter, although noting that they may have a certain “lock in” effect on the interpretation of *locus standi* requirements see BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*”, 2004, at 1658.

³²⁰ ORTEGA, “Fundamental Rights in the European Constitution”, 2005, at 363.

³²¹ QUADROS, *Direito da União Europeia*, 2012, at 176. See also MACHADO, *Direito da União Europeia*, 2010, at 267.

³²² YOUNG, “The Charter, Constitution and Human Rights”, 2005, at 219.

³²³ MEDEIROS, “A Carta dos Direitos Fundamentais da União Europeia, a Convenção Europeia dos Direitos do Homem e o Estado Português”, 2001, at 234; CORREIA, *Direito do Contencioso Administrativo*, 2005, at 357.

³²⁴ VITORINO, *Carta dos Direitos Fundamentais da União Europeia*, 2002, at 16 *et seq.*

³²⁵ ANDERSON; MURPHY, “The Charter of Fundamental Rights”, 2012, at 179.

³²⁶ *Ibid.*, at 153. Speaking about a movement “from an indirect to a direct protection of rights” see YOUNG, “The Charter, Constitution and Human Rights”, 2005, at 219.

³²⁷ ANDERSON; MURPHY, “The Charter of Fundamental Rights”, 2012, at 179. See *infra* Chapter 2, Section 2.1.1.

protection as a constitutional principle requires thus a more *subjectivist* approach to judicial review.³²⁸ This process of *constitutionalization* of fundamental rights, *maxime* procedural rights, follows the main legal trends in national legal orders.³²⁹ In light of these developments, individuals should be put at the centre of the system of judicial review, and the *subjective* dimension of the right to effective judicial protection should occupy a central place in the legal discourse.³³⁰

Article 47 of the Charter is in line with the common constitutional traditions of Member States and the international commitments of the Union. It formally fills in a void which could not persist. Considering that the principles enshrined in the Charter constitute the standards of judicial protection in the EU and the basis of the development of the procedural law at the Union level, the Charter is “fated” to constitute a decisive reference in this process³³¹ and to influence the “*modo di essere*”³³² of the judicial protection in the EU. In fact, the Charter constitutes the “most modern systematisation of fundamental rights”³³³ and should be viewed as “a authoritative representation of the human rights standards of the European Union.”³³⁴ As DE BÚRCA has put it, “the stronger the nature and degree of legal recognition given to the Charter, the more the relationship of particular provisions contained within it with existing provisions of the EC Treaty will need to be taken seriously and addressed.”³³⁵ Here, one should also note that although Article 47 does not mention the term “effective” to qualify the protection it entails³³⁶, this requirement derives implicitly from the guarantees enshrined in such provision: the *essence* of judicial protection lies in its *effectiveness*. Thus, a mere *formal* access to justice is not enough. It is necessary to construe such access in a way which truly enables judicial protection of private parties. The case-law of the Court has long considered the need for an *effective protection*.³³⁷

The Charter – and consequently Article 47 and the right to effective judicial protection –

³²⁸ Noting that the emergence of the status of citizenship, in 1992, should have translated into the reinforcement of the right of action, as the recognition of the justiciability of their rights and interests should be the logic complement of the new political and democratic prerogative see VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 547; SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 7.

³²⁹ In fact, as seen above, historically there has been since the last years of the XX century a revalorization of procedural realities which reflected in the protection of rights at the constitutional level. See *supra* Section 1.1.

³³⁰ Noting that under the Charter it is necessary to find a means of “*placer l’être humain au centre de la construction européenne, une fois qu’il constitue son but ultime*” see MARTINS, “Les valeurs communes et la place de la charte en Europe”, 2002, at 134. See also the Preamble of the Charter.

³³¹ TROCKER notes that “la Carta è destinata a costituire – indipendentemente dal suo status – un punto di riferimento per tutti coloro che nell’ambiente sovranazionale come in quello nazionale sono chiamati ad offrire il loro contributo all’operazione dell’opera di costruzione dell’diritto processuale europeo.” See TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1240, 1241. On the main consequences of the constitutionalization of the Charter see MARTÍN DÍZ, “Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea”, 2003, at 239 *et seq.*

³³² TROCKER, “La Carta dei diritti fondamentali dell’Unione Europea ed il processo civile”, 2002, at 1183.

³³³ WALTER, “History and Development of European Fundamental Rights and Fundamental Freedoms”, 2007, at 15.

³³⁴ *Ibid.*

³³⁵ BÚRCA, “Human Rights”, 2001, at 2.

³³⁶ The term is mentioned incidentally in the need for legal aid.

³³⁷ It is noticeable that the GC has made reference to the Charter in cases involving procedural issues. See e.g., Case T-54/99, *max.mobil/Commission* [2002] II-313; Case T-177/01, *Jégo-Quéré/Commission*, [2002] ECR II-2365. Noting that Article 47 has been the most cited provision of the Charter to date, see DOUGLASSCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 46. Considering that the Court could reinterpret standing requirements in light of Article 47 see SOARES, *A Carta dos Direitos fundamentais da União Europeia*, 2002, at 60. After Lisbon, the Charter was cited on 24 occasions by AGs, twice by the GC, and in 30 judgements of the CJ according to ANDERSON; MURPHY, “The Charter of Fundamental Rights”, 2012, at 173.

binds *primarily* the Union institutions, and thus also the CJEU. Hence, despite the framers' intention, it is hard to see how a right so well-settled in the Union legal order, and now established at the *constitutional* level, could have no impact on the Union's judicial system.³³⁸ Why the latter — where the core of rights protection lays — may escape the influence of the *constitucionalization* of procedural fundamental rights would be difficult to explain. In particular, why the CJEU's case-law on its own jurisdiction should remain immune to the need to ensure effective judicial protection of private parties, while extensive procedural obligations have been imposed on national courts, lacks a satisfactory explanation.

In light of the above, it is submitted that taking into account the reinforced legal value of the Charter under the Lisbon Treaty, both the jurisdiction of national and Union courts should no longer be considered in light of the *objective* effectiveness of the Union legal order, but should emerge as an “*imperativo e manifestação da essencialidade do posicionamento da pessoa*”³³⁹ at the centre of Union law. If the Charter is to be “groundbreaking in the future”³⁴⁰, — more than “an immovable showcase for an old treasury”³⁴¹ — and if it should have “a certain spill-over effect”³⁴² by spreading ideas over “well strict frontiers”³⁴³, it is submitted that when interpreting the limits of its jurisdiction the CJEU should take into consideration the need to ensure the respect for the procedural dimension of individual rights, and *maxime* fundamental rights.³⁴⁴

Lastly, one should note that Articles 52(3) and 53 of the Charter indicate that the latter should be seen as establishing the “minimum to be guaranteed in all circumstances”³⁴⁵ in the EU. It is not the place to elaborate on the exact scope and meaning of these provisions.³⁴⁶ It suffices to say that these provisions “pay tribute to the fact that the Charter was drafted in the image of the

³³⁸ Noting that the incorporation of the Charter would lead to a shift in the Court's case-law, see European Group of Public Law, “Proposal on the Debate on the European Constitution”, E.R.P.L., European Papers 2, 2003. See also LAWSON, “Human Rights”, 2005, at 29.

³³⁹ CORREIA, *Direito do Contencioso Administrativo*, 2005, at 356.

³⁴⁰ WALTER, “History and Development of European Fundamental Rights and Fundamental Freedoms”, 2007, at 15.

³⁴¹ FENGE, “Fundamental Rights in the European Union”, 2001, at 52.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ See *infra* Chapter 2, Section 2.1.5.

³⁴⁵ LENAERTS; DE SMIJTER, “A ‘Bill of Rights’ for the European Union”, 2001, at 288. See also LENAERTS; DE SMIJTER, “The Charter and the Role of European Courts”, 2001, at 97; TOTH, “The Charter of Fundamental Rights of the European Union”, 2002, at 178; EHLERS, “The Fundamental Rights of the European Union”, 2007, at 378; MARTINS, “A protecção dos direitos fundamentais em Portugal e a Constituição Europeia”, 2007, at 137; PAIS, “A protecção dos direitos fundamentais na União Europeia”, 2012, at 127. Scholars have generally pointed to the inclusion of the ECHR's case-law in these provisions.

³⁴⁶ Scholars have, nonetheless, considered that these provisions have incorporated the material content of the Convention into the Union legal order. See JACQUÉ, “The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 2011, at 1000; WEISS, “Human Rights in the EU”, 2011, at 69 *et seq.*, noting that incorporation is limited to ECHR provisions which have corresponding twin provisions in the Charter. Nonetheless, the author questions if such incorporation changed the status of the ECHR in the states' legal orders. Noting that these provisions do not offer complete protection against the risks of conflicts see MEDEIROS, “A Carta dos Direitos Fundamentais da União Europeia, a Convenção Europeia dos Direitos do Homem e o Estado Português”, 2001, at 263 *et seq.*; ARNULL, “From Charter to Constitution and Beyond”, 2003, at 786. On the scope of the horizontal provisions of the Charter see *e.g.*, BESSELINK, “The Member States, the National Constitutions and the Scope of the Charter”, 2001, at 72 *et seq.*; LEMMENS, “The Relation between the Charter of Fundamental Rights of the EU and the European Convention on Human Rights” 2001, at 49-67; SOARES, *A Carta dos Direitos fundamentais da União Europeia*, 2002, at 52 *et seq.*; ALONSO GARCÍA, “The General Provisions of the Charter of Fundamental Rights of the European Union”, 2002, at 492-514; PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 28 *et seq.*; VRANES, “The Final Clauses of the Charter of Fundamental Rights”, 2003, at 9 *et seq.*; PEERS, “Taking Rights Away?”, 2004, at 152 *et seq.*

[ECHR]”³⁴⁷ to which I will now turn. Before proceeding, however, it is worth noticing that it seems that the rights established in the Charter were not intended to lower the degree of protection already existent in the EU. Such provisions seem to be intended to afford the *most extensive degree of protection possible*. In this context, it has been considered that this highest degree of protection should be “the one which presents the highest requirements in favour precisely of the individual and not of public authority.”³⁴⁸ Hence, fundamental rights conflicts should be resolved *pro individuo*. Accordingly, it is submitted that the duties imposed on the CJEU by those provisions mandate the Court to adopt a *pro actore* approach, which grants access to justice “*una mayor protección y tutela*”³⁴⁹ and which ensures one “*más elevado y beneficioso*”³⁵⁰ standard of protection.

1.3 Article 6(2) TEU: the Mandatory Accession to the ECHR

1.3.1 General Remarks: from Opinion 2/94 to the Draft Agreement on Accession

I. Article 6(2) TEU is said to have deprived academics and lawyers involved in the European legal discourse from one of their favourite topics of discussion. In fact, the discussion surrounding accession by the EC/EU to the ECHR “is as old as integration itself”³⁵¹ and it has been in the EU’s political agenda for over thirty years.

It is a given fact that over the years the CJEU has consistently applied the ECHR, and more recently the case-law of the EctHR.³⁵² This has led the latter court to establish a *presumption of compliance* with the Convention, in certain circumstances.³⁵³ However, as seen above, this “purely praetorian initiative”³⁵⁴ of the CJEU to protect fundamental rights was considered insufficient. The absence of an EU written catalogue of fundamental rights heated the debate also on the formal accession of the EC/EU to the ECHR.³⁵⁵ Hence, the adoption of the Charter of Fundamental Rights went “hand-in-hand”³⁵⁶ with accession to the ECHR.

Scholars have drawn the attention to the several advantages of accession. The main arguments focused on the need to promote legal certainty and the rule of law³⁵⁷ by providing for

³⁴⁷ WEISS, “Human Rights in the EU”, 2011, at 69.

³⁴⁸ ALONSO GARCÍA, “The General Provisions of the Charter of Fundamental Rights of the European Union”, 2002, at 509.

³⁴⁹ MARTÍN DIZ, “Garantías procesales básicas en la Carta de Derechos Fundamentales de la Unión Europea”, 2003, at 239.

³⁵⁰ *Ibid.*

³⁵¹ JACQUÉ, “The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 2011, at 2011, at 995. In 1953, in its Draft Treaty establishing the European Community, the *ad hoc* Assembly of the ECSC provided for the integration of the substantive provisions of the ECHR in the Treaty.

³⁵² For an overview see DEFEIS, “Human Rights and the European Union”, 2000, at 301 *et seq.*; DOUGLAS-SCOTT, “A Tale of Two Courts”, 2006, at 644 *et seq.*; HARPAZ, “The European Court of Justice and its Relations with the European Court of Human Rights”, 2009, at 108 *et seq.*

³⁵³ See *infra* Section 1.3.3(a). On the dynamics of the relationship between the two courts, considering that the linkage between them has become a driving force of integration through human rights see SCHEECK, “The Relationship between the European Courts and Integration through Human Rights”, 2005, at 864 *et seq.*

³⁵⁴ TULKENS, “Towards a Greater Normative Coherence in Europe”, 2000, at 329.

³⁵⁵ Noting that Convention rights were protected under the system of remedies established in the Treaties, which was not as generous as the individual complaint before the EctHR see TOTH, “The European Union and Human Rights”, 1997, at 495.

³⁵⁶ EICKE, “European Charter of Fundamental Rights”, 2000, at 284.

³⁵⁷ LORD RUSSEL-JOHNSTON, “The ECHR and the EU Charter”, 2000, at 56; TRIDIMAS, *The General Principles of EU Law*, 2006, at 355.

the existence of “outsiders checks”³⁵⁸, notably by an “authoritative, specialist arbiter”³⁵⁹; and to ensure congruence³⁶⁰, coherence³⁶¹, and consistency³⁶² between the case-law of the two courts and therefore avoiding putting the Member States in “an impossible situation”³⁶³ within the Bermuda triangle of European courts.³⁶⁴ Besides its obvious symbolic meaning³⁶⁵, accession would have the advantage of avoiding duplication of European human rights standards and of allowing the creation of a single institutional framework³⁶⁶ – notably a single *judicial* framework – to control the exercise of Union competences, which would be the Convention’s organs and in particular the EctHR.³⁶⁷ Accession would thus reinforce the level of protection of fundamental rights in the EU³⁶⁸ by making sure that there is “*un lenguaje común en Europa a la hora de hablar de derechos fundamentales*.”³⁶⁹ Plus, given that the CJEU continued to “encounter criticism of its human rights role”³⁷⁰ and to its commitment to promoting human rights, accession would reinforce the international credibility³⁷¹ and legitimacy³⁷² of the EU.

Although the Commission had considered in the 1970s that formal accession to the ECHR was not necessary, it proposed such solution in 1979³⁷³ and Parliament supported such view.³⁷⁴ The proposal re-emerged in 1990 and in 1993.³⁷⁵ However, technical and political difficulties had to be overcome,³⁷⁶ the most significant of all being the Opinion 2/94³⁷⁷ of the CJEU which

³⁵⁸ WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 890; JACOBS, “The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice”, 2006, at 294, 295.

³⁵⁹ Noting that these provisions do not offer complete protection against the risk of divergence between the two courts see ARNULL, “From Charter to Constitution and Beyond”, 2003, at 786.

³⁶⁰ WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 890.

³⁶¹ Preamble of the Draft Agreement on the Accession [CDDH-UE (2011)16fin], para. 4.

³⁶² COOPER; PILLAY, “Through the Looking Glass”, 2000, at 116; TULKENS, “Towards a Greater Normative Coherence in Europe”, 2000, at 331.

³⁶³ TOTH, “The Charter of Fundamental Rights of the European Union”, 2002, at 180.

³⁶⁴ See DUARTE, “A Carta dos Direitos Fundamentais da União Europeia”, 2006, at 286.

³⁶⁵ WEILER, “Methods of Protection of Fundamental Human Rights in the European Community”, 1992, at 620.

³⁶⁶ To have such access would effectively prevent two parallel bodies of case-law on the meaning of the ECHR to arise within Europe. See EICKE, “The European Charter of Fundamental Rights”, 2000, at 289.

³⁶⁷ WALTER, “History and Development of European Fundamental Rights and Fundamental Freedoms”, 2007, at 14.

³⁶⁸ LASAGABASTER HERRARTE, “Las Comunidades Europeas y los derechos fundamentales”, 1986, at 70.

³⁶⁹ BIGLINO CAMPOS, “De que hablamos en Europa cuando hablamos de derechos fundamentales”, 1997, at 103. See also LENAERTS; DE SMIJTER, “A ‘Bill of Rights’ for the European Union”, 2001, at 297, considering that the main reason for accession would be to enhance the uniform protection of fundamental rights in the EU.

³⁷⁰ CRAIG; BURCA, *EU Law*, 2011, at 399.

³⁷¹ LOCK, “Walking on a Tightrope”, 2011, at 1026.

³⁷² *Ibid.*

³⁷³ Commission Report, “The Protection of Fundamental Rights as Community law is Created and Developed”, EC Bull. Suppl. 5/76. Memorandum of 4 April 1979, Bull. Suppl. 2/79.

³⁷⁴ Resolution of the European Parliament of 27 April 1979, OJ 127, 21/03/1979, p. 69.

³⁷⁵ Communication on the Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols (SEC (90) 2087 final of 19 November 1990); and Working Document on Accession of the European Community to the European Convention on Human Rights and the Community Legal Order (SEC(93)1679). On the history of accession see e.g., SAGGIO, “A protecção dos direitos fundamentais na ordem jurídica comunitária”, 1993, at 92 *et seq.*; BARUFFI, “Alla ricerca della tutela dei diritti fondamentali nel sistema comunitario”, 1999, at 1007 *et seq.*; FRAGOLA, “Sovranità degli stati membri e garanzie a protezioni dei diritti umani nell’ordinamento comunitario”, 2001, at 1472 *et seq.*; RIZZO, “Il problema della tutela dei diritti fondamentali nell’Unione Europea”, 2001, at 65 *et seq.*; SOARES, *A Carta dos Direitos Fundamentais da União Europeia*, 2002, at 23 *et seq.*

³⁷⁶ See for a overview of those difficulties see e.g., LASAGABASTER HERRARTE, “Las Comunidades Europeas y los derechos fundamentales”, 1986, at 71 *et seq.*; TOTH, “The European Union and Human Rights”, 1997, at 502 *et seq.*, who has proposed that Member States withdraw the Convention following accession by the EU, to avoid conflicting decisions and to bring the protection of human rights in the EU and its Member States within a single

formally “blocked the road to accession.” As is well known, faced with resistances of some Member States, the Council sought the opinion of the CJEU on this issue, who considered that the Communities had no competence to accede to the Convention as no Treaty provision conferred on the Community institutions any general power to enact rules on human rights or to conclude international agreements in this matter. Moreover, ex-Article 308 TEC – current Article 352 TFEU – could not be used as a legal basis for accession as the latter would bring about a substantial change in the Community system for protection of fundamental rights as it would entail the entry of the Community into a distinct international institutional system as well as the integration of all provisions of the Convention into the Community legal order.³⁷⁸

Opinion 2/94 was largely criticized in the literature.³⁷⁹ Apart from the fact that there was no envisaged agreement at the time it was delivered, and that the respect for fundamental rights is a component to all Union policies³⁸⁰, scholars noted that the Opinion echoed mostly the resistances of the CJEU to be submitted to the jurisdiction of the ECtHR.³⁸¹ Notwithstanding, since then, it became patent that the CJEU would not clear the way for accession unless the Treaties provided for a specific legal basis. In light of these developments, and although some scholars considered that an open conflict between the two courts was unlikely and that the relationship between the two jurisdictions became one “more of cooperation than one of confrontation”³⁸², Member States agreed that accession *must* occur.³⁸³

system of enforcement under the final authority of a single court, i.e., the CJEU; MYJER, “Can the EU Join the ECHR”, 2006, at 305-308; WALTER, “History and Development of European Fundamental Rights and Fundamental Freedoms”, 2007, at 14.

³⁷⁷ Opinion 2/94, [1996] ECR I-1759.

³⁷⁸ See para. 34. For a contextual analysis of the Opinion see WARD, “The Opinion of the Court of Justice Regarding Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, 1998-1999, at 635-653.

³⁷⁹ See e.g., GAJA, “Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, 1996, at 973-989; SCHUTTER, “L’adhésion de la Communauté à la Convention européenne des droits de l’homme”, 1996, at 555-606; SIMON, “L’avis 2/94 du 28 mars 1996 sur l’adhésion de la Communauté à la Convention européenne des droits de l’homme”, 1996, at 1-4; WACHSMANN, “L’avis 2/94 de la Cour de justice relatif à l’adhésion de la Communauté européenne à la Convention de sauvegarde des droits de l’homme et des libertés fondamentales”, 1996, at 467-491; WAELBROECK, M., “La Cour de Justice et la Convention Européenne des Droits de l’Homme”, 1996, at 549-553; AREILZA CARVAJAL, “O Parecer n.º 2/94 do Tribunal de Justiça das Comunidades Europeias ou como não abordar o espinhoso assunto das competências comunitárias”, 1997, at 317-328; BURROWS, “Question of Community Accession to the European Convention Determined”, 1997, at 61-63; MATHIEU, “L’adhésion de la Communauté à la CEDH”, 1998, at 31-36; RIZZO, “Il problema della tutela dei diritti fondamentali nell’Unione Europea” 2001, at 69; MOREIRA, “A Carta e a adesão da União Europeia à Convenção Europeia de Direitos do Homem (CEDH)”, 2001, at 92; EECKHOUT, “The EU Charter of Fundamental Rights and the Federal Question”, 2002, at 981. Considering Opinion 2/94 to have been “une autolimitation prétorienne respectueuse des équilibres inhérents à la ‘Constitution’ communautaire” see ZAMPINI, “La Cour de justice des Communautés européennes, gardienne des droits fondamentaux dans le cadre du droit communautaire”, 1999, at 660.

³⁸⁰ TRIDIMAS, *The General Principles of EU Law*, 2006, at 354.

³⁸¹ Noting that what was at stake was “the conservation by the Court of Justice of its present functions” see GAJA, “Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, 1996, at 988.

³⁸² TRIDIMAS, *The General Principles of EU Law*, 2006, at 343. The Courts have in time started to refer to each others case-law see Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, [2002], ECR I-6279; Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich*, [2003], ECR I-9607. Noting that the risk of divergences exists, but the latter “ne sont pas graves”, see ROCHÈRE, “La charte de droits fondamentaux de l’Union européenne”, 2000, at 679. On the diverging interpretations adopted by the ECtHR and CJEU see e.g., MENENDEZ, “Constituting Rights on Their Own Right”, 2002, at 397-415; YOUNG, “The Charter, Constitution and Human Rights”, 2005, at 226-227; TIZZANO, “Quelques réflexions sur les rapports entre les Cours européennes dans la perspective de l’adhésion de l’Union à la Convention EDH”, 2011, at 9 et seq.

³⁸³ Accession was also advocated, *inter alia*, by the Parliamentary Assembly to the Council of Europe, and Judge MARC FISCHBACH of the ECtHR, and Deputy Secretary General of the Council of Europe, HANS CHRISTIAN KRÜGER, official observers of the Council of Europe to the Convention process. Favouring accession see e.g., LASAGABASTER

II. Current Article 6(2) TEU leaves no scope for ambiguity: accession to the ECHR must take place.³⁸⁴ Thus, this provision not only provides for the competence to sign up for the Convention but is also places the Union under an *obligation* to do so.³⁸⁵ While confirming the existence of such obligation, Article 218(8) TFEU requires unanimity in the Council regarding the adoption of the agreement on accession and the need of approval by all the Member States in accordance with their respective constitutional requirements.³⁸⁶ Protocol no. 8 to the Treaty of Lisbon sets out a number of further requirements for the conclusion of the accession agreement³⁸⁷, and Protocol no. 14 to the ECHR³⁸⁸ amended Article 59 of the Convention to allow the EU to accede to it.

Notwithstanding, for the moment, the consequences of the future system of judicial review under the ECHR remain uncertain. It is still unclear how accession to the ECHR will take place and which changes will have to be introduced in the Union Treaties, if any. Negotiations on accession began in the summer of 2010.³⁸⁹ An informal working group presented a first *Draft Agreement on Accession* in February 2012³⁹⁰, and revised versions in March³⁹¹ and May.³⁹² In July 2011, a final version of the draft legal instruments on the accession was presented³⁹³ which was

HERRARTE, "Las Comunidades Europeas y los derechos fundamentales", 1986, at 70, 71; TURNER, "European Rights Protection in the European Community", 1999, at 470; CANOR, "*Primus Inter Pares*", 2000, at 21; FERNANDEZ SOLA, "À quelle nécessité juridique répond la négociation d'une Charte des Droits Fondamentaux de l'Union Européenne?", 2000, at 597; LENAERTS, "Fundamental Rights in the European Union", 2000, at 600; GARCIA, "La protection juridictionnelle des droit de l'homme en Europe", 2001, at 36; MAUS, "La Charte des droits fondamentaux de l'Union européenne et la protection des droits de l'homme en Europe", 2005, at 312; PAIS, "A proteção dos direitos fundamentais na União Europeia", 2012, at 130, 131. Questioning the true need for accession see e.g., BARUFFI, "Alla ricerca della tutela dei diritti fondamentali nel sistema comunitario", 1999, at 1025 *et seq.*

³⁸⁴ Noting, however, the different language versions of Article 6(2) TEU see WALTER, "History and Development of European Fundamental Rights and Fundamental Freedoms", 2007, at 15.

³⁸⁵ LOCK, "Walking on a Tightrope", 2011, at 1026; JACQUÉ, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 2011, at 1023; GAJA, "Accession to the ECHR", 2012, at 181; JACOBS, "The Lisbon Treaty and the Court of Justice", 2012, at 204; Draft Explanatory Report to the Agreement on the Accession, para. 2. Article I-9(2) CT had a slightly different wording, as it provided that the Union "shall seek accession". Noting that this provision provided more than a legal basis for accession as it gives "an incentive" see ROCHÈRE, "The EU and the Individual", 2004, at 353.

³⁸⁶ Scholars have noted that these procedural requirements are cumbersome and find no parallel with any other agreement to be concluded by the EU, which may seem at odds with the obligation to accede. See GAJA, "Accession to the ECHR", 2012, at 182, 183.

³⁸⁷ See also Declaration no. 2 to the Treaty of Lisbon.

³⁸⁸ Which was adopted in 2004 and entered into force on 1 June 2010.

³⁸⁹ Notably, the issue of knowing which Protocols the Union should ratify is unclear. See JACQUÉ, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 2011, at 1003-1005. On 26 May 2010, the Committee of Ministers of the Council of Europe gave an *ad hoc* mandate to its Steering Committee for Human Rights (CDDH) to elaborate with the EU the necessary legal instrument for the EU's accession to the ECHR. On the EU side, the EU Justice Ministers gave the European Commission on 4 June 2010 the mandate to conduct the negotiations on their behalf. The CDDH entrusted the task of elaborating an accession instrument to an informal group of 14 members (7 coming from Member States of the EU and 7 coming from non-Member States of the EU). Between July 2010 and June 2011, this informal working group (CDDH-UE) met eight times and presented a batch of draft legal documents to the CDDH. The latter, discussed these instruments in October 2011 and, given the political implications of some of the pending problems, agreed to transmit them to the Committee of Ministers for consideration and further guidance. On 13 June 2012, the Committee of Ministers instructed the CDDH to pursue negotiations with the European Union, in an *ad hoc* group "47+1", with a view to finalising without delay the accession instruments.

³⁹⁰ CDDH-UE(2011)04.

³⁹¹ CDDH-UE(2011)06.

³⁹² CDDH-UE(2011)10.

³⁹³ CDDH-UE(2011)16. The draft legal instruments on the accession of the EU to the ECHR elaborated by the CDDH-UE consist of a (i) Draft Agreement on the Accession of the EU to the ECHR; (ii) a Draft Rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (draft Union 18) and (iii) a Draft Explanatory Report to the Agreement on Accession.

followed in October 2011 by the Report to the Committee of Ministers.³⁹⁴ One should expect accession to still take a considerable amount of time before it finally becomes a reality.

III. Although one should be aware of the multitude of questions and difficulties surrounding accession³⁹⁵, for purposes of the present study, the subject is relevant in two different regards discussed briefly below. Firstly, accession represents the possibility of *directly* enforcing Articles 6 and 13 ECHR against the European Union for insufficient procedural protection of individual rights. Secondly, accession may entail a change in the mechanisms of judicial review of Union acts currently available both in the ECHR system and in the EU legal order.

1.3.2 The Right of Access to Justice under the ECHR: Articles 6 and 13 ECHR

a) Article 6: the Right of Access to a Court

I. Article 6 ECHR establishes the right to a fair trial³⁹⁶, and it is the “most popular” article of the ECHR as it constitutes its most relied upon provision.³⁹⁷ “*Une telle importance quantitative*”³⁹⁸ is justified, and it is mostly due to the “extensive and sophisticated body of rights”³⁹⁹ such provision includes. It has been referred to as an “*omnibus* provision.”⁴⁰⁰ In fact, the “combination of some six specific rights which are clearly non-exhaustive, surrounded by a rather open-ended right to a fair hearing, provides considerable scope for innovative arguments and applicants to Strasbourg in recent years have attempted (with some notable success) to take advantage of the various possibilities.”⁴⁰¹ According to the EctHR, Article 6 “lays down the more *general principle* of the proper administration of justice”⁴⁰² and it occupies a “prominent place”⁴⁰³ in democratic societies. Scholars acknowledge its “*importance pratique capitale*”⁴⁰⁴ and qualify the right to a fair trial as a “*pierre angulaire*”⁴⁰⁵ of the Convention and the “keystone of a society based on the rule of law.”⁴⁰⁶

³⁹⁴ CDDH(2011)009. For an overview of the accession proceedings see Draft Explanatory Report to the Agreement on Accession, paras. 8-14; Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the EU to the ECHR [CDDH-EU(2011)009], paras. 1-13; LOCK, “Walking on a Tightrope”, 2011, at 1026 *et seq.*; JACQUÉ, “The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 2011, at 996 *et seq.*

³⁹⁵ See JACQUÉ, “L’adhésion de l’Union européenne à la Convention européenne des droits de l’homme”, 2011, at 7-8.

³⁹⁶ See headings of articles inserted by the appendix to Protocol no. 11 to the ECHR.

³⁹⁷ HARRIS; O’BOYLE; BATES; BUCKLEY, *Harris, O’Boyle & Warbrick, Law of the European Convention on Human Rights*, 2009, at 202. See SOYER, SALVIA, “Article 6”, 1999, at 239 *et seq.*

³⁹⁸ TAVERNIER, “Faut-il réviser l’article 6 de la Convention européenne des droits de l’homme”, 1998, at 707.

³⁹⁹ BERMS, “Conflicting Human Rights”, 2005, at 295.

⁴⁰⁰ WHITE; OVEY, *Jacobs, White & Ovey, The European Convention on Human Rights*, 2010, at 242.

⁴⁰¹ ASHWORTH, “Article 6 and the Fairness of Trials”, 1999, at 261. For an overview of the several rights included in Article 6 see FOCARELLI, *Equo Processo e Convenzione Europea dei Diritti dell’Uomo*, 2001, at 358 *et seq.*; ERGEC, *Protection européenne et internationale des droits de l’homme*, 2004, at 182 *et seq.*; GRABENWARTER, “Fundamental Judicial and Procedural Rights”, 2007, at 162 *et seq.*

⁴⁰² *Boddaert v. Belgium*, Application no. 12919/87, Judgement of 12/10/1992.

⁴⁰³ *Deweert v. Belgium*, Application no. 6903/75, 27/02/1980, para. 44; *Moreira de Azevedo v. Portugal*, Application no. 11296/84, Judgement of 23/10/1990, para. 66. See also *Sunday Times v. The United Kingdom*, Application no. 6538/74, 26/04/1979, para. 55: [f]or this purpose, account must be taken of the central position occupied in this context by Article 6 (art. 6), which reflects the fundamental principle of the rule of law.”

⁴⁰⁴ ERGEC, *Protection européenne et internationale des droits de l’homme*, 2004, at 183.

⁴⁰⁵ COHEN-JONATHAN, “Conclusions générales des nouveaux développements du procès équitable au sens de la Convention européenne des droits de l’homme”, 1996, at 169.

⁴⁰⁶ BERMS, “Conflicting Human Rights”, 2005, at 298.

Moreover, it has been noted that as the ECHR includes far larger number of procedural rights than national constitutions, national legal orders have been significantly influenced by the Convention in this field.⁴⁰⁷ Article 6 is thus said to establish “*un droit commun du process européen*.”⁴⁰⁸

Article 6 is said to regard exclusively the so-called “*zone protégée du procès*”⁴⁰⁹ and to relate therefore exclusively to *procedural* guarantees⁴¹⁰: it “means only a right to have a trial conducted according to certain procedural requirements such as, for instance, the opportunity to examine witnesses or to produce relevant evidence.”⁴¹¹ Hence, Article 6 defines “*tous les paramètres nécessaires à une bonne justice*.”⁴¹² Notwithstanding, some scholars have noted that the case-law of the EctHR has expanded the scope of said provision to cover “*véritables droits substantiels*.”⁴¹³ For example, the EctHR has acknowledged under Article 6 the right to the enforcement of judgments and the right to damages.⁴¹⁴ Again the strict links between *process* and *substance* make it difficult to determine the boundaries of a *due process of law*.⁴¹⁵

Scholars have noted that it is possible to separate the guarantees mentioned in Article 6 ECHR in two different groups. On the one hand, the right to a fair trial encompasses the obligation of Contracting Parties to create “*une structure répondant à certains critères*”⁴¹⁶; on the other hand, a given process to be “*due*” “*doit se dérouler en suivant une série de règles*.”⁴¹⁷ Notwithstanding, the *due* nature of such proceedings must be considered *as whole*⁴¹⁸ and analyzed on a case-by-case basis, which allows, for instance, for a defect in the proceedings before a court to be “cured by an appeal”⁴¹⁹ to a higher court.

For purposes of the present study, the first set of duties imposed to Contracting Parties, *i.e.* those which relate to the creation of courts and tribunals which are made accessible to individuals,

⁴⁰⁷ GRABENWARTER, “Fundamental Judicial and Procedural Rights”, 2007, at 151.

⁴⁰⁸ ROUHETTE, “Brèves remarques sur l’application de l’article 6 de la Convention européenne des droits de l’homme”, 1997, at 63.

⁴⁰⁹ FABRE, “Le droit à un procès équitable”, 1998, at 1426. However, it must be able to “*incidere effettivamente, cioè utilmente, sulla situazione sostanziale della quale si chiede la tutela giudiziaria*.” See SPADEA, “Il giusto processo amministrativo secondo l’art. 6 della CEDU e con cenni al caso italiano”, 2000, at 370. On the scope of the proceedings as “*garanzi del singolo dall’arbitrio della decisione*” covered by Article 6 see FOCARELLI, *Equo Processo e Convenzione Europea dei Diritti dell’Uomo*, 2001, at 267 *et seq.*

⁴¹⁰ However, scholars have noted that there have been a few cases where the EctHR assessed the adequacy of the decision on the merits. See LOUCAIDES, “Questions of Fair Trial under the European Convention on Human Rights”, 2003, at 30, 31; ERGEC, *Protection européenne et internationale des droits de l’homme*, 2004, at 183, mentioning *Dulaunans v. France*, Application no. 34553/97, Judgment of 21/03/2000; HARRIS; O’BOYLE; BATES; BUCKLEY, *Harris, O’Boyle & Warbrick, Law of the European Convention on Human Rights*, 2009, at 202-204.

⁴¹¹ LOUCAIDES, “Questions of Fair Trial under the European Convention on Human Rights”, 2003, at 30.

⁴¹² FABRE, “Le droit à un procès équitable”, 1998, at 1425.

⁴¹³ FLAUSS, “Les nouvelles frontières du procès équitable”, 1996, at 85. See also gJONATHAN, “Conclusions Générales des nouveaux développements du procès équitable au sens de la Convention européenne des droits de l’homme”, 1996, at 170.

⁴¹⁴ For further developments see FLAUSS, “Les nouvelles frontières du procès équitable”, 1996, at 86 *et seq.* Noting that “*la source du jugement, qui est lui-même la source du droit d’accès, c’est l’exécution. L’exécution devient le point de départ de la procédure*” see FRISON-ROCHE, “La procédure et l’effectivité des droits substantiels”, 2003, at 9.

⁴¹⁵ The intricacy between substantive and procedural due process is also well known to the American system. For further developments see HARRISON, “Substantive Due Process and the Constitutional Text”, 1997, 493-506; FOCARELLI, *Equo Processo e Convenzione Europea dei Diritti dell’Uomo*, 2001, at 169 *et seq.*; ORTH, *Due Process of Law*, 2003, at 15 *et seq.*; MARTINS, *Da Proclamação à Garantia Efetiva dos Direitos Fundamentais*, 2007, at 85 *et seq.*

⁴¹⁶ FABRE, “Le droit à un procès équitable”, 1998, at 1426.

⁴¹⁷ *Ibid.* See also GRABENWARTER, “Fundamental Judicial and Procedural Rights”, 2007, at 152, distinguishing between *organisational* and *procedural* guarantees.

⁴¹⁸ *Kostovski v. The Netherlands*, Application no. 11454/85, Judgment of 20/11/1989, para 39. See also ASHWORTH, “Article 6 and the Fairness of Trials”, 1999, at 261.

⁴¹⁹ *Holm v. Sweden*, Application no. 14191/88 Judgment of 25/11/1993, para. 33.

are the most relevant. In this context, states to the ECHR must ensure the existence of a *true jurisdiction*, established by law, competent to decide the controversial cases brought before it. In the words of the EctHR:

“[a] ‘tribunal’ is characterized in the *substantive sense* of the term by its *judicial function*, that is to say *determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner* (...). It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 para. 1 itself (emphasis added).”⁴²⁰

A “court” or “tribunal” does not necessarily have to correspond to a “classical” type of jurisdiction fully integrated in the ordinary judicial structures. However, it must have the power of delivering binding decisions which can only be reviewed by another judicial authority.⁴²¹ Furthermore, a “tribunal” must be established by law.⁴²² Here, the EctHR has considered that the Convention requires “a certain quality of the relevant law.”⁴²³ In modern democratic states the creation of courts is reserved to the legislatures who represent the interests of the people.⁴²⁴ Hence, Article 6 ECHR protects individuals “*contre toute tentative du pouvoir executive pour le faire juger par une juridiction autre que celle que le législateur a determiner au preambule par voie de normes générales et objectives*.”⁴²⁵

More importantly, those courts must be *open* to all individuals. Every legal or moral person, “*quelle que soit sa nationalité*”⁴²⁶, must have access to justice “in all circumstances.”⁴²⁷ Although the right of access is not explicitly included in Article 6, the EctHR considered that it could be inferred from such provision, and such right is seen as a consequence of the prominence of the law.⁴²⁸ In what has been considered “one of the most important decisions of the Strasbourg Court”⁴²⁹, in the *Golder*⁴³⁰ case, the EctHR found that the right to a fair trial implies the protection of the right of access to a court as:

“[i]t would be *inconceivable*, that Article 6 para. 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,

⁴²⁰ *Demicoli v. Malta*, Application no. 13057/87, Judgement of 27/08/1991, para. 39; *Belilos v. Switzerland*, Application no. 10328/83, Judgment of 29/04/1988, para. 64.

⁴²¹ *Van de Hurk v. The Netherlands*, Application no. 16034/90, Judgement of 19/04/1994, para. 45. Noting that Article 6 requires a “*juridictions qui décident*” see FABRE, “Le droit à un procès équitable”, 1998, at 1426; SUDRE, *La Convention européenne des droits de l’homme*, 2001, at 97. However, Article 6, as well as Article 13, do not require the court to enjoy “full jurisdiction” in all types of proceedings. For further developments see FLAUSS, “Les nouvelles frontières du procès équitable”, 1996, at 82; BELOFF; BELLOF, “Judicial Review”, 2001, at 155 *et seq.*; ERGEC, *Protection européenne et internationale des droits de l’homme*, 2004, at 189.

⁴²² *Olsson v. Sweden*, Application no. 13441/87, Judgment of 27/11/1992. The issue was controversial in *Cyprus v. Turkey*, Application no. 25781/94, Judgement of 10/05/2001.

⁴²³ LOUCAIDES, “Questions of Fair Trial under the European Convention on Human Rights”, 2003, at 43.

⁴²⁴ See *TS and FS v. Italy*, Application no. 13274/87, Decision of 06/09/1990.

⁴²⁵ ERGEC, *Protection européenne et internationale des droits de l’homme*, 2004, at 193.

⁴²⁶ FABRE, “Le droit à un procès équitable”, 1998, at 1426.

⁴²⁷ *Perez v. France*, Application no. 47287/99, Judgement of 12/02/2004, para. 26.

⁴²⁸ RENUCCI, “Le droit au juge dans la Convention européenne des droits de l’homme”, 1998, at 131.

⁴²⁹ LOUCAIDES, “Questions of Fair Trial under the European Convention on Human Rights”, 2003, at 41.

⁴³⁰ *Golder v. The United Kingdom*, Application no. 4451/70, Judgement of 21/02/1975. See MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*, 2012, at 383 *et seq.*

public and expeditious characteristics of judicial proceedings *are of no value* at all if there are no judicial proceedings (emphasis added).⁴³¹

In this case the EctHR adopted what was said to be a “very teleological interpretation”⁴³² of Article 6(1). Indeed, “one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.”⁴³³ Hence:

“[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the *universally ‘recognised’ fundamental principles of law*; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) *must be read in the light of these principles* (emphasis added).”⁴³⁴

The EctHR based its reasoning on two legal principles: the principle according to which a civil claim must be capable of being submitted to a judge as one of the universally recognized fundamental principles of law, and the principle of international law which forbids denial of justice.⁴³⁵ Moreover, since the Convention is intended to guarantee rights that are not “theoretical or illusory”, but that are “practical and effective”⁴³⁶, the right of access to justice should allow for a *proper and satisfactory possibility* to have a case decided by a court of law. Hence, according to the EctHR’s case-law, the fact of having access to domestic remedies only to be told that one’s actions are barred by operation of law does not always satisfy the requirements of Article 6(1):

“[t]he *degree of access* afforded by the national legislation must also be *sufficient* to secure the individual’s ‘right to a court’, having regard to the principle of the rule of law in a democratic society. For the right of access to be effective, an individual *must have a clear, practical opportunity* to challenge an act that is an interference with his rights (emphasis added).”⁴³⁷

In line with the idea that the right of access to a court must be *effective*, the EctHR has highlighted that the right of access to the courts constitutes both a civil right and an economic and social right. This means that it “necessitates some positive action on the part of the State.”⁴³⁸ The issue has been mainly discussed regarding the right to legal aid. In this context, the EctHR has held that although states are not obliged under the ECHR to provide free legal aid for every dispute relating to a “civil right”, “Article 6 para. 1 may sometimes compel the State to provide for the

⁴³¹ Para. 35.

⁴³² KILPATRICK, “The Future of Remedies in Europe”, 2000, at 25. See also ROCHÈRE, “Droit au juge”, 1996, at 125, noting the dissenting opinion of Judge FITZMAURICE criticising the teleological approach.

⁴³³ Para. 34.

⁴³⁴ Para. 35.

⁴³⁵ *Golder v. The United Kingdom*, Application no. 4451/70, Judgement of 21/02/1975, paras. 35-36.

⁴³⁶ *Belgian Linguistic Case*, Applications nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23/07/1968, paras. 3-4; *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979, para. 24; *Artico v. Italy*, Application no. 6694/74, Judgement of 13/05/1980, para. 33; *Luedicke, Belkacem and Koç v. Germany*, Applications nos. 6210/73; 6877/75; 7132/75, Judgement of 28/11/1978, para. 42; *Marckx v. Belgium*, Application no. 6833/74, Judgment of 13/06/1979, para. 31. Noting that “l’article 6 constitue un véritable ‘droit-créance’ du justiciable à un procès équitable qui doit être ‘concret et effectif’” see BARTHELEMY, “Les nouvelles frontières du procès équitable”, 1996, at 105.

⁴³⁷ *De Geoffre de la Pradelle v. France*, Application no. 12964/87, Judgment of 16/12/1992, para. 34; *Bellet v. France*, Application no. 23805/94, Judgement of 05/12/1995, para. 36.

⁴³⁸ *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979, para. 25. Article 6(1) leaves to the State a free choice of the means to be used in the protection of the right of access to courts. See also *De Wilde, Ooms and Versyp v. Belgium* (“Vagrancy”), Applications nos. 2832/66; 2835/66; 2899/66, Judgment of 10/03/1972, para. 22; *Marckx v. Belgium*, Application no. 6833/74, Judgment of 13/06/1979, para. 31.

assistance of a lawyer when such assistance proves indispensable for an *effective access to court* either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”⁴³⁹

II. The EctHR has stated that there is no justification to interpret Article 6(1) restrictively⁴⁴⁰, and has “certainly taken its own advice to heart.”⁴⁴¹ Hence, although Article 6 applies literally only to the determination of “civil rights and obligations or of any criminal charge”⁴⁴² the Court has expanded such notions in order to include administrative justice as a fundamental right. The scope of application of Article 6 was largely debated among scholars and in the case-law.⁴⁴³ It suffices to say here that the EctHR has interpreted the scope of said provision broadly.⁴⁴⁴ Hence, the *right to a court*, of which the right of access is merely an aspect, may be relied upon by anyone who considers on arguable grounds that an *interference* with the exercise of his civil rights is unlawful and complains that he/she has not had the possibility of *submitting that claim to a tribunal* meeting the requirements of Article 6(1).⁴⁴⁵ Thus, although the so-called *contestations*, or disputes contemplated by Article 6(1) may involve the actual existence of a “civil right”⁴⁴⁶, the applicability of Article 6(1) does not depend on whether an asserted “privilege or interest” is classified or described by the domestic system as a “civil right” or even a “right.”⁴⁴⁷ The meaning of the words “*contestations*” over “civil rights and obligations” has been clarified in *Ringeisen*⁴⁴⁸ and the *König*.⁴⁴⁹ Accordingly, these

⁴³⁹ *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979, para. 25. See HARRIS; O’BOYLE; BATES; BUCKLEY, *Harris, O’Boyle & Warbrick, Law of the European Convention on Human Rights*, 2009, at 236-238; MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*, 2012, at 387 *et seq.*

⁴⁴⁰ *Moreira de Azevedo v. Portugal*, Application no. 11296/84, Judgement of 23/10/1990, para. 66.

⁴⁴¹ HARLOW, “Access to Justice as a Human Right”, 1999, at 202.

⁴⁴² The French text is slightly different as it refers to “*contestations sur [des] droits et obligations de caractère civil*” and to “*bien-fondé de toute accusation en matière pénale.*”

⁴⁴³ See e.g., BARTHÉLÉMY, “Les nouvelles frontières du procès équitable”, 1996, at 106 *et seq.*; ROCHÈRE, “Droit au juge”, 1996, at 126 *et seq.*; LOUCAIDES, “Questions of Fair Trial under the European Convention on Human Rights”, 2003, at 28 *et seq.*; ERGEC, *Protection européenne et internationale des droits de l’homme*, 2004, at 184 *et seq.* Noting that the EctHR “*n’ayant pas réussi à dégager des critères précis pour déterminer le champ d’application de cette disposition*” see TAVERNIER, “Faut-il réviser l’article 6 de la Convention européenne des droits de l’homme”, 1998, at 710.

⁴⁴⁴ BELOFF; BELLOF, “Judicial Review”, 2001, at 154. See *Ringeisen v. Austria*, Application no. 2614/65, Judgement of 16/07/1971; *König v. Germany*, Application no. 6232/73, Judgement of 28/06/1978; *Bryan v. The United Kingdom*, Application no. 19178/91, Judgement of 22/11/1995; *Chapman v. The United Kingdom*, Application no. 27238/95, Judgement of 18/01/2001. Discussing the application of Article 6 to arbitration proceedings see CONSOLO, “L’equo processo arbitrale nel quadro dell’art.6, para. 1, della Convenzione Europea dei Diritti dell’Uomo”, 1993, at 295-334.

⁴⁴⁵ See also *Le Compte, Van Leuven and De Meyere v. Belgium*, Applications nos. 6878/75; 7238/75, Judgment of 23/06/1981, para. 44 *in fine*; *Sporrong and Lönnroth v. Sweden*, Applications nos. 7151/75; 7152/75, Judgment of 23/09/1982, para. 81. Thus, the EctHR has used the private law nature of a right or obligation as a criterion of the term “civil.” In some cases, it has spoken about the *predominant* private law features of a right or obligation. However, at the same time, it held that the mere fact that the right or obligation at issue is governed by public law is not enough to deprive it of its civil character (see *Feldbrugge v. The Netherlands*, Application no. 8562/79, Judgement of 29/05/1986). Other qualifications or considerations have been adopted, such as the capacity in which a person claims a right or the economic or pecuniary character of the claim.

⁴⁴⁶ *Ashingdane v. The United Kingdom*, Application. No. 8225/78, Judgement of 28/05/1985, para. 55. For an analysis of the scope of application of Article 6 to “criminal charges” see e.g., ASHWORTH, “Article 6 and the Fairness of Trials”, 1999, at 262 *et seq.*

⁴⁴⁷ Opinion of Judge LAGERGREN. The judge noted the case of *Ashingdane*, noting that for purposes of Article 6(1) these concepts are both “autonomous” and must be defined in the light of their substantive content, of the object and purpose of the Convention and of the national legal systems of all Contracting States.

⁴⁴⁸ *Ringeisen v. Austria*, Application no. 2614/65, Judgement of 16/07/1971, para. 94.

⁴⁴⁹ *König v. Germany*, Application no. 6232/73, Judgement of 28/06/1978, paras. 86-96.

expressions cover “all proceedings the result of which is decisive for private rights and obligations” even if the proceedings concern a dispute between an individual and a public authority acting in its sovereign capacity.⁴⁵⁰ Hence, Article 6 does not cover only private law disputes in the traditional sense. Accordingly, “the character of the legislation which governs how the matter is to be determined (...) and that of the authority which is invested with jurisdiction in the matter (...) are (...) of little consequence.”⁴⁵¹ Merely the character of the right at issue is relevant. As a consequence, a number of proceedings have been considered as determining civil rights or obligations without regard to any particular criterion but simply on a case-by-case basis.⁴⁵² Scholars note that the term “civil rights” has been given a broad meaning and include anything which has a “significant financial element”⁴⁵³, e.g. the right to engage in a commercial activity or to practice a liberal profession.⁴⁵⁴ Hence, Article 6 covers determinations concerning the grant of a commercial license⁴⁵⁵; the grant of a planning permission⁴⁵⁶; a challenge to milk quotas regulations⁴⁵⁷; a grant of preferential tax concessions⁴⁵⁸ and the right to be the controller of an insurance company.⁴⁵⁹ It also applies to disciplinary or regulatory proceedings which could result in dismissal from employment or loss of a license, professional qualification or means of livelihood.⁴⁶⁰ In light of this case-law, scholars note that the notion of civil rights has become “*ampia ed elastica*.”⁴⁶¹

In sum, the EctHR has extended the scope of application of Article 6, considering on the one hand, that national concepts are irrelevant, and on the other hand, that the right to a fair trial applies to issues of an administrative and disciplinary nature.⁴⁶² The Court summarises its case-law as following⁴⁶³:

(a) conformity with the spirit of the Convention requires that the word “dispute” should not be “construed too technically” and should be “given a *substantive rather than a formal*

⁴⁵⁰ *Le Compte, Van Leuven and De Meyere v. Belgium*, Applications nos. 6878/75; 7238/75, Judgment of 23/06/1981, para. 44 *in fine*.

⁴⁵¹ *Ringeisen v. Austria*, Application no. 2614/65, Judgement of 16/07/1971, para. 94; *König v. Germany*, Application no. 6232/73, Judgement of 28/06/1978, para. 90.

⁴⁵² LOUCAIDES, “Questions of Fair Trial under the European Convention on Human Rights”, 2003, at 29.

⁴⁵³ BELOFF; BELLOF, “Judicial Review”, 2001, at 154.

⁴⁵⁴ Noting that “l’existence d’éléments patrimoniaux a une grande force attractive qu’il s’agisse de prestations d’assurance sociale ou d’aide sociale” see ROCHÈRE, “Droit au juge”, 1996, at 127. See also GRABENWARTER, “Fundamental Judicial and Procedural Rights”, 2007, at 161.

⁴⁵⁵ *Bentham v. The Netherlands*, Application no. 8848/80, Judgement of 23/10/1985.

⁴⁵⁶ *Bryan v. The United Kingdom*, Application no. 19178/91, Judgement of 22/11/1995.

⁴⁵⁷ *Procola v. Luxembourg*, Application no. 14570/89, Judgment of 28/09/1995.

⁴⁵⁸ *Editions Periscope v. France*, Application no. 11760/85, Judgement of 26/03/1992.

⁴⁵⁹ *Kaplan v. The United Kingdom*, Application no. 7598/76, Judgement of 17/07/1980.

⁴⁶⁰ BELOFF; BELLOF, “Judicial Review”, 2001, at 154, 155. Noting that there have been contradictory solutions see LOUCAIDES, “Questions of Fair Trial under the European Convention on Human Rights”, 2003, at 29 *et seq.*

⁴⁶¹ SPADEA, “Il giusto processo amministrativo secondo l’art. 6 della CEDU e con cenni al caso italiano”, 2000, at 373.

⁴⁶² The Court has however limited the application of Article 6 to civil servants litigation. For a critical view of this case-law see TAVERNIER, “Faut-il réviser l’article 6 de la Convention européenne des droits de l’homme”, 1998, at 713 *et seq.*; WACHSMANN, “Un nouveau critère de l’application de l’article 6 de la Convention européenne des droits de l’homme au contentieux de la fonction publique”, 2000, at 819-850. Also tax issues are in principle excluded from Article 6, although the case-law is not straightforward. See ERGEC, *Protection européenne et internationale des droits de l’homme*, 2004, at 186. Commenting the exclusion of asile issues see SAROLEA, “Les droits procéduraux du demandeur d’asile au sens des articles 6 et 13 de la Convention européenne des droits de l’homme”, 1999, at 125 *et seq.* On the scope of application of Article 6 regarding environmental disputes see FRUMER, “Protection de l’environnement et droits procéduraux de l’homme”, 1998, at 799-833, adopting a critical approach on the Court’s decision in the case of *Balmer-Schafroth v. Switzerland*, Application no. 22110/93, Judgment of 26/08/1997.

⁴⁶³ *Bentham v. The Netherlands*, Application no. 8848/80, Judgement of 23/10/1985.

meaning”;⁴⁶⁴

(b) the dispute may relate not only to “the actual existence of a (...) right” but also to its scope or the manner in which it may be exercised (...). It may concern both “questions of fact and questions of law”;⁴⁶⁵

(c) the dispute must be *genuine* and of a *serious* nature;⁴⁶⁶

(d) the expression “disputes over civil rights and obligations” covers *all proceedings* the result of which is *decisive* for [such] rights and obligations.⁴⁶⁷ However, “a tenuous connection or remote consequences do not suffice for Article 6 para. 1 (art. 6-1) (...): civil rights and obligations must be the object – or one of the objects – of the ‘*contestation*’ (dispute); the result of the proceedings must be *directly decisive* for such a right (emphasis added).”⁴⁶⁸

Furthermore, the EctHR uses three main criteria in order to determine whether the national proceedings involved the determination of a “criminal charge” within the meaning of Article 6: (i) whether the provisions defining the offence belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently, although this fact is not decisive; (ii) the “very nature of the offence”, which is considered a factor of greater importance; and the (iii) “degree of severity of the penalty which the person concerned risks incurring.”⁴⁶⁹ Accordingly, disciplinary, administrative and tax proceedings may come within the scope of Article 6.⁴⁷⁰ À propos, one should note that although ECHR criminal guarantees have played a smaller role in the EU due to a lesser impact of Union law on criminal issues, the submission of the PJCCM policy to the *Union method* may rapidly change the importance of these guarantees regarding the Union legal order.

III. Although according to the EctHR Article 6 “holds so prominent place in a democratic society so that there can be no justification for interpreting the [relevant guarantees] restrictively”⁴⁷¹, the EctHR has made it clear that such right is not absolute and maybe subject to

⁴⁶⁴ *Le Compte, Van Leuven and De Meyere v. Belgium*, Applications nos. 6878/75; 7238/75, Judgment of 23/06/1981, para. 45.

⁴⁶⁵ *Albert and Le Compte v. Belgium*, Applications nos. 7299/75; 7496/76, Judgment of 10/02/1983, para. 29 *in fine*, and para. 36.

⁴⁶⁶ *Sporrong and Lönnroth v. Sweden*, Applications nos. 7151/75; 7152/75, Judgment of 23/09/1982, para. 81. Noting that the dispute must be “*sostanziale, e non formale, reale e sostenibile*” see SPADEA, “Il giusto processo amministrativo secondo L’art. 6 della CEDU e con cenni al caso italiano”, 2000, at 370.

⁴⁶⁷ According to *Ringeisen v. Austria*, Application no. 2614/65, Judgement of 16/07/1971.

⁴⁶⁸ *Le Compte, Van Leuven and De Meyere v. Belgium*, Applications nos. 6878/75; 7238/75, Judgment of 23/06/1981, para. 47. For further developments see HARRIS; O’BOYLE; BATES; BUCKLEY, *Harris, O’Boyle & Warbrick, Law of the European Convention on Human Rights*, 2009, at 210 *et seq.*; BARRETO, *A Convenção Europeia dos Direitos do Homem*, 2010, at 143-148; WHITE; OVEY, *Jacobs, White & Ovey, The European Convention on Human Rights*, 2010, at 247 *et seq.*; SUDRE, *Droit européen et international des droits de l’homme*, 2011, at 377 *et seq.*; MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*, 2012, at 344 *et seq.*

⁴⁶⁹ These are the so-called *Engel* criteria. See *Engel v. The Netherlands*, Applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgement of 08/06/1976, para. 82; *Bendenoun v. France*, Application no. 12547/86, Judgement of 24/02/1994, para. 45; *Demicoli v. Malta*, Application no. 13057/87, Judgement of 27/08/1991, para. 33; *Garyfallou Aebe v. Greece*, Application no. 18996/91, Judgement of 24/09/1997, para. 33. For further developments see HARRIS; O’BOYLE; BATES; BUCKLEY, *Harris, O’Boyle & Warbrick, Law of the European Convention on Human Rights*, 2009, at 204 *et seq.*; WHITE; OVEY, *Jacobs, White & Ovey, The European Convention on Human Rights*, 2010, at 243 *et seq.*; MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*, 2012, at 368 *et seq.*

⁴⁷⁰ For further developments see ERGEC, *Protection européenne et internationale des droits de l’homme*, 2004, at 187, 188; GRABENWARTER, “Fundamental Judicial and Procedural Rights”, 2007, at 161, 162.

⁴⁷¹ See *KarlHeinz Wemhoff v. Germany*, Application no. 2122/64, Judgement 27/06/1968, para. 8; *Delcourt v.*

limitations.⁴⁷² The latter are allowed by implication since the right of access “by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals.”⁴⁷³ The EctHR considers, for instance, that Article 6 does not compel the Contracting States to set up courts of appeal or of cassation.⁴⁷⁴ Moreover, the guarantees of Article 6 “ne s’étendant pas au droit pour les particuliers de provoquer contre un tiers l’exercice de poursuites pénales.”⁴⁷⁵

However, such limitations must not restrict or reduce access in such a way or to such an extent that the very essence of the right is impaired.⁴⁷⁶ Additionally, limitations will not be compatible with Article 6(1) “if they do 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.”⁴⁷⁷ Here, the EctHR verifies if both substantive and procedural rules limit the access to a court. Hence, excessive formalism or any form of “byzantinisme processuel”⁴⁷⁸ in the admissibility of judicial actions may have non-proportionate and unforeseeable consequences for the applicant.⁴⁷⁹ In *Levages Prestations de Services*⁴⁸⁰ the EctHR held that proceedings must be coherent and foreseeable from the point of view of a litigant⁴⁸¹ and that the penalty for failing to follow a given procedure must respect the principle of proportionality.⁴⁸² In *Bellet*⁴⁸³ the EctHR considered that the

Belgium, Application no. 2689/65, Judgement of 17/01/1970, para. 25; *Deweert v. Belgium*, Application no. 6903/75, Judgement of 27/02/1980, para. 44; *Albert de Cubber v. Belgium*, Application no. 9186/80, Judgement of 26/10/1984, para. 30; *Colozza and Rubinat v. Italy*, Application no. 9024/80, Judgement of 12/02/1985, para. 32; *Moreira de Azevedo v. Portugal*, Application no. 11296/84, Judgement of 23/10/1990, para. 66; *Soering v. The United Kingdom*, Application no. 14038/88, Judgement of 07/07/1989, para. 113. It has also been discussed whether a waiver of the guarantees of a fair trial is admissible. For further developments see LOUCAIDES, “Questions of Fair Trial under the European Convention on Human Rights”, 2003, at 48. II. Scholars tend to consider that it is not. Considering that Article 6 establishes a “*garantia giudiziaria minima inderogabile*” see SPADEA, “Il giusto processo amministrativo secondo L’art. 6 della CEDU e con cenni al caso italiano”, 2000, at 369.

⁴⁷² *Delcourt v. Belgium*, Application no. 2689/65, Judgement of 17/01/1970; *Golder v. The United Kingdom*, Application no. 4451/70, Judgement of 21/02/1975; *Silver and others v. The United Kingdom*, Applications nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgement of 25/03/1983; *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979; *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgement of 18/02/1999.

⁴⁷³ *Levages prestations de services v. France*, Application no. 21920/93, Judgement of 23/10/1996, para. 40; *Bellet v. France*, Application no. 23805/94, Judgement of 04/12/1995, para. 31. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention’s requirements rests with the Court (para. 31). See also *Ashingdane v. The United Kingdom*, Application. No. 8225/78, Judgement of 28/05/1985, para. 57.

⁴⁷⁴ *Delcourt v. Belgium*, Application no. 2689/65, Judgement of 17/01/1970, paras. 25-26. However, where such courts do exist, the guarantees of Article 6 must be complied with. See *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979, para. 26; *Levages prestations de services v. France*, Application no. 21920/93, Judgement of 23/10/1996, para. 44.

⁴⁷⁵ *Ernst and others v. Belgium*, Application no. 33400/96, Judgement of 15/07/2003, para. 47. The EctHR acknowledges the doctrine of parliamentary immunity and jurisdictional immunity of states and international organizations, which are deemed to be admissible limitations to the right of access to a court. See e.g., *A. v. The United Kingdom*, Application no. 35373/97, Judgement of 17/12/2002; *Cordova v. Italy*, Application no. 45649/99, Judgement of 30/01/2003. See also LOUCAIDES, “Questions of Fair Trial under the European Convention on Human Rights”, 2003, at 41 et seq.; MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*, 2012, at 392 et seq.

⁴⁷⁶ *Bellet v. France*, Application no. 23805/94, Judgement of 04/12/1995, para. 31.

⁴⁷⁷ *Bellet v. France*, Application no. 23805/94, Judgement of 04/12/1995, para. 31; *Pérez De Rada Cavanilles v. Spain*, Application no. 28090/95, Judgement of 28/10/1998, para. 44.

⁴⁷⁸ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 2.

⁴⁷⁹ See ALVIM, “Protecção dos direitos do homem e das liberdades fundamentais perante o Tribunal Europeu de Direitos Humanos”, 1999, note 5, at 127.

⁴⁸⁰ *Levages prestations de services v. France*, Application no. 21920/93, Judgement of 23/10/1996.

⁴⁸¹ *Geouffre De La Pradelle v. France*, Application no. 12964/87, Judgement of 16/12/1992.

⁴⁸² Para. 42.

⁴⁸³ *Bellet v. France*, Application no. 23805/94, Judgement of 04/12/1995.

compensation system at stake “was not sufficiently clear or sufficiently attended by safeguards to prevent a misunderstanding as to the procedures for making use of the available remedies and the restrictions stemming from the simultaneous use of them.”⁴⁸⁴ Moreover, the EctHR has considered that hindrance *in fact*, such as the high cost of the proceedings and the impossibility of obtaining free and effective legal aid, may contravene the Convention just like a legal impediment.⁴⁸⁵

In sum, the EctHR’s case-law has established “*un droit très general d’accès à la justice*”⁴⁸⁶, which must be as “*il più possibile facilitato o il meno limitato*.”⁴⁸⁷ Contracting Parties are free to organize its own judiciaries and should ensure a good administration of justice.⁴⁸⁸ In limiting the right of access to Court “various aims can be pursued that can differ according to the nature of limitation, the nature of the tribunal and the respective legal system.”⁴⁸⁹ However, possible limitations should not compromise the core of the right of access.⁴⁹⁰ Thus, although states enjoy a certain margin of appreciation, restrictions are subject to proportionality review.⁴⁹¹

b) Article 13: the Right to an Effective Remedy

I. Article 13 ECHR has been described by two of the EctHR judges as “one of the most obscure clauses”⁴⁹² of the Convention. It ensures the right to an effective remedy against all violations of the rights established in the Convention: it is a right associated with the other rights of the Convention, although perfectly distinguishable⁴⁹³, and it may only be invoked in conjunction with other provisions of the Convention or one of its protocols.⁴⁹⁴ The Experts Committee of the Council of Europe has noted that Article 13 does not ensure the existence of a fundamental right but works as a *safeguard of all other human rights*⁴⁹⁵, and thus also of Article 6.

⁴⁸⁴ Para. 37.

⁴⁸⁵ *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979, para. 25. See also *Quaranta v. Switzerland*, Application no. 12744/87, paras. 32-34.

⁴⁸⁶ ROCHÈRE, “Droit au juge”, 1996, at 125.

⁴⁸⁷ SPADEA, “Il giusto processo amministrativo secondo L’art. 6 della CEDU e con cenni al caso italiano”, 2000, at 373.

⁴⁸⁸ *Kostovski v. The Netherlands*, Application no. 11454/85, Judgment of 20/11/1989; *Quaranta v. Switzerland*, Application no. 12744/87, Judgement of 24/05/1991. See also SPADEA, “Il giusto processo amministrativo secondo L’art. 6 della CEDU e con cenni al caso italiano”, 2000, at 373.

⁴⁸⁹ For further developments see GRABENWARTER, “Fundamental Judicial and Procedural Rights”, 2007, at 163.

⁴⁹⁰ *Ashingdane v. The United Kingdom*, Application. no. 8225/78, Judgement of 28/05/1985.

⁴⁹¹ Para. 58.

⁴⁹² See dissenting opinions of Judges MATSCHER and PINHEIRO FARINHA in *Malone v. The United Kingdom*, Application no. 8691/79, Judgement of 02/08/1984. Noting that said provision is best described by what it does not require see KILPATRICK, “The Future of Remedies in Europe”, 2000, at 24. In fact, Article 13 does not require states to provide means by which national legislation could be challenged as not being in conformity with the Convention (See *Young, James and Webster v. The United Kingdom*, Applications nos. 7601/76; 7806/77, Judgement of 13/08/1981). It does not require the state to provide any particular form of remedy for Convention violations. Contracting States enjoy a margin of discretion in choosing the appropriate remedies. Also, the context of the substantive right of the Convention right affected must be taken into consideration under Article 13 when assessing whether a given remedial set of possibilities at the national level is effective.

⁴⁹³ *Klass and others v. Germany*, Application no. 5029/71, Judgement of 06/09/1978. Noting that Article 13 was intended to enhance protection of Convention Rights at the national level in order to reduce the cases from being brought to Strasbourg see WARBRICK, “Article 13”, 2000, at 451. See also DRZEMCZEWSKI, GIAKOUMOPOULOS, “Article 13”, at 455 *et seq.*

⁴⁹⁴ GRABENWARTER, “Fundamental Judicial and Procedural Rights”, 2007, at 173.

⁴⁹⁵ European Commission on Human Rights, “Preparatory Works on Article 13 of the ECHR”, 10/05/1957, DH(57)5, at 12.

Thus, the scope of application of Article 13 has not proved controversial as it applies not just to civil rights and obligations but to *all Convention rights*. Although they may overlap, not all civil rights are Convention rights. As a consequence, scholars note that Article 13 does not have “*une existence autonome*.”⁴⁹⁶ It completes the other Convention rights and must be invoked in combination with other provisions of the ECHR. However, it does not require a finding of a previous breach to the Convention: it suffices that the applicants’ claims to be a victim of a violation⁴⁹⁷ and that such claim is arguable.⁴⁹⁸ For a long time, this provision played a limited role in the EctHR’s case-law and scholars noted that it occupied “something of a twilight zone.”⁴⁹⁹ However, since the decision in *Kudla*⁵⁰⁰ it has received more attention, which is in line with the need to ensure “*l’effectivité des droits*.”⁵⁰¹

The different language versions of Article 13 point to the different dimensions of the right to an *effective remedy*. RENUCCI notes that in the French version, the use of the word “*octroi*” seems to imply the existence of a subjective right of individuals, by contrast with the English version which refers to the existence of an “*effective remedy*” which seems to emphasize the *obligation of the state* to ensure such a remedy.⁵⁰² Notwithstanding, according to the EctHR, where an individual has an *arguable* claim to be the victim of a violation of the rights set forth in the Convention⁵⁰³, he/she should have a *remedy before a national authority* in order both to have his claim decided and, if appropriate, to obtain redress.⁵⁰⁴ The authority referred to in Article 13 may not necessarily be a judicial authority but, if it is not, the powers it exercises and the guarantees which it affords are relevant in determining whether the remedy before it is *effective*.⁵⁰⁵ If such authority is of a judicial nature it must ensure “appropriate relief” and “adequate redress” for the alleged violation.⁵⁰⁶ Nonetheless, states retain a significant margin of discretion in choosing the remedies that are available in national legal orders.⁵⁰⁷ Although a single remedy may itself not entirely satisfy the requirements of Article 13, the *aggregate of remedies* provided for under domestic law may do so.⁵⁰⁸

⁴⁹⁶ SAROLEA, “Les droits procéduraux du demandeur d’asile au sens des articles 6 et 13 de la Convention européenne des droits de l’homme”, 1999, at 136. Noting that Article 13 has an “autonomous but subsidiary character” see HARRIS; O’BOYLE; BATES; BUCKLEY, *Harris, O’Boyle & Warbrick, Law of the European Convention on Human Rights*, 2009, at 575.

⁴⁹⁷ *Klass and others v. Germany*, Application no. 5029/71, Judgement of 06/09/1978, para. 64.

⁴⁹⁸ *Leander v. Sweden*, Application no. 9248/81, Judgement of 26/03/1987, para. 77; *Powell and Rayner v. The United Kingdom*, Application no. 9310/81, Judgment of 21/02/1990, para. 33; *Boyle and Rice v. The United Kingdom*, Applications nos. 9659/82; 9658/82, Judgement of 27/04/1988, para. 52.

⁴⁹⁹ WHITE; OVEY, *Jacobs, White & Ovey, The European Convention on Human Rights*, 2010, at 131. See also RENUCCI, *Droit européen des droits de l’homme*, 2010, at 239-241.

⁵⁰⁰ *Kudla v. Poland*, Application no. 30210/96, Judgement of 26/10/2000. See MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*, 2012, at 808-812.

⁵⁰¹ GREWE, “L’accès au juge”, 2003, at 36. See also HARRIS; O’BOYLE; BATES; BUCKLEY, *Harris, O’Boyle & Warbrick, Law of the European Convention on Human Rights*, 2009, at 570, 571.

⁵⁰² RENUCCI, “Le droit au juge dans la Convention européenne des droits de l’homme”, 1998, at 137.

⁵⁰³ The invocation of Article 13 does not imply a previous acknowledgement of a breach of a Convention right.

⁵⁰⁴ *Silver and others v. The United Kingdom*, Applications nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgement of 25/03/1983, para. 113 (a). See also *Klass and others v. Germany*, Application no. 5029/71, Judgement of 06/09/1978, para. 64.

⁵⁰⁵ *Silver and others v. The United Kingdom*, Applications nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgement of 25/03/1983, para. 113 (b).

⁵⁰⁶ *Kudla v. Poland*, Application no. 30210/96, Judgement of 26/10/2000, para. 158.

⁵⁰⁷ *Vikarajah and others v. The United Kingdom*, Applications nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Judgment of 30/10/1991; *Chahal v. The United Kingdom*, Application no. 22414/93, Judgement of 15/11/1996.

⁵⁰⁸ See *Silver and others v. United Kingdom*, Applications nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75;

It is noticeable that Article 13 does not oblige Contracting States to introduce a constitutional complaint, in their national legal orders.⁵⁰⁹ The crucial requirement is that access to an authority is provided and the latter is under an obligation to issue a decision which provides for *adequate redress*.⁵¹⁰ Lastly, the application of Article 13 will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 directly to secure to anyone within its jurisdiction the rights and freedoms set out in Section I⁵¹¹, as neither Article 13, nor the Convention in general lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention – for example, by incorporating the Convention into domestic law.⁵¹²

II. The combined application of Articles 6 and 13 ECHR highlights the notion of *effectiveness* of the protection granted by the Convention.⁵¹³ Remedies must be effective “both in practice and in law.”⁵¹⁴ In fact, although Article 6 does not mention directly the need for an *effective* protection of the rights ensured therein, the EctHR considers that Contracting States are under a positive obligation to ensure an *effective right of access to justice*.⁵¹⁵ In contrast, under Article 13 the concept of *effectiveness* has been addressed in the case-law of the EctHR with a certain degree of sophistication. Firstly, it implies “institutional effectiveness”, which means that the body deciding the case must be independent from the one allegedly responsible for the violation of the Convention.⁵¹⁶ Secondly, it implies “substantial effectiveness”, *i.e.* the obligation to allow the direct invocation of the ECHR before the deciding body and to provide for an adequate redress for the violation.⁵¹⁷ Thirdly, there must be “remedial effectiveness”, which means that it must be possible to obtain a legally binding decision. Last but not least, the proceeding must be “materially effective”, *i.e.* accessible to individuals in practice, and not only theoretically.⁵¹⁸ The assessment of

7113/75; 7136/75, Judgement of 25/03/1983, para. 113. See also *X. v. the The United Kingdom*, Application no. 7215/75, Judgement of 05/11/1981, para. 60; *Van Droogenbroeck v. Belgium*, Application no. 7906/77, Judgment of 24/06/1982, para. 56. The idea of the “aggregate of remedies” is also relevant with regard to Article 6. See *Lithgow and others v. The United Kingdom*, Applications nos. 9006/80; 9262/81; 263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgement of 08/07/ 1986, para. 196; *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgement of 18/02/1999, para. 68.

⁵⁰⁹ *James and others v. The United Kingdom*, Application no. 8793/79, Judgment of 21/02/1986, para. 85; *Lithgow and others v. The United Kingdom*, Applications nos. 9006/80; 9262/81; 263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgement of 08/07/ 1986, para. 206.

⁵¹⁰ Noting that the extent of the obligations arising from Article 13 depend on the right of the Convention in connection to which it is invoked, see GRABENWARTER, “Fundamental Judicial and Procedural Rights”, 2007, at 174.

⁵¹¹ *Ireland v. The United Kingdom*, Application no. 5310/71, Judgement of 18/01/1978, para. 239.

⁵¹² *Swedish Engine Drivers' Union v. Sweden*, Application no. 5614/72, Judgment of 06/02/1976, para. 50. See HARRIS; O'BOYLE; BATES; BUCKLEY, *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, 2009, at 558, 559.

⁵¹³ Article 5(4) and Article 3 of Protocol no. 7 should be considered as *lex specialis* regarding Article 13.

⁵¹⁴ *Metropolitan Church of Bessarabia and others v. Moldova*, Application no. 45701/99, Judgement of 13/12/2001, para. 137.

⁵¹⁵ *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979. As someone has put it “*l'efficacité, c'est-à-dire l'aptitude de la procédure à rendre le plus directement effectifs les droits des personnes, doit être la mesure de la procédure.*” See FRISON-ROCHE, “La procédure et l'effectivité des droits substantiels”, 2003, at 10.

⁵¹⁶ See HARRIS; O'BOYLE; BATES; BUCKLEY, *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, 2009, at 565, 566.

⁵¹⁷ *Ibid.*, at 562, 563.

⁵¹⁸ See WARBRICK, “Article 13”, 2000, at 452.

the effectiveness of a given remedy is made *in concreto*⁵¹⁹, i.e. taking into account the circumstances of the case, and not so much on the grounds of theoretical considerations.⁵²⁰ A remedy is considered to be effective if it not only exists but it is also *accessible*⁵²¹ and *adequate*.⁵²²

III. One of the most controversial issues regarding Article 13 concerns its articulation with Article 6 ECHR.⁵²³ In fact, both provisions refer to the *same* fundamental right, i.e. the right to effective judicial protection. Nonetheless, scholars note that Article 6(1) exercises “a sort of *vis attrattiva*, which includes all the procedural guarantees, both in relation to the initial question of access to justice and at subsequent times during the proceedings.”⁵²⁴ KILPATRICK notes that a “dual hierarchy” has been established with regard to Article 13. Firstly, Article 6 has a broader scope of application as it applies to all “civil rights and obligations” whereas Article 13 only applies to Convention rights. Secondly, the Strasbourg case-law has operated on the assumption that access to courts is *ipso facto* an effective remedy.⁵²⁵ This means that where Article 6(1) can be applied, Article 13 is redundant and is not examined.⁵²⁶ Often the EctHR considers that Article 13 requirements “are less strict than, and are here entirely absorbed by”⁵²⁷ those of the latter Article 6(1). Lastly, the EctHR has interpreted Article 6 in a generous fashion which contrasts with its refusal to interfere with the states’ margin of discretion under Article 13.

Nonetheless, one should note that Article 13 may be invoked *in addition* to a violation of Article 6 and *vice-versa*.⁵²⁸ However, some illustrations of the difficulty in pleading both provisions may be put forward. In *Airey*⁵²⁹, Judge THÓR VILHJÁLMSOON noted that “because the applicant alleged a violation of her rights under the Convention she was entitled to an effective remedy in order to test the point whether or not she had the right to legal aid.” Such an argument would have been in line with the Court’s judgment in the case of *Klass and others*.⁵³⁰ However, this

⁵¹⁹ *Colozza and Rubinat v. Italy*, Application no. 9024/80; 9317/81, Decision of 09/07/1982.

⁵²⁰ RENUCCI, “Le droit au juge dans la Convention européenne des droits de l’homme”, 1998, at 139.

⁵²¹ *Plattform: “Ärzte für das Leben” v. Austria*, Application no. 10126/82, Judgement of 12/03/1987.

⁵²² The remedy must be adequate in so far as it allows, on the one hand, for the declaration of the breach and, on the other hand, to obtain adequate reparation. See *Soering v. The United Kingdom*, Application no. 14038/88, Judgment of 07/07/1989. However, a favourable decision on the merits is not guaranteed.

⁵²³ See, e.g., on the remedial dimension of Article 6, *Immobiliare Saffi v. Italy*, Application no. 22774/93, Judgement of 28/07/1999. Noting that the EctHR has held states accountable for a violation of Article 13 in addition to Article 6 when there is no internal remedy available to deal with violations of the reasonable time requirement, see BERMS, “Conflicting Human Rights, 2005, at 297. See *Kudla v. Poland*, Application no. 30210/96, Judgement of 26/10/2000, para. 160.

⁵²⁴ SIERRA, “Provisional Court Protection in Administrative Disputes in Europe”, 2004, at 50.

⁵²⁵ KILPATRICK, “The Future of Remedies in Europe”, 2000, at 25. See also BARRETO, *A Convenção Europeia dos Direitos do Homem*, 2010, at 306, 307.

⁵²⁶ E.g., *Campbell and Fell v. The United Kingdom*, Applications nos. 7819/77; 7878/77, Judgement of 28/06/1984, para. 123; *Hokkanen v. Finland*, Application no. 19823/92, Judgement of 23/09/1994, para. 74. Questioning whether access to court is an effective remedy for purposes of Article 13 see dissenting opinion of Judge WALSH in *Brannigan and McBride v. The United Kingdom*, Applications nos. 14553/89; 14554/89, Judgement of 26/05/1993. See also *Balmer-Schafroth v. Switzerland*, Application no. 22110/93, Judgment of 26/08/1997 and dissenting opinion of Judge PETTITI, joined by Judges GÖLCÜKLÜ, WALSH, RUSSO, VALTICOS, LOPES ROCHA and JAMBREK.

⁵²⁷ Noting that Article 13 has been “eclipsed” by Article 6 see KILPATRICK, “The Future of Remedies in Europe”, 2000, at 24. See *De Wilde, Ooms and Versyp v. Belgium* (“Vagrancy”), Applications nos. 2832/66; 2835/66; 2899/66, Judgment of 18/06/1971, para. 95; *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979, para. 34.

⁵²⁸ *Kudla v. Poland*, Application no. 30210/96, Judgement of 26/10/2000, para. 149; *Horvat v. Croatia*, Application no. 51585/99, Judgement of 26/07/2001, para. 63.

⁵²⁹ *Airey v. Ireland*, Application no. 6289/73, Judgement of 09/10/1979.

⁵³⁰ *Klass and others v. Germany*, Application no. 5029/71, Judgement of 06/09/1978.

argument was not put before the EctHR, and there was no evidence that the applicant could not have used the ordinary means available to all citizens to approach her Government or courts on this matter without prohibitive costs. Judge EVRIGENIS who voted for the absence of a violation to Article 8 in that case, considered that the facts put before the Court disclosed a violation which went not to the *substance* of a right but to its *procedural superstructure* and was, therefore, covered and absorbed by Article 6(1). Thus, the Court should have undertaken an examination of the claim based on the violation of Article 13 as the judicial proceedings contemplated by Article 6(1) concern civil rights (in the present case the right to a judicial separation) and the remedy mentioned in Article 13 refers to the fundamental rights protected by the Convention (in the present case the right of access to the courts). Accordingly, there was no overlapping or absorption regarding the two provisions. In *Ashingdane*⁵³¹ Judge LAGERGREN noted that the existence of a “right” presupposes a “right to sue.” However, if Article 6(1) is applicable only where there is already a remedy, i.e. a right to sue, then the area of Article 6(1) would be rather restricted. In *Bellet*⁵³², Judge PETTITI noted that “the Chamber argued mainly on the basis of the concept of *no access* to the courts, whereas the question to be determined is whether there may in this particular case have been *no actions and remedies* or else *ineffective remedies* for the purposes of Article 6 of the Convention.”

It is indisputable that Article 13 applies to Article 6. This means that an individual may invoke Article 13 when the state breached the guarantees established in Article 6 and provided for no remedy in the national legal order which allowed the individual to challenge such breach. However, it is not clear in the EctHR’s case-law whether, in these cases, a breach of Article 13 *absorbs* a breach of Article 6 or *viceversa*. These provisions are inextricably related to the *procedural* dimension of rights protection. Furthermore, the issue can be viewed from a more general perspective. In fact, it is not always clear-cut whether a breach of either or both Articles 6 and 13 is consumed by a breach of other *substantive* Convention rights, or *viceversa*.⁵³³ This fact illustrates once again the intricacy between *substance* and *procedure* highlighted above⁵³⁴, and concerns the articulation of both these provisions with other human rights included in the Convention. It is, indeed, unclear whether the EctHR considers the procedural dimension of a given right to be protected under each individual provision of the Convention, or autonomously under Articles 6 and 13. In this context, one should note that some decisions of the EctHR have taken into consideration the breach of procedural guarantees under Article 6 when finding a breach to other substantive rights included in the Convention, notably when applying the proportionality principle.⁵³⁵ The so-called *procedural dimension of fundamental rights* is thus reflected at least in some decisions of the EctHR.⁵³⁶

⁵³¹ *Ashingdane v. The United Kingdom*, Application. No. 8225/78, Judgement of 28/05/1985.

⁵³² *Bellet v. France*, Application no. 23805/94, Judgement of 04/12/1995.

⁵³³ See for illustrations of this intricacy WARBRICK, “Article 13”, 2000, at 452-454; WHITE; OVEY, *Jacobs, White & Ovey, The European Convention on Human Rights*, 2010, at 132, 133.

⁵³⁴ See *supra* Section 1.2.4.

⁵³⁵ For some examples see FLAUSS, “Les nouvelles frontières du procès équitable”, 1996, at 95 *et seq.*, noting that this case-law although reinforcing the protection of individuals’ rights brings confusion to the case-law of the EctHR.

⁵³⁶ See *infra* Chapter 2, Section 2.1.5(a).

1.3.3 The Union's Judicial System under the EctHR's Watch

a) Review of Union Acts by the EctHR Pre-Accession: “from the Straits of Gibraltar to the straits of Bosphorus”⁵³⁷

I. So far, while the EctHR has not admitted complaints brought *directly* against the EC or the EU, it has *indirectly* reviewed Union acts in complaints brought against the Member States. The case-law on this process of “annexing the EU”⁵³⁸ is well known. Early on, in 1958, the European Commission of Human Rights observed that if a Contracting Party concluded another international agreement which brought it into conflict with the ECHR, it would nonetheless remain responsible under the ECHR for that breach.⁵³⁹ However, several attempts to challenge Union law before the EctHR were rejected by the European Commission. The Convention bodies have held that, as a matter of principle, they are not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities as they are not party to the Convention.⁵⁴⁰ Nonetheless, that circumstance did not prevent applications being filed in Strasbourg for an alleged breach by the institutions and/or the national authorities of the Member States in the implementation of Union law. In time, the EctHR would consider such complaints admissible and would hold Member States, collectively or individually, responsible for violations of the ECHR committed by the Union institutions.

The issue was addressed in *M&Co*⁵⁴¹ which involved a challenge to state action following a judgement of the CJEU and a breach of the right to a fair trial. The European Commission adopted a *deferential* approach towards the EC by considering that transfer of powers to an international organisation is not incompatible with the Convention, provided that within that organisation fundamental rights receive an *equivalent protection* – as otherwise the guarantees of the Convention could be limited or excluded and thus be deprived of their peremptory character. Here, the European Commission took the view that the legal system of the European Communities not only secured fundamental rights but also provided for control of their observance in a way which was deemed to be equivalent to the ECHR. As a consequence, the application was dismissed *ratione materiae*.⁵⁴² Similarly, in *Heinz*⁵⁴³ the Commission confirmed that

⁵³⁷ TRIDIMAS, *The General Principles of EU Law*, 2006, at 348.

⁵³⁸ SCHEECK, “The Relationship between the European Courts and Integration through Human Rights”, 2005, at 859.

⁵³⁹ *X. & X. v. Federal Republic of Germany*, Application no. 342/57, Decision of 04/09/1958.

⁵⁴⁰ In *Confédération Française Démocratique du Travail v. European Communities and, in a Subsidiary Manner, the Collective of their Member State and the Member States taken Individually* (CFDT), Application no. 8030/77, Decision of 10/07/1978, the European Commission had considered that it could not admit the complaint as the EC was not party to the Convention. The complaint was held inadmissible *ratione personae*. See paras. 3-7. See also *Dufay v. European Communities in a Subsidiary Manner, the Collective of their Member State and the Member States taken Individually*, Application no. 13539/88, Decision of 19/01/1989. Some scholars considered that the ECs had substituted the states as members of the Council of Europe. The thesis was nonetheless controversial. For a critical view e.g., SCHUTTER, “La Cour Européenne des Droits de l’Homme juge de droit communautaire”, 2000, at 171 *et seq.*

⁵⁴¹ *M&Co. v. Germany*, Application no. 13258/87, Decision of 09/02/1990.

⁵⁴² Noting that the ruling results “non seulement de la prudence, de la sollicitude ou de l’autocensure, mais à évidence de l’observation” resulting from the undeniable existence of a *jus commune*, and that it demonstrates “une attitude conciliante” of the EctHR which puts itself in a position of “garde-fou” similar to some constitutional courts see ZAMPINI, “La Cour de justice des Communautés européennes, gardienne des droits fondamentaux dans le cadre du droit communautaire”, 1999, at 690. Noting that the *M&Co* approach might have been due to the fact that negotiations on accession were ongoing and had not yet been blocked by Opinion 2/94 see MARZANATI, “La responsabilità per atti comunitari del sistema della Convenzione Europea dei Diritti dell’Uomo”, 1999, at 1098.

the transfer of powers to an international organization does not exclude state's responsibility under the ECHR, and found that the procedural safeguards established by the European Patent Convention was sufficient to ensure *equivalent protection*.⁵⁴⁴

However, just a few days after Opinion 2/94 was issued, the European Commission deemed admissible a complaint brought by Denise Matthews against the UK for breach of Article 3 of the Protocol no. 1 to the ECHR on the right to vote in free elections due to the inability of residents of Gibraltar to vote in elections for the European Parliament.⁵⁴⁵ The famous *Matthews*⁵⁴⁶ case "shuffled the cards"⁵⁴⁷ by opening "*una brecha en la entente cordial que existía entre ambas instancias europeas*."⁵⁴⁸ Here, the EctHR reiterated that the Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured."⁵⁴⁹ Member States remain responsible after such a transfer. The Court considered that the impugned acts constituted international instruments which were freely entered into by the UK. For these purposes, "there is no difference between European and domestic legislation" and the suggestion that the UK might not have "effective control over the state of affairs complained of" could not affect such position, given that the UK's responsibility derived from it having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol no. 1 to Gibraltar.⁵⁵⁰ This judgment was particularly significant as the EctHR ignored the fact that there was an obligation imposed on the Member States by Union law. Thus, the decision is only partially reconcilable with *M&Co* since an act of *primary law* was at stake and therefore the CJEU had no jurisdiction to review its validity.⁵⁵¹ Consequently, the Union was not in a position to offer *equivalent protection*.⁵⁵² However, although the EctHR did not revoke the *presumption of compliance* set forth in *M&Co*, it made no attempt to reconcile the two approaches. In *Matthews* the action

⁵⁴³ *Heinz v. The Contracting States Party to the European Patent Convention*, Application no. 21090/92, Decision of 10/01/1994. On the European Patent Office see also *Reber Systematik GmbH and Kinkel v. Germany*, Application no. 27410/95, Decision 12/04/1996; *Lenzing AG v. The United Kingdom*, Application no. 38817/97, Decision of 09/09/1998, para. 1. For a case comment see VIVIANI, "La decisione *Lenzing* della Commissione Europea dei Diritti dell'Uomo", 1999, at 517-538.

⁵⁴⁴ In light of this case-law scholars considered that it was unlikely that an application directed against a EC/EU measure would be admissible in the EctHR, which should open the way to accession. See "EICKE, "The European Charter of Fundamental Rights", 2000, at 294.

⁵⁴⁵ See EDITORIAL COMMENTS, "*Matthews v United Kingdom*", 2000, at 175-177.

⁵⁴⁶ *Matthews v. The United Kingdom*, Application no. 24833/94, Judgment of 18/02/1999, which was one of the first judgements of the newly structured EctHR. For a case comment see MARZANATI, "La responsabilità per atti comunitari del sistema della Convenzione Europea dei Diritti dell'Uomo", 1999, at 1089-1107; SÁNCHEZ RODRÍGUEZ, "Sobre el derecho internacional, de los derechos humanos y comunitario europeo", 1999, at 95-108; CANOR, "*Primus Inter Pares*", 2000, at 4 *et seq.*; GORI; KAUFFGAZIN, "*L'arrêt Matthews*", 2000, at 4-8; SCHUTTER, "La Cour Européenne des Droits de l'Homme juge de droit communautaire", 2000, at 141-214; SANZ CABALLERO, "El control de los actos comunitarios por el TEDH", 2001, at 498 *et seq.* See subsequent Case C-145/04, *Spain/United Kingdom*, [2006] ECR I-7917.

⁵⁴⁷ CANOR, "*Primus Inter Pares*", 2000, at 4.

⁵⁴⁸ SANZ CABALLERO, "El control de los actos comunitarios por el TEDH", 2001, at 498.

⁵⁴⁹ Para. 32.

⁵⁵⁰ Para. 34.

⁵⁵¹ Para. 33. See also MARZANATI, "La responsabilità per atti comunitari del sistema della Convenzione Europea dei Diritti dell'Uomo", 1999, at 1102.

⁵⁵² HINAREJOS PARGA, "*Bosphorus v Ireland* and the Protection of Fundamental Rights in Europe", 2006, at 255. By contrast, in *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgment of 18/02/1999, and *Beer and Reagan v. Germany*, Application no. 28934/95, Judgment of 18/02/1999, judgments of the same day, the EctHR held that the immunity from the jurisdiction of the German courts conferred on the European Space Agency (ESA), under the ESA Convention, was compatible with Article 6(1), ECHR as the ESA Convention provided for the settlement of disputes by an independent Appeals Board.

was held admissible *ratione materiae* without any mention to the existence or absence of *equivalent protection* at the EU level.⁵⁵³

The *Matthews* judgment did not address the question of knowing whether Member States could be held responsible for breaches of the ECHR resulting from *secondary legislation* of the Union or even *judgments* of the CJEU. Nonetheless, regarding national implementation of EU and international obligations, states generally remain responsible under the ECHR. There are numerous examples of such scrutiny.⁵⁵⁴ Accordingly, although it could be argued that Member States are not directly responsible for acts of secondary EU law, the fact remains that they are so *indirectly*, whilst the authors of the Union legal order, and in so far as they implement those acts. The issue was addressed in *Bosphorus*⁵⁵⁵, a case involving the impounding by Irish authorities of an aircraft leased by a Turkish Company from the Yugoslav national airline pursuant to a UN Regulation imposing sanctions against the Federal Republic of Yugoslavia.⁵⁵⁶ Here, the EctHR confirmed its previous jurisprudence according to which the ECHR prohibits Contracting Parties from transferring sovereign rights to international organisations, and reaffirmed that Contracting States remain responsible for breaches of the ECHR whether they are committed as a consequence of domestic law or as a consequence of the need to comply with international obligations.⁵⁵⁷ However, the EctHR added that *state action* taken in compliance with international obligations is *presumed justified in so far* as the relevant organization protects fundamental rights at a *substantive* and a *procedural level at least equivalent* to the protection provided by the Convention.⁵⁵⁸ In this context, equivalent means *comparable* and not identical, as identical would run counter international cooperation.⁵⁵⁹ Hence, the existence of such an equivalent protection raises a *presumption of compliance* that the state has not breached the ECHR. However, this presumption is

⁵⁵³ Noting that until this decision the two courts maintained “a cease fire under which they regarded themselves as separate, but, most probably equal” see CANOR, “*Primus Inter Pares*”, 2000, at 3.

⁵⁵⁴ See, *inter alia*, *Procola v. Luxembourg*, Application no. 14570/89, Judgment of 28/09/1995; *Van de Hurk v. The Netherlands*, Application no. 16034/90, Judgment of 19/04/1994; *Cantoni v. France*, Application no. 17862/91, Judgment of 15/11/1996; *Hornsby v. Greece*, Application no. 18357/91, Judgment of 19/03/1997; *Pafitis and others v. Greece*, Application no. 20323/92, Judgment of 26/02/1998; *S.A. Dangeville v. France*, Application no. 36677/97, Judgment of 16/04/2002; *Société Colas Est and others v. France*, Application no. 37971/97, Judgment of 16/04/2002. The case-law of the CJEU itself supported the applicant company’s position. See Case C-235/99, *Kondova*, [2001] ECR I-6427, para. 90.

⁵⁵⁵ *Bosphorus Airways v. Ireland*, Application no. 45036/98, Judgment of 30/06/2005. Before *Bosphorus* two cases could have been decisive, notably *Société Guérin Automobiles v. The 15 Member States of the European Union*, Application no. 51717/99, Judgment of 04/07/2000, and *DSR-Senator Lines GmbH v The 15 Member States of the European Union*, Application no. 56672/00, Decision of 10/03/2004. However, the first was dismissed as manifestly ill-founded and the second would come to be decided in a separate action before the GC (Joined Cases T-191 and 212 to 214/98, *Atlantic Container Line and others/Commission*, [2003] ECR II-3275).

⁵⁵⁶ See para. 117 of the judgment for an indication of the case-law referred to by the applicants. Discussing the CJEU’s decision on the case see DREWNIAK, “The *Bosphorus* Case”, 1996-1997, at 1007 *et seq.*; BURROWS, “Caught in the Cross-Fire”, 1997, at 170-172.

⁵⁵⁷ For discussion see BANNER; THOMSON, “Human Rights Review of State Acts Performed in Compliance with EC Law”, 2005, at 649-659; BENOIT-ROHMER, “À propos de l’arrêt *Bosphorus Air Lines* du 30 juin 2005”, 2005, at 827-853; CONSTANTINESCO, “C’est comme si c’était fait”, 2006, at 363-378; COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 87-130; DOUGLASSCOTT, “*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*”, 2006, at 243-254; MELCHIOR, “L’arrêt *Bosphorus c. Irlande* de la Cour Européenne des Droits de l’Homme de 30 juin 2005”, 2006, at 245-255; PEERS, “Limited Responsibility of European Union Member States for Actions within the Scope of Community Law”, 2006, at 443-455; ECKES, “Does the European Court of Human Rights Provide Protection from the European Community?”, 2007, at 47-67.

⁵⁵⁸ Para. 155.

⁵⁵⁹ ECKES, “Does the European Court of Human Rights Provide Protection from the European Community?”, 2007, at 51.

limited – it applies only when Contracting States implement legal obligations arising from the organization, *without the use of discretion*⁵⁶⁰ – and it is *rebuttable* on a case-by-case basis, if the protection granted is shown to be *manifestly* deficient.⁵⁶¹ Scholars note that, in *Bosphorus*, the Court introduced a two-stage test: at the first stage the Court examines whether an organisation provides an equivalent protection, which causes the presumption to apply; at the second stage the Court examines whether that presumption has been rebutted in the concrete case before it because of a manifest deficit in the protection of human rights. *In casu*, the EctHR considered the human rights protection afforded by the European Union to be equivalent to that of the Convention – and so the presumption applied – and saw no reason why the protection in that case could be considered manifestly deficient. Therefore, the EctHR held that the interference with the applicant’s property rights was justified.⁵⁶²

One should note that while in *M&Co*, and the decisions that followed, the transfer of powers to an international organisation was considered in the assessment of the admissibility of the complaint – which meant that where the relevant international organisation provided equivalent protection of fundamental rights the application would be outside the scope *ratione materiae* of the Convention – in *Bosphorus* the EctHR made “a clear and unequivocal departure”⁵⁶³ from this approach. Here, the decisive factor regarding the EctHR’s competence was that the impugned act took place on Irish territory: the application was within the scope *ratione materiae, loci* and *personae* of the Convention and was thus held admissible.⁵⁶⁴ The issue that the contested act was required by Union law went instead to the merits of the complaint: compliance with legal obligations flowing from EC membership was conceived as a “general interest” pursuant to which an interference with property rights could be justified.⁵⁶⁵ The advantage of this shift was to allow the EctHR a more concrete scrutiny of EU law.⁵⁶⁶ In fact, although the *equivalent protection* test

⁵⁶⁰ See para. 157. One of the decisive arguments in *Bosphorus* was the fact that Ireland was under an obligation to implement Union law, which left no discretion in its implementation. Scholars noted that *Bosphorus* was a more obvious case as there had been a reference to the CJEU and the case involved a regulation on a subject-matter closely related to international trade, largely a subject which Community law has fully harmonized and which the EC has exclusive competence over. However, other cases would be less obvious, as for example if there had been no preliminary reference, or a ruling of the CJEU would have been disregarded. A further point would be to know how much discretion must be left by the CJEU’s judgment and/or the EC legislation before the presumption will cease to apply, and if the EctHR would have to decide on the existence of such discretion. See PEERS, “Limited Responsibility of European Union Member States for Actions within the Scope of Community Law”, 2006, at 452, 453; LOCK, “Beyond *Bosphorus*”, 2010, at 531.

⁵⁶¹ In this respect, the decision may be differentiated from the approach adopted by the *Bundesverfassungsgericht* in *Solange II*, which reserves control only when a general systemic protection of fundamental rights in the EU has fallen below the standard of protection afforded by the German constitution. See LIMBACH, “Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe”, 2000, at 336; COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 105; ECKES, “Does the European Court of Human Rights Provide Protection from the European Community?”, 2007, at 62.

⁵⁶² LOCK, “Beyond *Bosphorus*”, 2010, at 530.

⁵⁶³ BANNER; THOMSON, “Human Rights Review of State Acts Performed in Compliance with EC Law”, 2005, at 656, noting that the EctHR had already hinted of a shift away from this position in *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgement of 18/02/1999.

⁵⁶⁴ Para. 137.

⁵⁶⁵ *Ibid.* See para. 150. In their concurring opinion, Judges ROZAKIS, TULKENS, TRAJA, BOTOCHAROVA, ZAGREBELSKY, GARLICKI, and RESS considered that the EctHR was clearly departing from its *M&Co* approach.

⁵⁶⁶ Noting that the “equivalent protection” doctrine implies an assessment “in general” in that the EctHR looks at the EC judicial system “as a whole”, which allowed for the EctHR to avoid having to scrutinise the particular findings of the CJEU in its *Bosphorus* ruling see COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 102, 103.

remained a general abstract review of the Union's system — which was criticised by the first concurring opinions of six judges — it was no longer enough if, on the facts of any particular case, the EC's protection of Convention rights was deemed manifestly deficient. In such circumstances, the presumption of Convention compliance would be rebutted.⁵⁶⁷ Thus the EctHR checks, first, if the assumption arises that EC law offers equivalent protection and, secondly, whether the mechanisms of protection of human rights offered by the Union's legal system have worked properly in the case at stake, or whether such system failed at some point during the process.⁵⁶⁸

Nonetheless, the *Bosphorus* decision was criticized at several levels.⁵⁶⁹ Scholars noted that *Bosphorus* showed a *deferential* attitude towards Union law⁵⁷⁰ and the EctHR was said to have avoided “piercing the corporate veil”⁵⁷¹, which was *per se* highly questionable.⁵⁷² The concept of *conditional review* as developed by the EctHR was said to be “fraught with ambiguities and uncertainties” and ran “the risk that human rights [would] not be sufficiently guaranteed in certain cases.”⁵⁷³ Scholars noted that the *Bosphorus* presumption introduced the opportunity to circumvent review in Strasbourg by means of international cooperation:⁵⁷⁴ in the future “the EctHR would refrain from scrutinizing national measures against their consistency with the ECHR if these national measures fall inside strict obligations under EC law.”⁵⁷⁵ The manifestly deficient test was said to be “too low a threshold”⁵⁷⁶ and the standard to be reached qualified as “worrisome.”⁵⁷⁷ Furthermore, the level of scrutiny applied in the case itself was considered “rather superficial.”⁵⁷⁸

⁵⁶⁷ BANNER; THOMSON, “Human Rights Review of State Acts Performed in Compliance with EC Law”, 2005, at 658.

⁵⁶⁸ HINAREJOS PARGA, “*Bosphorus v Ireland* and the Protection of Fundamental Rights in Europe”, 2006, at 255.

⁵⁶⁹ See VAN DEN BERGHE, “The EU and Issues of Human Rights Protection”, 2010, at 117, 118. *Per contra*, favouring the decision see BENOIT-ROHMER, “À propos de l'arrêt *Bosphorus Air Lines* du 30 juin 2005”, 2005, at 827-853.

⁵⁷⁰ See e.g., MELCHIOR, “L'arrêt *Bosphorus c. Irlande* de la Cour Européenne des Droits de l'Homme de 30 juin 2005”, 2006, at 253. Noting that the decision showed “great deal of self-restraint and deference”, perhaps as a response to how the CJEU has shown deference to the EctHR's case-law see HINAREJOS PARGA, “*Bosphorus v Ireland* and the Protection of Fundamental Rights in Europe”, 2006, at 257, 259. Considering that at the heart of *Bosphorus* is an attempt to reach a compromise between two conflicting principles, i.e. the freedom of Member States to join international organizations and the need to ensure protection of rights under the ECHR see PEERS, “Limited Responsibility of European Union Member States for Actions within the Scope of Community Law”, 2006, at 451.

⁵⁷¹ EDITORIAL COMMENTS, “Relations between the International Courts and Community Courts”, 2005, at 582. Noting that *Bosphorus* was a “very cautious” judgement see DOUGLAS-SCOTT, “*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*”, 2006, at 250.

⁵⁷² CANOR, “Can Two Walk Together, Except They Be Agreed?” 1998, at 137. By contrast, considering that the decision “rather than a blanket immunity” emerges as a “diaphanous veil” and that it allows for a deep and specific enquiry into the level of fundamental rights protection afforded by the EU and the CJEU in individual cases, whilst accommodating the autonomy of the Union legal order see COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 129.

⁵⁷³ PEERS, “Limited Responsibility of European Union Member States for Actions within the Scope of Community Law”, 2006, at 452. *Per contra*, approving the general tenor of the decision see JACQUÉ, “Droit communautaire et Convention européenne des droits de l'homme”, 2005, at 749 *et seq.*

⁵⁷⁴ The issue of “piercing the corporation veil” could be considered at a larger scale regarding international responsibility of states parties to other international organisations. See COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 127 *et seq.*; VERDIRAME, “Breaches of the European Convention on Human Rights Resulting from the Conduct of International Organisations”, 2008, at 209-213.

⁵⁷⁵ EHLERS, “The Fundamental Rights of the European Union”, 2007, at 377.

⁵⁷⁶ HINAREJOS PARGA, “*Bosphorus v Ireland* and the Protection of Fundamental Rights in Europe”, 2006, at 256. Noting that the EctHR seemed not to want to get involved unless “outrageous breaches” of fundamental rights are at stake see DOUGLAS-SCOTT, “A Tale of Two Courts”, 2006, at 639.

⁵⁷⁷ COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 105. Noting that it was also unclear when exactly the protection granted by an international organisation would be considered manifestly deficient and how rigorous the EctHR's scrutiny would be, see LOCK, “Beyond *Bosphorus*”, 2010, at 531.

⁵⁷⁸ LOCK, “Beyond *Bosphorus*”, 2010, at 541. According to the author the subsequent case-law reveals a mixed picture. It seems that the Court is generally willing to discuss the existence of a manifest deficiency in some detail. In

Its more obvious consequence was the creation of a *double standards policy* regarding the ECHR.⁵⁷⁹ ECKES noted that:

“[t]he Court’s approach towards the Union and its approach to the jurisdictions of the Contracting Parties are *fundamentally different*: with regard to the former it accepts a general level of comparative protection as sufficient; while it scrutinizes the compliance of the latter in each and every individual case.”⁵⁸⁰

At the outset, one could argue that the EctHR should review all cases within its jurisdiction on the basis of the *same standards* set out by the Convention. Therefore, the EctHR should not lower the standard of examination regarding the question of whether the protection was manifestly deficient for some areas of law, even if this would effectively address its workload problem. Furthermore, a special treatment for the European Union seemed highly unjustifiable. From the point of view of the individual, the decision was thus qualified as “alarming”, and as taking away “one tier of fundamental rights protection in the field of European law”⁵⁸¹, which appeared “particularly crucial with a view to the latest examples of international cooperation.”⁵⁸²

II. Although read together *Mattheus* and *Bosphorus* “muddied the waters”⁵⁸³, they are to be considered good law until accession by the EU to the ECHR finally occurs.⁵⁸⁴ Accordingly, the deficit of judicial protection arising from the limited access of private parties to the CJEU may be problematic in light of these cases.

Under *Mattheus*, the limitations to the CJEU’s jurisdiction are relevant in the admissibility of a complaint against the Member States regarding the validity of Union acts which the CJEU considers not reviewable under the Treaties. Although the decision is not entirely clear whether review was based on the act being imputable to the UK or on the fact that the CJEU lacked jurisdiction, it encompasses an underlying distinction between “normal Community acts” and “other acts” which cannot be object of judicial review at the EU level.⁵⁸⁵ Regarding the latter, the equivalent protection standards cannot be met. As LENAERTS has put it:

Gasparini v. Italy, Application no. 10750/03, Decision of 12/05/2009, *Cooperative des Agriculteurs de Mayenne* and *Cooperative Laitière Maine-Anjou v. France*, Application no. 16931/04, Judgement of 10/10/2006, and *Coöperatieve Producentenorganisatie Van de Nederlandse Kokkelvisserij u.a. v. The Netherlands*, Application no. 13645/05, Judgement of 20/01/2009 the Court entered into a short but convincing scrutiny of the merits of the case. Regrettably in *Biret v. The 15 Member States of the European Union*, Application no. 13762/04, Decision of 09/12/2008, no such test was carried out, without there being an apparent reason for this. *Ibid.*, at 543.

⁵⁷⁹ CONSTANTINESCO, “C’est comme si c’était fait”, 2006, at 373; ECKES, “Does the European Court of Human Rights Provide Protection from the European Community?”, 2007, at 65; POTTEAU, “À propos d’un pis-aller”, 2009, at 716; Joint concurring opinion of Judges ROZAKIS, TULKENS, TRAJA, BOTOCHAROVA, ZAGREBELSKY and GARLICKI, concurring opinion of Judge RESS. Suggesting that the alternative approach of holding Member States responsible without the benefit of any presumption would be better see HINAREJOS PARGA, “*Bosphorus v. Ireland* and the Protection of Fundamental Rights in Europe”, 2006, at 258; PEERS, “Limited Responsibility of European Union Member States for Actions within the Scope of Community Law”, 2006, at 455.

⁵⁸⁰ The decision can be contrasted with *Pellegrini v. Italy*, Application no. 30882/96, Judgement of 20/07/2001, although the EctHR distinguished the two cases.

⁵⁸¹ ECKES, “Does the European Court of Human Rights Provide Protection from the European Community?”, 2007, at 66, noting however the advantages of such an approach notably the control of workload and the building of a trust relationship between the two courts.

⁵⁸² *Ibid.*

⁵⁸³ DOUGLAS-SCOTT, “A Tale of Two Courts”, 2006, at 639.

⁵⁸⁴ Both cases reached the Grand Chamber which reinforces their importance.

⁵⁸⁵ Noting that in *Mattheus* the EctHR has taken the first step into building its relationship with the CJEU based on a *de facto* vertical dimension see CANOR, “*Primus Inter Pares*”, 2000, at 4.

“[t]he judgment looks ‘classical’ at first sight in that it confirms implicitly the ‘equivalent protection’ test excluding direct European Union Member State responsibility under the Convention in relation to ‘normal’ Community acts subject to judicial review inside the Community order. But, at the same time, the judgment indicates that *in the absence of any such possibility of judicial review* the European Union Member States may be held responsible under the Convention for any infringement of the provisions of the latter resulting from ‘international instruments which [they] freely entered into (emphasis added).”⁵⁸⁶

Hence, Union acts which are excluded from the jurisdiction of CJEU may be contested directly before the EctHR. This is particularly relevant regarding the CFSP⁵⁸⁷ and the judicial arrangements made under Title IV TEC and Title VI pre-Lisbon, which shall remain in force until five years after the entry into force of the Lisbon Treaty.⁵⁸⁸ In fact, in these fields it can be said that there is “a gap in the jurisdiction”⁵⁸⁹ of the CJEU.

Moreover, *Bosphorus* provides for a *conditional* review of Member States acts implementing EU law without discretion.⁵⁹⁰ The presumption of compliance applies only when Union law provides for substantive and procedural protection of human rights which is deemed *equivalent* to the protection offered by the EctHR.⁵⁹¹ Hence, it could be said that the scope of the *Bosphorus* presumption is limited to policies formerly of the responsibility of the Communities, and does not extend to the intergovernmental pillars of the Union.⁵⁹² In fact, under Title VI ex-TEU on the PJCCM Member States could choose whether or not to allow national courts to refer questions for a preliminary ruling. In exercising that discretion, Member States could empower all national courts or only national courts of final instance to refer. Several references to Luxembourg have been deemed inadmissible on these grounds.⁵⁹³ Furthermore, the CJEU is precluded from

⁵⁸⁶ LENAERTS, “Fundamental Rights in the European Union”, 2000, at 585; LENAERTS, “The Respect for Fundamental Rights as a Constitutional Principle”, 2000, at 16. See also CANOR, “*Primus Inter Pares*”, 2000, at 5; WARD, “The Limits of the Uniform Application of Community Law and Effective Judicial Review”, 2000, at 226, arguing that given the exclusion of complete judicial review introduced in Amsterdam and given that the CJEU does not have jurisdiction over the Treaties, activation of the Strasbourg scheme of judicial review “may not be completely implausible”; RIEDER, “Protecting Human Rights within the European Union”, 2005, at 82.

⁵⁸⁷ KING, “Ensuring Human Rights Review of Inter-Governmental Acts in Europe”, 2000, at 79-88, noting that *Mattheus* opens the way for the EctHR to examine complaints concerning all acts adopted under the TEU which cannot be reviewed by the CJEU.

⁵⁸⁸ Article 10 of Protocol 36 to the Lisbon Treaty postpones the entry into force of the newly extended jurisdiction of the CJEU to the PJCCM to a maximum limit of five years counting from the date of the entry into force of the revision Treaty. Noting, however, that the decision of the EctHR in *Segi and Gestoras Pro-Amnistia and others v. Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the United Kingdom and Sweden*, Applications nos. 6422/02; 9916/02, Judgement of 23/05/2002 casts doubts on the availability of a remedy under the ECHR see CARRUTHERS, “The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs”, 2009, at 795, 796. Noting that third pillar conventions should be deemed as purely international law and thus submittable under *Mattheus* to the EctHR control see PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 36.

⁵⁸⁹ LENAERTS; DE SMIJTER, “The Charter and the Role of European Courts”, 2001, at 94.

⁵⁹⁰ PEERS, “Limited Responsibility of European Union Member States for Actions within the Scope of Community Law”, 2006, at 452.

⁵⁹¹ *Ibid.*

⁵⁹² In *MSS v. Belgium and Greece*, Application no. 30696/09, Judgement of 21/01/2011, para. 338, the EctHR clarified that the *Bosphorus* presumption only applied to the first pillar. See also CALLEWAERT, “The European Convention on Human Rights and European Union law”, 2009, at 774.

⁵⁹³ Suggesting that those states who have opted out of the third pillar jurisdiction under the previous TEU should not benefit from the *Bosphorus* presumption see PEERS, “Limited Responsibility of European Union Member States for Actions within the Scope of Community Law”, 2006, at 454. Considering that having in mind the limitations imposed on the CJEU’s jurisdiction under Articles 68 TEC and 35 TEU it is also possible to imagine that the protection offered

reviewing acts adopted under the CFSP. In these areas, Strasbourg should assert its jurisdiction, as Luxembourg does not provide equivalent protection.⁵⁹⁴ This can be seen either as a consequence of the non-application of the *Bosphorus* presumption to violations originating in the Treaty itself — as no judicial remedy against them is available under Union law —, or as an application of the *Mattheus* doctrine. In fact, the lack of reviewability may lead either to the application of *Mattheus* or serve to rebut the presumption in *Bosphorus*.⁵⁹⁵ The articulation of both decisions is not entirely clear, as it may not be the distinction between primary and secondary Union law. The case of *Guérin*⁵⁹⁶ illustrates the difficulty in isolating whether a violation is attributable to a feature of Union primary or secondary law. On one view, the applicant sought to challenge the Commission's decision, for failing to indicate the means and time limits of judicial challenge. This decision was clearly amenable to review by the CJEU under ex-Article 230 TEC and, hence, *prima facie* inadmissible before the EctHR. On the other hand, the issue could be framed as a challenge to the provisions of Article 230 TEC itself, a provision of Community primary law, directly imputable to the Member States, which cannot be reviewed by the CJEU.⁵⁹⁷ Judge RESS's opinion in *Bosphorus* makes clear that challenges to the Article 230 TEC mechanism could be admissible before the EctHR. Accordingly, "a litigant may well bring proceedings before the EctHR, based on the practical impossibility of challenging the EC measure."⁵⁹⁸ The EctHR should examine this issue *in full*, either by considering that equivalent protection is not available or that the presumption of compliance has been rebutted.

Furthermore, the *Bosphorus* presumption is merely *iuris tantum*, and can be rebutted if the applicant demonstrates that in his/her particular case the offered protection was *manifestly deficient*.⁵⁹⁹ Thus, the concept of *presumed compliance* developed in *Bosphorus* does not prevent the EctHR's review of whether, in the *specific circumstances of a case*, there was a breach of the ECHR, which means that there may be exceptional situations where the protection afforded by the Union legal order may be found to be insufficient. This could happen if, for example, there has been, in procedural terms, no adequate review in a particular case or, again, if the CJEU lacks jurisdiction

by the CJEU may in some cases be deficient and would not pass the equivalent protection test as no complete review by the CJEU is available see HINAREJOS PARGA, "*Bosphorus v Ireland* and the Protection of Fundamental Rights in Europe", 2006, at 258. Also questioning if the previous system established under Title IV TEC complied with Article 6 ECHR see COSTELLO, "The *Bosphorus* Ruling of the European Court of Human Rights", 2006, at 116 *et seq.* The restricted Title IV TEC preliminary reference mechanism amounts to such a "dysfunction of control" as it requires individuals to wait for excessive periods in order to establish the invalidity of EC measures or clarify their meaning. LENAERTS noted that it seemed paradoxical that Member States refused judicial enforcement in these areas and preferred to be bound by the human rights jurisdiction of the EctHR. See LENAERTS, "The Respect for Fundamental Rights as a Constitutional Principle", 2000, at 6.

⁵⁹⁴ BADINTER has proposed to exclude the CFSP from the scope of application of the accession agreement. See BADINTER, "L'adhésion de l'Union européenne à la Convention européenne de sauvegarde des droits de l'homme", 2010, at 8.

⁵⁹⁵ Noting that in *Mattheus* situations the basis for the equivalent protection test is lacking see COSTELLO, "The *Bosphorus* Ruling of the European Court of Human Rights", 2006, at 103; DOUGLASSCOTT, "*Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v. Ireland*", 2006, at 249; HINAREJOS PARGA, "*Bosphorus v Ireland* and the Protection of Fundamental Rights in Europe", 2006, at 255.

⁵⁹⁶ *Société Guérin Automobiles v. The 15 Member States of the European Union*, Application no. 51717/99, Judgement of 04/07/2000.

⁵⁹⁷ COSTELLO, "The *Bosphorus* Ruling of the European Court of Human Rights", 2006, at 115.

⁵⁹⁸ *Ibid.*, at 116.

⁵⁹⁹ ECKES, "Does the European Court of Human Rights Provide Protection from the European Community?", 2007, at 54.

to rule on a given case.⁶⁰⁰

At a first glance, the *Bosphorus* ruling itself did not leave much room for arguing that the Union's system of judicial review breaches Articles 6 and 13 ECHR. In fact, the level of scrutiny applied by the EctHR regarding the protection of rights within the European legal order was significantly low.⁶⁰¹ From a *substantive* perspective, the EctHR referred briefly, and merely in the abstract, to the case-law of the CJEU protecting fundamental rights and incorporating the ECHR into the Union legal order, to some fundamental rights declarations of the Union institutions and to the European Charter. The EctHR neither analyzed the case-law of the CJEU to any extent, nor entered into an examination of the substance of the *Bosphorus* case before it.⁶⁰² It simply left the scrutiny whether the impoundment infringed the applicant's fundamental rights to the Union Courts. From a *procedural* perspective, the EctHR was in general satisfied with the EU judicial system: whilst acknowledging the limitations imposed on the access by individuals to the Union courts it seems to have accepted the general level of protection offered in the EU.⁶⁰³ More significantly, the EctHR devoted very little time and effort – two sentences to be precise⁶⁰⁴ – to determine if the presumption had been rebutted in the case.

In light of the foregoing, the EctHR came to the conclusion that the control mechanisms within the EC are *effective* and therefore *equivalent* to the Convention standard.⁶⁰⁵ However, as seen above and duly recognised by scholars, lawyers and AGs, as well as by the CJEU itself, there are reasons to believe that effective judicial protection may in some situations be at risk in the EU.⁶⁰⁶ In their concurring opinion Judges ROZAKIS, TULKENS, TRAJA, BOTOCHAROVA, ZAGREBELSKY and GARLICKI stressed the need to take a more *concrete* approach. In light of the importance of establishing the *effectiveness* of protection of ECHR standards from a procedural perspective, they viewed the majority as minimising or ignoring certain factors which establish “a genuine difference and make it unreasonable to conclude that ‘equivalent protection’ exists in every case.”⁶⁰⁷ For example, as regards the operation of the preliminary references procedure, they emphasised that normally the national court has discretion as to how to apply that ruling and that the use of that discretion is not covered by the equivalent protection doctrine. Moreover, as the judgment itself acknowledges, individuals' access to the Union courts is limited. Yet, the EctHR reiterated in

⁶⁰⁰ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 114.

⁶⁰¹ Noting that the judgment was “rather short and thinly reasoned” see DOUGLASSCOTT, “*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*”, 2006, at 250.

⁶⁰² See para. 159. Analyzing the critique by the EctHR to the CJEU see COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 102 *seq.*; DOUGLASSCOTT, “*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*”, 2006, at 251; ECKES, “Does the European Court of Human Rights Provide Protection from the European Community?”, 2007, at 52.

⁶⁰³ See para. 160. While the EctHR emphasised the preliminary reference procedure in general, it did not specifically mention the possibility of preliminary references on validity of Community secondary acts, as the CJEU itself emphasises in its jurisprudence on effective judicial protection. See COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 102, 103.

⁶⁰⁴ See para. 166.

⁶⁰⁵ It is noteworthy that it is only after this assessment has taken place that the EctHR concludes that Ireland's compliance with its EC obligations is presumptively justified. See COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 102, 103.

⁶⁰⁶ See *supra* Part I, Chapters 1 and 2.

⁶⁰⁷ Para. 3.

*Mamatkulov and Askarov*⁶⁰⁸, that the right of individual application is “a key component of the machinery for protecting the rights and freedoms set forth in the Convention.”⁶⁰⁹ Surely, judicial protection under Union law is based on a plurality of appeals, among which the reference to the CJEU for a preliminary ruling has an important role. However, they stressed that despite its value, a reference for a preliminary ruling entails an internal, *a priori* review. It is not of the same nature and does not replace the external, *a posteriori* supervision of the EctHR, carried out following an individual application.

Judge RESS noted in his opinion that the EctHR refrained from directly addressing this issue, having based the conclusion that the protection in the EU is equivalent on “a more global scheme.”⁶¹⁰ In particular, he noted that the EctHR had “not addressed the question of whether this limited access is really in accordance with Article 6 § 1 of the Convention and whether the provisions, in particular, of former Article 173 of the EC Treaty should not be interpreted more extensively in the light of Article 6 § 1 of the Convention.”⁶¹¹ Hence, “one should not infer from paragraph 162 of the judgment in the present case that the Court accepts that Article 6 § 1 does not call for a more extensive interpretation” and “one cannot say once and for all that, in relation to all Convention rights, there is already such a presumption of Convention compliance because of the mere formal system of protection by the ECJ.”⁶¹² Although the EctHR did not give any indication as to where the threshold for *manifestly deficient* lies, Judge RESS provided some examples and included among them situations when there had been, in procedural terms, no adequate review in a given case. Examples given of this “dysfunction”⁶¹³ are cases where the CJEU lacks jurisdiction⁶¹⁴ and when it “has been too restrictive in its interpretation of individual access to it.”⁶¹⁵ Scholars have noted that:

“[t]his strikes an obvious chord with the assertion in the first concurring opinion that the EC does not provide equivalent protection in the field of individual access and points to the possibility of a review by the Strasbourg Court of cases where an individual has not been accorded standing under Art. 230 EC.”⁶¹⁶

Commentators have further noted that *Bosphorus* is no impediment to the examination of the substance of the matter.⁶¹⁷ In fact, even in cases where preliminary references on validity are available, *i.e.* the indirect route to challenge the validity of EC measures, the system may still not provide equivalent protection. Preliminary references on validity effectively allow the CJEU to act not only as the final, but also the first, arbiter of compliance with fundamental rights norms. In

⁶⁰⁸ *Mamatkulov and Askarov v. Turkey*, Applications nos. 46827/99; 46951/99, Judgement of 04/02/2005.

⁶⁰⁹ Para. 122.

⁶¹⁰ ECKES, “Does the European Court of Human Rights Provide Protection from the European Community?”, 2007, at 56, 57.

⁶¹¹ Para. 2, mentioning the cases of *Jégo-Quéré* and *UPA*.

⁶¹² Para. 2.

⁶¹³ Para. 166 of the *Bosphorus* judgement.

⁶¹⁴ He mentioned *Segi and Gestoras Pro-Amnistía and others v. Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, The United Kingdom and Sweden* (dec.), Applications nos. 6422/02; 9916/02, Judgement of 23/05/2002.

⁶¹⁵ Para 3.

⁶¹⁶ BANNER; THOMSON, “Human Rights Review of State Acts Performed in Compliance with EC Law”, 2005, at 658.

⁶¹⁷ COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 116.

such a case, even if an individual succeeds in gaining access to the CJEU, the EctHR should not be too hasty in concluding that the EC system has provided equivalent protection. In light of the peculiar role of the CJEU as first and final arbiter of EU issues in such cases, the EctHR should examine the substance of the CJEU's ruling. The flexibility of the *equivalent protection/manifest deficiency* test allows the EctHR to do so, on a case-by-case basis. LENAERTS has even gone further and suggested that in *all instances* where challenges are brought against the CJ itself, there appeared to be no equivalent protection.⁶¹⁸ The issue of knowing if the EctHR could hold Member States collectively liable for a decision of the Union courts arose in *Garzilli*⁶¹⁹, which involved a challenge to a GC's decision. However, the EctHR held the action inadmissible *ratione materiae*, as the case involved a labour dispute with the Commission which was deemed outside the scope of Article 6. Nonetheless, the case left open the possibility of review of CJEU decisions before the EctHR.

III. In sum, it is unquestionable that the EctHR reserved itself sufficient margin of manoeuvre to intervene in situations where it considers appropriate to do so.⁶²⁰ Thus, much will depend on the level of scrutiny the EctHR is prepared to exercise. Notwithstanding, in cases where the CJEU lacks jurisdiction or where the CJEU interprets *locus standi* requirements too narrowly, the *Bosphorus* presumption will clearly fail. Scholars have noticed that a very strict interpretation of the jurisdiction of the CJEU "that systematically deprives individuals of an effective remedy would qualify as a manifest deficiency"⁶²¹ for these purposes.

Lastly, it may be argued that the effectiveness and adequacy of the Union's judicial system of protection has been so far assessed merely in the abstract by the EctHR because the cases brought before it did involve a breach of the Convention's procedural provisions. Hence, as *Bosphorus* concerned a breach of the right to property, the procedural aspect of fundamental rights review in the EU was secondary in the decision of the EctHR. However, in a procedurally-based claim, the existence of situations of denial of justice or lack of an effective remedy may fail the EctHR's standards on Articles 6 and 13 ECHR. The *dicta* in *Waite and Kennedy* are particularly emblematic:

"[w]here States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their

⁶¹⁸ LENAERTS, "Fundamental Rights in the European Union", 2000, at 585; LENAERTS, "Respect for Fundamental Rights as a Constitutional Principle", 2000, at 17, noting that there is no judicial review mechanism of the decisions of the CJ.

⁶¹⁹ *Garzilli v. Member States of the EU*, Application no. 32384/96, Judgement of 22/10/1998.

⁶²⁰ Noting that *Bosphorus* implies overlapping jurisdictions see COSTELLO, "The *Bosphorus* Ruling of the European Court of Human Rights", 2006, at 119 *et seq.* In fact, it is noticeable that the EctHR did not decline jurisdiction even though the measure had been previously challenged and upheld in an earlier action before the CJEU. See DOUGLAS-SCOTT, "A Tale of Two Courts", 2006, at 630. This author notes that the jurisdiction of the CJEU and the EctHR provides an illustration of "overlapping jurisdiction and segmented authority" in a situation of "Kafkaian complexity." (*Ibid.*, at 639). *Per contra*, noting that there are reasons to believe in an improved relationship between the two courts which enjoy a significant degree of commonality see HARPAZ, "The European Court of Justice and its Relations with the European Court of Human Rights", 2009, at 115 *et seq.*

⁶²¹ HINAREJOS, *Judicial Control in the European Union*, 2009, at 181.

responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are *practical* and *effective*. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (emphasis added).⁶²²

b) Review of Union Acts by the EctHR after Accession: *Nemo Iudex in Causa Sua?*

I. Although the abovementioned case-law shows that Member States can already be found responsible for breaches of the ECHR which have their origin in EU law, accession will close a gap of protection derived from violations *directly imputable* to the Union.⁶²³ In the wake of the *Bosphorus* decision there was speculation whether the EctHR would apply the presumption of compliance *a fortiori* where it would have to decide a case in which there was no implementing action by a Member State.⁶²⁴ However, in another line in the case-law, illustrated by the *Behrami*⁶²⁵ decision, the EctHR made clear that it would not review action undertaken *directly* by international organisations which are not parties to the ECHR.⁶²⁶ Accordingly, in *Connolly*⁶²⁷, an employee of the European Commission argued before the EctHR that the impossibility to reply to the AG's Opinion in a labour dispute litigated before the GC, and on appeal before the CJ, breached Article 6 ECHR. The EctHR stated that in reality the complaint was directed against the decisions by the EU courts and that at no time had the respondent States directly or indirectly intervened in the proceedings. Therefore, the EctHR declared the complaint inadmissible *ratione personae*.⁶²⁸ On the same day, the same section of the EctHR decided the case of *Biret*.⁶²⁹ Biret made two complaints to the EctHR. It claimed a violation of its procedural rights enshrined in Articles 6 and 13 ECHR because it did not have a chance to directly challenge the EC directives in the Union courts and it

⁶²² See para. 67; and *Beer and Reagan v. Germany*, Application no. 28934/95, Judgement of 18/02/1999, para. 57.

⁶²³ Accession will also avoid holding Member States liable for acts over which they have very little control. See DOUGLASSCOTT, "Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland", 2006, at 252.

⁶²⁴ The first open point was whether the *Bosphorus* presumption would also apply where there was no action or omission by a Member State but only action by EU institutions.

⁶²⁵ *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Applications nos. 71412/01; 78166/01, Judgement of 02/05/2007.

⁶²⁶ The *Bosphorus* and *Matthews* case-law contradicted the traditional view in public international law that members of international organisations cannot be held responsible for acts or omissions by these organisations because they enjoy a legal personality distinct from that of their Member States. Therefore, the extension of the *Behrami* approach to cases where there was no domestic act or omission by a Contracting Party can be interpreted as a return to the more traditional view regarding the responsibility of Contracting Parties for acts and omissions committed by international organisations of which they are members. See LOCK, "Beyond *Bosphorus*", 2010, at 544.

⁶²⁷ *Connolly v. The 15 Members of the European Union*, Application no. 73274/01, Decision of 09/12/2008. Confirmed in *Rambus Inc. v. Germany*, Application no. 40382/04, Decision of 16/06/2009 and *Beygo v. The 46 Members States of the Council of Europe*, Application no. 36099/06, Decision of 16/06/2009.

⁶²⁸ The Court followed the same approach in *Boivin v. The 34 Members of the Council of Europe*, Application no. 73250/01, Judgement of 09/09/2008 and *Behrami and Beric and others v. Bosnia and Herzegovina*, Applications nos. 36357/04; 36360/04; 38346/04, Judgement of 16/10/2007. LOCK summarized the case-law as follows: "[t]he *Bosphorus* principle applies where a Contracting Party's authorities have acted, either by implementing a decision of an international organisation (*Bosphorus*) or by making a reference to that organisation's court (*Kokkelvisserij*). In the former case, applications are held inadmissible *ratione personae* as they are directed, in effect, against an act of an international organisation, which is not a party to the Convention. In accordance with the *Behrami* case-law, the Court finds that the applicant was not within the jurisdiction of the respondent State." See LOCK, "Beyond *Bosphorus*", 2010, at 535. The author is critical of the EctHR's approach. For a critical overview of these decisions see also POTTEAU, "A propos d'un pis-aller", 2009, at 700 *et seq.*

⁶²⁹ *Biret v. The 15 Member States of the European Union*, Application no. 13762/04, Judgement of 09/12/2008.

claimed that its property rights guaranteed by Article 1 of Protocol no. 1 ECHR had been breached. With regard to the first claims the EctHR held that they related solely to deficits in the judicial protection offered by the EC and were thus *not attributable* to the Member States. When discussing the alleged infringement of Biret's property rights, the EctHR applied its *Bosphorus* presumption and stated that it could not find a manifestly deficient protection of human rights in the case.

As a consequence of this case-law LOCK noted that action taken by the EU under the CFSP would not be subjected to review by the EctHR, as it would not involve acts or omissions by EU Member States but rather by the EU itself. According to the author, this would be especially relevant for missions carried out in the framework of the EU's CFSP, as violations of the ECHR by forces under the command of the EU would not be attributable to the Member States and any complaints directed against them would be held inadmissible by the EctHR.⁶³⁰

II. After accession, this type of cases will come within the jurisdiction of the EctHR *ratione personae* and *materiae*. In fact, it could be argued that the CJEU is not in the best position to examine whether the procedure before it complies with ECHR standards.⁶³¹ Accession will make clear that such assessment must be done by the EctHR and thus solve the *nemo iudex in causa sua* conundrum.

In fact, the main practical consequence of accession is that the EU will become subject to the jurisdiction of the EctHR and the CJEU will no longer be the "ultimate guardian"⁶³² of the lawfulness of Union acts deemed to breach fundamental rights. Hence, there is no doubt that accession will change the relationship between the two courts.⁶³³ The preamble of the Draft Agreement on Accession states that the individual should have the right to submit the acts, measures or omissions of the EU to the *external control* of the EctHR.⁶³⁴ Accordingly, accession "shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf."⁶³⁵ This means that the decisions of the EctHR will be binding on all EU institutions, which includes the CJEU.⁶³⁶

Hence, the procedural difficulties faced by private parties in accessing Union courts as well as the limitations to the jurisdiction of such courts gain a new meaning in face of accession. Already writing in 1997, RIDEAU and RENUCCI had noted that:

"[l]a possibilité de saisir les organes de Strasbourg de requêtes compenserait dans une certaine mesure les insuffisances du système de recours et conduirait peut-être l'Union européenne à se prononcer de

⁶³⁰ LOCK, "Beyond *Bosphorus*", 2010, at 545.

⁶³¹ VAN DEN BERGHE, "The EU and Issues of Human Rights Protection", 2010, at 143.

⁶³² CANOR, "*Primus Inter Pares*", 2000, at 3.

⁶³³ JACOBS, "The Lisbon Treaty and the Court of Justice", 2012, at 205.

⁶³⁴ Para. 5.

⁶³⁵ Article 1(2)(c) of the Draft Agreement on Accession.

⁶³⁶ Draft Explanatory Report to the Agreement on the Accession, para. 21. Hence WEISS noted that as Article 47(2) and (3) of the Charter correspond to Article 6(1) ECHR, the latter became legally binding on the EU institutions and there is no leeway to depart from Convention level of human rights protection. See WEISS, "Human Rights in the EU", 2011, at 70, 71.

façon plus effective du réaménagement des voies de droit au profit des particuliers."⁶³⁷

After accession, the *Bosphorus* presumption will probably fall into oblivion, which means that the EctHR will consider the EU in a similar position to all other signatories of the Convention.⁶³⁸ Scholars have noted that the "non-aggression pact"⁶³⁹ between the two courts will no longer prevail.⁶⁴⁰ The EctHR will no longer see itself as having to mediate between two sets of international commitments – the TEU and the ECHR – but will rather see the EU as a *normal* member of the Convention, which should be treated like any other and should not hide behind its obligations.⁶⁴¹

As seen above, it is highly questionable whether the system of judicial protection established in the European Union is in compliance with the requirements of the EctHR's case-law on the right of access to justice. CORTHAUT and VANNESTE have noted that the EU "is currently showing major deficiencies in light of Article 6 ECHR."⁶⁴² In fact, considering the difficulties surrounding access to courts by individuals within the Union's judicial system it is hard to say that such a system ensures an *effective* and *real* possibility for every individual to address a court of law when one of his/her rights has been breached. Thus, the procedural obstacles faced by private parties in accessing Union courts risk failing the requirements of Articles 6 and 13 ECHR. JACOBS has noted that if standing requirements of individuals under the EU Treaties remain too restrictive after Lisbon, the Strasbourg Court will certainly scrutinize them, as it "has already been alerted to the difficulty and [it] attaches high importance to the right of access to a court."⁶⁴³

In this context, one should recall that in *Golder* the EctHR considered that the right of access to courts means not only *de jure* but *de facto* access. In *Airey*, the EctHR stated that such right must be *effective*. Furthermore, the EctHR has not only considered that administrative and constitutional review comes within the scope of Article 6, in so far as disputes are genuine and serious and the result of the proceedings is directly decisive for the rights in question, but has also condemned unduly restrictive systems in relation to actions for annulment.⁶⁴⁴ In *De Geouffre de la Pradelle*⁶⁴⁵, the EctHR condemned the French system in which an annulment action before the *Conseil d'État* had to be brought within a two months time limit counting from the publication of the act, irrespective of notification to the interested party. In *Bentham*⁶⁴⁶, the EctHR considered that the Netherlands

⁶³⁷ RIDEAU; RENUCCI, "Dualité de la protection juridictionnelle européenne des droits fondamentaux", 1997, at 109.

⁶³⁸ See also WEISS, "Human Rights in the EU", 2011, at 94; GAJA, "Accession to the ECHR", 2012, at 188; JACOBS, "The Lisbon Treaty and the Court of Justice", 2012, at 205. Although it cannot be excluded that a deferential attitude of the EctHR *vis-à-vis* de CJEU and Union law may continue to take place in the Strasbourg. Highlighting the need for the EU to accede in *equal footing* with other Contracting Parties to the ECHR see Draft Explanatory Report to the Agreement on the Accession, paras. 7 and 22; TULKENS, "Pour et vers une organisation harmonieuse", 2011, at 29.

⁶³⁹ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 261.

⁶⁴⁰ LOCK, "EU Accession to the ECHR", 2010, at 798, noting that the EU will no longer "deserve special treatment."

⁶⁴¹ CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 262.

⁶⁴² CORTHAUT; VANNESTE, "Waves between Strasbourg and Luxembourg", 2006, at 490. See also CORTÉS MARTÍN, "Ubi Ius, Ibi Remedium", 2004, at 256.

⁶⁴³ JACOBS, "The Lisbon Treaty and the Court of Justice", 2012, at 206.

⁶⁴⁴ SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 450.

⁶⁴⁵ *De Geouffre de la Pradelle v. France*, Application no. 12964/87, Judgment of 16/12/1992, paras. 27-35.

⁶⁴⁶ *Bentham v. The Netherlands*, Application no. 8848/80, Judgment of 23/10/1985, paras. 41-43. See MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*, 2012, at 352-345.

were in breach of the Convention for not foreseeing a system of judicial review of administrative acts. The EctHR stated that an individual must enjoy a reasonable opportunity to exercise remedies provided by national law and a *clear, concrete and effective* means to contest an administrative act that directly interferes with his/her rights.⁶⁴⁷ When assessing complaints dealing with the lack of possibilities to challenge *administrative acts* the EctHR evaluates the impact of the contested act on the individuals' civil rights and obligations.⁶⁴⁸ Hence, everyone who claims that an intervention from public authorities in his/her rights and obligations is illegal has the right of access to a judge, provided that he/she is *personally affected* by the measure in a way that is "not only serious but also specific and, above all, imminent."⁶⁴⁹ Thus, according to the EctHR's case-law, administrative acts which have a *direct impact* on the rights of individuals must be challengeable in a court of law.⁶⁵⁰ Regarding *legislative acts*, the EctHR is more reluctant.⁶⁵¹ The Court does not consider that judicial review of legislation must be available in Contracting States either under Article 6 or 13 ECHR.⁶⁵² Nonetheless, *when that is the case*, constitutional proceedings must respect the guarantees established in Article 6.⁶⁵³

Here, one should note that although the rhetoric of alternative remedies has permeated its case-law⁶⁵⁴, the EctHR highlighted that rights under the Convention are to be *practical and effective*, and that this is *particularly true* for the right of access to the courts.⁶⁵⁵ Hence, the action for damages is not considered a suitable alternative to judicial review.⁶⁵⁶ Surely the issue is particularly problematic in cases where there are procedural *lacunae*, which happens when Union acts lack implementing measures.⁶⁵⁷ In this respect, the ECHR has confirmed in *Posti and Rahko* that "no one can be required to breach the law so as to be able to have a 'civil right' determined in

⁶⁴⁷ Questioning if that is the case in the EU see WARD, "Locus Standi under Article 230(4) of the EC Treaty", 2003, at 71; CORTÉS MARTÍN, "Ubi Ius, Ibi Remedium", 2004, at 255.

⁶⁴⁸ CORTHAUT; VANNESTE, "Waves between Strasbourg and Luxembourg", 2006, at 479; *Posti and Rahko v. Finland*, Application no. 27824/95, Judgement of 24/09/2002.

⁶⁴⁹ *Balmer-Schafroth and others v. Switzerland*, Application no. 22110/93, Judgment of 26/08/1997, para. 40; *Athanassoglou and others v. Switzerland*, Application no. 27644/95, Judgement of 06/04/2000, para. 51. The EctHR made a slight detour to this formulation in *Posti and Rahko v. Finland* (para. 53), which has been criticized by scholars. See CORTHAUT; VANNESTE, "Waves between Strasbourg and Luxembourg", 2006, at 508.

⁶⁵⁰ CORTHAUT; VANNESTE, "Waves between Strasbourg and Luxembourg", 2006, at 485. See also Recommendation 2004(20) of the Committee of Ministers to Member States on judicial review of administrative acts, adopted by the Committee of Ministers on 15/12/2004, at the 909th meeting of the Ministers' Deputies: "[j]udicial review should be available at least to natural and legal persons in respect of administrative acts that *directly affect their rights or interests*. Member states are encouraged to examine whether access to judicial review should not also be opened to associations or other persons and bodies empowered to protect collective or community interests."

⁶⁵¹ *Kleyn and others v. The Netherlands*, Applications nos. 39343/98; 39651/98; 43147/98; 46664/99, Judgement of 06/05/2003, para. 193.

⁶⁵² Regretting this case-law see CORTHAUT; VANNESTE, "Waves between Strasbourg and Luxembourg", 2006, at 486 and 510.

⁶⁵³ *Voggenreiter v. Germany*, Application no. 47169/99, Judgement of 08/01/2004, paras. 31-33.

⁶⁵⁴ *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgement of 18/02/1999, para. 68: "[f]or the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."

⁶⁵⁵ See *supra* Section 1.3.2.

⁶⁵⁶ *Posti and Rahko v. Finland*, Application no. 27824/95, Judgement of 24/09/2002, paras. 61-62.

⁶⁵⁷ In *Segi and Gestoras Pro-Amnistia and others v. Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, The United Kingdom and Sweden* (dec.), Applications nos. 6422/02; 9916/02, Judgement of 23/05/2002, the ECHR referred to the decision of the GC in *Jégo-Quéré* just three weeks after it had been delivered. Questioning the meaning of this reference see BROWN; MORIJN, "Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*", 2004, at 1647, note 32.

accordance with Article 6 § 1.”⁶⁵⁸ Hence, as seen above, in cases where there is no challengeable measure in national legal orders the reliance on preliminary rulings on validity results in “a complete denial of remedy to applicants.”⁶⁵⁹ Additionally, KOMAREK has rightfully noted that the EctHR has misrepresented the standing of individuals in preliminary rulings, when it said that “the parties to the domestic proceedings have the right to put their case to the Court of Justice during the Art. 234 process.”⁶⁶⁰ In fact, no such right exists, at least as matter of Union law and the CJEU has confirmed it on several occasions.⁶⁶¹

Also, the *TWD* and *Nachi* doctrines seem questionable in light of Article 6 and the EctHR’s case-law. Article 6 prohibits Contracting Parties from maintaining procedural rules that are so complex and incoherent that amount themselves to an *unreasonable barrier* to an effective right of access to courts. The EctHR has held that a time limit which the applicant could not reasonably have been expected to meet is in breach of his/her right of access.⁶⁶² In *Lagrange*⁶⁶³ after stating that the degree of access afforded by national legislation must be sufficient to secure the individuals’ right to a court, the EctHR considered that the guarantees provided for by national legislation must avoid *misunderstandings* as for the methods of exercise of the recourses offered and the limitations regarding their simultaneous exercise.⁶⁶⁴ In light of this jurisprudence it is highly questionable whether the combination of the test of individual concern and the procedural preclusion endorsed in *TWD* and *Nachi* satisfies the requirements of legal certainty demanded by the EctHR.

It is also questionable whether the restrictive interpretation on direct and individual concern can be justified within the ECHR parameters, according to which limits on the right of access to a court cannot impair the very essence of that right, and restrictions must pursue a legitimate aim, and be proportionate.⁶⁶⁵

Furthermore, given that it is the Union which accedes to the ECHR, the Convention will cover the whole of Union’s activities. This could result in an “asymmetry between the control exercised by the Court of Justice and that of the EctHR.”⁶⁶⁶ Indeed, as seen in further detail below, Article 275 TFEU excludes the jurisdiction of the CJEU over the CFSP, with the exception of

⁶⁵⁸ *Posti and Rahko v. Finland*, Application no. 27824/95, Judgement of 24/09/2002, para. 64.

⁶⁵⁹ KOCK, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 515. *Per contra*, BESSELINK believed that Article 230(4) was compatible with the Charter and the ECHR, as in his view, Article 13 ECHR did not require access to a court of justice in all cases. Other remedies might also satisfy the ECHR’s requirements. Since Article 6 ECHR does not grant an unlimited right of access to any court, Article 13 when read in conjunction with Article 6 ECHR, did not grant a right to citizens of access to any court for any complaint they might have. This remained the case also under Article 47 of the Charter. See Memorandum of the House of Lords European Union Committee, *The Future Role of the European Court of Justice*, 2003-2004, at 40 and 59.

⁶⁶⁰ See *Bosphorus Airways v. Ireland*, Application no. 45036/98, Judgement of 30/06/2005, para. 164.

⁶⁶¹ KOMAREK, “In the Court(s) We Trust?”, 2007, at 477. See *supra* Part I, Chapter 1, Section 1.2.2(c).

⁶⁶² *Neshev v. Bulgaria*, Application no. 40897/98, Judgement of 28/10/2004; *Tsironis v. Greece*, Application no. 44584/98, Resolution of 25/06/2008.

⁶⁶³ *Lagrange v. France*, Application no. 39485/98, Judgement of 10/10/2000.

⁶⁶⁴ See paras. 40-41. See also *Bellet v. France*, Application no. 23805/94, Judgement of 04/12/1995, para. 37.

⁶⁶⁵ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 334. It could further be questioned if the need to take the indirect route through national courts risks breaching the right to a fair trial with undue delays. See CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 256.

⁶⁶⁶ JACQUÉ, “The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 2011, at 1005.

restrictive measures against individuals.⁶⁶⁷ However, the ECHR applies to all matters, including foreign affairs, which means that the CFSP will be under the jurisdiction of the ECHR, who will be allowed to review acts or conduct in relation to the external action of the EU.⁶⁶⁸ In fact, in so far as the Union manages operations within the UN or autonomously, it may breach the ECHR directly. Under the *Behrami* case-law, the Union is deemed responsible for these violations when their authors are acting on behalf of the Union or under its control.⁶⁶⁹

Moreover, review of primary law of the EU in light of the Convention may also take place. It could be argued in this regard that the Union could not be held responsible for acts of EU primary law, as it is not the author of such acts and the CJEU, although it can interpret them, cannot exercise review of their legality. Under *Matthews*, Member States would remain responsible for such acts. However, Article 4(3) of the Draft Agreement on Accession does not seem to exclude primary law.⁶⁷⁰ In light of this assumption, one could argue that it is not clear whether the lack of jurisdiction of the CJEU in the field of the CFSP in and of itself complies with the requirements of Article 6 ECHR⁶⁷¹, or even Article 47 of the Charter, especially in cases where Union acts can be applied directly or indirectly to individuals and no alternative remedy is available in the national legal orders.⁶⁷² Despite the fact that CFSP measures cannot have a legislative content⁶⁷³, one should not disregard this possibility especially in cross-pillar measures. Furthermore, a conflict between Articles 6 and 13 ECHR and Article 263(4) TFEU could be envisaged.⁶⁷⁴ One should note that the ECHR has already been receptive to the argument of the existence of *structural deficits* in international organisations which have led it to deem admissible a complaint which according to previous case-law seemed inadmissible.⁶⁷⁵ LENAERTS has suggested that, in light of *Matthews*, Member States could be held responsible for breaches to the ECHR on the grounds that neither the Treaties nor the Statute of the CJ established any mechanisms which allowed for the review of the CJ's decisions which breached Article 6 ECHR.⁶⁷⁶ In this context, also the *locus standi* requirements under Article 263(4) TFEU, the absence of the possibility to reply to the AG, the length of the proceedings before the CJEU have been pointed frequently as *structural deficits* of the

⁶⁶⁷ See *infra* Chapter 2, Section 2.2.2.

⁶⁶⁸ *Per contra* see MESQUITA, *A União Europeia após o Tratado de Lisboa*, 2010, at 94. Admitting that the EU might introduce a reservation to the ECHR in this respect see LADENBURGER, "Vers l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", 2011, at 23. Noting that the issue is more problematic as the ECHR does not allow reservations covering future activity in general (Article 57 ECHR) see JACQUÉ, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 2011, at 1006.

⁶⁶⁹ See also Article 2 of the Draft Agreement on Accession.

⁶⁷⁰ JACQUÉ, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 2011, at 1007; LOCK, "Walking on a Tightrope", 2011, at 1038. LOCK considers that review of primary law *should not* be excluded. See LOCK, "EU Accession to the ECHR", 2010, at 783, 784. *Per contra*, BADINTER had proposed the exclusion of primary law from the agreement on accession. See BADINTER, "L'adhésion de l'Union européenne à la Convention européenne de sauvegarde des droits de l'homme", 2010, at 8.

⁶⁷¹ LADENBURGER, "Vers l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", 2011, at 23.

⁶⁷² Also hinting this question see GAJA, "Accession to the ECHR", 2012, at 194.

⁶⁷³ See *infra* Chapter 2, Section 2.2.2.

⁶⁷⁴ JACOBS noted that "the absence of such [direct] remedy would itself be a violation of the Convention." See JACOBS, "The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice", 2006, at 295.

⁶⁷⁵ *Gasparini v. Italy*, Application no. 10750/03, Decision of 12/05/2009. See LOCK, "Beyond *Bosphorus*", 2010, at 539; POTTEAU, "À propos d'un pisaller", 2009, at 705.

⁶⁷⁶ LENAERTS, "Fundamental Rights in the European Union", 2009, at 585.

Union's system of judicial protection.⁶⁷⁷ One should note that the CJEU has no jurisdiction to decide on the invalidity of primary law. Hence, it is not excluded that individuals may bring a complaint against the EU and the Member States before the EctHR on the basis of a breach to the ECHR by the Treaties themselves. In the context of such action, although the Union is not the author of the Treaties, it could intervene as co-respondent in the proceedings.⁶⁷⁸

III. In addition, one should note that although the EctHR has had few opportunities to address directly the adequacy of the Union's system of judicial review in light of the Convention — due to the fact that the Union is not yet a party to the ECHR — this fact has not prevented such court from assessing some of the judicial mechanisms adopted within the EU. For instance, although the length of the preliminary rulings proceedings has never been directly scrutinized, the EctHR showed in *Pafitis*⁶⁷⁹ a deferential approach to the EU by holding that the period it takes for the CJ to answer a question under the preliminary references procedure does not count into the calculation of the unreasonable delay of a national proceeding under Article 6 ECHR. This judgment has been criticised on the basis that it goes too far in allowing Member States to escape responsibility for a judicial system they have created and may modify, through their control of the EU Treaties.⁶⁸⁰ In contrast, in *Divagsa* the EctHR has considered that “there may be certain circumstances in which the refusal of a national court called upon to give a ruling at final instance might infringe the principle of the fairness of judicial proceedings as set forth in Article 6 para. 1 of the Convention, particularly when such refusal appears to be arbitrary.”⁶⁸¹ In *Hornsby*⁶⁸² the EctHR held Greece in violation of the ECHR for failing to implement a ruling of its Council of State in response to a preliminary ruling from Luxembourg.

More recently, the case of *Kokkelvisserij*⁶⁸³ illustrated the tensions between the Luxembourg and Strasbourg case-law on procedural guarantees. The case involved the fine question of knowing if the intervention of the AGs before the CJEU breaches the right to a fair trial. In fact, as is well known, the Opinion of the AG, delivered after the closing of the oral procedure and before the CJEU's renders its judgment, is not subject to adversarial proceedings between the parties, which although has been confirmed by the CJEU has raised doubts in light of Article 6(1) ECHR.⁶⁸⁴ In

⁶⁷⁷ See e.g., LENAERTS; DE SMIJTER, “The Charter and the Role of European Courts”, 2001, at 95.

⁶⁷⁸ On the scope of the co-respondent mechanism and the powers of the EctHR to decide who is responsible for the breach see LOCK, “Walking on a Tightrope”, 2011, at 1038 *et seq.*

⁶⁷⁹ *Pafitis and others v. Greece*, Application no. 20323/92, Judgment of 26/02/1998. The decision contrasts with the inclusion of constitutional procedures under the scope of Article 6. See *Ruiz Mateos and others v. Spain*, Application no. 14324/88, Judgment of 19/04/1991. The latter decision is controversial among scholars. For a case comment see KLEIN; MESTRE, “La Cour européenne, le juge constitutionnel et le droit à un procès équitable”, 1994, at 1-5; FAIRÉN GUILLÉN, *Proceso Equitativo*, 1996, at 153 *et seq.*

⁶⁸⁰ See LENAERTS, “Fundamental Rights in the European Union”, 2000, at 583; COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights”, 2006, at 92.

⁶⁸¹ *Divagsa v. Spain*, Application no. 20631/92, 12/05/1993, at 279. See also *Fritz and Nana v. France*, Application no. 15669/89, Decision of 28/06/1993; *Dotta v. Italy*, Application no. 38399/97, Judgment of 07/09/1999; *Desmots v. France*, Application no. 41358/98, Judgment of 02/07/2002.

⁶⁸² *Hornsby v. Greece*, Application no. 18357/91, Judgment of 19/03/1997.

⁶⁸³ *Coöperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v. The Netherlands*, Application no. 13645/05, Judgment of 20/01/2009. For a case comment see VAN DE HEYNING, “PO Kokkelvisserij v. The Netherlands”, 2009, at 2117-2125.

⁶⁸⁴ In the literature the issue is not without controversy. See for discussion DELVOLVÉ, “L’avocat général devant la Cour de Justice et le droit à un procès équitable”, 2000, at 415-418; LAWSON, “Case C-17/98, *Emesa Sugar (Free Zone)*,”

fact, the procedural safeguards which the EctHR considered pivotal in *Kress*⁶⁸⁵ regarding the corresponding national institution – notably, the French *Commissaires du Gouvernement* – are not available in the CJEU. Here, the only procedural guarantee of the parties lies with the possibility of the CJEU to reopen the oral procedure. In *Kokkelvisserij*, EctHR considered that such possibility is enough provided that it is *realistic* and not *merely theoretical*.⁶⁸⁶ However, there seems to be a clear divergence between the two courts in this respect: whereas in Union law, the independence and impartiality of the AGs ensure *per se* the right to a fair trial⁶⁸⁷, for the EctHR only the real and effective possibility to reply of the AG ensures such right. These decisions reflect two different approaches regarding the protection of procedural fundamental rights. Here, it is undeniable that the EctHR is more focused on the protection of the individual legal position than the CJEU.⁶⁸⁸

One should note that although the European courts – as “courts of equal dignity”⁶⁸⁹ – have, through “judicial diplomacy”⁶⁹⁰, found ways to avoid clashes between the two systems⁶⁹¹ and of being deferential towards each other’s case-law⁶⁹², it is clear that the CJEU and the EctHR have not

NV V *Aruba*”, 2000, at 983-990; PALLARO, “Il diritto all'equo processo nell'ordinamento giuridico comunitario”, 2000, at 509; SPIELMANN, “L'indépendance de l'avocat général à la Cour de justice des Communautés européennes face à l'égalité des armes et au principe du contradictoire”, 2000, at 585-615; BENOÎT-ROHMER, “Le commissaire du gouvernement auprès du Conseil d'Etat, l'avocat général auprès de la Cour de justice des Communautés européennes et le droit à un procès équitable”, 2001, at 727-741; IANNONE, “L'avvocato generale della Corte di giustizia delle Comunità europee”, 2002, at 123-141; BELL, “The Role of the *Commissaire du Gouvernement* and the European Convention on Human Rights”, 2003, at 309-314; VARJU, “Case C-466/00, *Arben Kaba v. Secretary of State for Home Department*”, 2004, at 851-859; WARD, “Access to Justice”, 2004, at 133-135; TRIDIMAS, *The General Principles of EU Law*, 2006, at 344 *et seq.*; DIREITO, *A Figura do Advogado-Geral no Contencioso Comunitário*, 2007, at 123 *et seq.*; GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 505; CRAIG; BÜRCA, *EU Law*, 2011, at 405; MARTINS, “Reflexões a propósito do acórdão *Po Kokkelvisserij* do Tribunal Europeu dos Direitos do Homem”, 2011.

⁶⁸⁵ *Kress v. France*, Application no. 39594/98, Judgement of 07/06/2001.

⁶⁸⁶ See Opinion of AG in Case C-212/06, *Gouvernement de la Communauté française et Gouvernement wallon*, [2008] ECR I-1683. See paras. 156-157 of the AG's Opinion.

⁶⁸⁷ See Case C-50/96, *Schröder*, [2000] ECR I-743; Joined Cases C-234 and 235/96, *Vick e Conze*, [2000] ECR I-799; Case C-17/98, *Emesa Sugar*, [2000] ECR I-665 and I-675; Opinion of AG RUIZ-JARABO COLOMER in Case C-466/00, *Arben Kaba*, [2003] ECR I-2219.

⁶⁸⁸ For further developments see MARTINS, “Reflexões a propósito do acórdão *Po Kokkelvisserij* do Tribunal Europeu dos Direitos do Homem”, 2011. Also, the EctHR considered relevant that the annulment of the license had not been a consequence of the proceedings before the CJEU. This seems to suggest that the more limited the influence of the preliminary ruling in the outcome of the case, the higher the probability of stricter limitations to procedural rights of the parties are accepted. This suggestion leaves open the possibility for future litigants to argue on the basis of the “intensity” of the effects of the preliminary ruling in their legal position, in order to avoid a decision such as the one in *PO Kokkelvisserij*. See also VAN DE HEYNING, “*PO Kokkelvisserij v. The Netherlands*”, 2009, at 2123.

⁶⁸⁹ SPIELMANN, “Human Rights Case Law in the Strasbourg and Luxembourg Courts”, 1999, at 779.

⁶⁹⁰ SCHEECK, “The Relationship between the European Courts and Integration through Human Rights”, 2005, at 838.

⁶⁹¹ See *Garzilli v. Member States of the EU*, Application no. 32384/96, Judgement of 22/10/1998 (dismissed for not concerning a civil right) *Société Guérin Automobiles v. The 15 Member States of the European Union*, Application no. 51717/99, Judgement of 04/07/2000 (breach of Articles 6 and 13 dismissed *ratione materiae*); *DSR-Senator Lines GmbH v The 15 Member States of the European Union*, Application no. 56672/00, Decision of 10/03/2004 (breach of Articles 6 and 13 dismissed on the grounds of the applicants no being a victim); *Emesa Sugar v. The Netherlands*, Application no. 62023/00, Decision of 13/01/2005 (breach of Article 6 dismissed *ratione materiae*); *Segi and Gestoras Pro-Amnistia and others v. Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, The United Kingdom and Sweden* (dec.), Applications nos. 6422/02; 9916/02, Judgement of 23/05/2002, (breach of Article 6(1) dismissed on similar grounds). Nonetheless it is significant that in neither of these cases the EctHR decided on the grounds that it had no jurisdiction to examine violations committed by the EU.

⁶⁹² To the “blurring of the boundaries between these two regimes” (HARPAZ, “The European Court of Justice and its Relations with the European Court of Human Rights”, 2009, at 140) has been decisive the mutual references to each other's case-law. See SPIELMANN, “Human Rights Case Law in the Strasbourg and Luxembourg Courts”, 1999, at 772 *et seq.*; DOUGLASSCOTT, “A Tale of Two Courts”, 2006, at 640 *et seq.*; CALLEWAERT, “The European Convention on Human Rights and European Union Law”, 2009, at 771 *et seq.*; HARPAZ, “The European Court of Justice and its Relations with the European Court of Human Rights”, 2009, at 115 *et seq.* Speaking of a “remarkable jurisprudential cross-fertilization” see CORTHAUT; VANNESTE, “Waves between Strasbourg and Luxembourg”, 2006, at 475.

always agreed on their interpretation of the scope and meaning of fundamental procedural guarantees.⁶⁹³ In fact, “the potential for differences of interpretation between the two sets of European Courts on the same issue can be seen in a range of earlier cases.”⁶⁹⁴ The decision in *Open Door Counselling*⁶⁹⁵ and the Opinion of the AG in *Grogan*⁶⁹⁶, the approach in *Lentia*⁶⁹⁷ and the decision in *ERT*⁶⁹⁸, or the contrast between *Hoechst*⁶⁹⁹ and *Niemietz*⁷⁰⁰, are commonly referred to as emblematic examples of inconsistencies and contradictory solutions regarding the application of the ECHR.⁷⁰¹ More significantly, the two courts have disagreed on the scope of protection of Article 6 ECHR, as the decision in *Orkem*⁷⁰², in opposition to the decisions in *Funke*⁷⁰³ and *Saunders*⁷⁰⁴, and the subsequent Union case-law on the rights of defence in competition law clearly show.⁷⁰⁵

IV. Lastly, one should note that although the EctHR does not have competence to declare a Union act invalid – as its judgements are declaratory in nature and only binding under International law⁷⁰⁶ – the CJEU has already held that:

“[w]here, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court *will be binding* on the Community institutions, *including the Court of Justice*. Those decisions will

⁶⁹³ Noting that divergences in the case-law are not always easy to identify as they have to be assessed *in concreto* see LENAERTS, “Fundamental Rights in the European Union”, 2000, at 581, 582; LENAERTS, “The Respect for Fundamental Rights as a Constitutional Principle”, 2000, at 11-13.

⁶⁹⁴ CRAIG; BÜRCA, *EU Law*, 2011, at 404. See also RIDEAU; RENUCCI, “Dualité de la protection juridictionnelle européenne des droits fondamentaux”, 1997, at 103 *et seq.*; SPIELMANN, “Human Rights Case Law in the Strasbourg and Luxembourg Courts”, 1999, at 764 *et seq.*; DEFEIS, “Human rights and the European Union”, 2000, at 317 *et seq.*; RIEDER, “Protecting Human Rights within the European Union”, 2005, at 98 *et seq.*; DUARTE, “O modelo europeu de protecção dos direitos fundamentais”, 2008, at 37 *et seq.*; CALLEWAERT, “The European Convention on Human Rights and European Union Law”, 2009, at 775 *et seq.* Speaking about a “*difficile coesistenza*” see GRECO, “I diritti fondamentali nella Costituzione Europea”, 2001, at 195. *Per contra*, several authors note the convergence between the two regimes. See e.g., SIMON, “Des influences réciproques entre CJCE et CEDH”, 2001, at 41 *et seq.*

⁶⁹⁵ *Open Door and Dublin Well Woman v. Ireland*, Applications nos. 14234/88; 14235/88, Judgement of 29/10/1992.

⁶⁹⁶ Case C-159/90, *Society for the Protection of Unborn Children Ireland/Grogan and others*, [1991] ECR I-4685.

⁶⁹⁷ *Lentia v. Austria*, Application no. 37093/97, Judgement of 10/01/2002.

⁶⁹⁸ Case C-159/90, *Society for the Protection of Unborn Children Ireland/Grogan and others*, [1991] ECR I-4685.

⁶⁹⁹ Case 46/87, *Hoechst/Commission*, [1989] ECR 2859.

⁷⁰⁰ *Niemietz v. Germany*, Application no. 13710/88, Judgement of 16/12/1992.

⁷⁰¹ The first reference of Luxembourg to Strasbourg’s case-law was made rather late in Case C-13/94, *P/S and Cornwall County Council*, [1996] ECR I-2143. For further developments see e.g., LAWSON, “Confusion and Conflict?”, 1994, at 227 *et seq.*; DOUGLASSCOTT, “A Tale of Two Courts”, 2006, at 648, 649; WEISS, “Human Rights in the EU, 2011”, at 78 *et seq.*

⁷⁰² Case 374/87, *Orkem/Commission*, [1989] ECR 3283.

⁷⁰³ *Funke v. France*, Application no. 10828/84, Judgement of 25/02/1993. See BARUFFI, “Alla ricerca della tutela dei diritti fondamentali nel sistema comunitario”, 1999, at 1018 *et seq.*; and Case C-60/92, *Otto/Postbank*, [1993] ECR I-5683.

⁷⁰⁴ *Saunders v. The United Kingdom*, Application no. 19187/91, Judgement of 17/12/1996.

⁷⁰⁵ Joined Cases T-305 to 307, 313 to 316, 318, 325, 328, 329 and 335/94, *LVM/Commission*, [1999] II-931, para. 420; Joined Cases T-213/95 and T-18/96, *SCK and FNK/Commission*, [1997] ECR II-1739, paras. 56-57; Case T-112/98, *Mannesmannröhren-Werke/Commission*, [2001] ECR II-729; Case C-94/00, *Roquette Frères*, [2002] ECR I-9011. See ALONSO GARCÍA, “The General Provisions of the Charter of Fundamental Rights of the European Union”, 2002, at 498, with further references; DINE, “Criminal Law and the Privilege against Self-Incrimination”, 2004, at 271 *et seq.*

⁷⁰⁶ See Article 46 ECHR. This has been the main argument put forward by LOCK in considering that accession by the EU to the ECHR does not compromise the autonomy of the EU legal order, along with Article 6(2) TEU. See LOCK, “Walking on a Tightrope”, 2011, at 1035 *et seq.*

also be binding in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order (emphasis added).⁷⁰⁷

Surely this does not mean that the EctHR may directly invalidate Union acts: the applicant would still need to seek a declaration of invalidity before the CJEU. However, in these proceedings the CJEU is bound by the EctHR's findings.⁷⁰⁸ This means that the CJEU might be put in a bizarre situation if in a given case the EctHR finds a breach of Articles 6 and 13 ECHR. In fact, if for instance, the CJEU was to refuse an action for annulment for lack of jurisdiction or by applying strict standing requirements, and as a consequence the individual was considered to be left without an effective remedy, the same CJEU would have to deal with a EctHR's judgment on the validity of Union law under the ECHR when deciding the admissibility of a second action brought subsequently to a successful complaint before the EctHR.

All the above may be reasons to compel the CJEU to fill in eventual gaps of judicial protection in the EU. In fact, by not acknowledging its competence to review certain Union acts, the CJEU risks that the decision regarding their interpretation and validity is left to national courts and the EctHR, jeopardizing its own position as the "Constitutional" or "Supreme" Court of the Union. If the CJEU wants to avoid external review of Union acts as much as possible, it should adopt a broad reading of its jurisdiction which enables it to control the validity of any Union measure which affects individuals, thus meeting the demands of the rule of law.

c) Ensuring the CJEU's Review of Union Acts: the Draft Agreement on Accession

I. The main change brought by accession of the EU to the ECHR will be that the Union may be held responsible for breaches of the ECHR either as a sole respondent or as co-respondent, *i.e.* together with Member States.⁷⁰⁹ This has raised the question of knowing how to reconcile the autonomy of the EU legal order with accession, notably with the requirement of exhausting internal remedies before litigating before the EctHR.⁷¹⁰

As seen above, as a general rule, Union law is implemented by Member States. Only in limited cases will implementation be ensured directly by Union institutions.⁷¹¹ After accession there will be thus a unique situation where an act adopted by one party to the Convention is implemented by another. Consequently, it is important to envisage a mechanism which avoids "gaps in participation, accountability and enforceability in the Convention system"⁷¹² which is said to be "the very purpose of EU accession"⁷¹³ and to serve "the proper administration of justice."⁷¹⁴

⁷⁰⁷ Opinion 1/91, [1991] ECR I-6079, para. 39.

⁷⁰⁸ LOCK, "Walking on a Tightrope", 2011, at 1037.

⁷⁰⁹ Noting the difficulties in identifying the "right" respondent see LOCK, "EU Accession to the ECHR", 2010, at 779 *et seq.*

⁷¹⁰ Considering that the autonomy of the EU legal order is probably the "most prominent obstacle" to accession, which is "jealously policed" by the CJEU see LOCK, "Walking on a Tightrope", 2011, at 1025.

⁷¹¹ See *supra* Part I Chapter 1, Section 1.1.1.

⁷¹² Draft Explanatory Report to the Agreement on the Accession, para. 33.

⁷¹³ *Ibid.*

This is also fully in line with the wording of Protocol no. 8 to the Treaty of Lisbon.

Pursuant to principle of subsidiarity which governs the ECHR, the Union must make sure that external review by the EctHR is preceded by internal review by the courts of Member States or the Union courts. However, as seen above, when the validity of Union acts is at stake, the CJEU is the sole arbiter of validity of Union law.⁷¹⁵ Hence, individuals are instigated to bring proceedings before national courts that, if the case arises, are under an obligation to refer the questions of *invalidity* of Union law to the CJEU. Accession does not intent to break such monopoly. In fact, “that prerogative is an integral part of the competence of the Court of Justice, and hence of the ‘powers’ of the institutions of the Union, which, in accordance with Protocol no. 8, must not be affected by accession.”⁷¹⁶ Hence, as ARNULL has noted, the case should be “ventilated in the Union courts first.”⁷¹⁷

Surely, the system established by the Convention does not lay down, as a condition of admissibility of an application to the EctHR that in every case a court of supreme jurisdiction must first have been asked to rule on the alleged violation of fundamental rights by the act in question. However, the issue is put here as a matter involving not the place of the CJEU as the supreme court of the EU, but the “arrangement of the judicial system of the Union in such a way that, where an act of the Union is challenged, it is a court of the Union before which proceedings can be brought”⁷¹⁸ that carries out an internal review before the external review takes place.

Thus, the condition relating to the exhaustion of internal remedies imposed by Article 35(1) ECHR obliges applicants wishing to apply to the ECHR to first refer the matter to the Union courts, in accordance with the conditions laid down by EU law. As a consequence, SCHERMERS as stated that “the road to Luxembourg is shorter than the road to Strasbourg.”⁷¹⁹ However, a distinction should be made between direct and indirect review of Union acts.⁷²⁰ Where there is a direct action for annulment brought before Union courts the CJEU will have a chance to apply the ECHR before the EctHR. It is guaranteed that the review exercised by the EctHR will be preceded by the internal review carried out by the CJEU and that subsidiarity will be respected.⁷²¹ However, in the context of indirect review, when the validity of Union acts is at stake, the individual applicant will still have to exhaust internal remedies. Here, it is consensual that preliminary references should not be considered a legal remedy that has to be exhausted before

⁷¹⁴ *Ibid.*

⁷¹⁵ See *supra* Part I Chapter 1, Section 1.2.2(b).

⁷¹⁶ Discussion Document of the CJEU on Certain Aspects of the Accession of the EU to the ECHR, para. 8.

⁷¹⁷ ARNULL, “From Charter to Constitution and Beyond”, 2003, at 787. Considering nonetheless that prior involvement of the CJEU is not necessary from the point of view of autonomy of the EU legal order see LOCK, “Walking on a Tightrope”, 2011, at 1047, 1048. On the contrary, the existence of a new mechanism could breach such principle, as it is not foreseen in the current Treaties.

⁷¹⁸ Discussion Document of the CJEU on Certain Aspects of the Accession of the EU to the ECHR, para. 11.

⁷¹⁹ SCHERMERS, “European Remedies in the Field of Human Rights”, 2000, at 205-211.

⁷²⁰ Considering that recourse to the European Ombudsman should not be considered a remedy that has to be exhausted see LOCK, “EU Accession to the ECHR”, 2010, at 789.

⁷²¹ Joint Communication of Presidents COSTA and SKOURIS, para. 2. It may be questioned, however, if the EctHR will require individual applicants to bring clearly inadmissible actions before the CJEU. In *De Wilde, Ooms and Versyp* (“Vagrancy”) v. *Belgium*, Applications nos. 2832/66; 2835/66; 2899/66, Judgement of 18/06/1971, para. 62, the EctHR stated that: “[w]ithout it even being necessary to examine here whether recourse to the Conseil d’État would have been of such a nature as to satisfy the complaints – that according to the settled legal opinion which existed in Belgium up to 7th June 1967 recourse to the Conseil d’État against the orders of a magistrate was *thought to be inadmissible*.”

addressing the EctHR, as the parties may only suggest the reference.⁷²² Furthermore, under the *Foto-Frost* doctrine national courts are under an obligation to refer *only* in those cases where they tend to consider the Union act invalid. This means that if a national court considers a Union measure to be valid it may legitimately not refer the question, which puts the EctHR in a situation where it will have to decide a case without previous intervention of the CJEU.⁷²³ Hence, in cases which do not involve a previous preliminary ruling – either because there is no obligation to refer, or there was a breach of an obligation to refer – the EctHR may be the first court to answer a question of validity of Union law on fundamental rights grounds. Without a preliminary reference, the EctHR will have to decide on the interpretation or validity of EU law before the CJEU has the opportunity to do so, which is seen as compromising the *autonomy of the EU legal order*.⁷²⁴

There are at least two different ways of mitigating these difficulties. At the outset, “the most logical”⁷²⁵ would be to strengthen the *Foto-Frost* obligation, by imposing on all national courts a duty to refer a question on invalidity in all cases where the parties raise a conflict between a Union act and the ECHR.⁷²⁶ In these cases, preliminary references would become *automatic*. Nonetheless, apart from the obvious fear of overloading the CJEU⁷²⁷, it is questionable whether this very particular and internal EU law issue should be resolved within the framework of accession.⁷²⁸ Moreover, the CJEU seems not to trust “its powers of persuasion of national courts”⁷²⁹ as it agreed that “in order to observe the principle of subsidiarity which is inherent in the Convention and at the same time to ensure the *proper functioning of the judicial system of the Union*”⁷³⁰, a mechanism should be put in place which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the CJEU before the EctHR rules on the compatibility of that act with the Convention.⁷³¹ In their joint communication President COSTA and SKOURIS have also

⁷²² Draft Explanatory Report to the Agreement on the Accession, para. 57; Joint Communication of Presidents COSTA and SKOURIS, para. 2. The wording of the latter was slightly different: “[t]he reference for a preliminary ruling is *normally* not a legal remedy to be exhausted by the applicant before referring the matter to the ECHR.” The CJEU stated that “it would be difficult to regard this procedure a remedy which must be made use of as a necessary preliminary to bringing a case before the European Court of Human Rights.” See Discussion Document of the CJEU on Certain Aspects of the Accession of the EU to the ECHR, para. 10. A similar approach has been adopted regarding states indirect systems of constitutional review. See *De Jorio v. Italy*, Application no. 73936/01, Judgement of 03/06/2004. Suggesting that individuals might be required to *ask* for the preliminary ruling although this solution might be formalistic see TULKENS, “Pour et vers une organisation harmonieuse”, 2011, at 32. See *supra* Part I, Chapter 1, Section 1.2.2(c).

⁷²³ Moreover, it is not clear which will be the consequences of the breach of the obligation to refer in this regard, and whether the EctHR will become the court of appeal against national court decisions on the controversial issue of knowing if there was indeed a breach of an obligation to refer. Such solution would involve the control and exercise of the CJEU’s jurisdiction and would probably collide with Article 344 TFEU.

⁷²⁴ Analysing the challenges to the autonomy of the EU legal order put by accession see TULKENS, “Towards a Greater Normative Coherence in Europe”, 2000, at 331; JACQUÉ, “The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 2011, at 1011 *et seq.*; LOCK, “Walking on a Tightrope”, 2011, at 1028 *et seq.*

⁷²⁵ JACQUÉ, “The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 2011, at 1019.

⁷²⁶ *Ibid.*; TULKENS, “Pour et vers une organisation harmonieuse”, 2011, at 33.

⁷²⁷ See *infra* Chapter 3.

⁷²⁸ JACQUÉ, “The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 2011, at 1019.

⁷²⁹ *Ibid.*, at 1020.

⁷³⁰ Discussion Document of the CJEU on Certain Aspects of the Accession of the EU to the ECHR, para. 12.

⁷³¹ Furthermore, in cases where the CJEU lacks jurisdiction – either because it is limited or excluded – the EctHR will *necessarily* be the first European instance where to plead the ECHR.

stated that in order for the principle of subsidiarity to be respected, a procedure should be put in place which “is flexible and would ensure that the CJEU may carry out internal review before the ECHR carries out external review.”⁷³² Put briefly, the existence of a special mechanism was considered necessary to “accommodate the specific situation of the EU as a non-state entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States.”⁷³³

II. Accordingly, the Draft Agreement on Accession as of July 2011, stated in Article 3(6) that:

“[i]n proceedings to which the European Union is *corespondent*, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is *made quickly* so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court (emphasis added).”⁷³⁴

This mechanism is designed to remedy a situation that could be regarded as incompatible with Article 13 ECHR which requires all parties to the ECHR to provide for effective remedies for the protection of Convention rights.⁷³⁵ Nonetheless, GAJA has rightfully noted that this procedure “puts the EU in a favourable position in relation to other parties to the ECHR”⁷³⁶ with regard to whom no such safeguard applies. Even if the ECtHR is not bound by the CJEU’s interpretation, this privilege is significant and leaves one with the impression that it was designed not with the need to ensure judicial protection of individuals in mind, but mostly to insulate a pacific coexistence between the two courts.

Notwithstanding, the mechanism will only be applicable when the EU is co-respondent, *i.e.* in cases where an individual has filed a claim against a Member State and the EU decided to participate in the proceedings as party.⁷³⁷ It is not certain yet which kind of proceeding will be

⁷³² Para. 2. TIZZANO noted that in the context of accession the relationship between the two courts should not follow a hierarchical logic but should be construed on the basis of complementarity and coordination. See TIZZANO, “Quelques réflexions sur les rapports entre les Cours européennes dans la perspective de l’adhésion de l’Union à la Convention EDH”, 2011, at 15.

⁷³³ Draft Explanatory Report to the Agreement on the Accession, para. 32.

⁷³⁴ The Declaration no. 2 to the Lisbon Treaty had made reference to a “dialogue” between the two courts. BADINTER had suggested that third party intervention would suffice. LOCK disagreed. See LOCK, “EU Accession to the ECHR”, 2010, at 785.

⁷³⁵ See JACOBS, “Contribution to the Parliamentary Assembly: The accession of the European Union/European Community to the European Convention on Human Rights” (Doc. 11533), at 18. Considering that this mechanism should be reserved for the most serious cases where preliminary rulings did not work properly see LADENBURGER, “Vers l’adhésion de l’Union européenne à la Convention européenne des droits de l’homme” 2011, at 25.

⁷³⁶ GAJA, “Accession to the ECHR”, 2012, at 194. This mechanism has been probably introduced to avoid a binary and “zero sum game” approach to the relationship between the two courts.

⁷³⁷ See Article 3(2) which states that “[w]here an application is directed against one or more Member States of the European Union, 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, notably where that violation could have been avoided only by disregarding an obligation.” The latter case will occur when the EU act left Member States with no discretion.

created.⁷³⁸ This seems to be a question to be decided by the EU, although it can be said that Article 3(6) suggests that Member States want to avoid having to amend the Treaties.⁷³⁹ Proposals on how to ensure such prior internal review include a preliminary reference by the EctHR to the CJEU⁷⁴⁰, an involvement of the CJEU by means of an opinion⁷⁴¹, the right of the Commission to instigate proceedings before the CJEU while proceedings before the EctHR are temporarily suspended⁷⁴² and even a preliminary ruling of the CJEU to the EctHR *in lieu* of the individual application.⁷⁴³ Most importantly, the two courts agreed on the need for such a mechanism⁷⁴⁴ which means that the issue will probably be dealt in the CJEU's opinion on accession.⁷⁴⁵ The simplest procedure seems to be a preliminary reference.⁷⁴⁶ Here, it seems that the decision of the CJEU would have to be binding.⁷⁴⁷ The EctHR would give time to the CJEU to decide the issue on invalidity first. However, after that it would retain full discretion to rule on the complaint brought before it, which could compromise the CJEU's final decision.⁷⁴⁸

For what it is worth, one should note that the existence of such a review mechanism may bring about changes to the jurisdiction of the CJEU under the Treaties. At the outset, the terms

See Draft Explanatory Report to the Agreement on the Accession, para. 42. There seems to be a consensus that this proceeding will only be applicable in a limited number of cases. During the negotiations, the view was expressed that in recent years, the only cases which might have certainly required the application of the co-respondent mechanism would have been *Matthews* and *Bosphorus*. See also Draft Explanatory Report to the Agreement on the Accession, para. 44, footnote 18, para. 58. See also GAJA, "Accession to the ECHR", 2012, at 191, noting that the co-respondent mechanism seems to be intended to avoid an application from being held inadmissible *ratione personae* and to involve the EU when the interpretation or application of EU law is at stake.

⁷³⁸ Before the Draft Agreement on Accession scholars had put forward different proposals. For instance, TURNER suggested the creation of specialized Chamber of Human rights within the EU judicial architecture, which could allow for an informal forum of discussion involving both courts. See TURNER, "European Rights Protection in the European Community", 1999, at 466 *et seq.* Mentioning the creation of a procedural bridge between the two courts through a preliminary reference from Luxembourg to Strasbourg see LENAERTS, "Fundamental Rights to be Included in a Community Catalogue", 1991, at 380. Suggesting that the CJEU should ask the EctHR for an advisory opinion before deciding on the application of the ECHR see TULKENS, "Towards a Greater Normative Coherence in Europe", 2000, at 331, 332. Speaking about a mechanism of cooperation between the two courts see BARUFFI, "Alla ricerca della tutela dei diritti fondamentali nel sistema comunitario", 1999, at 1026, 1027.

⁷³⁹ LOCK, "Walking on a Tightrope", 2011, at 1049.

⁷⁴⁰ BADINTER, "L'adhésion de l'Union européenne à la Convention Européenne de Sauvegarde des Droits de l'Homme", 2010, at 7. In a Working Document the Commission argues that "the general features of those procedural rules would be similar to those governing the preliminary ruling procedure." See DS 1930/10, of 22/12/2010, para. 5.

⁷⁴¹ CDDH-EU(2011) 02, at 3. Noting that a mere informal non-binding opinion of the CJEU will not be enough in light of Opinion 1/91, see JACQUÉ, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 2011, at 1021.

⁷⁴² Judge TIMMERMANS, Hearing before the Constitutional Affairs Committee of the European Parliament, 18 March 2010. Considering the difficulties of involving the Commission in this proceeding see LOCK, "EU Accession to the ECHR", 2010, at 793; LOCK, "Walking on a Tightrope", 2011, at 1049. Suggesting instead the involvement of the first AG see JACQUÉ, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 2011, at 1021. The Commission proposed in its Memorandum of 1979 the establishment of an internal mechanism in form of a notice to be given by the CJEU to the institution representing the Community before the EctHR.

⁷⁴³ CDDH(2002)10, paras. 75-77.

⁷⁴⁴ See Joint Communication of Presidents COSTA and SKOURIS.

⁷⁴⁵ Pursuant to Article 218(11) TFEU.

⁷⁴⁶ JACQUÉ, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 2011, at 1021, noting that the reference should be asked when the Union becomes party in the proceedings and that either the Commission or the First Advocate-General could be entrusted with the referral. The Commission also argued that the procedure should be similar to existing preliminary references. See Working Document DS 1930/10, para. 5. Noting that these provisions do not offer complete protection against the risk of divergence between the two courts see ARNULL, "From Charter to Constitution and Beyond", 2003, at 788.

⁷⁴⁷ Opinion 1/91, [1991] ECR I-6079.

⁷⁴⁸ Although the EctHR has no power to annul Union acts. See Draft Explanatory Report to the Agreement on the Accession, para. 60: "[t]he prior involvement of the CJEU will not affect the powers and jurisdiction of the Court. The assessment of the CJEU will not bind the Court."

under which the Commission should be involved are not clear. There are a number of issues to be decided which could influence decisively the functioning of the Union's judicial system. Firstly, although it would be plausible to allow the Commission to have the case reviewed by the CJEU as it represents the EU before the EctHR, and would be in line with a power which the Commission already has under Article 263(2) TFEU, the power to initiate judicial review under such provision is merely discretionary, and it could become binding under the accession agreement. Secondly, it is not clear which effect will the time-bar set forth in Article 263(6) TFEU and the TWD doctrine would be in this context.⁷⁴⁹ The need for the CJEU to deliberate *quickly* could also entail the need to extend the accelerated procedure to these matters.⁷⁵⁰ More significantly, however, is the fact that in the current state of Union law, there is no "purely fundamental rights review."⁷⁵¹ Under its legality competence, the CJEU controls the validity of Union acts on any grounds established in Article 263 TFEU. Although the limitation to Convention rights review would be novel in the context of the EU, this aspect should not be ignored when discussing the scope of judicial review of Union acts under the novelties brought along by the Lisbon Treaty.⁷⁵² In fact, in a situation where no preliminary ruling on validity took place, the applicant may later bring a case before the EctHR and "provoke" the existence of such reference within the co-respondent mechanism. In such case, it would probably be advisable and more adequate from a procedural point of view to make such reference mandatory already for national courts.⁷⁵³ This would be relevant regarding Convention rights. However, one could argue that such solution would introduce a distinction in the means available to ensure protection of Convention rights and other fundamental rights. This differentiation would probably not make much sense in the context of Union law. In light of the foregoing, one could further argue that Convention rights review – along with other fundamental rights – should *tendentiously* take place *directly* within the context of an action for annulment. In fact, in order to avoid a later reference within the co-respondent mechanism it would be convenient that the CJEU took the opportunity to decide an action for annulment brought on the grounds of (Convention) fundamental rights. This circumstance should lead to a liberalization of standing requirements on these grounds.⁷⁵⁴

III. The future of the Draft Agreement on Accession is still uncertain, especially considering the most likely intervention of the CJEU prior to accession pursuant to Article 218(11) TFEU. Surely, one could argue that the CJEU will have at a certain point to accept accession.⁷⁵⁵ However, the wording of Declaration on Article 6(2) to the TEU and of Protocol no. 8 to the Lisbon Treaty

⁷⁴⁹ For further developments see LOCK, "Walking on a Tightrope", 2011, at 1050-1052.

⁷⁵⁰ Joint Communication of Presidents COSTA and SKOURIS, para. 2; Draft Explanatory Report to the Agreement on the Accession, para. 61.

⁷⁵¹ LOCK, "Walking on a Tightrope", 2011, at 1053.

⁷⁵² Questioning the compatibility with such limited review under Article 263 TFEU, and considering that the intervention of the CJEU should extend to all grounds of review see LOCK, "Walking on a Tightrope", 2011, at 1053.

⁷⁵³ German courts have considered that national judges must be particularly attentive to preliminary rulings on fundamental rights grounds. See *infra* Chapter 2, Section 2.1.5(b).

⁷⁵⁴ See *infra* Chapter 2, Section 2.1.5.

⁷⁵⁵ On the autonomy of the EU legal order one should note that Article 6(2) TEU may be regarded as a limit to such autonomy, which would presuppose that this provision has some substantive content and is not merely an attribution of external competence see LOCK, "Walking on a Tightrope", 2011, at 1032, 1033.

give the CJEU sufficient leeway to *veto* any draft agreement, especially in light of its previous case-law regarding participation of the Union in international agreements which establish mechanisms of judicial control.⁷⁵⁶ It is not the place to dwell on such difficulties. However, one should note that “it is axiomatic that agreements which provide for the jurisdiction of a court outside the EU legal system are likely to come into conflict with the autonomy of Union law.”⁷⁵⁷

2. ACCESS BY PRIVATE PARTIES TO THE CJEU UNDER THE LISBON TREATY: REFORMING JURISDICTION WITHIN THE UNION’S JUDICIAL SYSTEM

2.1. A New Test on *Locus Standi* of Private Parties: the Scope and Meaning of the new Article 263(4) TFEU

2.1.1 General Remarks: the Lisbon Treaty and the Establishment of a *Pro Actore* Approach

I. Despite the broad range of reforms introduced by the CT in 2004, neither the Convention nor the Intergovernmental Conference (IGC) considered it necessary to introduce substantial amendments to the Union’s judicial system, which was left largely unmodified. A specific Discussion Circle was established, with the mission to consider possible changes to the role, structure and functioning of the Union courts, and most of the proposals put forward were retained by both the Convention plenary and, later, the IGC. However, these proposals concerned mainly the nomenclature and structure of the Union judicature, and the procedure for judicial appointments: “[t]he debate about the future of the Court, which had so recently been conducted in the context of the reforms agreed at Nice – incidentally, yet to be given full implementation – was not reopened.”⁷⁵⁸

The most significant change introduced in Lisbon was the abolition of the “three-pillar” structure operated by Articles 1 TEU and 1 TFEU. With the collapsing of the pillars the former third pillar was integrated into the “mainstream of EU law”⁷⁵⁹ and transformed from “weak public international law to ‘strong EC law’.”⁷⁶⁰ Surely, some traces of intergovernmentalism are said to remain. Although formally integrated into the *first pillar*, the PJCCM still maintains some traces of its previous nature foreseeing the protection of national competences in certain instances.⁷⁶¹ These

⁷⁵⁶ See Opinion 1/91, [1991] ECR I-6079; Opinion 1/00, [2002] ECR I-3493; Opinion 1/09, [2011]. For further developments on the meaning of these opinions under the principle of autonomy of the EU legal order see LOCK, “EU Accession to the ECHR”, 2010, at 781-783; LOCK, “Walking on a Tightrope”, 2011, at 1028 *et seq.* Discussing the co-respondent mechanism in light of the foreseeable opinion of the CJEU see JACQUÉ, “The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 2011, at 1011 *et seq.* See also Opinion 1/76, [1977] ECR 741, on Draft Agreement establishing a European laying-up fund for inland waterway vessels.

⁷⁵⁷ LOCK, “Walking on a Tightrope”, 2011, at 1033.

⁷⁵⁸ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 99.

⁷⁵⁹ PEERS, “Mission Accomplished?”, 2011, at 661.

⁷⁶⁰ HINAREJOS, “The Lisbon Treaty *Versus* Standing Still”, 2009, at 100. For a comprehensive analysis of the Lisbon reform over the third pillar see BAKER; HARDING, “From Past Imperfect to Future Perfect?”, 2009, at 43 *et seq.*; PIÇARRA, “O Tratado de Lisboa e o Espaço de Liberdade, Segurança e Justiça”, 2011, at 135 *et seq.*

⁷⁶¹ E.g., Article 76(b) TFEU; Articles 82(3) and 83(3) TFEU; Articles 86, 87(3) and 89 TFEU; Articles 82(3), 83(3), 86(1) and 87(3) TFEU; Article 72 and Article 276 TFEU. The availability of several national out-puts allows also for

aspects should be considered, however, exceptions to the new general spirit underlying the development of such policy.⁷⁶²

The abolishment of the pillar structure and the “*retour à l’unité*”⁷⁶³ have important judicial consequences as it entails a substantial extension of the CJEU’s jurisdiction. In fact, the pre-Lisbon limitations established in Articles 68 TEC and 35 TEU – which foresaw a system regarded “as opaque, incoherent and generally unsatisfactory”⁷⁶⁴ – were fully abolished and the CJEU’s jurisdiction extends now to the whole area of freedom, security and justice, established in Title V TFEU. This change has been welcomed by scholars.⁷⁶⁵ In addition, it has been noted that there may be in the future a substantial body of legislation adopted in these areas.⁷⁶⁶ JACOBS has noted that “it is very clear that the Court of Justice will have to tread a careful path in what way may prove a metaphorical minefield.”⁷⁶⁷

Nonetheless, the Lisbon Treaty introduced important limitations to the CJEU’s jurisdiction in these matters. Firstly, there is a Protocol attached to the Treaty postponing the entry into force of the newly extended jurisdiction of the CJEU to the PJCCM to a maximum limit of five years counting from the date of the entry into force of the revision Treaty.⁷⁶⁸ As a consequence of this Protocol, Article 35 TEU remains applicable until 1 December 2014 with respect to the Third Pillar acts existing on 1 December 2009.⁷⁶⁹ Secondly, pursuant to Article 276 TFEU the CJEU does not have jurisdiction to “review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”⁷⁷⁰ This provision is fully in line with Articles 4(2) TEU and 72 TFEU.⁷⁷¹ Thirdly, Denmark, Ireland and the United Kingdom negotiated special protocols in these matters, maintaining the possibility of opting-out of the AFSJ and prolonging the so-called

intergovernmentalism to enter “through the back door.” See LADENBURGER, “Police and Criminal Law in the Treaty of Lisbon”, 2008, at 31 *et seq.*; OTT, “Depillarisation”, 2008, at 35 *et seq.*; PEERS, “Mission Accomplished?”, 2011, at 685 *et seq.*

⁷⁶² Which can also be found in other Union policies, for instance regarding social security issues pursuant to Article 21(3) TFEU, the right to vote of European citizens pursuant to Article 22 TFEU and even in certain cases of free movement of capitals under Article 64(3) TFEU.

⁷⁶³ LABAYLE, “L’espace de liberté, de sécurité et de justice dans la Constitution pour l’Europe”, 2005, at 441.

⁷⁶⁴ JACOBS, “The Lisbon Treaty and the Court of Justice”, 2012, at 202.

⁷⁶⁵ See e.g., LABAYLE, “L’espace de liberté, de sécurité et de justice dans la Constitution pour l’Europe”, 2005, at 453 *et seq.*; PIÇARRA, “O espaço de liberdade, segurança e justiça após a assinatura do Tratado que estabelece uma Constituição para a Europa”, 2005, at 17 *et seq.*; ENGSTRÖM, “Recent and Potential Future Developments in Judicial Protection in the European Area of Freedom, Security and Justice”, 2009, at 487; LECZYKIEWICZ, “Effective judicial protection’ of Human Rights after Lisbon”, 2010, at 326; PEERS, “Mission Accomplished?”, 2011, at 681 *et seq.*

⁷⁶⁶ JACOBS, “The Lisbon Treaty and the Court of Justice”, 2012, at 203. The “Stockholm Programme” established the framework of Union policies in these areas for 2010-14, and touches on many sensitive issues and has thus proved controversial.

⁷⁶⁷ JACOBS, “The Lisbon Treaty and the Court of Justice”, 2012, at 203.

⁷⁶⁸ See Article 10 of Protocol 36.

⁷⁶⁹ BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, at 719. This limitation only applies to acts adopted before the Lisbon Treaty. Legislation passed after that date and pre-existing measures which are amended after Lisbon are subject to the full jurisdiction of the CJEU.

⁷⁷⁰ The new provision only covers the instances to which Article 35(5) TEU applied leaving aside the restrictions of Article 68(2) TEC, and therefore does not apply to the reintroduction of Schengen internal borders. For further developments see CARRUTHERS, “The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs”, 2009, at 795; HINAREJOS, *Judicial Control in the European Union*, 2009, at 74 *et seq.*

⁷⁷¹ For further developments on the scope of these provisions see HINAREJOS, *Judicial Control in the European Union*, 2009, at 107.

variable geometry system in this regard.⁷⁷²

As I have dealt elsewhere with the scope of these provisions⁷⁷³ and they concern the validity of Member State action, it is superfluous to deal with them here in detail. Suffices to say that these provisions seem to originate an unjustifiable limitation regarding the standard of review, in so far as Member State action within the scope of Union law cannot be reviewed by the CJEU, notably under the proportionality principle. Nonetheless, one should note that Article 276 TFEU is now applicable within the framework of a single *Union of law* – contrary to former Article 35(5) TEU – which may compel the Court to consider that compliance with EU standards of fundamental rights should apply to all national state action.⁷⁷⁴ Also, some scholars have considered that as a limitation to the jurisdiction of the CJEU, former Article 35(5) TEU should be interpreted restrictively⁷⁷⁵ – which would now be valid regarding Article 276 TFEU –, and that the CJEU should interpret the latter provision “in a manner that ensures due respect for human rights” is guaranteed regarding PJCCM measures “whether adopted by the Union institutions or implemented by the Member States.”⁷⁷⁶

II. Regarding judicial review of Union acts under the CJEU’s general jurisdiction, the Lisbon Treaty introduced significant changes in current Article 263 TFEU. To begin with, at the institutional level, the Lisbon Treaty extended judicial review by the CJEU to acts adopted by the European Council and to acts adopted by bodies or agencies of the Union which are intended to produce legal effects *vis-à-vis* third parties. It is significant that judicial review now extends to all authorities of the Union and to all forms of illegality. As the European Council becomes one of the institutions of the Union which adopts acts intended to produce legal effects it was logical to include its acts in Article 263 TFEU.⁷⁷⁷ It has been noted that while challenges to European

⁷⁷² See e.g., LADENBURGER, “Police and Criminal Law in the Treaty of Lisbon”, 2008, at 23. See Protocols no. 19 to no. 22. If the United Kingdom decides to opt-out under Article 10(4) and (5) of the Protocol 36, the complexity of the opt-out/opt-ins regimes may become even more Byzantine. Scholars have been critic of both the complexity and the symbolic message of such protocols. In particular, regarding the United Kingdom it is the first time an EU Treaty allows a Member State to withdraw from existing *acquis*. However, these protocols do not in themselves raise issues of legitimacy as regards the jurisdictional powers of the Court since the relevant acts do not apply to the opted-out Member State. See DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 682 *et seq.*

⁷⁷³ MARTINS, *The Court of Justice of the European Union and the Collapsing of the Pillars*, 2011, at 65 *et seq.*

⁷⁷⁴ Noting some divergences in the language versions of the Treaty see WEYEMBERGH; RICCI, “Le Traité de Lisbonne et le contrôle juridictionnel sur le droit pénal de l’Union européenne”, 2009, at 250. In cases of mixed questions, the CJEU should be allowed some leeway to answer the relevant questions, although leaving some margin for national courts, for instance regarding the application of the proportionality test, as done in Case C-423/98, *Alfredo Abore*, [2000] ECR I-5965.

⁷⁷⁵ See CARRUTHERS, “The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs”, 2009, at 795. The case-law of the Court of Justice shows that the concept of public security does not have a single meaning. Thus the concept covers both the internal security of a Member State and its external security. See Case T-174/95, *Svenska Journalistförbundet/Council*, [1998] ECR II-2289, para. 121.

⁷⁷⁶ *Ibid.*, at 802. One should further note that the new provision inserted in Article 267 TFEU concerning persons held in custody, which will presumably imply the application of the accelerated or urgent preliminary reference procedures, may be especially relevant regarding the AFSJ.

⁷⁷⁷ The European Council is however not included amongst the privileged or semi-privileged applicants who are entitled to seek judicial review. This entails an asymmetry which does not apply to any other institutions, and which is even more bizarre as the European Council may bring an action for failure to act. Noting the oddness of the solution embodied in the current version of the Treaties and suggesting that the CJEU might consider the Council to be covered by the *Chemobyl* case-law see CRAIG; BURCA, *EU Law*, 2011, at 490. Also suggesting that the European Council and other bodies or agencies of the EU should be allowed to challenge the Union acts see PAIS, “Assimetrias no contencioso da União Europeia depois de Lisboa e a sensação de *déjà vu*”, 2012, at 94-96. Further, as the draftsmen

Council's acts may be relatively rare — especially those brought by private applicants — “it is symbolically significant that jurisdiction now extends for the first time to the supreme political authority of the Union.”⁷⁷⁸ In fact, although the European Council exercises essentially political competences and not legislative ones, it “does have powers to take a remarkably wide range of decisions having legal effect, ranging from determination of the existence of a serious and persistent breach of the Union's values by a Member State to the decision following an ‘emergency brake’ on the adoption of a CFSP decision.”⁷⁷⁹

More significant from the point of view of individuals, judicial review extends currently to the acts of all Union bodies, offices and agencies. It could be argued that this change follows with the Charter of Fundamental Rights which provides for protection from all sources of Union law.⁷⁸⁰ Although it is fully in line with the previous case-law of the CJEU in this respect⁷⁸¹, it is now particularly relevant regarding the action of agencies established under the previous TEU. In fact, second and third pillar agencies, created by the Council, are generally considered to be mere information and coordination agencies.⁷⁸² In principle such agencies have no legislative role or decision-making powers, and are limited to information exchange and coordination functions.⁷⁸³ However, cases like *Spain/Eurojust* show that some of these agencies can adopt acts that affect individuals.⁷⁸⁴ As Eurojust and Europol belong to the institutional framework of the EU, actions for annulment may be brought by or against these agencies. Moreover, in the future, it is likely that the role of these agencies will grow. Eurojust may in the future “initiate criminal investigations directly” pursuant to Article 85(1)(a) TFEU. Also the mandate of Europol is widened under Lisbon, pursuant to Article 88(2) TFEU which goes further than former Article 30(2) TEU. Consequently, scholars have noticed that the fact that Europol becomes operational and not only managerial prompts “questions as to the arrangements that will have to be laid down in the future to monitor its activities.”⁷⁸⁵ The Lisbon Treaty foresees parliamentary control of both agencies and extends judicial control. Hence, to the extent that in the future these agencies adopt acts which are intended to produce legal effects on individuals these acts may be reviewed by the CJEU. The new

seem to have forgotten to alter Article 51 of the Statute of the CJ, the GC seems to be competent to rule on actions brought against acts of the European Council. See BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, at 717.

⁷⁷⁸ JACOBS, “The Lisbon Treaty and the Court of Justice”, 2012, at 199.

⁷⁷⁹ For an analysis of the provisions in the current Treaties which enable the European Council to take decisions having legal effects see PIRIS, *The Lisbon Treaty*, 2010, Appendix 6.

⁷⁸⁰ JACOBS, “The Lisbon Treaty and the Court of Justice”, 2012, at 199. See Article 51(1) of the Charter.

⁷⁸¹ Case T-295/01, *Nordmilch/OHIM (OLDENBURGER)*, [2003] ECR II-4365; Case T-411/06, *Sogelma/EAR*, [2008] ECR II-2771. However, such bodies can only challenge the legality of Union measures under Article 263(4) TFEU, i.e. by demonstrating standing requirements as private applicants must do. The point was object of a large debate within the European Convention (see CONV. 636/03, CERCLE I 13, Final Report of the Discussion Circle on the Court of Justice, 25/3/2003, paras. 24-26).

⁷⁸² At present there are three second pillar agencies, which are the European Defence Agency (EDA), the European Union Institute for Security Studies (ISS) and the European Union Satellite Centre (EUSC), and three third pillar agencies, which are the European Police College (CEPOL), the European Police Office (EUROPOL), and the European Union's Judicial Cooperation Unit (EUROJUST).

⁷⁸³ See CRAIG, *EU Administrative Law*, 2012, at 153 *et seq.* Specifically on the creation of Europol and Eurojust, see MITSILEGAS, “The Third Wave of Third Pillar Law”, 2009, at 549 *et seq.*; DE MOOR; VERMEULEN, “The Europol Council Decision”, 2010, at 1089-1121.

⁷⁸⁴ Noting that both Europol and Eurojust have extensive powers to collect and store information about individuals, which raises concerns about data protection see DOUGLASSCOTT, “The rule of law in the EU”, 2004, at 234.

⁷⁸⁵ HINAREJOS, *Judicial Control in the European Union*, 2009, at 118.

solution covers unquestionably *Spain/Eurojust* type of cases. However, some other situations may be less clear. Would, for instance, the decision to initiate a criminal investigation taken by Eurojust be reviewable or would it be considered a preparatory act for purposes of an action for annulment?⁷⁸⁶ How the CJEU will apply traditional concepts developed in the context of the former Article 230 TEC to the whole scope of Union law is for the moment open to speculation. One should note that Europol may in the future adopt acts of a purely executive nature, which do not intend to produce legal effects *vis-à-vis* third parties and which, consequently, may not be reviewable pursuant to Article 263 TFEU. In these cases, judicial control could only take place through actions for damages brought either under EU law (Article 340 TFEU) or national law.⁷⁸⁷ Nonetheless, the situation is certainly more serious regarding second pillar agencies whose actions seem to continue to be excluded from the CJEU's jurisdiction insofar as the Court lacks competence to review CFSP measures (Article 275 TFEU).⁷⁸⁸

Lastly, at the institutional level, the Committee of Regions became a semi-privileged applicant under Article 263 TFEU, although under the Protocol on the Principle of Subsidiarity and Proportionality it can also bring an action for annulment against an act which it deems to infringe the principle of subsidiarity even if such action is not brought for the purpose of protecting its prerogatives.⁷⁸⁹

III. Notwithstanding, the most significant change introduced in Article 263 TFEU is included in its para. 4 and regards the standing of individuals to bring actions for annulment. This was the first ever change introduced in the standing of natural or legal persons to bring actions for annulment.⁷⁹⁰ Pursuant to the newly drafted Article 263(4) TFEU private parties may challenge an act of the Union if and when (i) they are the addressees of such act, (ii) the act is of direct and individual concern to them, and (iii) against regulatory acts which do not entail implementing measures and are of direct concern to them.

Former Article 230(4) TEC was regarded by the members of the European Convention “as a provision that had constitutional significance of an extent that could impact on the legitimacy and the general approach of the Court in performing its constitutional function.”⁷⁹¹ One should recall that, chronologically, the Draft Treaty establishing a Constitution for Europe was elaborated in the aftermath of the debate surrounding the *UPA* and *Jégo-Quéré* cases. While the Convention did not establish a Working Group to look specifically at judicial remedies, the question of effective judicial remedies and access of individuals to the CJEU was object of reflection by Working Group

⁷⁸⁶ *Ibid.*, at 119.

⁷⁸⁷ Noting some of the difficulties surrounding these actions see HINAREJOS see *ibid.* at 119.

⁷⁸⁸ See *infra* Section 2.2.

⁷⁸⁹ Nonetheless, the regions of Member States themselves remain non-privileged applicants. See Case C-95/97 *Région Wallonne/Commission*, [1997], ECR I-1787; Case C-417/04 P, *Regione Siciliana/Commission*, [2006] ECR I-3881. For a detailed analysis see VAN NUFFEL, “What’s in a Member State?”, 2001, at 871-901; THIES, “The *Locus Standi* of the Regions before EU Courts”, 2011, at 25-53. Pursuant to Article 8 of the Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality, national parliaments acting through their Member States were also granted access to actions for annulment on grounds of infringement of the principle of subsidiarity by a legislative EU act, although the action should formally be brought by the Member States.

⁷⁹⁰ SCHWENSFEIER, “The TWD Principle Post-Lisbon”, 2012, at 156.

⁷⁹¹ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 14.

II, concerned with the incorporation of the Charter of Fundamental Rights and with accession to the ECHR. In a paper presented by the Chairman of the group, the various suggestions were drawn together and three possible solutions were put forward.⁷⁹² The first was to introduce a new special action enabling individuals to challenge Union acts, including those of general application, directly in the CJEU on the grounds of violations of the applicants' fundamental rights. The second focused on amending Article 230(4) either by (i) making "direct" and "individual" concern alternative conditions⁷⁹³, (ii) adopting a stricter version of the *Jégo-Quéré* test, adding, at the end of ex-Article 230(4), the words "or against an act of general application which is of direct concern to the applicant without calling for a measure of implementation", or (iii) providing for direct actions against acts of general application which are of direct concern to the applicant "where there is no [adequate] remedy before a national court or tribunal." The final set of suggestions concentrated on the obligation of Member States to provide for effective rights of action, which could compel national courts to fill in the existing *lacunae*.⁷⁹⁴

In the Discussion Circle on the CJEU established under the European Convention the issue was controversial. Some members considered that the former drafting satisfied the essential requirements for providing effective judicial protection to private parties, whereas others considered it necessary to include the possibility of challenging acts of general application.⁷⁹⁵ The first group considered that within the EU decentralized judicial system based on the principle of subsidiarity, it was mainly national courts which were called upon to defend the rights of individuals and which could refer questions to the CJ for a preliminary ruling on the validity of a Union act. It would therefore not be necessary to make any substantive changes to previous Article 230(4) TEC. These members felt, on the other hand, that it would be appropriate for the CT to mention explicitly that, in accordance with the principle of loyal cooperation as interpreted by the CJEU, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such act. *Per contra*, according to the second group, the conditions of admissibility laid down in Article 230(4) TEC were too restrictive. Therefore, some members proposed the following solutions: (i) separate the two conditions, which would no longer be cumulative; (ii) replace "and individual" by

⁷⁹² WD 021, WG II, Document by Mr. ANTÓNIO VITORINO, Chairman of the Working Group and member of the *Praesidium*, "The question of effective judicial remedies and access of individuals to the European Court of Justice", 1/10/2002.

⁷⁹³ Proposal by Professor JÜRGEN MEYER (CONV. 439/02, Brussels, 29/11/2002, "Enforceability of the Charter of Fundamental Rights and improvement of the individual's right to legal redress").

⁷⁹⁴ The matter was dealt with somewhat more briefly in the Working Group's Final Report (CONV. 354/02, Brussels, 22/10/2002).

⁷⁹⁵ For further developments see BERNAT, "The *Locus Standi* of Private Applicants under Article 230 (4) EC and the Principle of Judicial Protection in the European Community", 2003, at 44 *et seq.*; CRAIG, "Standing, Rights and the Structure of Legal Argument", 2003, at 507, 508; For a more detailed analysis of the debate that took place in the European Convention see USHER, "Direct and Individual Concern", 2003, at 595 *et seq.*; BARENTS, "The Court of Justice in the Draft Constitution", 2004, at 121 *et seq.*; LENAERTS; CORTHAUT, "Judicial Review as a Contribution to the Development of European Constitutionalism", 2004, at 39 *et seq.*; VARJU, "Debate on the Future of Standing under Article 230(4) TEC in the European Convention", 2004, at 48 *et seq.*; FLOGAITIS; POTTAKIS, "Judicial Protection under the Constitution", 2005, at 109 *et seq.*; HEFFERNAN, "Effective Judicial Remedies", 2006, at 292 *et seq.*

“and affects his legal situation”; (iii) maintain the previous wording and add “or against a measure of general application which is of direct concern to him without entailing any implementing measure”; (iv) leave the previous wording for legislative acts and allow referral to the CJEU for regulatory acts, which could be the subject of proceedings where they are of direct or individual concern to an individual; (v) giving individuals the right to bring proceedings against legislative acts of the Union which do not entail any implementing measures; (vi) introduce a specific right to bring proceedings for the defence of fundamental rights.

In light of these proposals, the Convention suggested a change to Article 230(4) TEC which was *expressly intended* to broaden access by individuals to the CJEU⁷⁹⁶, which was included in the CT⁷⁹⁷, and later imported by the Lisbon Treaty. The current solution seems to represent a compromise between the positions of the two groups.⁷⁹⁸ Pursuant to current Article 263(4) TFEU individuals may institute proceedings against (i) an act addressed to them, (ii) acts which are of direct and individual concern to them, and (iii) against regulatory acts which are of direct concern to them and do not entail implementing measures.

Thus, the new wording of Article 263(4) TFEU no longer mentions *decisions* that may be challenged by non-privileged applicants, but extends such possibility to all *acts* regardless of the form under which they are adopted.⁷⁹⁹ This new element seems to render nugatory the argument as to whether the individual must prove that the measure is in reality a decision before he/she can challenge it.⁸⁰⁰ As mentioned above, such doubts have in the past created difficulties for applicants wishing to challenge regulations, with some case-law suggesting that in addition to satisfying the requirements of direct and individual concern that applicant should also show that the measure was a “disguised decision.”⁸⁰¹ Moreover, the new wording has clarified the fact that directives can be reviewed as legally binding measures, which is not only in line with recent case-law⁸⁰², but also with the recognition of the direct and indirect effect of such measures.

Scholars have in general been critical of the wording of the new provision. Article 263(4) TFEU was described as a “minimalist solution”⁸⁰³ and a “small step in the right direction.”⁸⁰⁴ It has been considered that the basic policy underlying the system of judicial review in the Treaties remains unchanged.⁸⁰⁵ HEFFERNAN considered that the new provision does not go far enough and

⁷⁹⁶ Article III-270(4) of the Draft Treaty establishing a Constitution for Europe, OJ C 169, 18/7/2003, p. 1-150.

⁷⁹⁷ Article III-365(5) of the Treaty establishing a Constitution for Europe, OJ C 310, 16/12/2004, p. 1-474.

⁷⁹⁸ See CONV. 636/03, CERCLE I 13, Final Report of the Discussion Circle on the Court of Justice, 25/3/2003, at 6-7.

⁷⁹⁹ Welcoming the solution and considering that it allows new instruments to be challenged, such as the Conclusions of the European Council and international agreements see CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 414.

⁸⁰⁰ WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 211.

⁸⁰¹ Nonetheless, it has been noted that the cases in which standing was denied on the ground that the act was not a decision would today be decided, in the same way, on the ground that the applicant was not individually concerned. See HARTLEY, *The Foundations of European Union Law*, 2010, at 374. See *supra* Part I, Chapter 1, Section 1.1.2(b).

⁸⁰² Case T-420/05, *Vischim/Commission*, [2009] ECR II-3841. See *supra* Part I, Chapter 1, Section 1.1.3(b).

⁸⁰³ DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 677. See also CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 249.

⁸⁰⁴ ARNULL, “April Shower for *Jégo-Quéré*”, 2004, at 288; ELIANTONIO; STRATIEVA, “From *Plaumann*, through *UPA* and *Jégo-Quéré*, to the Lisbon Treaty”, 2009, at 8; ELIANTONIO; KAS, “Private Applicants and the Annulment Procedure”, 2010, at 129.

⁸⁰⁵ CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 250; KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 519; DUARTE, “A União Europeia e o sistema europeu de protecção dos direitos

that the definitional puzzles it includes suggest that it was drafted with undue haste and not adequately thought out.⁸⁰⁶ PECH considered that the provision failed to liberalise the current position and introduced a “minor change”⁸⁰⁷ based on the distinction between legislative and regulatory acts. KOMBOS noted that the new provision “offers limited liberalisation of the standing requirements that is unsatisfactory and it introduces a terminological distinction that is *ab initio* blurred due to the lack of clear definitions.”⁸⁰⁸ TOTH considered the new text confusing and as a paradigm of unclear drafting that represented a minor improvement, not sufficiently broad and effective to resolve the problems associated with the strict approach of the CJEU.⁸⁰⁹ In fact, private applicants affected by acts not addressed to them still have to show, as a rule, that they are directly and individually concerned in order to have standing before the Union courts. Therefore, the only avenue to these courts will very often be indirect, *via* the preliminary rulings procedure. Thus, the problems falling into the “complete denial of a remedy” and “denial of an effective remedy” are largely preserved.⁸¹⁰ In fact, direct access for individuals to the Union courts will only be more readily available where two conditions are fulfilled: first, the measures under challenge are *regulatory acts* and, secondly, they *do not entail implementing measures*. This shows that the relaxation of the standing rules *only* aims to overcome the “complete denial of a remedy”⁸¹¹ problem regarding the so-called regulatory acts. In these cases, where there is no national measure that individuals can challenge in national courts, their access to the Union courts has been made easier. In all other cases, however, they still have to seek review in national courts. Furthermore, all of the “denial of an effective remedy”⁸¹² problems remain. Accordingly, although Article 263(4) TFEU has reduced the possibilities of gaps of judicial protection in the EU, it has not eliminated all of them.

Notwithstanding, it is submitted that Article 263(4) TFEU should not be read in isolation. Direct access of individuals to the CJEU should be “re-constructed” in light of the *shift to fundamental rights* introduced by the Lisbon Treaty. Therefore, standing of private parties to challenge the validity of Union acts should be established by focusing on the need to ensure the individuals’ legal protection instead of concentrating on the traditional *objective, institutional* and *systemic* concerns underlying judicial review of Union measures. In fact, it has been considered that the Lisbon Treaty introduced the most far-reaching changes in the judicial system of the EU in the Union’s history which reinforce the role of the CJEU in upholding the rule of law.⁸¹³ In order for that understanding to be proven correct, it is crucial that the CJEU interprets the changes to Article 263(4) TFEU in light of the *constitutional shift* operated by the Lisbon Treaty. Such an interpretation should lead to the acknowledgement of a procedural principle of *in dubio pro actore*

fundamentais”, 2010, at 107, 108.

⁸⁰⁶ HEFFERNAN, “Effective Judicial Remedies”, 2006, at 293.

⁸⁰⁷ PECH, “The Significance of the EU Constitutional Treaty with Particular Reference to the Charter of Fundamental Rights”, NUI, Galway Faculty of Law, 3 Law CPS 2004, at 4.

⁸⁰⁸ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 16.

⁸⁰⁹ See Memorandum of the House of Lords European Union Committee, *The Future Role of the European Court of Justice*, 2003-04, at 42, 43 and 58.

⁸¹⁰ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 519.

⁸¹¹ See *supra* Part I, Chapter 1, Section 1.2.2(a).

⁸¹² See *supra* Part I, Chapter 1, Section 1.2.2(c).

⁸¹³ JACOBS, “The Lisbon Treaty and the Court of Justice”, 2012, at 197.

when assessing access to justice by individuals within the Union's judicial system. To begin with, such an approach implies that the notion of acts intended to have legal effects *vis-à-vis* third parties included in Article 263 TFEU should be understood as encompassing all acts *faisant grief*, i.e. acts which affect the *factual* or *legal* situation of individual applicants. This may imply a clarification of certain less obvious cases.⁸¹⁴ Nevertheless, such clarification does not appear to constitute the main interpretative challenge that the CJEU has to face under the newly drafted Article 263(4) TFEU.

2.1.2 The Notion of Regulatory Acts

I. The key to the interpretation of the new Article 263(4) TFEU lies in the meaning of the term “regulatory act” which can widen or narrow the access of individuals to the CJEU. In fact, the new wording of Article 263(4) TFEU creates “an exception from the rule”⁸¹⁵ by abandoning the requirement of individual concern in cases of regulatory acts which do not entail implementing measures. Only those acts can be challenged more easily in the Union courts. Hence, the extent to which the standing rules have been relaxed can only be understood if the meaning of the term “regulatory act” is ascertained.⁸¹⁶

Scholars have generally criticized the use of this term as it is nowhere defined in the Treaties.⁸¹⁷ In fact, the new provision is inherited from the CT, where a new hierarchy of Union norms and acts was created, and does not fit well with the Lisbon classification of legal acts.⁸¹⁸ Nonetheless, not even the CT included a definition of a “regulatory act” which was regretted in a provision which directly impacts private parties’ procedural rights.⁸¹⁹

Nonetheless, already before the Lisbon Treaty entered into force, the majority of scholars considered that the notion of regulatory act should be interpreted in light of the new hierarchy of norms established in the Treaties and referred only to delegated or executive acts of general application, defined in the old CT as *non-legislative* acts.⁸²⁰ In fact, the CT had introduced a new

⁸¹⁴ See *supra* Part I, Chapter 1, Section 1.1.2(a).

⁸¹⁵ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 519.

⁸¹⁶ *Ibid.*

⁸¹⁷ See e.g., TOTH and ERRERA, in Memorandum of the House of Lords European Union Committee, *The Future Role of the European Court of Justice, 2003-2004*, at 42; KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 16; DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 677.

⁸¹⁸ CRAIG; BÚRCA, *EU Law*, 2011 at 508. See Articles I-33 to I-37 CT.

⁸¹⁹ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 520. Article III-365 TC already casted doubts in this respect. See DOUGAN, “The Convention’s Draft Constitutional Treaty”, 2003, at 790; DASHWOOD; JOHNSTON, “The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty”, 2004, at 1506-1509;

⁸²⁰ See e.g., ARNULL, “From Charter to Constitution and Beyond”, 2003, at 792; DOUGAN, “The Convention’s Draft Constitutional Treaty”, 2003, at 790; USHER, “Direct and Individual Concern”, 2003, at 598; BARENTS, “The Court of Justice in the Draft Constitution”, 2004, at 134; BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*”, 2004, at 1655; DASHWOOD; JOHNSTON, “The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty”, 2004, at 1509; LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 42; WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 214 *seq.*; CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2005, at 250; KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 520; ARNULL, *The European Union and its Court of Justice*, 2006, at 89-90; CORTHAUT; VANNESTE, “Waves between Strasbourg and Luxembourg”, 2006, at 499; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 327; LÜSBERG, “The EU Constitutional Treaty and its Distinction between Legislative and Non-Legislative Acts”, 2006, at 38-39; GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 503, note 83; PARFOURU, “*Locus Standi* of Private Applicants under the Article 230 EC Action for Annulment”, 2007, at 401, note 223; TÜRK, *Judicial Review in EU law*, 2009, at 168-169, noting that the *rationale* for the changes lies in providing private parties with effective judicial protection in case indirect means of review are not available.

classification of Union acts, which once associated with the *locus standi* provisions would improve the coherence of the system of judicial review and reflect the legal traditions of Member States. Although the Lisbon Treaty abandoned the system of sources of law created by the CT, it still provides some guidelines in this respect⁸²¹ and an implied hierarchy among legal acts is said to remain⁸²², although deprived of the previous constitutional nomenclature. Hence, the restrictive approach to the notion of regulatory acts would remain fully justified under Lisbon.⁸²³

Following this view, the only *executive* acts which private applicants cannot challenge directly before the CJEU are the ones which require implementing measures, which would be the rule regarding directives.⁸²⁴ One should note that in contrast with what happened under the CT, regulatory acts may currently take the form of regulations, directives or decisions.⁸²⁵ Hence, regarding *regulatory* regulations, directives or decisions which require implementing measures, individuals would have to wait for such measures to be adopted, either at the European or national level, and then challenge them before the GC or national courts respectively. Legislative acts – which corresponded in the CT to European laws and framework laws⁸²⁶ – either entailing implementing measures or not, would also be preferably subject to indirect review through the preliminary ruling procedure. Here, national courts must do their utmost to provide those seeking to contest the validity of a Union measure with an effective national remedy even if none existed prior to the beginning of the challenge⁸²⁷ – an obligation which could be said to have been reinforced pursuant to the new Article 19(2) TEU.⁸²⁸ Hence, as WARD has put it, in this construction, the legislative or executive nature of a given measure should be the reference point for designating which court, national or Union, should be “the first port-of-call”⁸²⁹ to assess the legality of Union measures.

II. The GC confirmed such view, in its ruling delivered in the case of *Inuit Tapiriit Kanatami*⁸³⁰, in the beginning of September 2011.⁸³¹ This was the first decision of the Union

⁸²¹ See Articles 288 to 291 TFEU.

⁸²² Further evidence of the importance to strict adherence to the hierarchy of legal norms can be found in the substantive chapters of the new Treaties, which are infinitely more rigorous than the old TEC, which rarely referred to specific instruments to be adopted in a certain area. See, for instance, the provisions on the Environment policy (Articles 191-193 TFEU) and Development policy (Articles 212-213 TFEU). See WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 216.

⁸²³ Under Lisbon considering that regulatory acts are *non-legislative acts* see BARENTS, *Hetverdrag van Lissabon*, 2008, at 508; KAUFF-GAZIN, “Les droits fondamentaux dans le traité de Lisbonne”, 2008, at 41; HATJE; KINDT, “Der Vertrag von Lissabon”, 2008, at 1767; WITTE, “The European Judiciary after Lisbon”, 2008, at 47; SCHWENSFEIER, *Individuals’ Access to Justice under Community Law*, 2009, at 330; BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, at 725; CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 415; ELIANTONIO; KAS, “Private Applicants and the Annulment Procedure”, 2010, at 128; MARQUES, “O acesso dos particulares ao recurso de anulação após o Tratado de Lisboa”, 2010, at 101; STREINZ; OHLER; HERRMANN, *Der Vertrag von Lissabon zur Reform der EU*, 2010, at 116; CRAIG; BURCA, *EU Law*, 2011, at 508, considering that regulatory acts are only delegated acts; MONIZ, “Comentário ao Artigo 263.º TFUE”, 2012, at 950.

⁸²⁴ See also BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 543.

⁸²⁵ By contrast, see Article I-35(1) CT, where non-legislative acts could only be regulations or decisions.

⁸²⁶ Article I-34 CT.

⁸²⁷ Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 42.

⁸²⁸ See *infra* Section 2.1.6.

⁸²⁹ WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 221.

⁸³⁰ Case T-18/10, *Inuit Tapiriit Kanatami and others/Parliament and Council*, [2010] ECR II-75. The case is currently pending on appeal before the CJ (Case C-583/11 P, *Inuit Tapiriit Kanatami and others/Parliament and Council*, pending). Before this case, two others were decided after the Lisbon Treaty entered into force. See Case T-532/08, *Norilsk Nickel*

courts on the scope of Article 263(4) TFEU. *In casu*, seventeen applicants challenged the validity of Parliament and Council Regulation no. 1007/2009 on trade in seal products, the purpose of which is to establish harmonised rules concerning the placing on the market of those products.⁸³² The case was referred to the seventh chamber of the GC, extended composition, probably considering the importance of the ruling.⁸³³ Parliament and Council, supported by the Kingdom of the Netherlands and the Commission, raised three pleas of inadmissibility, alleging, respectively, that the contested regulation (i) was not a regulatory act, that it (ii) did not entail implementing measures and that it (iii) did not individually concern the applicants.

The GC started by analysing the meaning of the term “regulatory act” and considered that it “must carry out a literal, historical and teleological interpretation of that provision.”⁸³⁴ In light of this assumption, the GC noted firstly that “it is apparent from the *ordinary meaning* of the word ‘regulatory’”⁸³⁵ that this category covers acts of *general application*. Furthermore, the GC stated that the possibility foreseen in Article 263(4) TFEU *in fine* does not regard *all acts of general application*, but a “more restricted category”⁸³⁶, i.e. regulatory acts. The GC considered that para. 4 should be “read in conjunction” with para. 1 of Article 263 TFEU which sets out a number of acts which can be subject to review, distinguishing legislative acts from “other binding acts intended to produce legal effects *vis-à-vis* third parties.” The latter may be either acts of individual or general application. In light of the foregoing, the GC concluded that regulatory acts are defined *by opposition* to legislative acts, and include *all non-legislative acts of general application*. Although there is no definition of the notion in the Treaties, the GC drew attention to the fact that an interpretation of the word “regulatory” – and of the equivalent word in the different language versions of the TFEU –, as opposed to the word “legislative”, was apparent from a number of other provisions of the TFEU, in particular Article 114 TFEU, which was the litigious legal basis in the case.⁸³⁷ One should note that the word “regulatory” appears only once in the Treaties, besides Article 263(4) TFEU, in Article 207(6) TFEU and is used therein in opposition to legislative action of Member States. The GC further added that it was clear that “the objective of the Member States was not to limit the scope of that provision solely to delegated acts within the meaning of Article 290 TFEU, but more

Harjavalta and Umicore/Commission, [2010] ECR II-3959 and Case T-539/08, *Etimine and Etiproducs/Commission*, [2010] ECR II-4017. However, since the actions were brought in December 2008, the question arose whether the Article 263(4) TFEU was applicable *ratione temporis* to the actions in question and, more generally, to all actions that were pending when the Treaty of Lisbon entered into force. The GC stated that, first, in accordance with the maxim *tempus regit actum* the question of the admissibility of an application must be resolved on the basis of the rules in force at the date on which it was submitted and, second, that the conditions of admissibility of an action are judged at the time of bringing the action, that is, the lodging of the application, a defect in which can be rectified only before the expiry of the period for bringing proceedings.

⁸³¹ For a case comment see MARTINS, “O caso das comunidades inuítes e a noção de “acto regulamentar” estabelecida no artigo 263.º § 4 TFUE”, 2012.

⁸³² OJ L 286, 31/10/2009, p. 36-39. On the merits, the applicants put forward three main arguments: (i) incorrect use of legal basis; (ii) breach of the principles of subsidiarity and proportionality, and (iii) breach of the Article 1 of Protocol no. 1 to the ECHR and Article 8 ECHR, read in light of Articles 9 and 10 ECHR.

⁸³³ Commission and Council had proposed that the case was decided by the Grand Chamber.

⁸³⁴ Para. 40.

⁸³⁵ Para. 42.

⁸³⁶ Para. 43.

⁸³⁷ There are other Treaty provisions where the term “regulation” is used as opposed to Member States legislation. See e.g., Articles 2(5), 19(2), 45(3)(c), 52, 65(1)(b), 79(4), 82(1) TFEU. One should note, nonetheless, that in some of them the expression “law, regulation or administrative action” could also be interpreted as encompassing a distinction between regulatory and administrative action.

generally, to regulatory acts”⁸³⁸ suggesting that also implementing acts adopted under Article 291 TFEU should be deemed included in Article 263(4) TFEU *in fine*.

Secondly, the GC noted that this interpretation is borne out by the *history* of the process which led to the adoption of said provision. Here, the Court mentioned the cover note of the *Praesidium* of the Convention of 12 May 2003, which in spite of the proposal for an amendment to Article 230(4)TEC mentioning “an act of general application”, adopted another one mentioning “regulatory acts.”⁸³⁹ The note clarified that a distinction should be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions brought by individuals against legislative acts.⁸⁴⁰

Thirdly, the GC noted that the *purpose* of Article 263(4) TFEU is to avoid the situation in which such a person would have to infringe the law to have access to a court. However, this is only valid for “a specific category of acts of general application”, *i.e.* regulatory acts, and does not extend to legislative acts. There is an obvious concealed tension underlying this statement of the GC as the gap of protection deriving from the absence of implementing measures arises likewise in the case of legislative or regulatory acts.⁸⁴¹ However, it could be argued that the preparatory works of the CT show that there was a consensus that this provision would only apply to administrative acts, to close the gap originated by *Jégo-Quéré* type of cases.⁸⁴² Nevertheless, scholars have noted that the *Jégo-Quéré* admissibility conditions would have covered both legislative and non-legislative acts of general application, and consequently the opening created by Article 263(4) TFEU is not as large as the one envisaged by the GC in that case.⁸⁴³ Notwithstanding, in light of the foregoing, the GC concluded that:

“[i]t must be held that the meaning of ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application *apart from legislative acts*. Consequently, a legislative act may form the subject-matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them (emphasis added).”⁸⁴⁴

In addition, the Court clarified that both legislative and regulatory acts *not entailing*

⁸³⁸ Para. 48.

⁸³⁹ CONV. 734/03, ANNEX, at 20-21.

⁸⁴⁰ See CONV. 734/03, ANNEX, para. 4. In Working Document no. 21, the Working Group II contended that opening the action for annulment against legislative acts might not be unequivocally acceptable. In the Oral Presentation by the President of the GC (CONV. 575/03), Mr. VESTERDORF, stressed that all members agreed on the fact that “a distinction would be drawn between legislative measures and regulatory measures.” In his view individuals should openly challenge regulatory measures (para. 4). In the Oral Presentation by the President of the CJ (CONV. 572/03), Mr. RODRÍGUEZ IGLESIAS stated that the new hierarchy of acts established under the Constitution could support the establishment of a restrictive approach towards the challenge of legislative measures and a relaxed approach towards the challenge of regulatory measures by individuals (para. 4). When revising the Draft Treaty, the Council Legal Service pointed out that the reference to regulatory acts was not in line with the new terminology on instruments as suggested by the Treaty. The Legal Service assumed that the intention of the authors was to refer to binding non-legislative acts of general application and suggested replacing “a regulatory act” with “a regulation or decision having no addressees” (CIG 4/1/03 REV 1, “IGC 2003 – Editorial and Legal Comments on the Draft Treaty establishing a Constitution for Europe – Basic document”, 6 October 2003). The European Convention and 2003 IGC documents are publicly available at the website of the Convention (<http://european-convention.eu.int>).

⁸⁴¹ See MACHADO, *Direito da União Europeia*, 2010, at 538.

⁸⁴² KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 520.

⁸⁴³ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 327.

⁸⁴⁴ Para. 56.

implementing measures will require proof of direct and individual concern.⁸⁴⁵

III. This interpretation “shifts the distinction between general and individual acts to a new frontier of legislative and non legislative acts”⁸⁴⁶ and raises some concerns from the point of view of judicial protection of individuals. In fact, by choosing to exclude legislative acts which do not entail implementing measures and are of direct concern to the applicants from the scope of Article 263(4) TFEU *in fine*, the GC opted for a *restrictive* approach to the notion of regulatory act. This means that the gaps of protection identified above deriving from the *Plaumann*-formula are perpetuated under Lisbon.⁸⁴⁷ The problem of “denial of an effective remedy” persists in so far as the uncertainties surrounding the use of preliminary references remain the unchanged.⁸⁴⁸ Additionally, the “complete denial of remedy” persists for all acts which are not to be considered regulatory acts which do not require implementing measures.⁸⁴⁹ This is mostly true regarding directives and can be problematic in certain areas where Member States choices seem to have been to adopt mainly legislative acts. For instance, the newly integrated AFSJ (Title V Part III TFEU) establishes in most cases the adoption of acts pursuant to the legislative process, either ordinary or special. Consequently, regarding these acts, in most situations it will be impossible – or at least extremely difficult – for individuals to challenge AFSJ measures directly before the Union courts.⁸⁵⁰ Surely it can be said that regarding these measures individuals can challenge them indirectly through Article 267 TFEU.⁸⁵¹ However, as demonstrated above preliminary references may not provide for an effective and adequate judicial protection of private parties.

The restrictive interpretation adopted by the GC is, however, said to align the Union’s system of judicial review with Member States’ legal traditions.⁸⁵² Surely, in national constitutional systems access to judicial review “often becomes more restrictive as one moves up through the hierarchy of norms.”⁸⁵³ Hence, in the majority of Member States legislative acts are not subject to challenge by private parties: natural and legal persons may only challenge these acts in very special cases, generally when a violation of fundamental rights protected by the national constitution is at stake.⁸⁵⁴ Thus the right of action of private parties is more restricted regarding legislative

⁸⁴⁵ Para. 47. See *infra* Section 2.1.3.

⁸⁴⁶ USHER, “Direct and Individual Concern”, 2003, at 599.

⁸⁴⁷ See *supra*, Part I, Chapter 1, Section 1.1.3. See KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 520; BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 547.

⁸⁴⁸ Noting that the Lisbon Treaty did not close the gap see ELIANTONIO; KAS, “Private Applicants and the Annulment Procedure”, 2010, at 128.

⁸⁴⁹ See also CORTHAUT; VANNESTE, “Waves between Strasbourg and Luxembourg”, 2006, at 499.

⁸⁵⁰ The adoption of non-legislative acts is, for instance, established in Article 75 TFEU which establishes the adoption of implementing (Article 291 TFEU) or delegated acts (Article 290 TFEU). Moreover, some provisions establish the adoption of non-legislative acts which are also not implementing or delegate acts – as happens under Articles 70, 78(3), 86(4) TFEU and with Council decisions pursuant to Articles 81(3), 82(2) and 83(1) TFEU.

⁸⁵¹ Under Lisbon the preliminary rulings mechanism applies fully to the AFSJ “fostering the equality and uniformity of Union law”. See HINAREJOS, *Judicial Control in the European Union*, 2009, at 106.

⁸⁵² WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 214, noting that courts have traditionally played a diminished role in testing primary measures for compliance with the rule of law, on the logic that democratically elected national parliaments have played the principle role in assessing competing interests and formulating policy. By contrast, there is less guarantees regarding secondary measures, where national parliaments have played at best a supervisory role. See also CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 415.

⁸⁵³ DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 678.

⁸⁵⁴ In Germany, direct judicial protection is only granted against administrative acts of general application. Against

measures.⁸⁵⁵ By contrast, private parties may challenge administrative acts and enjoy a wide right of action in this respect.⁸⁵⁶ However, the *rationale* for this solution does not derive from the hierarchy of norms *per se*, but from “the system of democratic accountability that is assumed to underpin it.”⁸⁵⁷ In national legal orders, legislative acts are enacted by parliaments which are said to express the voice of the people and have a key role in the legislative process.⁸⁵⁸ Thus, the existence of judicial control would be less needed regarding acts which are subject to effective parliamentary control. *Per contra*, measures adopted by unelected executive authorities should be more easily subject to judicial control.⁸⁵⁹ However, the application of this reasoning to the EU will probably call for judicial review of all Union legislation. In fact, the “democratic-input”⁸⁶⁰ of Union acts cannot be compared with their national counterparts. The degree of representativity of the European Parliament cannot be compared, neither from a legal or political point of view, with the one of national parliaments.⁸⁶¹ Furthermore, while the European Parliament can still be said to be democratically elected, the Council is not. Thus, the *European legislator* is unequivocally more *distant* from European citizens than its national counterparts⁸⁶² and therefore much less accountable to citizens than national legislators in democratic nation states.⁸⁶³ ARNULL argues that, since the legitimacy of the Union cannot be equated with that of the Member States, it must be

acts of the legislature, only the *Verfassungsbeschwerde* is available as an extraordinary legal remedy admissible at the German Constitutional Court, which requires that the plaintiff is directly, individually and presently concerned by the contested law (Article 93(1)(4a) GG). Moreover § 90 para. 2 ph. 1 of the Law governing the German Constitutional Court (BVerfGE) requires the principle of subsidiarity to be respected, which means that the possibilities of regular judicial relief have to be exhausted before this extraordinary legal remedy can be relied on. See SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 288. See *infra* Section 2.1.5(b).

⁸⁵⁵ Review of legality of primary legislation is limited, for example, in the Netherlands, UK, France, Lithuania. In France, the *recours* is not available against parliamentary acts. Only recently individuals became allowed to challenge the validity of a Parliament’s bill through a referral mechanism from the *Cour de Cassation* or the *Conseil d’État* to the *Conseil Constitutionnel* (Article 61-I of the French Constitution). Nonetheless, because Article 34 of the French Constitution gave Parliament a restricted area of competence, all other matters are dealt with by the government and the *Conseil d’État* considers that what emanates from government is *administrative*. Otherwise a large area of government would be excluded from review. See CROSSLAND, “Rights of the Individual to Challenge Administrative Action before Administrative Courts in France and Germany”, 1975, at 718; JACKSON; TUSHNET, *Comparative Constitutional Law*, 2006, at 509 *et seq.* and 565 *et seq.* English courts cannot also in principle declare a Parliament’s act invalid, although this rule does not apply strictly when EU law is at stake and under the *Human Rights Act*. For discussion see also BREYER, “Judicial Review”, 2000, at 131-143; SIR WILLIAM WADE, “British Restriction of Judicial Review”, 2000, at 267-273; WALDRON, “The Core of the Case against Judicial Review”, 2006, at 1346-1406; FALLON, “The Core of an Uneasy Case for Judicial Review”, 2008, at 1693-1736. For an overview of the situation in Scandinavian countries see SUNDBERG, “Judicial Protection of Human Rights at National Level”, 1991, at 251 *et seq.* Noting that in some Member States the possibility for judicial review of acts of the elected legislator is rather limited, because it is hard to see why the assessment of a judge should always prevail over the opinion of a democratically elected parliaments, see LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 33.

⁸⁵⁶ See also ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 30 *et seq.*

⁸⁵⁷ DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 678.

⁸⁵⁸ See WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 214.

⁸⁵⁹ Noting the democratic weaknesses of comitology procedures and considering that individuals should be allowed to challenge any *Union executive measures* on the basis of a mere interest in bringing the proceedings see WARD, “*Locus Standi* under Article 230(4) of the EC Treaty”, 2003, at 72.

⁸⁶⁰ LENAERTS, “Le Traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l’Union”, 2009, at 726.

⁸⁶¹ WAELBROECK, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires”, 1995, at 436; RAGOLLE, “Access to Justice for Private Applicants in the Community Legal Order”, 2003 at 101; LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 33; Opinion of AG JACOBS in *UPA*, paras. 89-90.

⁸⁶² See also SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 299.

⁸⁶³ KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 526.

“whiter than white”⁸⁶⁴ in order to reconnect with ordinary people. Accordingly, it would be inappropriate to make access to the Union courts dependent on the type of act under review.⁸⁶⁵

In addition, one should note that the *privileged position* of legislative acts in comparison to executive acts regarding judicial review is justified by the fact that they are adopted within a procedure which involves a participation of a broad spectrum of interests which endow them with a high level of legitimacy.⁸⁶⁶ Thus, a *genuine* legislative procedure can only be acknowledged in the EU when the Commission, the Council and Parliament have sufficient access to the lawmaking process in order to fulfil their functions. This may be said to happen only with the assent and more obviously with the co-decision procedures.⁸⁶⁷ Under Lisbon, even if one can overcome the discussion on whether Union legal acts deserve the term “legislative” – provided that the lawmaking process ensures adequate representation of the interests represented by the Union institutions⁸⁶⁸ –, it is important to note that there are two main kinds of legislative procedures in the EU: the ordinary procedure and the legislative special procedures. The ordinary procedure where Parliament and Council participate in equal footing is not introduced in all areas of Union competence. Furthermore, the special legislative procedures may involve a “weak participation”⁸⁶⁹ of Parliament. In fact, the majority of cases in which the special legislative procedures apply concern the adoption of Council acts after *mere consultation* with Parliament.⁸⁷⁰ Hence, as TÜRK has put it, “it is difficult to see on what grounds such a procedure should be regarded as legislative.”⁸⁷¹ Indeed, this procedure is indistinguishable from the procedure which leads to the adoption of non-legislative acts, such as that provided for under *e.g.*, Article 103(1) TFEU. The notion of legislative acts under Lisbon is thus “*trop hétérogène*.”⁸⁷² In light of the above, some scholars have considered that the “limitation of judicial protection can only be justified in relation to Union legislative acts which are *functionally equivalent* to national legislation.”⁸⁷³ Acts of general application adopted within the special legislative procedures “where one branch of the legislative authority is merely consulted cannot occupy such a privileged position”⁸⁷⁴ and should be considered regulatory acts for purposes of Article 263(4) TFEU.⁸⁷⁵

⁸⁶⁴ ARNULL, “April Shower for *Jégo-Quéré*”, 2004, at 288.

⁸⁶⁵ USHER, “Direct and Individual Concern”, 2003, at 599. Noting also that the distinction between legislative and non-legislative acts in the Treaties is often sometimes formalistic an arbitrary, and extend the effects of such flawed distinction to Article 263(4) TFEU would merely serve to magnify that formalism and arbitrariness see DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 678, 679.

⁸⁶⁶ TÜRK, *The Concept of Legislation in European Community Law*, 2006, at 228.

⁸⁶⁷ *Ibid.*, at 238.

⁸⁶⁸ TÜRK, “Lawmaking after Lisbon”, 2012, at 68. See also WEILER, “Does Europe need a Constitution?”, 1995, at 219.

⁸⁶⁹ See TÜRK, “Lawmaking after Lisbon”, 2012, at 69.

⁸⁷⁰ *Ibid.*, with indication of the respective Treaty provisions.

⁸⁷¹ *Ibid.* Scholars have identified thirty different procedures by which binding acts can be adopted on the basis of the TFEU, besides the ones adopted under the TEU: four variants of the ordinary legislative procedure; seven kinds of special legislative procedure; and nineteen ways of adopting non-legislative acts directly grounded on the TFEU. See BEST, “Legislative Procedures after Lisbon”, 2008, at 95. See also LENAERTS; DESOMER, “Towards a Hierarchy of Legal Acts in the European Union?”, 2005, at 744-765; CRAIG, *The Lisbon Treaty*, 2010, at 246-285.

⁸⁷² ROUX, “Les actes”, 2008, at 55.

⁸⁷³ TÜRK, “Lawmaking after Lisbon”, 2012, at 73.

⁸⁷⁴ *Ibid.*, noting that in substantive terms the characterization of legal acts as legislative has already led the CJEU to apply a more marginal standard of review.

⁸⁷⁵ This also extends to non-legislative acts adopted directly based on the Treaties. See TÜRK, *Judicial Review in EU law*, 2009, at 169. This distinction should also apply regarding the right to be heard. See TÜRK, “Lawmaking after

Moreover, an argument built on the hierarchy of legal norms would imply restricting the ability of individuals to challenge Union legislation by any means.⁸⁷⁶ However, in the EU, legislative acts are subject to collateral challenge, which also weakens the “democratic-pedigree” argument. In fact, regarding the challenge of Union legislation the question seems to lie in the decision between direct or indirect challenge, and not between the possibility or the impossibility of a challenge.⁸⁷⁷ Again, as seen above, there are good reasons to believe that direct challenge is preferable from the point of view of the adequate and effective judicial protection of private parties.⁸⁷⁸ Otherwise, the possibility to challenge legislative acts would become wider or narrower depending on the “arbitrary factor of how far national rules on standing will permit such indirect actions to proceed.”⁸⁷⁹

Furthermore, one should note that challenges to administrative acts in the Member States are not made dependent on the *regulatory* nature of the act nor on the existence of implementing measures. Hence, scholars have noted that Article 263(4) TFEU does not go far enough as it would have been preferable to allow the challenge of *all non-legislative acts* provided that the applicants demonstrate a *legal interest*, rather than imposing the requirement of proving that the contested is a regulatory act of direct concern not entailing implementing measures.⁸⁸⁰ Moreover, Article 263(4) TFEU *in fine* implies that *all regulatory acts which require implementing measures* still require proof of direct and individual concern.⁸⁸¹ This means that unless the CJEU is ready to relax the test of individual concern, standing against administrative acts of general application will be still more limited under the Treaties than it is in Member States legal orders.⁸⁸²

Regarding the notion of regulatory acts as referring to acts of general application it also remains to be seen how the CJEU will address the issue of certain *hybrid* EU acts, notably decisions addressed to Member States.⁸⁸³ As seen above, this type of acts has a mixed nature.⁸⁸⁴ Although enacted in form of decisions, they produce legally binding effects *vis-à-vis* a plurality of individuals, which have been in certain circumstances allowed to challenge them directly. It remains to be seen if the CJEU will consider these acts as covered by Article 263(4) TFEU *in fine* or will continue to

Lisbon”, 2012, at 72. Also considering that the democratic legitimacy the European Parliament conveys to Union measures is not comparable with that of national parliaments see TOTH, “The Individual and European law”, 1975, at 705; SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 299. This author considered that the individual’s judicial protection should be enhanced by granting a remedy for objections only to regulations issued by the Commission. Regulations with law-like character would however not be directly objectionable by individuals. An exception to this should be made for antidumping-regulations issued by the Council as their content is mainly administrative in nature.

⁸⁷⁶ DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 678.

⁸⁷⁷ BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 547.

⁸⁷⁸ See *supra* Part I, Chapter 1, Section 1.2.2. See Opinion of AG in *UPA*, paras. 45-49.

⁸⁷⁹ DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 678.

⁸⁸⁰ See WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 218.

⁸⁸¹ See *infra* Section 2.1.3.

⁸⁸² See *infra* Section 2.1.4.

⁸⁸³ KOCK had already drew attention to the issue of European decisions under the CT, which should be deemed challengeable under Article-III 365(4) CT, regardless of the fact that they were not acts of general application. See KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 523. In fact, the term “regulatory acts” should comprise all acts coming from the Union executive, either in the form of regulations or decisions. CORTHAUT and VANNESTE considered that decisions addressed to Member States should be understood as regulatory acts. See CORTHAUT; VANNESTE, “Waves between Strasbourg and Luxembourg”, 2006, at 500.

⁸⁸⁴ See *supra* Part I, Chapter 1, Section 1.1.2(b).

require proof of individual concern.

In light of the above, it is thus highly questionable whether, at the EU level, judicial review at the initiative of individuals should be made dependent on the type of legal act.⁸⁸⁵ In fact, whereas the GC's approach may fix *Jégo-Quéré* situations, applicants in UPA-type of cases will not deserve the same treatment.⁸⁸⁶ It could be asked if those applicants were truly in such different positions after all. As BARENTS has stated, this solution "could lead to the absurd result that if, for example, a prohibition to use fishing nets of a certain type is included in a non-legislative act, an action against this measure is admissible if the condition of 'direct concern' is fulfilled, while if the same prohibition is included in a law of the Union, the admissibility of an action is dependent on whether the person in question is directly *and* individually concerned, which in practical terms means that in the former case the action is admissible while in the latter case it is inadmissible."⁸⁸⁷ In such cases, the legal protection of individuals becomes dependent on the *form of the act* in question, a result which totally contradicts the case-law of the Union courts, according to which only the contents of the act are decisive for the interpretation of the requirement of direct and individual concern.

As a matter of fact, scholars have considered that this approach is inconsistent with the CJEU's case-law according to which the contents and not the form of an act should determine its reviewability.⁸⁸⁸ This may well be the "Gordian knot"⁸⁸⁹ underlying the new provision. In fact, the interpretation endorsed in the GC's ruling highlighted an additional complication. After having excluded legislative acts from the last part of Article 263(4) TFEU, the GC proceeded into the categorisation of the regulation at stake. Here, the applicants had argued that "it is not the way in which an act has been adopted, but its *scope*, individual or general that determines its nature."⁸⁹⁰ The GC recalled settled case-law according to which "a measure is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged generally and in the abstract."⁸⁹¹ As seen above, the purpose of this case-law was to prevent the institutions of the European Union from being in a position, merely by choosing the form of a regulation, to exclude an application by an individual against a decision which concerns him directly and individually: "it therefore stipulates that the choice of form cannot change the nature of a measure."⁸⁹² However, the GC considered that this was not an issue in this case, as it was not the general application of the contested regulation which was at issue, but the claim that it should be categorised as a regulatory act.⁸⁹³ Here, the GC stated that "categorisation as a legislative act or a regulatory act according to the FEU Treaty is based *on the criterion of the*

⁸⁸⁵ USHER, "Direct and Individual Concern", at 599.

⁸⁸⁶ Also noting the difference see ELIANTONIO; KAS, "Private Applicants and the Annulment Procedure", 2010, at 128.

⁸⁸⁷ BARENTS, "The Court of Justice in the Draft Constitution", 2004, at 134.

⁸⁸⁸ *Ibid.*

⁸⁸⁹ BARENTS, "The Court of Justice after the Treaty of Lisbon", 2010, at 725.

⁸⁹⁰ Para. 62.

⁸⁹¹ Para 63.

⁸⁹² Para. 64. See *supra* Part I, Chapter 1, Section 1.1.2(b).

⁸⁹³ Para. 65.

procedure, legislative or not, which led to its adoption.”⁸⁹⁴ This purely formal criterion is comparable to the approach adopted in some national constitutional systems.⁸⁹⁵ As the contested act had been adopted pursuant to a *legislative procedure* its *legislative nature* was undisputed.

One should note that although there is an implied hierarchy of legal acts under the Lisbon Treaty, there is no clear *material* or *substantive* criteria that allow one to distinguish between legislative and non-legislative acts: such distinction seems to be of a purely formal nature.⁸⁹⁶ This means that the choice of a given instrument may in some cases be a random one, which allows the European institutions to deprive individuals from access to justice by the choice of the form of the act, precisely what the case-law of the CJEU intends to avoid.⁸⁹⁷ There is thus a perceived *tension* between the purely formal criteria endorsed in the Treaties and confirmed by the GC in *Inuit*, and the previous CJEU’s case-law in this regard. In fact, somewhat compromising such case-law, it seems that under the new Article 263(4) TFEU it is not possible to ask the CJEU to go beyond form and look into substance. Thus, CRAIG and DE BÚRCA have noted “it is currently harder for individuals to argue on the basis of substance over form”, *i.e.* to ask the CJEU to look “to the substance of a measure across the categories of legal acts.”⁸⁹⁸ In fact, the consequence of re-classifying a legislative act as a delegated act or *vice-versa* would condemn the act as invalid, since it would not have been adopted under the proper procedural conditions.⁸⁹⁹

However, although it has not proved relevant within the context of the admissibility of actions for annulment, it is not entirely true that a *material* distinction between legislative and non-legislative acts is completely absent from the Treaties.⁹⁰⁰ In the 1970s, in the famous *Köster* case, the CJEU held that:

“[b]oth the legislative scheme of the Treaty, reflected in particular by the last indent of Article 155, and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognized in all the Member States, between the measures *directly based on the Treaty* itself and *derived law* intended to ensure their implementation (emphasis added).”⁹⁰¹

The Lisbon Treaty gave more visibility to such distinction. The exact scope of what should be considered *legislation* under the new Treaties may prove, however, to be more problematic than it seems. Later, the CJEU would clarify the scope of powers which could be delegated by the Council as the primary legislator of the Union, to the Commission, *i.e.* the executive branch. In *Commission/Germany*⁹⁰² the CJEU considered that it followed from *Köster* that the Treaty distinguishes “between rules which, since they are *essential* to the subject-matter envisaged, must be

⁸⁹⁴ Para. 65. It could be said that DE WITTE failed its prognosis when stated that “the Court will look at the substance of the Union act rather than at the form, thus preventing the possibility of rendering an act immune from challenges by classifying it as a ‘legislative act’”. See WITTE, “The European Judiciary after Lisbon”, 2008, at 47.

⁸⁹⁵ TÜRK, “Lawmaking after Lisbon”, 2012, at 68.

⁸⁹⁶ See Article 289(3) TFEU.

⁸⁹⁷ Joined Cases 16 and 17/62, *Confédération nationale des producteurs de fruits et légumes and others/Council of the EEC*, [1962] ECR 471.

⁸⁹⁸ CRAIG; BÚRCA, *EU Law*, 2011, at 493.

⁸⁹⁹ *Ibid.*

⁹⁰⁰ TÜRK, “Lawmaking after Lisbon”, 2012, at 66.

⁹⁰¹ Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel/Köster*, [1970] ECR 1161, para. 6.

⁹⁰² Case C-240/90 *Germany/Commission* [1992] ECR I-5383.

reserved to the Council's power, and those which being merely of an implementing nature may be delegated to the Commission."⁹⁰³ More recently, the GC stated in *Afrikanische Frucht-Compagnie*⁹⁰⁴ that:

"[t]he Court of Justice has also held that a distinction must be drawn between rules which, since they are *essential to the subject-matter envisaged*, must be reserved to the Council's power, and those which, being merely of an implementing nature, may be delegated to the Commission (...). It stated that *only those provisions which are intended to give concrete shape to the fundamental guidelines of Community policy can be classified as essential* (...). The Court of Justice also stated that 'since the Council has laid down in its basic regulation the *essential rules* governing the matter in question, it may delegate to the Commission general implementing power without having to specify the essential components of the delegated power; for that purpose, a provision drafted in general terms provides a sufficient basis for the authority to act (emphasis added).'"⁹⁰⁵

Taking into consideration this case-law and although pursuant to Article 289(3) TFEU legal acts adopted in the legislative procedure constitute legislative acts, the Treaty suggests one limitation to the *content* of legislative acts. It can be inferred from Article 290(1)(2) TFEU that legislative acts must contain the *essential elements of an area*, i.e. the fundamental choices of a given policy. In light of the foregoing, it could be argued that in so far as Article 263(4) TFEU mentions *acts*, it allows for either a substantive or formal approach to the *nature* of the contested act. Pursuant to the combined interpretation of Articles 263(4), 289(3) and 291(1)(2) TFEU, one could argue that in so far as a legislative act determines *more than the essential elements of a given policy*, it loses its strictly *material legislative nature*, and can be challenged by individuals under Article 263(4) TFEU *in fine*.⁹⁰⁶ The adoption of substantive criteria would allow one to look *beyond procedure* and prevent an abuse of the Union institutions when choosing to adopt a legislative or delegated/implementing act.⁹⁰⁷ This approach would also be more in line with previous case-law of the CJEU which ascertains the substance of the act over its form.⁹⁰⁸ In fact, the CJEU has, on the one hand, constantly held that the distinction between a regulation and a decision may be based *only* on the nature of the measure itself and the legal effects which it produces and not on the proceedings for its adoption; and on the other hand, that acts of general application are those which apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged generally and in the abstract, without any reference to the proceedings for their adoption.⁹⁰⁹ Lastly, in light of this case-law one should further note that Article 263(4) TFEU

⁹⁰³ See paras. 36-41.

⁹⁰⁴ Joined Cases T-64 and 65/01, *Afrikanische Frucht-Compagnie/Council*, [2004] ECR II-521.

⁹⁰⁵ Para. 119. See also Case 25/70 *Köster* [1970] ECR 1161, para. 6.

⁹⁰⁶ *Per contra*, favouring the adoption of a strictly formal criterion see CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 415.

⁹⁰⁷ SCHWARZE, "The Legal Protection of the Individual against Regulations in European Union Law", 2004, at 298.

⁹⁰⁸ Case 60/81, *IBM/Commission*, [1981] ECR 2639; Case C-147/96, *Netherlands/Commission*, [2000] ECR I-4723; and, more recent, Case C-322/09 P, *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB/Commission*, [2011] ECR 0000.

⁹⁰⁹ Joined Cases 16 and 17/62, *Confédération nationale des producteurs de fruits et légumes and others/Council of the EEC*, [1962] ECR 471. See *supra* Part I, Chapter 1, Section 1.1.2(b).

does not preclude one to *look beyond procedure and form* when legislative acts include provisions of individual application. In fact, the CJEU has considered that there may be individual provisions inserted in acts of general application.⁹¹⁰ These provisions should be deemed reviewable under the Article 263(4) TFEU as acts directly addressed to individuals, regardless of the fact that they were adopted within a legislative procedure.

IV. Surely, another approach would have been possible. Scholars have noted that the term “regulatory act” offers an ample room of manoeuvre for the CJEU.⁹¹¹ In fact, this term could be “construed broadly to cover any legally binding act, whether legislative, delegated or implementing; it could cover only legislative, delegated or implementing acts that take the form of regulations or decisions; it could cover only delegated and implementing acts that take the form of regulation or decisions, or only delegated acts.”⁹¹²

Thus, it is possible to consider the term “regulatory act” more broadly as extending to all Union acts of *general application*, notably legislative acts.⁹¹³ Some authors have considered that since the Lisbon Treaty did not adhere to an explicit hierarchy among legal acts and did not distinguish clearly legislative from non-legislative acts Article 263(4) TFEU *in fine* should be read as including *all kinds of regulations*, including legislative ones.⁹¹⁴ AG RUIZ-JARABO COLOMER considered in *Belgium/Commission*⁹¹⁵ that the new standing rules set forth in the Treaty establishing a Constitution for Europe “were consistent with” the test advocated by AG JACOBS in *UPA*, a case involving a *legislative regulation*.

In this view, the preparatory works of the Convention are considered not definitive. Not only do they not concern the Lisbon Treaty specifically, but such works are also not usually a “decisive mean”⁹¹⁶ in Treaty interpretation⁹¹⁷, and the guidance sought therein is deemed “less appropriate to a constitutional text” and often “misleading.”⁹¹⁸ Accordingly, the CJEU has

⁹¹⁰ See e.g., Joined Cases T-481 and 484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee/Commission*, [1995] ECR II-2941, para. 50; Case T-122/96, *Federolio/Commission*, [1997] ECR II-1559, para. 58; Case T-39/98, *Sadam Zuccherifici and others/Council*, [1998] ECR II-4207, para. 19.

⁹¹¹ See FLOGAITIS; POTTAKIS, “Judicial Protection under the Constitution”, 2005, at 109, noting that the intention seems to exclude legislative acts from direct challenging although the terms seem to leave the Court ample room for *manoeuvre*; KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 520; BAST, “Legal Instruments and Judicial Protection”, 2009, at 396, 397; HARTLEY, *The Foundations of European Union Law*, 2010, at 387; PAIS, “A protecção dos particulares no âmbito do recurso de anulação depois de Lisboa”, 2012, at 122, noting that a broader interpretation should be advocated as the provision does not exclude the challenge of legislative acts in itself.

⁹¹² CRAIG; BÚRCA, *EU Law*, 2011, at 508.

⁹¹³ Following this view see BROWN; MORIJN, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie A*” 2004, at 1656; DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 677, considering that the natural meaning of the expression would be *any binding act of general application*; ROUX, “Les actes”, 2008, at 56; WEYEMBERGH; RICCI, “Le Traité de Lisbonne et le contrôle juridictionnel sur le droit pénal de l’Union européenne”, 2009, at 251.

⁹¹⁴ See EVERLING, “Rechtsschutz in der Europäischen Union nach dem Vertrag von Lissabon”, 2009, 1, at 74. See also DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 675-679; BAST, “Legal Instruments and Judicial Protection” 2009, at 396, 397.

⁹¹⁵ Opinion in Case C-110/03, *Belgium/Commission*, [2005] ECR I-2801, note 14. Although referring to the CT, it is clear that these words also apply to Article 263(4) TFEU.

⁹¹⁶ BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 544.

⁹¹⁷ Articles 31 *et seq.* of the Vienna Convention on the Law of the Treaties, 1969.

⁹¹⁸ See JACOBS, “The Lisbon Treaty and the Court of Justice”, 2012, at 201. Considering also that the CJEU is not bound by Member States intentions see KOCH, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 520; BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 544.

rightfully interpreted Treaty provisions in light of their scope and purpose, and does not consider itself bound by the preparatory works of the Treaties.⁹¹⁹ Furthermore, a more attentive analysis of such documents hardly supports the idea of a clear and broad consensus regarding the exclusion of legislative acts.⁹²⁰ According to the published documents it was only a minority in the Discussion Circle who wanted to exclude legislative acts from direct challenge.⁹²¹ The explanatory notes from the *Praesidium* simply state that this solution was to be followed without further indication of the existence of a majority supporting such view.⁹²²

In addition, although the notion of regulatory act is used in the Treaties as opposed to legislative acts⁹²³, it is also frequently used in Union law as opposed to “decision”⁹²⁴ or “act of individual application”⁹²⁵ and can, in some contexts, include all acts of general application.⁹²⁶ For instance, AG TESAURO spoke in *Assurances du Crédit*⁹²⁷ of a “directive” and “other regulatory acts”⁹²⁸, including in the latter notion all provisions of general application. Lastly, the expression “non-legislative acts” is used in Articles 290(1) and 297(2) TFEU, which means that if Member States – *Herren der Verträge* – wanted to exclude such type of acts from Article 263(4) TFEU *in fine* they could have done it by expressly adopting such expression in the latter provision.

Determinant in this view is that the hierarchy of rules is a less important guide. The keystone to this construction lies in the “opportunities for challenging”⁹²⁹ EU measures.⁹³⁰ The main *rationale* underlying the new provision seems to be to make access to the Union courts easier regarding *all measures which do not entail implementing measures*, i.e. to close the gaps of protection identified above.⁹³¹ Hence, the concept of regulatory act should be interpreted broadly “since what is in issue here is no less than the right of access to a court, a right generally recognized today as fundamental ... [as a right] central to the rule of law.”⁹³² Such solution would encompass also an interpretation of Article 263 TFEU in light of the principle of effective judicial protection which the CJEU has constantly affirmed as an essential component of Union law⁹³³, and would be reinforced by the binding legal value of Article 47 of the Charter and the future accession to the

⁹¹⁹ BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 545.

⁹²⁰ BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, at 724.

⁹²¹ BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 545.

⁹²² CONV 734/03, at 20. In the Final Report of the Discussion Circle on the Court of Justice (CONV. 636/03) the majority agreed on the following wording “[a]ny natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, and against [an act of general application] [regulatory act] which is of direct concern to him without entailing implementing measures.” The words in parenthesis show that there was no agreement between the members of the group regarding the challenge legislative acts by individuals (see also CONV. 716/03).

⁹²³ Opinion of MISCHO Case C-278/01, *Commission/Spain*, [2003] ECR I-14141, para. 85; Case C-193/05, *Commission/Luxembourg*, [2006] ECR I-8673, para. 13.

⁹²⁴ Opinion of AG TIZZANO in Case C-229/00, *Commission/Finland*, [2003] ECR I-5727, para. 10.

⁹²⁵ Opinion of AG COSMAS in Case C-199/92 P, *Hüls/Commission*, [1999] ECR I-4287, para. 15.

⁹²⁶ BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 545.

⁹²⁷ Opinion of AG TESAURO in Case C-63/89, *Assurances du Crédit/Council and Commission*, [1991] ECR I-1799.

⁹²⁸ Para. 9.

⁹²⁹ See WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 213.

⁹³⁰ Considering that if the new provision intends to alleviate the pre-existing difficulties for private parties it will have to be interpreted to cover any legislative, delegated or implementing act that does not entail implementing measures, see CRAIG; BÜRCA, *EU Law*, 2011, at 508.

⁹³¹ See *supra* Part I, Chapter 1, Section 1.2.2.

⁹³² JACOBS, “The Lisbon Treaty and the Court of Justice”, 2012, at 201.

⁹³³ See *supra* Chapter 1, Sections 1.2.2 and 1.2.3.

ECHR.⁹³⁴ In fact, the most disappointing factor of the GC's decision in *Inuit* is the long-standing *resistance* to the argument based on the right to effective judicial protection put forward by the applicants in the case. In this respect, the GC merely held that:

“[a]ccording to settled case-law, the Courts of the European Union may not, without exceeding their jurisdiction, interpret the conditions under which an individual may institute proceedings against a regulation in a way which has the effect of setting aside those conditions, expressly laid down in the Treaty, *even in the light of the principle of effective judicial protection* (emphasis added).”⁹³⁵

In addition, the GC repeated the *Les Verts* approach according to which “the Treaty established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Courts of the European Union.”⁹³⁶ The reiteration of these two famous *dicta* indicates that the Court remains attached to an *objectivist, institutional and systemic* view of the system of judicial review established in the Treaties, and refuses to enhance the *subjective* dimension of the right to effective judicial protection. Hence, the GC's decision does not reflect the *constitutional shift* operated by the Lisbon Treaty, and remains attached to the traditional conceptual view on the Union's system of judicial protection. By contrast, a broader interpretation of the concept of regulatory acts could have contributed to mitigate the persistent gaps of judicial protection of private parties. Thus, in light of the foregoing, it is submitted that such notion should be interpreted in light of the right to effective judicial protection. As a result, the term “regulatory acts” included in Article 263(4) TFEU should be deemed to include all Union measures which are adopted under the *form of regulation* or which perform some sort of *regulatory function* regardless of their form and of the procedure for their adoption.

2.1.3 The Test of Direct Concern and the Absence of Implementing Measures

I. The changes introduced in Article 263(4) TFEU regarding the test of direct concern are not straightforward either. As seen above, this test has played a less decisive role in the dismissal of actions for annulment due to the less strict and more consistent interpretation adopted by the CJEU in this respect.⁹³⁷ The new wording of Article 263(4) TFEU risks, however, compromising the *status quo*. At the outset, the expression “does not entail implementing measures” may seem pleonastic. As seen above, the idea of *immediate legal consequences* in the individual's position underlies the notion of direct concern. That is to say that the measure applies directly without the need for intermediate rules, which would be the same as not entailing implementing measures in the first place.⁹³⁸ This *apparent redundancy* needs, however, to be addressed carefully.

⁹³⁴ See also BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 548.

⁹³⁵ Para. 51.

⁹³⁶ Para. 55.

⁹³⁷ See *supra* Part I, Chapter 1, Section 1.1.3(b).

⁹³⁸ See WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 213. Also noting the pleonasm see CORTHAUT; VANNESTE, “Waves between Strasbourg and Luxembourg”, 2006, at 501.

If the two requirements mentioned in Article 263(4) TFEU were to be understood as one and the same, direct concern would be precluded whenever there is the need for implementing measures, either involving the exercise of discretion or not. This would mean that the new provision would entail a step back in the CJEU's case-law. In fact, following this interpretation, in so far as a measure requires the existence of implementing measures it could not be of direct concern. This conclusion not only lacks support in the wording of Article 263(4) TFEU but it would also entail the conclusion that under the new provision standing of private parties to challenge, for instance, directives would be more reduced than it has been so far. In fact, according to the CJEU an act which requires implementing measures may still be of direct concern. For instance, in *Vischim* the GC considered that the contested directive affected the applicant's legal position in a direct manner since the Commission *left no discretion* to the Member States whose decisions were purely automatic. There was thus a measure which *in abstracto* entailed the existence of implementing measures but *in concreto* was, at the same time, of direct concern. Furthermore, to consider that the two criteria overlap would raise the question of knowing if the new test of direct concern (i.e., measures not entailing implementing measures) would apply to other directives of general application, notably those adopted within legislative procedures and which fall under the first part of Article 263(4) TFEU. This position is, however, absurd in light of the *rationale* of the changes introduced by the Lisbon Treaty in this respect. Thus, there is nothing that suggests that the two requirements should be understood as one. The only viable interpretation of Article 263(4) TFEU is to consider that the two requirements do not overlap and should be understood separately. This is confirmed by the CJEU's case-law on direct concern.

In pre-Lisbon case-law there seemed to be three main (cumulative) elements included in the test of direct concern. To be of direct concern a measure must (i) *directly affect* the legal situation of the person concerned, (ii) its implementation must be purely automatic, and (iii) it must be a complete set of rules which are *sufficient* in themselves. In *Inuit*, the GC reduced these elements to two main criteria: (i) direct affectability and (ii) no discretion on implementation, stating that:

“[f]or an individual to be directly concerned by a European Union measure, first, that measure must *directly affect the legal situation* of that individual and, secondly, there must be *no discretion* left to the addressees of that measure who are responsible for its implementation, that implementation being purely automatic and resulting from European Union rules alone without the application of other intermediate rules (emphasis added).”⁹³⁹

Under Lisbon, it seems that these two conditions should be separated, which could allow for a refinement of the test of direct concern. Thus, there may be measures which *do not require implementing measures* and therefore fall under Article 263(4) TFEU *in fine*, but which are *not of direct concern* to the applicant. In pre-Lisbon case-law, situations where measures not entailing implementing measures were not of direct concern to the individual were rare. Generally speaking, if a measure did not entail implementing measures it would be of direct concern to the individual,

⁹³⁹ Para. 71.

which means that in these cases the two conditions in fact overlapped. However, that is not always the case. It is clear from *Inuit* that an act which does not require implementing measures may not be of direct concern if it does not *directly affect the legal situation* of the applicants. The case of some of the applicants in *Inuit* illustrates the autonomy of the requirement of direct concern, which deals essentially with the *intensity* and *degree of the impact* of the application of the measure to the individual. Here, according to the GC, *direct affectability* excludes mere factual considerations, *i.e.* an act has to affect the *legal position* of the individual.⁹⁴⁰ In fact, the GC excluded direct concern regarding those applicants involved in the hunting, use or consumption of seal products, by holding that:

“[w]hile it cannot be precluded that the general prohibition of placing on the market provided for by the contested regulation *may have consequences* for the business activities of persons intervening upstream or downstream of that placing on the market, the fact remains that such consequences cannot be regarded as *resulting directly* from that regulation (emphasis added).”⁹⁴¹

The GC noted that “as regards the possible economic consequences of that prohibition”, it must be borne in mind that, according to the CJEU’s case-law, those consequences “do not affect the applicants’ legal situation, but only *their factual situation*”⁹⁴² and should therefore be disregarded. In light of these considerations, the GC concluded that the contested regulation *only* affected the *legal situation* of those applicants who were active in the *placing on the market* of the European Union of seal products. In fact, the contested regulation does not in any way prohibit seal hunting, which indeed takes place outside the European Union market, or the use or consumption of seal products which are not marketed. Here, it seems that the GC adopted a predominantly *legally oriented* approach as to the effects that a measure must have in the individuals’ position to be of direct concern to them. In fact, the GC seems to have drawn attention to the *mere factual effects* of the measure *vis-à-vis* some of the applicants while implying that those applicants were not covered by the *scope of application* of the contested measure. The GC held that in so far as such measure does not *apply directly* to such applicants it cannot be of direct concern to them. One would say that this approach disregards the effects of the act on the *interests* of the applicants and covers only affectation on his/her *rights*. However, truth be said, the CJEU’s case-law on direct concern does not seem to have “yet come to terms with this problem.”⁹⁴³ In fact, although the formulation of the test of direct concern seems rather consistent in the CJEU’s case-law⁹⁴⁴ there have been cases where

⁹⁴⁰ Joined Cases T-172 and 175 to 177/98, *Salamander and others/Parliament and Council*, [2000] ECR II-2487, para. 62.

⁹⁴¹ Para. 75.

⁹⁴² Para. 75.

⁹⁴³ HARTLEY, *The Foundations of European Law*, at 388, note 74.

⁹⁴⁴ The formula is a constant in the CJEU’s case-law. See to that effect, in particular, Joined Cases 41 to 44/70, *International Fruit Company and others/Commission*, [1971] ECR 411, paras. 23-29; Case 113/77, *NTN Toyo Bearing/Council*, [1979] ECR 1185, paras. 11-12; Case 118/77, *ISO/Council*, [1979] ECR 1277, para. 26; Case 119/77, *Nippon Seiko/Council and Commission*, [1979] ECR 1303, para. 14; Case 120/77, *Koyo Seiko/Council and Commission*, [1979] ECR 1337, para. 25; Case 121/77, *Nachi Fujikoshi/Council*, [1979] ECR 1363, para. 11; Case 92/78, *Simmenthal/Commission*, [1979] ECR 777, paras. 25-26; Case 333/85, *Mannesmannröhren-Werke/Council*, [1987] ECR 1381, para. 14; Case 55/86, *Arposol/Council*, [1988] ECR 13, paras. 11-13; Case 207/86, *Apesco/Commission*, [1988] ECR 2151, para. 12; and Case 152/88, *Sofrimport/Commission*, [1990] ECR I-2477, para. 9; Case C-386/96 P, *Dreyfus/Commission*, [1998] ECR I-2309, para. 43; Case T-420/05, *Vischim/Commission*, [2009] ECR II-3841, para. 74.

the CJEU skips the first part of the test – and does not analyse if the act affects the legal position of the individual –, to immediately assess the existence of discretion on implementation.⁹⁴⁵ In some of those cases, it is *inclusive* possible to argue that it was the protection of *interests* of the applicant that were at stake.⁹⁴⁶ It would be convenient if the CJEU clarified this aspect of the test of direct concern and its articulation with the test of individual concern.⁹⁴⁷ Here, both legal and factual considerations should prove relevant. As seen above, the notion of direct concern is not without ambiguities.⁹⁴⁸ The *rationale* for direct concern lies with the idea that the act must have a *direct impact* on the position of the applicant.⁹⁴⁹ This was the understanding of the GC in *DSTV*⁹⁵⁰ and explains the CJ's ruling in *Salamander* where the Court considered that a directive cannot directly concern an applicant because it cannot impose obligations on individuals. Again, direct concern was seen as implying an effect on the *legal position* of individuals. However, other cases have suggested that direct concern exists where such an impact is not only a reality but is *foreseeable*, either due to a declaration of the state, as in *Bock*, or from the circumstances of the case as in *Piraiiki-Patraiki*.⁹⁵¹ Hence, in some cases, the factual situation of the applicants has also been considered relevant, and some scholars have even argued that, despite its formulation, direct concern is mainly a factual oriented test.⁹⁵²

II. As seen above, regardless of the two or three set formulation, the existence of implementing measures is not *per se* a decisive factor in assessing direct concern. In fact, an act requiring implementing measures may still be of direct concern if implementation does not involve the exercise of discretion or if it is fairly certain how discretion is going to be exercised – which was the case in the two classics of EU law in this regard, *Bock* and *Piraiiki-Patraiki*. In this context, the test of direct concern focuses mostly on the determination of the existence of an *autonomous will* between the act and its application, regardless of the existence of implementing measures. In so far as discretion is determined or fixed, the act will *still* be of direct concern, even if such implementing measures are adopted.

Hence, although closely associated, there is still a distinction to be made between direct concern and the existence of implementing measures in so far as these measures may imply the exercise of discretion. Thus, *as a matter of principle*, one would say that the requirement of “not entailing implementing measures” implies a determination *in abstracto* of whether the contested act foresees or requires the adoption of any kind of implementing measures. By contrast, the notion of

⁹⁴⁵ See e.g., Case C-386/96 P, *Dreyfus/Commission*, [1998] ECR I-2309, paras. 47-54; Case T-420/05, *Vischim/Commission*, [2009] ECR II-3841, paras. 74-79.

⁹⁴⁶ In *Vischim* the assessment seems to have been based on economic loss.

⁹⁴⁷ CORTHAUT and VANNESTE suggested that a similar approach to *direct concern* to that mentioned in *Inuit* should be adopted under the new CT. This new test would be a new version of the GC's test on *individual concern* in *Jégo-Quéré*, mainly a legally-oriented test as seen above. See CORTHAUT; VANNESTE, “Waves between Strasbourg and Luxembourg”, 2006, at 502-504. See *infra* Section 2.1.4.

⁹⁴⁸ See *supra* Part I, Chapter 1, Section 1.1.3(b).

⁹⁴⁹ TÜRK, *Judicial Review in EU law*, 2009, at 65.

⁹⁵⁰ Case T-69/99, *DSTV/Commission*, [2000] ECR II-4039, para. 24.

⁹⁵¹ TÜRK, *Judicial Review in EU law*, 2009, at 65. See Case 62/70, *Bock/Commission*, [1971] ECR 897, paras. 6-8; Case 11/82, *Piraiiki-Patraiki and others/Commission*, [1985] ECR 207, paras. 8-10; and Joined Cases C-68/94 and 30/95, *France and others/Commission*, [1998] ECR I-0000, para. 51.

⁹⁵² CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 488 et seq.

direct concern should be analyzed *in concreto*, i.e. by determining if the contested act applies *automatically* to the applicant without involving the exercise of discretion, regardless of the existence of those implementing measures.⁹⁵³ This distinction can be easily demonstrated with the example of directives. On the one hand, the new wording of the provision would not allow directives that are to be considered regulatory acts to be challenged under Article 263(4) TFEU *in fine*, as by definition these measures require implementing measures. Hence, all Union acts which require implementing measures, notably directives, could only be challenged under the first part of Article 263(4) TFEU, regardless of their “regulatory” nature, which means that proof of *direct and individual concern* would still be required.⁹⁵⁴

This interpretation may lead, however, to artificial results. In fact, although it could be said that acts requiring the adoption of implementing measures fall literally under the first part of Article 263(4) TFEU, this would mean that the CJEU could come to the conclusion that those acts directly concern the applicants since the adoption of said implementing measures implies the exercise of no discretion. This means that in so far as the applicant is concerned the need for implementing measures in the first place did not actually exist, i.e. it was *merely artificial*. Regardless of the fact that the act foresees implementing measures it applies directly and automatically to the applicant(s). This interpretation of Article 263(4) TFEU *in fine* would become more than pleonastic: it would become worrisome. In fact, to submit such acts to the first part of Article 263(4) TFEU would mean that individual concern still applies, which is more serious if the CJEU refuses to liberalize the *Plaumann* formula. Thus, it is submitted that the fact that an act requires *in abstracto* implementing measures should not *per se* lead to the application of the first part of Article 263(4) TFEU. The CJEU should determine if the application of those measures is purely automatic, and if so deem both the requirement of “not entailing of implementing measures” and the second part of the test of direct concern immediately fulfilled.

III. Additionally, it is not clear if the wording of Article 263(4) TFEU covers both Union and national implementing measures. The history and *rationale* of the new provision suggest that its intention was to solve “the *Jégo-Quéré* conundrum”⁹⁵⁵, in which the lack of *national* implementing measures made it impossible to challenge the validity of Union acts incidentally in national courts.⁹⁵⁶ However, the GC clarified in *Inuit* that the need for implementing measures mentioned in Article 263(4) TFEU refers either to national implementing measures or to the adoption of Union measures.⁹⁵⁷ *In casu*, the implementing measures were to be adopted by the

⁹⁵³ Suggesting a two stage assessment see KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 103.

⁹⁵⁴ ELIANTONIO; KAS, “Private Applicants and the Annulment Procedure”, 2010, at 128. See also Case T-16/04 *Arcelor/Parliament and Council* [2010] ECR II-211, para. 123. The point was confirmed by the GC in *Inuit*, para. 47.

⁹⁵⁵ HEFFERNAN, “Effective Judicial Remedies”, 2006, at 294, noting that it presupposes consistency in the use of implementing measures throughout the Member States.

⁹⁵⁶ KOCH, “Locus Standi of Private Applicants under the EU Constitution”, 2005, at 519. LENAERTS considered that “l’arrêt *Jégo-Quéré* du Tribunal a été codifié au quatrième alinéa de l’article 263 TFUE.” See LENAERTS, “Le Traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l’Union”, 2009, at 724.

⁹⁵⁷ Para. 73. Also endorsing this view see SCHWENSFEIER, *Individuals’ Access to Justice under Community Law*, 2009, at 344; HARTLEY, *The Foundations of European Union Law*, 2010, at 388.

Commission in accordance with the regulatory procedure with scrutiny.⁹⁵⁸ The Commission was *inter alia* empowered “[t]o define the conditions for the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence”, which are excluded from the general prohibition established in the legislative regulation. As these conditions are not defined in the contested regulation, national authorities were not in a position to apply it without the implementing regulation. Consequently, such a provision did not “constitute a complete set of rules which are sufficient in themselves, require no implementing provisions and may thus be of direct concern to persons.”⁹⁵⁹ This assessment allowed the GC to exclude those applicants whose activity extended to the placing on the market of the European Union of seal products *which resulted from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence*, as the latter continued to be permitted. Regarding the other applicants, who traded seal products not covered by this exception, the GC stated that their “legal situation must be regarded as being affected by the general prohibition” provided for in the general regulation, and therefore were deemed directly concerned.

This understating entails the conclusion that there may be cases where Union *regulatory acts* not requiring *national* implementing measures are not covered by the Article 263(4) TFEU *in fine* because they require Union implementing acts. The case of *Inuit* serves as an example. If instead of prohibiting trade on seal products through a legislative act, such prohibition was included in a delegated act which foresaw the adoption of an implementing act pursuant to Article 291 TFEU, the former *regulatory act* would still require proof of direct and individual concern, as it entailed the existence of Union implementing measures, although it did not require national implementing acts. In this scenario, one would be faced with a regulatory act subject to the “draconian”⁹⁶⁰ test of individual concern.⁹⁶¹ Thus, the gaps of judicial protection identified in *Jégo-Quéré* persist, as absent of national implementing acts it may not be possible to mount a challenge before national courts. Consequently, this interpretation reinforces the need for a more flexible approach to individual concern.⁹⁶²

Lastly, one may wonder if the notion of implementing measures established in Article 263(4) TFEU regards the adoption of any kind of acts, including any enforcement and implementing individual acts, or refers only to the adoption of *normative* acts and intermediate *rules*. In fact, an act that authorizes Member States or the Union institutions to take a particular course of action may imply very different consequences. Hence, scholars have noted that in principle regulations and decisions, being applicable in Member States’ legal orders do not require

⁹⁵⁸ Article 5a of Council Decision 1999/468/EC.

⁹⁵⁹ Para. 78.

⁹⁶⁰ See *supra* Part I, Chapter 1, Section 1.1.3(c).

⁹⁶¹ See case *Inuit* para. 47: “[i]n that regard, it is necessary to reject the applicants’ argument that the distinction between legislative and regulatory acts, as proposed by the Parliament and the Council and upheld in paragraphs 42 to 45 above, consists of adding the qualifier ‘legislative’ to the word ‘act’ with reference to the first two possibilities covered by the fourth paragraph of Article 263 TFEU. As is apparent from the conclusion drawn in paragraph 45 above, the word ‘act’ with reference to those first two possibilities covers not only an act addressed to the natural or legal person, but also any act, legislative or regulatory, which is of direct and individual concern to them. In particular, *legislative acts* and *regulatory acts* entailing implementing measures are covered by that latter possibility.”

⁹⁶² Noting that the restrictive notion of regulatory act is likely to lead to continuing pressure for relaxation of the test for individual concern see ARNULL, “From Charter to Constitution and Beyond”, 2003 at 792.

implementing measures. The opposite holds true for directives.⁹⁶³ However, these implementing measures may either be of a normative or individual nature, and direct challenges in national courts to such measures may either be possible or not. It is unclear whether the wording of Article 263(4) TFEU should be limited to those situations where individuals cannot mount a challenge in their national legal orders in the absence of national acts, or extends to other cases where implementing *rules* are not needed but an implementing *individual act* may still take place, and thus an indirect challenge would still be possible.

In this context, HARTLEY has considered that “a measure that cannot be challenged by non-privileged litigants should not be regarded as an implementing measure for this purpose.”⁹⁶⁴ This affirmation suggests that the absence of implementing measures referred to in Article 263(4) TFEU *in fine* should be interpreted in light of the *rationale* underlying the Lisbon reform, which was to avoid situations where individuals would have no access to a court unless they breached the law. Taking such affirmation to its ultimate consequences, one could argue that in so far as Union regulatory acts require the existence of implementing measures *but the latter cannot be directly challenged in national or Union courts* the initial act should be understood as “not entailing implementing measures”, and therefore be subject only to proof of direct concern.

IV. One should further note that in Member States legal orders the existence or absence of implementing measures is not, in general, required in order for individuals to challenge the validity of normative acts.⁹⁶⁵ In contrast, in German law, it is necessary that the applicant is directly concerned, which means that, in principle, constitutional review of legislation is precluded in so far as legislation requires implementing measures.⁹⁶⁶ Here, it is understood that the applicant should attack the implementing acts. This difference underlies the different assessment by some German authors of the regime established in the EU Treaties. Hence, PAPIER, President of the *Bundesverfassungsgericht*, noted that the standing to challenge primary legislation rules may be restricted in national legal systems:

“[i]n German law legal norms can only in exceptional cases be directly challenged before the courts. As a general rule, the person seeking recourse to the courts must strive for incidental review of the norm, in particular before the administrative courts. This is regarded as sufficient to ensure effective legal protection pursuant to German constitutional law and also pursuant to the European Convention on Human Rights (emphasis added).”⁹⁶⁷

⁹⁶³ CRAIG; BÚRCA, *EU Law*, 2011, at 509, disregarding the possibility of regulations or decisions requiring modification of pre-existent national legislation.

⁹⁶⁴ HARTLEY, *The Foundations of European Union Law*, 2010, at 388.

⁹⁶⁵ Considering that the level of judicial protection provided for in these rules falls behind the level existing in most of the Member States and that, accordingly, the condition “and does not entail implementing measures” should be deleted to provide generally judicial protection for the individual against all kinds of regulations issued by the Commission see SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 301.

⁹⁶⁶ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 109.

⁹⁶⁷ See Memorandum of the House of Lords European Union Committee, *The Future Role of the European Court of Justice*, 2003-2004, at 39, 40 and 89.

Besides the fact that it is not clear whether Article 263(4) TFEU *in fine* covers all executive acts, KOMBOS has noted that this position forgets the new EU constitutional environment: “insisting in denying the existence of an issue to effective judicial protection in the given context is undeniably an intelligent legalistic method, alas incomplete and routed in the past.”⁹⁶⁸ Furthermore, one should note that in German law there are, at least, two exceptions to such rule: (i) first, if there is *no margin of discretion* on implementation the action will be held admissible; and (ii) secondly, the *absence of an effective remedy* may compel the judge to accept the action regardless of the adoption of implementing acts. Hence, the *Bundesverfassungsgericht* has accepted a challenge against a piece of legislation which provided for the possibility of a government agency of conducting searches in companies’ premises in order to verify group relations on the grounds of a breach of Article 13 GG. *In casu*, the German Constitutional Court considered that the applicants need not to have to wait for a search to take place in order to be able to challenge the legality of such measure.⁹⁶⁹ The Federal Constitutional Court has also accepted a complaint brought by a group of lawyers against a law which restricted professional privilege without requiring that the law was applied to their detriment.⁹⁷⁰ It is further significant that several German scholars have thus considered that the Union’s system of judicial review does not live up to the national standards on the right to effective judicial protection.⁹⁷¹

V. Summing up, the wording of the new provision entails the risk of making access by private parties to Union courts even more difficult and complex than it has been so far. The current solution represents a serious interpretative challenge for the CJEU. It remains to be seen how the CJEU will reconcile its traditional case-law with the new provision.

As seen above, although the CJEU’s case-law on direct concern has mainly revolved around the notion of *discretion*, some scholars have considered that the test for direct concern should relate not to the adoption of intermediate rules but to the existence of a *causal link* between the measure and the harm inflicted on individuals.⁹⁷² In fact, the test based on the need of implementing measures has raised some difficulties.⁹⁷³ Firstly, it may be hard to determine precisely if there is a margin of discretion, and if this notion includes any margin of appreciation of the addressee of the act. In between the cases of *Getreide-Import* (where the Court considered that the state enjoyed no discretion) and *Piraiiki-Patraiki* (where the Court considered that the state enjoyed a broad margin of discretion) there is a wide range of situations where it may not be clear whether the Member State enjoys any margin of discretion. Secondly, this test does not explain why in certain cases although the Member State did not enjoy a margin of discretion, the action was nonetheless held

⁹⁶⁸ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 15.

⁹⁶⁹ BVerfGE 13/10/1971 *apud* CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 110.

⁹⁷⁰ BVerfGE 15/12/1970, *ibid*.

⁹⁷¹ VON DANWITZ, “Die Garantien effektiven Rechtsschutzes im Recht der Europäischen Gemeinschaft”, 1993, at 1114; CALLIESS, “Kohärenz und Konvergenz beim europäischen Individualrechtsschutz”, 2002, at 3759; BOROWSKI, “Die Nichtigkeitsklage gem. Art. 230 Abs. 4 EGV”, 2004, at 894.

⁹⁷² ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 63; See also Opinion of AG GAND in Case 69/69, *Alcan/Commission*, [1970] ECR 385.

⁹⁷³ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 70.

inadmissible for lack of direct concern as happened for instance in CNTA⁹⁷⁴ and STS.⁹⁷⁵ Lastly, this test based on the exercise of discretion does not fit well to situations where the addressee of the act is a private entity.⁹⁷⁶ Thus, it has been argued that the “causal link theory” would be better suited.⁹⁷⁷ The idea of the margin of discretion aims to ensure that the *causality chain* is not broken by an intermediate choice which may diverge the course of the Union action. Also, the main idea underlying the test for direct concern seems to be to ensure that the harm suffered by individuals is a *direct consequence* of the Union act.⁹⁷⁸ In light of this theory, the requirements of “not entailing implementing measures” and of “direct concern” would probably be easier to separate.

The Lisbon Treaty offers an opportunity for the CJEU to elaborate on the scope of the test of direct concern without reference to the existence of implementing measures, given that Article 263(4) TFEU *in fine* separates the two requirements. Thus, in so far as a measure causes *for in of itself* harm in the legal or factual position of individual applicants – notably, because there is no interposition of an autonomous will which involves the exercise of genuine discretion between the act and the individuals’ situation –, such applicants should be deemed directly concerned.⁹⁷⁹ Moreover, the need for implementing measures *per se* should not be deemed definitive in submitting Union acts to the standing requirements established in the first part of Article 263(4) TFEU. If there is no discretion on implementation and the application of the contested act is purely automatic, standing should be determined pursuant to Article 263(4) TFEU *in fine*. All things considered, the Lisbon Treaty should not serve as a pretext to bring confusion to the CJEU’s approach to direct concern. This would contradict Member States’ intentions when drafting the new Article 263(4) TFEU and would not favour the *pro actore* approach and the reinforced procedural protection of individuals under the Lisbon Treaty.

2.1.4 A New Approach to the Test of Individual Concern

I. In *Inuit*, after having considered that some applicants were *directly* concerned, the GC proceeded to analyse whether they were so *individually*. Here, the GC recalled the CJEU’s case-law on Article 230(4) TEC which “allowed natural and legal persons to institute proceedings against decisions as acts of individual application and against *acts of general application* such as a regulation which is of direct concern to those persons and affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision.”⁹⁸⁰

It is worth noting that the GC clarified that acts of general application could *already* be of

⁹⁷⁴ Joined Cases 89 and 91/86, *Étoile commerciale and CNTA/Commission*, [1987] ECR 3005; Case C-91/96, *Commission/Greece*, [1996] ECR I-6393.

⁹⁷⁵ Case 126/83, *STS/Commission*, [1984] 2769.

⁹⁷⁶ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 70.

⁹⁷⁷ *Ibid.*, noting that the case-law on standing on competition and state aids cases corroborates the idea that the existence of discretion is not taken into account and that the act must be the direct cause of the harm inflicted on the applicant. See *ibid.*, at 81 *et seq.*

⁹⁷⁸ *Ibid.*, 1996, at 73, 74.

⁹⁷⁹ See also VILAÇA, “A protecção jurisdiccional dos particulares na Ordem Jurídica Comunitária”, 2010, at 499.

⁹⁸⁰ Para. 41. The GC cited *Plaumann* and *UPA*.

individual concern to the applicant. As seen above, in *UPA*, the CJ adopted a rather obscure phrasing by stating that a regulation could be in certain circumstances of individual concern and “thus in the nature of a decision”⁹⁸¹ regarding some applicants. Thus, scholars disagreed on the possibilities of challenges against true regulations.⁹⁸² In *Inuit* the GC assumed that challenges against *true* general acts were possible according to settled case-law. However, the GC considered that the contested regulation applied to *objectively determined situations* and produced legal effects in regard to *categories of persons* envisaged *generally and in the abstract*⁹⁸³, and therefore it did not concern the applicants individually. In fact, the general prohibition of the placing on the market of seal products, with the exception of those which result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence, is expressed in a *general manner* and capable of *applying equally* to any trader who is covered by the contested regulation. Hence, these applicants were concerned by the contested regulation “like any other trader who places seal products on the market.”⁹⁸⁴ Furthermore, the GC dismissed the action regarding the “bodies representing both Inuit and non-Inuit companies active in the seal product production chain and the companies active in the processing of seal products” as even if they were covered by the exception “that would not be sufficient to distinguish them individually in the same way as the addressee of a decision.”⁹⁸⁵ Moreover, they had not explained how the contested regulation affected them by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons.

Thus, it seems that *Plaumann* – which has survived for more than fifty years—, will continue to live on after the Lisbon Treaty.⁹⁸⁶ As a matter of fact, the Lisbon reform left untouched the notion of individual concern and there is so far no indication that the CJEU will change its traditional approach. Notwithstanding, under Lisbon the scope of application of the test of individual concern became more limited as the challenge against *regulatory acts* which do not entail implementing measures is merely dependent on the requirement of direct concern. On the contrary, all *non-regulatory acts* which require implementing measures and *all regulatory acts* which require such measures (involving the exercise of discretion) continue to be subject to proof of direct and individual concern. This includes some legislative acts – or at least those adopted within the ordinary legislative procedure – but also delegated or implementing acts which require, according to the GC, implementing action either at the Union or national level. Accordingly, some of the gaps of protection identified above persist regarding these acts, notably when it is not possible to mount an indirect challenge in national courts. As a result, “the question arises as whether one should try to tackle the origin of the problem rather than fight its consequences.”⁹⁸⁷

⁹⁸¹ Para. 36 of *UPA*.

⁹⁸² See *supra* Part I, Chapter 1, Section 1.1.2(b). Nonetheless, as a challenge to a directive was admitted meanwhile it seemed hard to deny the reviewability of acts of general application notably regulations at the initiative of individuals.

⁹⁸³ Para. 89.

⁹⁸⁴ Para. 90.

⁹⁸⁵ Para. 91.

⁹⁸⁶ *Plaumann* was also confirmed recently in Joined Cases C-71, 73 and 76/09 P, *Comitato «Venezia vuole vivere»*, [2011], ECR I-0000, paras. 51-52.

⁹⁸⁷ ELIANTONIO; KAS, “Private Applicants and the Annulment Procedure”, 2010, at 129.

In fact, relaxation of standing requirements would allow for a more complete system of judicial protection in the EU and is thus pivotal under the Lisbon Treaty.

There is a wide consensus that the traditional interpretation of individual concern is too narrow and deprives individuals of any genuine possibility of challenging Union acts. Scholars have consistently held that the *Plaumann* formula has worked as “a formidable hurdle for private applicants”⁹⁸⁸ and deprived them of any chances of success. As seen above, from a conceptual point of view *Plaumann* is not based on a distinction between the protection of *rights* or *interests* and lacks a consistent theoretical approach. Moreover, scholars have noted that the main purpose of the test is to preclude challenges against acts of general application.⁹⁸⁹ In fact, either based on the notion of closed category or on the abstract terminology approach, the CJEU has generally required that in order for applicants to be deemed individually concerned they must show that they are in the same position as the addressee of the contested act would be. This construction was favoured by the wording of Article 230(4) TEC which suggested that only challenges against acts of individual application, i.e. decisions, whatever their form, were admissible. Hence, either by applying a two or a three set admissibility test, the CJEU focused mainly on the idea that the applicants must be individualized *as if* they were the addressees of a decision. This approach proves however problematic after Lisbon, as it became clear under the new Article 263(4) TFEU that challenges to *all* and *true normative acts* – including *pure* legislative acts – should be admissible. Hence, it is submitted that the traditional approach to individual concern focused mostly on preventing challenges against normative acts lacks theoretical support under the Lisbon Treaty. *Plaumann* counts therefore among the classics of EU Law which are in need for re-visitation after Lisbon.

Thus, in light of the constitutional shift operated by the Lisbon Treaty, and the inherent valorisation of the procedural protection of individuals’ rights, the time has come to find a “new beginning” for the test of individual concern. In this context, one should note that the actual substance of the current test of individual concern is the result of the case-law of the CJEU⁹⁹⁰ and is nowhere imposed in the Treaty. The terms “individual concern” may evidently entail different meanings. As AG JACOBS noted:

“[i]t is clear, and cannot be stressed too strongly, that the notion of individual concern is capable of carrying a number of different interpretations, and that when choosing between those interpretations the Court may take account of the purpose of Article 230 EC and the principle of effective judicial protection for individual applicants.”⁹⁹¹

⁹⁸⁸ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 1.

⁹⁸⁹ See *supra* Part I, Chapter 1, Section 1.1.3(c).

⁹⁹⁰ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 90.

⁹⁹¹ Para. 75. See e.g., VON DANWITZ, “Die Garantien effektiven Rechtsschutzes im Recht der Europäischen Gemeinschaft”, 1993, at 1115; ARNULL, “Plus Ça Change...”, 2002, at 510; ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 90; MEHDI, “La recevabilité des recours formés par les personnes physiques et morales à l’encontre d’un acte de portée générale”, 2003, at 40; RAGOLLE, “Access to Justice for Private Applicants in the Community Legal Order”, 2003, at 100; KOCH, “*Commission of the European Communities v Jégo-Quéré & Cie SA*”, 2004, at 819; PARFOURU, “*Locus Standi* of Private Applicants under the Article 230 EC Action for Annulment”, 2007, at 387; TRIDIMAS; POLI, “*Locus Standi* of Individuals under Article 230(4)”, 2008, at 70; CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 422; CRAIG, *EU Administrative Law*, 2012, at 300 *et seq.*

Hence, any adjustment of the *Plaumann* formula does not require an “amendment of the Treaty through judicial fiat.”⁹⁹² The meaning of individual concern accorded in *Plaumann* is “certainly linguistically and textually possible.”⁹⁹³ However, this “does not mean that any other interpretation would stray beyond the bounds of legitimate judicial interpretation.”⁹⁹⁴ Truly, the CJEU has not given any explanation as to why it felt that another test would not be compatible with the wording of the Treaty. As KOMBOS rightfully noted, the conceptual problem of the CJEU’s argument is that it “requests for reform referred to *the test* for the textual requirement of individual concern and not to ‘individual concern’ *per se*.”⁹⁹⁵ What is more, the reasoning of the CJEU disregards the fact that, as is well known, the same court has often stretched the meaning of Treaty articles and other provisions of Union law, through teleological interpretation, in order to attain Union goals.⁹⁹⁶ A court which established supremacy, direct effect and Member State liability with no Treaty support has limited legitimacy in refusing to interpret the Treaty “with maximum flexibility”⁹⁹⁷ where effective judicial protection of Union citizens against potentially unlawful Union acts is at stake. It comes as no surprise that scholars have considered that the refusal of the CJ to change the *Plaumann* test has “nothing to do with textual constraints”⁹⁹⁸ and must be explainable in light of other policy considerations.⁹⁹⁹ Put briefly, *Plaumann* is in need of rethinking and there are strong arguments that support its reconsideration. In fact, this is not a very hard case to plead.

II. Firstly, there is a consistent trend in Member States legal orders to grant a wide right of action to individuals regarding administrative acts, including those of general application. In Member States, it is generally accepted that the addressees of an administrative act are automatically allowed to challenge such a measure “as a logical reflection of the principle of protection of individuals against the Executive.”¹⁰⁰⁰ Furthermore, it is possible to challenge individual administrative acts addressed to a third-party non-addressee, provided that certain *locus standi* conditions have been satisfied. Lastly, as a rule, administrative acts of general application are challengeable across the Union with only a few exceptions. The possibility of an *actio popularis* is, however, admitted in rare cases.

As seen above, despite of the particularities of each national procedural law, scholars have considered that there are two main systems of administrative justice in Europe.¹⁰⁰¹ On the one

⁹⁹² CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 505.

⁹⁹³ *Ibid.*

⁹⁹⁴ *Ibid.* See also LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 38 considering that a new test of individual concern based on the requirement that an individual has an interest in the annulment of the contested act does not amount to an amendment of the Treaties.

⁹⁹⁵ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 10.

⁹⁹⁶ CRAIG, “Standing, Rights and the Structure of Legal Argument”, 2003, at 505.

⁹⁹⁷ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 90. ALBORS-LLORENS notes that “after all, it could be argued that the Court took a bolder, if less publicised, step when it accepted that private parties could challenge general acts that concerned them directly and individually by means of an Article 230 EC action.”

⁹⁹⁸ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 10.

⁹⁹⁹ See *supra* Part I, Chapter 1, Section 1.1.6.

¹⁰⁰⁰ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 30.

¹⁰⁰¹ See *supra* Part I, Chapter 1, Section 1.1.1.

hand, the French/objective model, which focuses mostly on the objective control of legality, and on the other hand, the German/subjective model, which puts the protection of individual rights at the centre of the system of judicial review. Hence, in France, the *recours pour excès de pouvoir* has a marked objective character in so far as its purpose is to “*assurer le respect de la légalité et non à réaliser des droits.*”¹⁰⁰² As HAURIU has put it, such objective nature derives from the fact that the action:

“*[e]st donnée contre l’acte, et non pas contre la personne administrative; de plus, il est uniquement pour assurer la bonne administration; il n’est pas pour faire valoir des droits subjectifs des administrés. Sans doutes, le recours est dans l’intérêt des administrés et il le faut bien, puisqu’il doit être mis en mouvement par eux, mais l’intérêt qu’ils ont à l’annulation de l’acte coïncide lui-même avec l’intérêt de la bonne administration et ils jouent le rôle d’un ministère public.*”¹⁰⁰³

Accordingly, private parties enjoy a wide rights of action to challenge administrative acts subject to the condition of the existence of an *intérêt pour agir*. Thus, in order to avoid an *uti cives* individuals must prove an *interest* in the suit. This requirement is not intended to limit access to justice but mainly to ensure that the action has “*un effet utile*”¹⁰⁰⁴ for the applicant by verifying the existence of a genuine dispute with the administration. Thus, this notion has been construed broadly. The Conseil d’État while considering that the *recours* serves a public interest has progressively enlarged its admissibility.¹⁰⁰⁵ Thus, *l’intérêt* may be material or moral, individual or collective.¹⁰⁰⁶ CHAPUS notes that such interest must be sufficiently *personnel, légitime, pertinent* and the harm inflicted must not be “*ni exagérément indirecte, ni exagérément incertaine.*”¹⁰⁰⁷ An *intérêt pour agir* does not imply the existence of an individual right, as it can be based on *mere factual interests*. The notion of *intérêt* is mainly an empirical one and is determined on a case-by-case basis. Scholars note that an *intérêt pour agir* exists not only when the applicants were “*matériellement affectés par l’acte contesté*” but also when they were “*potentiellement affectés par cet acte.*”¹⁰⁰⁸ The Commissaire du Gouvernement MOSET has considered that two conditions that must be met:

“*[i]l faut que la décision attaquée lèse le requérant matériellement ou moralement, qu’elle ait pour lui des conséquences fâcheuses sur l’un ou l’autre plan. Mais il faut aussi que ces conséquences fâcheuses atteignent le requérant en qualité à un titre particulier, en tant qu’il appartient à une catégorie, définie et limitée – i.e. usager d’un service habitant d’un quartier, contribuable d’une collectivité locale – et non comme un membre quelconque de la nation entière.*”¹⁰⁰⁹

The Commissaire du Gouvernement GALABERT added that it is necessary to look not only for an “*intérêt suffisant*” but also for a “*qualité nécessaire pour critiquer la mesure en cause.*”¹⁰¹⁰ In fact,

¹⁰⁰² CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 94.

¹⁰⁰³ HAURIU, *Précis de droit administratif*, 1938, at 258.

¹⁰⁰⁴ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 94.

¹⁰⁰⁵ AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 228.

¹⁰⁰⁶ CHAPUS, *Droit du contentieux administratif*, 2008, at 470, 471. Associations can initiate such proceedings against acts which affect their interests or the interests of their members. See AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 220; PARFOURU, “*Locus Standi of Private Applicants under the Article 230 EC Action for Annulment*”, 2007, at 395 et seq.; CHAPUS, *Droit du contentieux administratif*, 2008, at 487 et seq.

¹⁰⁰⁷ CHAPUS, *Droit du contentieux administratif*, 2008, at 483.

¹⁰⁰⁸ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 95, 96.

¹⁰⁰⁹ Conclusions in *Association générale des administrateurs civils*, 26/10/1956.

¹⁰¹⁰ See Conclusions in *Syndicat indépendant des cadres, ingénieurs et agentes de maîtrise*, 22/7/1965.

French case-law has not only been entirely consistent in distinguishing these two requirements. Scholars note that there is in reality a two stage assessment. First, the judge must consider “*la position du requérant par rapport à l’objet de l’acte attaqué*.”¹⁰¹¹ Here, the applicant must demonstrate that he/she is part of a category of persons which gives him/her the “*qualité pour agir, le titre en vertu duquel le demandeur saisit le juge*.” Secondly, the judge must assess “*les effets de l’acte attaqué sur le requérant*”, i.e. “*l’intérêt à agir, le degré d’affectation que l’acte cause au demandeur*.” Here, “*l’acte doit faire grief au requérant, de façon certaine en portant atteinte à un intérêt légitime, et ceci de façon directe et personnelle*.”¹⁰¹² However, if the applicant has not invoked a particular *qualité pour agir* the judge will analyse admissibility solely on the basis of *intérêt pour agir* and the action may still be admissible. When the applicant argues on the grounds of a given *qualité à agir* he/she either can further demonstrate the existence of an interest to sue – and the judge considers that such *intérêt* gives the applicant *qualité pour agir* – *intérêt donnant qualité*¹⁰¹³ – and the action is therefore deemed admissible; or the latter may be presumed “*en ce qu’il n’es pas contesté que l’acte litigieux affecte négativement le requérant*”¹⁰¹⁴ which may happen if the contested act applies unequivocally to that circle of persons and there is a “*lien suffisamment étroit avec cette qualité*”¹⁰¹⁵, or if the law protects specifically the interests of certain individuals. Here, whoever has *qualité pour agir* will automatically have *intérêt pour agir* and the action is admissible.¹⁰¹⁶ Despite the conceptual confusion underlying the notions of “*qualité*” and “*intérêt*”, it suffices to note that the *Conseil d’État* is fairly liberal in the construction of the degree of individualization required in so far as, as a rule, all persons *affected* by an administrative act of general application are entitled to bring annulment proceedings. Scholars note that according to the *Conseil* individuals have to prove an interest which is “*direct, personnel et certain*.”¹⁰¹⁷ The French concept of the *cercle d’intérêt* is much wider than the European notion of closed class.¹⁰¹⁸ Furthermore, the *Conseil d’État* has consistently granted standing to members of open classes. This implies the possibility of challenging tax regulations, measures regarding public utilities, acts establishing development plans or changing the names of villages.¹⁰¹⁹ The applicant needs only to be related to the contested act.¹⁰²⁰ Hence, the admissibility barrier is relatively easy to

¹⁰¹¹ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 97.

¹⁰¹² *Ibid.*

¹⁰¹³ CHAPUS, *Droit du contentieux administratif*, 2008, at 475.

¹⁰¹⁴ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 100, 101, noting that regarding civil servants litigation the case-law tends to rely, *per contra*, on the existence of a subjective right.

¹⁰¹⁵ *Ibid.*

¹⁰¹⁶ Noting that in French law the notion of *intérêt* has absorbed the notion of *qualité pour agir* see BERROD, *La systématique des voies de droit communautaires*, 2003, at 626.

¹⁰¹⁷ PARFOURU, “*Locus Standi of Private Applicants under the Article 230 EC Action for Annulment*”, 2007, at 371.

¹⁰¹⁸ *Ibid.*, at 390. In his Opinion in *Chicquel*, 10/2/1950, the *Commissaire du Gouvernement* CHENOT stated that “it is not necessary that the interest be special and peculiar to the applicant, but it should be contained in a circle in which the case-law has included ever widening groups of interested parties, without however enlarging it to the entire national community.” In *Association générale des administrateurs civils*, 26/10/1956, the *Commissaire du Gouvernement* MOSSET stressed that the negative consequences of the measure “must reach the applicant in a particular quality, by belonging to a defined and limited category” and that the applicant must “be in a particular situation in relation to the act.”

¹⁰¹⁹ For further examples see PARFOURU, “*Locus Standi of Private Applicants under the Article 230 EC Action for Annulment*”, 2007, at 391; CHAPUS, *Droit du contentieux administratif*, 2008, at 477 *et seq.*

¹⁰²⁰ Nonetheless, although standing of associations is also construed broadly, the *actio popularis* is not admissible. The *Conseil* has established a few limits regarding the quality of the *intérêt*. See PARFOURU, “*Locus Standi of Private Applicants under the Article 230 EC Action for Annulment*”, 2007, at 392 *et seq.*; CHAPUS, *Droit du contentieux administratif*, 2008, at 495 *et seq.*

overcome for private parties. French law has used the notion of *actes faisant grief* according to which practically any person adversely affected by a measure has standing to challenge it. Thus, according to French judges “*nenhum exercício de poder pela Administração escapa (...) ao correspondente controlo jurisdicional.*”¹⁰²¹

By contrast, the underlying approach to the system of administrative review in Germany is mainly subjectivist.¹⁰²² Indeed, in Germany, since the beginning of the twentieth century, “individual rights have advanced to become a central legal concept.”¹⁰²³ Although the German system constitutes probably the most emblematic model of administrative justice which focuses on the protection of private parties in so far as its main purpose is the protection of individual rights, this approach has created “a string of limitations in the right of action of individuals.”¹⁰²⁴ Hence, standing of private parties to bring an action for annulment is granted to those individuals who demonstrate to be entitled to *subjektive Rechten*. The latter notion is a condition of access to courts and limits the exercise of jurisdiction.¹⁰²⁵ According to JELLINEK’s definition “[d]as subjektive Recht ist die von der Rechtsordnung anerkannte und geschützte auf ein Gut oder Interesse gerichtete menschliche Willensmacht.”¹⁰²⁶ IHERING construed individual rights as “legally protected interests.”¹⁰²⁷ According to BÜHLER, an act of the Executive that violates a legal rule would also violate a subjective public right if the legal rule “has been enacted to favour certain persons or group of persons, to gratify their individual interests and not only in the general interests and has been enacted in the interests of these persons such that they can invoke it, and thus can elicit a certain behaviour on the part of the administrative authorities.”¹⁰²⁸ Article 19(4) of the German Basic Law endorses such views in so far as it contains a guarantee against illegal action by the Executive *only* for persons whose rights have been violated. Moreover, pursuant to Article 42(2) of the *Verwaltungsgerichtsordnung* an action for annulment will be held admissible provided that the applicant can claim that he/she has been harmed in his/her rights (*in seinem Rechten verletzt*).¹⁰²⁹ The existence of a violation of subjective rights is, however, to be decided on the merits: at the admissibility state the applicants have to have an *arguable* claim that the act breached his/her rights. As a consequence, the addressees of an act do not have any difficulties in challenging such act. Third parties, however, have to demonstrate an individual and direct interest.¹⁰³⁰ Here, a mere factual interest will not be considered enough.¹⁰³¹ Individual rights must be subjective public rights, *i.e.* “rights accruing from the relationship

¹⁰²¹ CORREIA, *Direito do Contencioso Administrativo*, 2005, at 380.

¹⁰²² See *supra* Part I, Chapter 1, Section 1.1.1.

¹⁰²³ BELJIN, “Rights in EU Law”, 2008 at 95.

¹⁰²⁴ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 33. Noting that this approach implies that substantial issues determine standing see GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2007, at 137.

¹⁰²⁵ CORREIA, *Direito do Contencioso Administrativo*, 2005, at 113.

¹⁰²⁶ JELLINEK, *System der subjektiven öffentlichen Rechte*, 1905, at 44.

¹⁰²⁷ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 103.

¹⁰²⁸ BÜHLER, O., *Die subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung*, Berlin, 1914, at 21, *apud* ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 34.

¹⁰²⁹ See also Article 113(1) and (5) regarding the well-foundedness of the action.

¹⁰³⁰ CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 44.

¹⁰³¹ As seen above, the challenge to regulations is in principle not admissible, although there have been some decisions which acknowledged that possibility in certain areas, such as urbanism. See also CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 110.

between the state and the citizen.”¹⁰³² Determining the existence of a subjective right may prove problematic. These are understood as “*des intérêts privés protégés en tant que tels par l’ordre juridique objectif*.”¹⁰³³ In this context, German scholarship applies the so-called *Schutznormtheorie*, as a comprehensive instrument to determine the existence of rights¹⁰³⁴, according to which it is necessary to determine the purpose of the act, and whether its protective scope includes individual rights. Hence, there will be a subjective right in those cases where the “*programa normativo aplicável apoia os interesses da parte de uma forma individualizada*”¹⁰³⁵ and it is possible to conclude that the rule protects also individual interests and not only general ones. This is the so-called “*zona de protecção jurisdicional*”¹⁰³⁶ guaranteed under Article 19(4) GG.¹⁰³⁷ As the complexity of the relationships established with the administration does not always translate into the granting of subjective rights to the individual, this requirement produces traditionally strict outcomes for private parties.¹⁰³⁸ However, over time, due to an evolution in case-law, standing requirements have been made more lenient and courts have imposed “the more magnanimous form of legally protected interest.”¹⁰³⁹ Scholars note that “evolution is ongoing, showing that the notion of rights cannot be understood as a fixed institution with selectively features.”¹⁰⁴⁰ Some German scholars have tried to mitigate the limitations derived from a strictly subjectivist approach and have considered that standing should be granted when the contested act causes some kind of harm in the individuals position (*individuelle Gestaltungsfreiheit*) arguing on the grounds of fundamental rights protection.¹⁰⁴¹ A more liberal trend has also, somewhat paradoxically, been promoted as consequence of the application of Union law in the national legal order. Under Union law the breach of an interest, even if a *mere factual interest* (*tatsächliche Betroffenheit*) is enough to grant standing *before national courts*. Accordingly, there have been pressures to make standing requirements more flexible in Germany, as a consequence of the need to ensure the effectiveness of Union law in national courts.¹⁰⁴² Regarding the challenge of acts of general application Article 47 of the *Verwaltungsgerichtordnung* foresees the possibility of challenges against normative acts by those who have been *aggrieved* by such acts. However, such provision only applies to *Länder* regulations. Nonetheless, some scholarship has considered that courts may fill possible *lacunae* in light of Article 19(4) GG.¹⁰⁴³

¹⁰³² ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 33.

¹⁰³³ WAELBROECK; VERHEYDEN, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires”, 1995 at 415.

¹⁰³⁴ BELJIN, “Rights in EU Law”, 2008, at 101 noting that the situation resembles casuistry.

¹⁰³⁵ CORREIA, *Direito do Contencioso Administrativo*, 2005, at 114.

¹⁰³⁶ *Ibid.*

¹⁰³⁷ *Ibid.*

¹⁰³⁸ Noting, moreover, that it should be possible under German law to conceive an objective cause of action based solely on the illegality of the act, although Article 113 of the *VwGO* raises difficulties in that respect, see CORREIA, *Direito do Contencioso Administrativo*, 2005, at 363. For a critique of the German system taking into consideration the increasing complexity of administrative relationships see CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 84.

¹⁰³⁹ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 34; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 105.

¹⁰⁴⁰ BELJIN, “Rights in EU Law”, 2008, at 101.

¹⁰⁴¹ CORREIA, *Direito do Contencioso Administrativo*, 2005, at 114.

¹⁰⁴² CLASSEN, “Individualrechtsschutz als Grundlage und Grenze der gerichtlichen Kontrolle”, 1996, at 77 *et seq.*

¹⁰⁴³ *Ibid.*, at 55-57; WAELBROECK; VERHEYDEN, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires”, 1995, at 416. Federal regulations are nonetheless subject to constitutional review.

German doctrine is, however, generally averse to the acknowledgement of an *actio popularis*.

It follows that the German approach is more restrictive than the French one. In German administrative law, there has to be a normative connection between an interest to sue and a legally protected interest, whereas in French law this nexus need not exist, since a factual interest of the applicant is also admitted.¹⁰⁴⁴ Here, the factual interest needs not to be protected by law.¹⁰⁴⁵ For instance, the affiliation of an individual to a group is sufficient: e.g., payers, residents, users of institutions, pupils, students, civil servants. Scholarship defines rights on the basis of an assertion of the *legal norms* whose protective intention needs to be determined. By contrast, regarding interests the only relevant element is whether or not they are *factually* concerned.¹⁰⁴⁶ Rights are determined in the interpretation of the law; interests are determined in the assessment of facts.¹⁰⁴⁷

Nonetheless, it is widely recognised that neither one nor the other model is in *pure form* and both have evolved towards common ground. Scholars note that in subjectivist models, “not only rights and not all rights can be enforced by legal action.”¹⁰⁴⁸ *Per contra*, in objectivist models “not everyone can sue for everything.”¹⁰⁴⁹ Hence, “in both systems there can be judicial protection without rights and rights without judicial protection.”¹⁰⁵⁰ Therefore, it is not surprising that other Member States have adopted systems of judicial review which can be put somewhere half-way between these two poles. In continental Europe, scholars have noted that whereas the Austrian¹⁰⁵¹, Finnish and Sweden systems are closer to the German approach, the Belgian¹⁰⁵², Danish, Dutch¹⁰⁵³, Spanish, Greek and Portuguese law¹⁰⁵⁴ echo the French tradition and have adopted the requirement of personal and direct interests, which include mere factual interests.¹⁰⁵⁵ Here,

¹⁰⁴⁴ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 24.

¹⁰⁴⁵ See BELJIN, “Rights in EU Law”, 2008, at 106.

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ Although one should note that this dichotomy is not entirely absolute. See BELJIN, “Rights in EU Law”, (2008) at 107.

¹⁰⁴⁸ BELJIN, “Rights in EU Law”, (2008) at 98.

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ See Article 131(1) of the German Constitution.

¹⁰⁵² AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 163, 164. The interest must be *direct, actuel, and personnel*. It may be either *matériel* or *moral*, it can be *corporatif* and *fonctionnel*.

¹⁰⁵³ See *ibid.*, at 413, noting that in the Netherlands actions may be open to individuals “*dont les intérêts ont été lésés*” or to individuals “*expressément désignés par la loi*.”

¹⁰⁵⁴ In Portugal, with the constitutional amendment of 1997 the the system of administrative justice was modified towards a more subjectivist system. Under current Article 268(4) individuals may challenge any illegal administrative act which causes some kind of harm in their rights and interests. Moreover, there has been an extension of the means of action that have to be available to individuals in order to ensure their effective judicial protection. Scholars note that there has been an evolution at the constitutional level towards the improvement of the judicial guarantees available to individuals, which was later followed by the adoption of legislation. Under Portuguese law, the parties in a relationship with the administration have standing to bring an action for annulment, either on the grounds of an individual right or an interest protected by law. However, procedural administrative law requires the existence of a legal interest, i.e., the objective verification of a genuine interest in the cause, of the usefulness of the action, which is mainly dictated by reasons of procedural economy. See ANDRADE, *Justiça Administrativa*, 2011, at 263 *et seq.* Individuals are granted standing on the basis of a mere direct and personal interest in the annulment of the contested act. Moreover, Portuguese law foresees the possibility of an *actio popularis* which allows individuals to defend general interests protected under the constitution, such as public health, environment, quality of life, cultural patrimony, among others, regardless of any personal interest in the cause.

¹⁰⁵⁵ For an over view see WAELBROECK; VERHEYDEN, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires”, 1995, at 404 *et seq.*; ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 31 *et seq.*; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 110 *et seq.*

although such an *interest* has to be *personal* – meaning that the applicant must show that he is in a different position from that of the community at large –, and *direct* – in so far as the applicant must show that he/she is or will be immediately affected –, these notions are broadly construed. In these states, the challenge against acts of general application is usually accepted provided that those requirements are met, and judges have been fairly liberal and allowed members of large categories of persons to challenge such acts. However, an *actio popularis* is usually not admitted except in Portugal, Spain, Finland and Sweden, although in the latter two countries only within municipal actions. Somewhere in the middle lies Italy, which regarding the standing of private parties in administrative law is said to have incorporated elements from both the objective and subjective model, in so far as it requires the allegation of (i) an *interesse legittimo, sostanziale o materiale*, which is understood as a legally protected right¹⁰⁵⁶, (ii) the existence of harm caused by the contested act and of (iii) an interest to sue (*interesse a ricorrere* or formal interest to sue).¹⁰⁵⁷ The situation in Luxembourg seems also *sui generis* as although the legal system follows mainly the French tradition the case-law has produced stricter outcomes, which have been largely criticized in the literature.¹⁰⁵⁸

Across the Channel, the different legal traditions of the common law systems – more focused on the law of remedies than in rights¹⁰⁵⁹ – have led to more generous approaches on standing. In the UK, pursuant to Order 53 of the Rules of the Supreme Court (now the Civil Procedure Rules 1998 part 54) and section 31(3) of the Supreme Court Act 1981, a person who has a “sufficient interest in the matter” has standing to bring an application for judicial review.¹⁰⁶⁰ This requirement is also mentioned in the Irish legal system.¹⁰⁶¹ In Scotland, courts require the existence of a “title and interest to sue”¹⁰⁶² and have construed these notions liberally. English courts have also adopted a generous attitude towards standing and opted for an elastic concept of sufficient interest which opens “access to judicial review mechanisms to interested citizens (e.g.

¹⁰⁵⁶ Although it is differentiated from individual rights. This distinction bases the division of competences between administrative and ordinary courts.

¹⁰⁵⁷ AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 313: “[l]e requérant doit avoir également intérêt à l’annulation de l’acte attaqué. Cet intérêt ‘formel’ doit être distingué de l’intérêt ‘matériel’, intérêt juridique que le recours est destiné à défendre. C’est la lésion de l’intérêt matériel qui fait naître l’intérêt formel.” See also CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 115. This requirement does not, however, exclude the right of individuals belonging to a wide category of people provided that they are affected by the measure in question. See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 34.

¹⁰⁵⁸ See AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 351 *et seq.*, noting that regulations are not challengeable in Luxembourg and that the notion of *intérêt* is not as broad as in France in so far as the courts emphasise the individual nature of the interest to sue; ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 35; CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 116.

¹⁰⁵⁹ While in continental Europe there is a tendency to see substantive law as primary and procedural law as secondary (*ubi ius, ibi remedium*) in common law countries rights show up as the result of judicial protection, and procedural law is superior to substantive law (*ubi remedium, ibi ius*). See BELJIN, “Rights in EU Law”, 2008, at 100.

¹⁰⁶⁰ For further developments see ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 35 *et seq.*; CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 130 *et seq.*; ALDER, *Constitutional and Administrative Law*, 2009, at 357. Where an action is *prima facie* unfounded and the applicant cannot show any interest, the action will be dismissed at the leave stage, so as to discourage actions by meddlesome busybodies. In other cases, standing will be granted or rejected at the substantive hearing, after due consideration of the whole factual and legal context of the case. See *R. v. Inland Revenue Comrs ex p. National Federation of Self-Employed and Small Business Ltd*, [1982], AC 617-664.

¹⁰⁶¹ For further developments see WAELBROECK; VERHEYDEN, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires”, 1995, at 420; ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 36-38.

¹⁰⁶² Case of *Scottish Old People’s Welfare Council*, 7/2/1986, [1987] SLT 179.

taxpayers, journalists, etc.) and groups defending collective interests (e.g. environment) or the interests of specific components of the population (e.g. children, women, etc.).” Thus, “if the applicant has a public duty, a specific expertise, or a procedural entitlement (e.g. consultation rights) in a decision-making process, if there is no other possible challenger, if the issue raised is of national significance, or if vindicating the rule of law is important, standing will usually be granted, as a *sufficient interest* will be deemed to be present.”¹⁰⁶³ Standing incorporates *substantive* elements, and if an applicant has a strong case on the merits, his/her action will usually be admissible.¹⁰⁶⁴ Hence, the most significant element of English law is probably the fact that the existence of a *sufficient interest* implies a preliminary assessment of the merits of the action: the applicants’ interest is determined also in light of whether they have a *strong case on the merits*.¹⁰⁶⁵ Furthermore, there is a growing trend to admit that the greater the merit of the petition, the lesser the degree of individual involvement required to bring an action to contest the validity of an act of public power.¹⁰⁶⁶ As issues of standing determine who has access to justice they are deemed to have “constitutional significance.”¹⁰⁶⁷ Generally speaking, courts have considered that a *direct and personal interest* is required. However, in some circumstances, applicants with a *general or public interest* will be granted standing when there has been a breach or failure to carry out statutory or public duties, by the authorities involved.¹⁰⁶⁸ Hence, standing in the UK is not based on the notion of individual right.¹⁰⁶⁹ At the most, the existence of subjective rights is an indicator of standing: legitimate expectations and mere interests are considered enough. Individuals are allowed to defend meta-individual rights in the economic, social, cultural and environmental fields. Courts often take into consideration the role of the individual in the framework of public law. In practice, the requirement of a *sufficient interest* will rarely be an obstacle to access to the court. The existence of a sufficient interest is uncontroversial when such interest is individualized, for instance, when the facts are personal to the applicant, or if the act breaches individual rights or has adverse financial consequences.¹⁰⁷⁰ When the challenge of an act addressed to third parties or which affects the public in general is at stake, adverse financial consequences, special geographic circumstances, the

¹⁰⁶³ GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2007, at 134.

¹⁰⁶⁴ *Ibid.* BELOFF notes the following factors which the Strand courts take into account in deciding whether an applicant has standing: (i) the merits of the application; (ii) the importance of maintaining the rule of law; (iii) the importance of the issue related; (iv) the likely absence of any other responsible challenger; (v) the nature of the breach of duty against which relief is sought; and (vi) the expertise and experience of the applicant body. See BELOFF, “Who Whom?”, 2000, at 277.

¹⁰⁶⁵ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 38; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 127, mentioning the same approach in Ireland. In Ireland, there seems to be a trend to admit the action considering the possibility of another action being brought by a more specifically affected applicant. If such possibility exists, the action may not be admitted. If not, the action will be, in order to ensure that a specific act is not reviewed for lack of specifically affected individuals. See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 129; CRAIG, *Administrative Law*, 2010, at 800, 801.

¹⁰⁶⁶ DE SMITH; WOOLF; JOWELL, *Judicial Review of Administrative Action*, 2007, at 80 et seq.

¹⁰⁶⁷ *Ibid.*, at 99.

¹⁰⁶⁸ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 36; CRAIG, *Administrative Law*, 2010, at 803.

¹⁰⁶⁹ Indeed, in the UK, since DICEY, the tension between the objective and subjective function of the system of judicial review is not entirely solved. For further developments see CORREIA, *Direito do Contencioso Administrativo*, 2005, at 163 et seq.

¹⁰⁷⁰ DE SMITH; WOOLF; JOWELL, *Judicial Review of Administrative Action*, 2007, at 82.

membership of an ethnic community or other objective connections with the affected institution may be enough to grant standing.¹⁰⁷¹ More significantly, in the UK there is some room for public interest litigation, which can take place either collectively through associations or individually.¹⁰⁷² The action for judicial review is seen as pursuing both a subjective and objective aim. It serves to defend individual rights but also to ensure the realization of public interests and accountability of public powers and good administration. Lastly, in the UK judicial review is seen as a counterbalance to limited parliamentary control over administrative action.

From the comparison of the national legal systems, several common features can be extracted. Hence, as a rule, in the majority of Member States, an individual applicant will be granted standing to bring an action for annulment if he/she can show an *interest* in the annulment, that must be *individualized* — i.e. different from the community at large — and *direct*, in the sense that the act may cause or may be likely to cause some harm to the applicant. In German-oriented systems, such an interest must be legally protected, unlike other Member States where factual interests may be enough. Nonetheless, there is a common criterion to qualify the *interest to sue* of a particular applicant and his/her right to a judicial action: “il s’agit de l’affectation don’t souffre le requérant du fait de l’acte attaqué.”¹⁰⁷³ The contested act must thus be capable of adversely affecting the individual as member of a limited and defined category of people. However, this last condition is far from being understood strictly. The decisive criterion seems to lie in the existence of a *sufficient interest* which is assessed taking into account the relationship between the act *faisant grief* and the way the individual is affected by its application. Surely such interest is easier to demonstrate when an individual act is at stake, and the applicant is the addressee of such act. However, challenges to regulations are also admissible in so far as they affect *particularly* certain individuals.¹⁰⁷⁴ Lastly, there has been an evolution in the judicial practice towards a more flexible approach to the rules on standing of private parties as a consequence of the development of the principles of respect for the rule of law and the need for adequate judicial protection of individuals against an action of the Executive.¹⁰⁷⁵ Hence, there is a judicial trend towards a relaxation of the conditions of standing to sue. In light of the above, CASSIA notes that:

“[l]a généralisation et l’ancrage temporel de cet assouplissement de l’examen des conditions d’accès aux prétoires nationaux conduit ainsi à relativiser la distinction entre les États de contentieux traditionnellement objectif et ceux de contentieux traditionnellement subjectif.”¹⁰⁷⁶

¹⁰⁷¹ CORREIA, *Direito do Contencioso Administrativo*, 2005, at 163.

¹⁰⁷² The decision granting standing to Greenpeace to challenge a nuclear regulation of Sellafield, on the grounds that it was a respected international organisation, the problems were serious and complex, and if the decision was negative there might not be any effective way to bring the matter before the court. See *R. v. Her Majesty's Inspectorate of Pollution, Ex p. Greenpeace Ltd.* (no. 2) [1994] 4 All E.R. 329. Also, in *R. v. Secretary of State for Foreign Affairs Ex p. World Development Movement* [1995] 1 W.L.R. 386, the World Development Movement challenged a ministry decision granting financial support to the construction of a dam in Pergau, Malasia. The court granted standing taking into account the fact that no challenger was likely to come forward. See CRAIG, *Administrative Law*, 2010, at 807. Scholars have suggested that environmental issues must have a specific regime on standing. See CORREIA, *Direito do Contencioso Administrativo*, 2005, at 166.

¹⁰⁷³ VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, at 547, 548.

¹⁰⁷⁴ *Ibid.*

¹⁰⁷⁵ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 39.

¹⁰⁷⁶ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 143, 144.

What is more, the influence of Union law and its decentralised application in national courts has contributed to the approximation of the Member States' systems of administrative justice. This evolution puts in evidence the fact that the case-law of the CJEU has somehow "magically" escaped, or found a way to avoid these developments. It is worth remembering that the test of individual concern may still apply to some executive acts of the Union, notably those requiring implementing measures. The case of "regulatory directives" is probably the most obvious example.¹⁰⁷⁷ In light of the above, it is submitted that *Plaumann* should become *more European*. If "*pour être Communautaire, le droit doit maintenir un reel équilibre entre toutes les sources nationales et s'enrichir simultanément de chacune*"¹⁰⁷⁸ the CJEU's should take into consideration the evolution that has taken place in Member States' legal orders in order to make the *Plaumann* test more flexible.¹⁰⁷⁹ The fact that the CJEU's approach to individual concern is far more restricted than in many, if not all, national legal systems is, in JACOBS words, indeed "a paradoxical situation, especially given the continuing concern about the lack of full democratic legitimacy of Community legislation, which exposes the Community to a risk of resistance by national courts which, it should not be forgotten, have repeatedly emphasized their resolve to ensure that developments in Community law do not undermine the judicial protection of individuals."¹⁰⁸⁰

III. A second good reason supporting the liberalisation of the *Plaumann* approach is the existence of large consensus among commentators who have over the years consistently pressed for a more relaxed approach to the test of individual concern. Several proposals have been put forward, including the abolition of this requirement.¹⁰⁸¹ Generally speaking scholars have pointed to criteria based on the notion of rights or interests affected by the contested measure regardless of its legal nature. ALLEMANO has suggested a "generalised opening of the conditions of admissibility" in light of the original logic of *Les Verts*.¹⁰⁸² CRAIG and DE BÚRCA have held that "there is something odd about the infringement of an *individual right* not counting as a matter of individual concern."¹⁰⁸³ TOTH considered that the CJEU should adopt a more liberal interpretation of direct

¹⁰⁷⁷ The case of *Vischim* is emblematic as it involved a challenge to a Commission directive adopted in comitology and therefore clearly an administrative act.

¹⁰⁷⁸ LECOURT, *L'Europe des Juges*, 1976, at 117.

¹⁰⁷⁹ Although it is true that the influence of national legal systems should not be overestimated given the autonomy of the Union legal order, it is undeniable that elements from the national legal orders are helpful guides in the interpretation of the *ratio legis* of the Treaties. The CJEU has itself admitted the validity of this method of interpretation (Joined Cases 7/56 and 3 to 6/57, *Algera and others/Common Assembly*, [1957-1958] ECR 39). The CJEU's records show that the AGs, if not the Court itself, have at least had in mind the relevant national laws and practices. But there has been no unanimity of opinion. M. LAGRANGE, the distinguished first Advocate General from the French *Conseil d'Etat*, was prepared to discount the fact that "the legal situation within the Community is undoubtedly less favourable [to the plaintiff] than that which has been reached for a greater or lesser length of time by some of the Member States, but it is similar to that known in other States." See Opinion in Joined Cases 19 to 22/62, *Fédération Nationale de la Boucherie en Gros and others/Council*, [1962] ECR 491. His counterpart, the able Mr. ROEMER, coming from private corporate law practice in Germany, appeared troubled, in 1968 at any rate, by the Court's formalistic approach as compared with rules applied by the German Federal Administrative Court, and particularly by the possible constitutional implications of leaving a citizen without any remedy (See Opinion in Case 6/68, *Zuckerfabrik Watenstedt GmbH/Council*, [1968] ECR 409). See STEIN; VINING, "Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context", 1976, at 233.

¹⁰⁸⁰ Opinion of AG JACOBS in *UPA* para. 86. See BOROWSKI, "Die Nichtigkeitsklage gem. Art. 230 Abs. 4 EGV", 2004, at 894.

¹⁰⁸¹ See, e.g., GINTER, "Access to Justice in the European Court of Justice in Luxembourg", 2002, at 444.

¹⁰⁸² ALEMANNO, "What Has Been, and What Could Be", 2010, at 332.

¹⁰⁸³ CRAIG; BÚRCA, *EU Law*, 2011 at 510.

and individual concern so as to allow challenges to “any act of the institutions capable of producing legal effects, irrespective of its nature and designation, which directly affects a *specific right or legal interest* of the individual.”¹⁰⁸⁴ ENCHELMAIER considered that the Treaty mandated a “comprehensive control of legality of all acts that can affect individuals’ rights.”¹⁰⁸⁵ Similarly, WALBROECK and VERHEYDEN suggested that an action for annulment should be made available “*contre tout acte communautaire quel qu’il soit pourvu qu’ils soient affectés dans leurs droits ou intérêts par celui-ci.*”¹⁰⁸⁶ DE WITTE advocated a more liberal test on standing based either on the British *sufficient interest* or the French “*intérêt pour agir.*”¹⁰⁸⁷ ALONSO GARCÍA pointed to a judicial reform based on the notions of *legitimate* or *sufficient interest*.¹⁰⁸⁸ SCHOCKWEILER has also considered that the CJEU should adopt criteria similar to the *Conseil d’État* and require a mere personal and direct interest, distinct from the community at large:

“[p]ermettant au requérant d’attaquer toute acte pour violation d’un élément de la légalité destiné à protéger sa situation juridique, dès lors que les conséquences de cet acte l’atteignent à titre particulier, fût-ce en tant qu’appartenant à une catégorie nettement définie d’intéressés et permettant même l’invocation d’intérêts collectifs.”¹⁰⁸⁹

VANDERSANDEN has considered that “une notion élargie de l’intérêt à agir, s’appréciant principalement par rapport au préjudice souffert par celui qui s’en prévaut” should be the predominant if not the sole criterion underlying the admissibility of an action for annulment.¹⁰⁹⁰ Such interest should be “né, actuel et concret”¹⁰⁹¹ and it should extend to the challenge of regulations. CASSIA noted that the existence of an *intérêt à agir* based on factual considerations is already taken into consideration by the CJEU and should be enough to ground an action for annulment. Such interest should be deemed demonstrated when no other possibility to challenge the act is available besides the action for annulment.¹⁰⁹² CANEDO notes that the establishment of a unique condition

¹⁰⁸⁴ TOTH, “The European Union and Human Rights”, 1997, at 518.

¹⁰⁸⁵ ENCHELMAIER, “No One Slips Through the Net”, 2005, at 177.

¹⁰⁸⁶ WAELBROECK; VERHEYDEN, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires”, 1995, at 441. In SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 454, the authors suggested an alignment of the test of individual concern with the requirements that support interventions, on the grounds that direct applicants should not be treated less favourably than mere interveners.

¹⁰⁸⁷ See WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 893. The author considers that Article 263(4) TFEU should be read in light of Articles 6 and 13 ECHR and admits *locus standi* of associations and public interest groups. In this scenario, a constitutional complaint would be only a second best solution.

¹⁰⁸⁸ ALONSO GARCÍA, “The General Provisions of the Charter of Fundamental Rights of the European Union”, 2002, at 505.

¹⁰⁸⁹ SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 8.

¹⁰⁹⁰ VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 548. The author adds that if an applicant proves that any type of act breaches his/her fundamental rights or prerogatives, it is *particularly important* that his/her case is received, without a too long and detailed analysis on admissibility. See *infra* Section 2.1.5.

¹⁰⁹¹ VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 548. The author suggests a new wording for Article 263(4) TFEU, according to which “*toute personne physique ou morale peut former, dans les mêmes conditions, un recours contre les actes autre que ceux dot elle est le destinataire, dans la mesure où elle est suffisamment affectée par tels actes.*” The only relevant angle here is the interest to sue and not the type of act. Such interest should be “*suffisamment caractérisé*”, which means that there should be a direct relationship between the content of the act and the consequences in the individuals’ position.

¹⁰⁹² CASSIA, “Continuité et rupture dans le contentieux de la recevabilité du recours en annulations des particuliers”, 2002, at 557, 558.

based on the existence of an interest “*unique, particulier et personnel*”¹⁰⁹³ would have the immediate advantage of abolishing “*appreciations délicates et subtiles*”¹⁰⁹⁴ underlying the notions of direct and individual concern. BONI has considered that the admissibility of an action for annulment “*dovrebbe dipendere principalmente dall’intensità del pregiudizio di cui soffre personalmente il ricorrente, in conseguenza dell’applicazione dell’atto impugnato e, in particolare, dalla gravità delle conseguenze economiche.*”¹⁰⁹⁵ TRIDIMAS suggested that individuals should be allowed to challenge any Union act which affects them and does not require implementing measures.¹⁰⁹⁶ KOVAR and BARAV have noted that the requirement of an individual interest may be enough to avoid an *actio popularis*.¹⁰⁹⁷ ARNULL while considering that the system is not mature enough to embrace the *actio popularis* held that the basic test of standing should be “whether the applicant has been adversely affected by the contested act.”¹⁰⁹⁸ There seems to be a general consensus regarding the inadmissibility of an *actio popularis* at the EU level.¹⁰⁹⁹ However, GORMLEY and HARLOW have gone further in admitting room for public interest litigation¹¹⁰⁰, *locus standi* for NGOs and the possibility of group litigation, especially in certain fields such as environmental protection.¹¹⁰¹ Furthermore, ALBORS-LLORENS has suggested that those applicants that show a “clear individualized interest” should be allowed to challenge decisions in the area of general management of the market. Regarding regulations “in those rare cases where it is reasonably arguable that a regulation violates a general principle of

¹⁰⁹³ CANEDO, “L’intérêt à agir dans le recours en annulation du droit communautaire”, 2000, at 509.

¹⁰⁹⁴ *Ibid.* Considering that the French solution would constitute a good solution in so far as standing in France is included in a constitutional reflection on the role of citizens and the civil society *vis-à-vis* the government, which would be important in the EU in the construction of a true European civil society see PARFOURU, “Locus Standi of Private Applicants under the Article 230 EC Action for Annulment”, 2007, at 372. Following the French tradition, PARFOURU suggested that individual concern should be established where individuals are part either of a closed class or of an open class, provided that they constitute a small and identifiable group. Associations should be deemed individually concerned when they are constituted before the measure is adopted and when the collective interest they seek to protect corresponds to the object of the contested measure and is not too general. Environmental associations should have standing to challenge measures which have an impact on the environment, unless such impact is geographically limited. *Ibid.*, at 400.

¹⁰⁹⁵ BONI, “Il ricorso di annullamento delle persone fisiche e giuridiche”, 1998, at 108.

¹⁰⁹⁶ See Memorandum of the House of Lords European Union Committee, The Future Role of the European Court of Justice, 2003-2004, at 43.

¹⁰⁹⁷ KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 93.

¹⁰⁹⁸ ARNULL, “Private Applications and the Action for Annulment under Article 173 of the EC Treaty”, 1995, at 49.

¹⁰⁹⁹ VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 550; CANEDO, “L’intérêt à agir dans le recours en annulation du droit communautaire”, 2000, at 510; SINANIOTIS, *The Interim Protection of Individuals Before the European and National Courts*, 2006 at 122. See also Case T-188/95, *Waterleiding Maatschappij “Noord-West Brabant”/Commission*, [1998] ECR II-3713, para. 68: [t]o follow the applicant’s reasoning would amount to recognising that any taxpayer is a party concerned within the meaning of Article 93(2) of the Treaty in relation to aid financed through the general tax resources of a Member State. Such an interpretation would be clearly incompatible with the interpretation given to Article 93(2) by the case-law (...). Moreover, in actions for annulment of decisions taken on the basis of Article 93(3) of the Treaty, it would have the effect of depriving the concept of a ‘person individually concerned’ for the purposes of the fourth paragraph of Article 173 of the Treaty of all legal significance.”

¹¹⁰⁰ GORMLEY, “Public Interest Litigation in Community Law”, 2001, at 58. The author suggested public interest litigation on a sector-by-sector basis through minor amendment of the Treaty and specific legislation. Taking from ZULLEG’s and KRÄMER’s proposals, GORMLEY suggested that the Council could in co-decision, after consulting the Economic and Social Committee, adopt measures conferring jurisdiction upon the CJEU for actions brought by public interest organizations. Such measures should specify the criteria which must be satisfied by such organizations in order to benefit from those measures. See also GORMLEY, “Public Interest Litigation”, 2000, at 191-201.

¹¹⁰¹ See HARLOW, “Access to Justice as a Human Right”, 1999, at 194 *et seq.*. See also BERROD, *La systématique des voies de droit communautaires*, 2003, at 1061. The special nature of environmental matters has also been acknowledged in the context of the ECHR. See FRUMER, “Protection de l’environnement et droits procéduraux de l’homme”, at 813-833. HARLOW has also suggested a more mitigated of ensuring public interest litigation through rights of intervention in proceedings. See HARLOW, “Towards a Theory of Access for the European Court of Justice”, 1992, at 247, 248.

Union law, private applicants should *always* be able to challenge them.”¹¹⁰² Lastly, LENAERTS and CORTHAUT have hinted that individual concern could mean the same as the *interest in bringing the proceedings*¹¹⁰³ and suggested that for implementing and delegated acts of general application direct concern should suffice.

IV. As a third argument one should note that there have been pressures for reform from within the CJEU itself. Early on, in 1975, the CJEU suggested that in order to safeguard individual rights, private parties should be able to challenge Union acts that directly affected their interests¹¹⁰⁴, a suggestion remarkably close to that of AG JACOBS in *UPA*. Later, on the eve of the 1996 IGC, the CJEU invited Member States to consider the reform of ex-Article 230(4) EC.¹¹⁰⁵ However, these suggestions “fell on deaf ears” for many years and such provision ended up being amended only in Lisbon.¹¹⁰⁶

Some AGs have also highlighted the need for reform. AG LAGRANGE has proposed the abolition of such condition.¹¹⁰⁷ AG MAYARS has affirmed its attachment to the notion of subjective right.¹¹⁰⁸ In *Greenpeace*, AG COSMAS pointed to a criterion based on the “existence of a legal interest” which allows to determine if an applicant is “personally affected” by a Union act. Additionally, the AG admitted the existence of “acquired interests” similar to “acquired rights” which if seriously harmed should be taken into consideration in the admissibility decision. When addressing the issue of standing in cases of environmental damage the AG mentioned the need to take into account the geographical proximity, the nature of the consequences which the intervention in the environment will or is likely to have, and the extent and gravity of those consequences.¹¹⁰⁹ AG RUIZ JARABO-COLOMER considered in *Associazione agricoltori della provincia di Rovigo*¹¹¹⁰ that:

“[I] share the view advanced *inter alia* by certain Advocates General, favouring a more broadly-based right of access to the Community judicature, particularly as regards actions for annulment. The present limitations on the right to bring proceedings may in fact, on

¹¹⁰² See ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 228, 229, notably to avoid cases which involve a breach general principles of EU law. The author seems to suggest that in cases like this no *locus standi* requirements should apply.

¹¹⁰³ LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 38.

¹¹⁰⁴ See Suggestions of the Court of Justice on European Union, *Bulletin of the European Communities*, Suppl. 9/75, 17, 18.

¹¹⁰⁵ Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union, 1995, at 19, 30.

¹¹⁰⁶ See e.g., WARD, “Amsterdam and Amendment to Article 230 EC”, 2001, at 37, 38.

¹¹⁰⁷ LAGRANGE, in *Dix ans de jurisprudence*, 1965, at 610 *apud* KOVAR; BARAV, “Variations nouvelles sur un thème ancien”, 1976, at 80.

¹¹⁰⁸ Opinion of AG in Case 43/72, *Merkur/Commission*, [1973] ECR 1055, at 1079.

¹¹⁰⁹ Paras. 116-120. In a footnote the AG added: “[A] special rule should thus be implied that, when there is no environmental impact assessment for a given set of works, such persons (...) should not be obliged to provide full and concrete proof of the effects on their individual situations owing to the actual or potential environmental impact of the works financed. It may then suffice for them to invoke their status as residents of the wider area in which the works in question are being carried out or as persons carrying on occupations in that area. Under that interpretation, the matters relied on by the appellants in the present case were in principle sufficient for them to be deemed to be affected individually by the contested act, in which case the order of the Court of First Instance is wrong in law and should be set aside.”

¹¹¹⁰ Case C-142/95 P, *Associazione agricoltori della provincia di Rovigo and others/Commission and others*, [1996] ECR I-6669.

occasion, leave persons or undertakings with no redress whatever where their *interests are adversely affected* by the conduct of the Community institutions. The fact that a single person or undertaking may be in the same situation as many others, all affected by the Community acts which it is sought to contest, in no way palliates that lack of redress.

More particularly, I consider that, in environmental matters, which involve such a multiplicity of crucial, and sometimes opposing, social interests, capacity to bring proceedings should be *more widely recognized*, so that both associations such as the appellants and others representing *wider interests* can have free access to judicial protection (emphasis added).¹¹¹¹

In *UPA*, AG JACOBS saw “no compelling reason” to read into the notion of individual concern a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee and suggested that a person should be regarded as individually concerned “where, *by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.*”¹¹¹² Later, the GC held in *Jégo-Quéré*¹¹¹³ that:

“[i]n order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him (emphasis added).”¹¹¹⁴

The Opinion of the AG in *UPA* and the ruling of the GC in *Jégo-Quéré* questioned the very essence of the *Plaumann* formula and suggested a radical new interpretation of the test of individual concern that would have general application. They “shared a common ethos”¹¹¹⁵ by making use of the applicants’ concerns about the lack of effective judicial protection in order to highlight the inadequacy of the alternative routes provided by the Treaty for the review of Union acts.¹¹¹⁶ It has been considered that the test proposed by JACOBS was broader than the one adopted by the GC in *Jégo-Quéré*.¹¹¹⁷ First, the AG’s test was wide enough to give standing to applicants who

¹¹¹¹ Paras. 40-41. In a footnote the AG noted that “in his work entitled ‘Le recours en annulation des particuliers (article 173, deuxième alinéa du traité CE): nouvelles réflexions sur l’expression “la concernent ... individuellement”, *Festschrift für Ulrich Everling*, 1995, p. 852, Judge Moitinho de Almeida stated: “la Cour n’a jamais suivi les suggestions de ses avocats généraux visant à une interprétation plus large de l’exigence d’un intérêt individuel.”

¹¹¹² Paras. 59-60. CRAIG followed this suggestion. See Memorandum of the House of Lords European Union Committee, *The Future Role of the European Court of Justice, 2003-2004*, at 43. The test put forward by AG JACOBS bears a considerable resemblance to the concept used from the outset in Articles 90 and 91 of the Staff Regulations, which allow for an action to be brought in relation to an “act adversely affecting” the applicant. For further developments see USHER, “Direct and Individual Concern” 2003, at 585, 586. AG GEELHOED seems to have agreed with AG’s JACOBS submissions in his Opinion in Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, [2002] ECR I-11453, para. 51.

¹¹¹³ See USHER, “Direct and Individual Concern”, 2003, at 585, 586, noting that whatever the differences between those interpretations, neither of them would on the face of it have opened the way to what might be termed public interest litigation, which appeared earlier to have been rejected in the *Greenpeace* decisions.

¹¹¹⁴ Para. 51. Noting that this test is close to the *ERTA* concept of reviewable acts but that it requires the individual to come within the personal scope of the contested measure see ENCHELMAIER, “No One Slips Through the Net?”, 2005, at 210. See *supra* Part I, Chapter 1, Section 1.1.4.

¹¹¹⁵ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 84.

¹¹¹⁶ *Ibid.*; TRIDIMAS; POLI, “*Locus Standi* of Individuals under Article 230(4)”, 2008, at 79-81.

¹¹¹⁷ *Ibid.*, at 85; CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 244; GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2007, at 133. Notwithstanding

suffer *grave economic damage* as a result of a Union measure. Second, it allowed an applicant to be individually concerned not only if a measure has already affected its situation, but also if the measure has the *potential* to do so. Thirdly, it made no distinction between challenges to *acts of general or individual application*. By contrast, the test suggested by the CG was based on the effect the act has on the *legal position* of the applicant, which means that the latter would still have to show that the measure either restricted his/her *rights* or imposed *obligations* on him/her. Furthermore, that effect should be *definite* and *immediate*, which seemed to exclude the possibility of a potential effect.¹¹¹⁸ Finally, the test was formulated with specific reference to Union measures of general application, thereby raising the question of whether the same approach would apply to individual acts.¹¹¹⁹

The refusal of the CJ to review the test in those cases, in the earlier 2000s, was received as a disappointment, and described as a missed opportunity to address a long identified *lacuna* of judicial protection of private parties in the EU. In the “long hot summer for individual concern”¹¹²⁰ the CJ was said to have “missed the boat”¹¹²¹, and scholars spoke of a “return of Euridice.”¹¹²² If the GC’s decision in *Jégo-Quéré* was considered to have caused an “earthquake in the landscape of Community law”¹¹²³ the CJ’s ruling downgraded it to a “passing tremor.”¹¹²⁴ In *UPA* and *Jégo-Quéré*, the CJ reaffirmed the centrality of its *Plaumann* ruling and gave effective judicial protection subsidiary consideration. According to the CJ, effective judicial protection is mostly an obligation for national courts. At the Union level, such principle does not justify a departure from the standing requirements that stem from an express and clear textual provision of the Treaties. Hence, effective judicial protection could not be given priority over *Plaumann*.¹¹²⁵

It is submitted that the constitutional environment of the EU has changed since then. The renewed system of fundamental rights protection introduced by the Lisbon Treaty must compel the CJEU to revisit its *constitutional priorities* and put the need to protect the individual at the centre of the system of judicial review. In fact, the case-law of the CJEU clearly shows that, similarly to administrative acts, legislative acts may directly affect the rights and interests of individuals. What is more, there seems to be an inconsistency between the recognition of the direct effect of Union law and the lack of standing of private parties to challenge it directly. Truth be said, such construction

favouring the GC’s test see RAGOLLE, “Access to Justice for Private Applicants in the Community Legal Order”, 2003, at 101.

¹¹¹⁸ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 85; CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 244.

¹¹¹⁹ Although I tend to follow such views, other scholars have considered that the GC’s test was broad enough to include either the breach of subjective rights or any harm caused on the interests of individuals. See CASSIA, “Continuité et rupture dans le contentieux de la recevabilité du recours en annulations des particuliers”, 2002, at 556.

¹¹²⁰ VAN DEN BROEK, “A long hot summer for individual concern?”, 2003, at 61-79.

¹¹²¹ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, 2003, at 72-92. See also RAGOLLE, “Access to Justice for Private Applicants in the Community Legal Order”, 2003, 90-101; ARNULL, “April Shower for *Jégo-Quéré*”, 2004, at 288; CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 233-261, 245; KOCH, “Challenge of Community fisheries regulation”, 2004, at 814-819; CHALMERS; DAVIES; MONTI, *European Union Law*, 2010, at 424;

¹¹²² TRIDIMAS; POLI, “*Locus Standi* of Individuals under Article 230(4)”, 2008, at 70.

¹¹²³ RAGOLLE, “Access to Justice for Private Applicants in the Community Legal Order”, 2003, 94.

¹¹²⁴ KOCH, “*Commission of the European Communities v Jégo-Quéré & Cie SA*”, 2004, at 819.

¹¹²⁵ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 9. See *supra* Part I, Chapter 1, Section 1.1.4.

favours the position of individuals wanting to prevail themselves of Union norms against Member States, by contrast with those individuals wishing to enforce EU law against the Union itself. Furthermore, it is submitted that the test for individual concern is ill-founded *in principle*: it is right and adequate that those who suffered some harm should have access to judicial review. The idea that the more people are affected by a provision the less chance there is for any challenge is contrary to the essence of effective judicial protection. As Union law “now affects the interests of individuals directly, frequently and deeply”, there is “a correspondingly greater need for effective judicial protection against unlawful action.”¹¹²⁶ Hence, a new test, based on the existence of a *substantial adverse effect on the interests* of the applicant, offers significant advantages. It is more realistic in economic terms¹¹²⁷; it would be easier to apply; it would therefore increase legal certainty for private parties; it would be more suitable for assessing the *locus standi* of associations; and it would be equally suited for all Union policies, putting an end to the variable geometry that has dominated the CJEU’s case-law in this regard. The existence of an individual right should serve as an indicator of standing, and *in dubio* it should be considered enough to bring an action for annulment. Nonetheless, harm to factual interests should not be disregarded, as it is clear that the individualization of the applicants “*se concrétise par une combinaison du droit et du fait.*”¹¹²⁸

V. This new test is further corroborated by another set of indications included in the CJEU’s own case-law. Hence, regarding the *locus standi* of individuals to enforce Union rights before national courts, the CJEU held in *Verholen*¹¹²⁹ that although “it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings”¹¹³⁰ Member States are obliged not to undermine the right to effective judicial protection. Thus, it follows from *Verholen* that directives may be invoked not only by those individuals who fall within the personal scope of Union rules and are directly protected by those rules, but also those who have a *direct interest* in the application of those rules.¹¹³¹ Hence, in national courts, EU rights must be “equipped with criteria that grant a possibility to enforce the right in accordance with national law.”¹¹³² This may either entail the creation of *rights* or the protection of *mere interests*, if this is the precondition for judicial enforceability in the respective Member State.¹¹³³ Moreover, there are EU

¹¹²⁶ Opinion of AG JACOBS in *UPA*, para. 77.

¹¹²⁷ For example, the competitor of an undertaking benefiting from Community aid might not satisfy the *Jégo-Quéré* test, but its interests could be affected negatively by the measure and it would seem unfair to exclude it from the possibility of bringing an Article 230(4) EC challenge. See ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, at 85.

¹¹²⁸ CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 567. See also Opinion of AG FENELLY in Case C-70/97 P, *Kruiviat/Commission*, [1998] ECR I-7183, paras. 66. The House of Lords stated in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd*, [1982], AC 617-664 that “the (...) question of *locus standi* (...) is one for decision, a mixed decision of fact and law, which the court must decide on legal principles.”

¹¹²⁹ Joined Cases C-87 to 89/90, *Verholen and others*, [1991] ECR I-3757.

¹¹³⁰ Para. 24. One should note that the CJEU mentioned the procedural requirements of *standing* and *interest* separately. RUFFERT argues that the notion of *direct interest* in *Verholen* should be construed in light of the objectives pursued by the directive and its protective scope according to the *Schutznormtheorie*. See RUFFERT, “Rights and Remedies in European Community Law”, 1997, at 331.

¹¹³¹ PRECHAL, *Directives in European Community Law*, 1995, at 167.

¹¹³² See BELJIN, “Rights in EU Law”, 2008, at 105.

¹¹³³ *Ibid.*

provisions in which both of these possibilities are juxtaposed, *i.e.* which make EU rights dependent on either the impairment of a right or a sufficient interest.¹¹³⁴

The CJEU has rarely addressed the issue of the personal scope of EU rights.¹¹³⁵ The issue of knowing who benefits from Union rights has already been considered the main *deficit* of Union rights.¹¹³⁶ BELJIN has noted that the indeterminability of Union rights, mostly in directives, is often intended as Member States are granted discretion to implement what is intended to be set of *minimum* rights.¹¹³⁷ Problems arise when the circle of beneficiaries is broad. In such cases, “the entitled persons can be determined by the degree to which they are (actually or potentially) concerned.”¹¹³⁸ Also here, “the less one can derive from the norm, the greater the significance of being concerned factually.”¹¹³⁹ However, sometimes EU law grants a right to those who are “affected or have an interest”¹¹⁴⁰ or establishes that “interested parties” shall mean “natural or legal persons affected or likely to be affected by, or having a legitimate interest.”¹¹⁴¹ The scope of protection of these norms is far from being straightforward. Furthermore, it is not always the case that the personal scope of application of a Union act determines the beneficiaries of a right. As mentioned above, in *Verholen* the CJEU held that the right to rely on the provisions of the directive at stake was not limited to individuals coming within the scope *ratione personae* of the directive, but extended also to other persons that have a *direct interest* in ensuring its application.¹¹⁴² Thus, national law must provide standing not only to the addressee of an individual act but also to its “direct victim.”¹¹⁴³ Accordingly, the husband of a discriminated woman can deduce rights from a directive which establishes the principle of equal treatment between genders.¹¹⁴⁴

Hence, there have been a number of cases which have dealt with national limitations on standing to bring action to enforce Union rights in national courts, where the CJEU has stated that the access to justice should be broader. In *Commission/Germany*¹¹⁴⁵ the CJEU considered that the directive at stake intended to create rights for individuals, which was less clear according to German doctrine and with the need to establish an *abgegrenzten und beschränkten Personenkreis*.¹¹⁴⁶

¹¹³⁴ Article 12(1) of Directive 2004/35/EC.

¹¹³⁵ The most emblematic case is probably Case C-222/02, *Paul and others*, [2004] ECR I-9425, paras. 25-32.

¹¹³⁶ See EILMANSBERGER, “The Relationship between Rights and Remedies in EC Law”, 2004, at 1199-1246.

¹¹³⁷ See BELJIN, “Rights in EU Law”, 2008, at 118.

¹¹³⁸ *Ibid.*

¹¹³⁹ *Ibid.*

¹¹⁴⁰ Article 6(4) of Directive 2001/42/EC.

¹¹⁴¹ Article 2(f) of Directive 2002/30/EC.

¹¹⁴² For instance, the dependents of an employee claiming payment of survivor pension may rely on Article 141 TEC to challenge a pension scheme. See Case C-200/91, *Coloroll Pension Trustees/Russell and others*, [1994] ECR I-4389.

¹¹⁴³ TRIDMAS, *The General Principles of EU Law*, 2006, at 453. According to this case-law there are EU law provisions which make EU rights judicial protection dependent on either the impairment of a right or of a sufficient interest. See BELJIN, “Rights in EU Law”, 2008, at 105.

¹¹⁴⁴ See also Case C-343/92, *Roks and others/Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others*, [1994] ECR I-571, para. 42: “[d]irective 79/7 may be relied upon by individuals who suffer the effects of discrimination in a national provision through another person who himself is covered by the directive.” However, in *Safalero*, the Court took a rather restrictive view. See also Case C-13/01, *Safalero*, [2003] ECR I-8679, paras. 55-56. Scholars have considered that this case should be read on its facts. See PRECHAL, “Protection of Rights”, 2008, at 178.

¹¹⁴⁵ Case 131/88, *Commission/Germany*, [1991] ECR I-825. See also Case 361/88, *Commission/Germany*, [1991] ECR I-2567; Case C-59/89, *Commission/Germany*, [1991] ECR I-2607; Case C-13/90, *Commission/France*, [1991] ECR I-4327; Case C-14/90, *Commission/France*, [1991] ECR I-4331; Case C-64/90, *Commission/France*, [1991] I-4335.

¹¹⁴⁶ PRECHAL, “Protection of Rights”, 2008, at 158.

Numerous studies have dwelled on the need to revise the German concept of subjective public rights and the key notion of *Individualrechtsschutz*.¹¹⁴⁷ In fact, it has been noticed that the CJEU is more readily satisfied that the provision also aims at the protection of an individual interest than would be the case for a German court applying the *Schutznormtheorie*.¹¹⁴⁸ Scholars note that the requirement of an individual right in EU law may “unduly restrict access to courts.”¹¹⁴⁹ Hence, for instance, in the wake of the *Courage*¹¹⁵⁰ judgement, German Competition Law had to be amended in order to make private enforcement more effective, and now a much broader category of persons can bring claims in damages.¹¹⁵¹ Also, the Austrian restrictive approach was brought to light in *Zuchtverband für Ponys*.¹¹⁵² What is more, PRECHAL has questioned the conformity with Union law of some restrictions imposed on appeals in the Netherlands, a Member State of the more liberal French tradition.¹¹⁵³ Hence, there have been cases where the CJEU has considered that standing to enforce Union rights has to be broader than it would be under national law.¹¹⁵⁴ In *Manfredi*¹¹⁵⁵, the CJEU seems to have gone as far as admitting that an *actio popularis* under current Article 101(2) TFEU can be brought at least as far as the issue of invalidity is concerned.

In light of the foregoing, standing before national courts *as a matter of Union law* is defined broadly and is made dependent either on the entitlement of rights or mere interests. In finding the EU law basis for the granting of standing, the CJEU makes a rather liberal interpretation of Union law provisions “often stretching their protective scope beyond what would be the case under national law alone.”¹¹⁵⁶ This may well have to do with the above mentioned conceptual difficulty which underlies the CJEU’s approach in this respect: private enforcement is conceived by the CJEU primarily to ensure the full and maxim *effectiveness of Union law* and not the protection of individual rights.¹¹⁵⁷

For what it is worth, Article 263(4) TFEU seems to represent in this context a “misleading comparator.”¹¹⁵⁸ In fact, ARNULL notes that if ex-Article 230 TEC were a national provision there would be no doubt that the CJEU would consider it sufficiently open-textured to be interpreted in accordance with the principle of judicial protection, and the competent national court would be expected to create a new remedy if needed be. Hence, “the Court’s own failure to adopt the approach it so enthusiastically commends to others is immensely damaging to the cohesion of the Community legal order and threatens to undermine the spirit of cooperation which has been such

¹¹⁴⁷ *Ibid.*, with further references. See also CALLIESS, “Kohärenz und Konvergenz beim europäischen Individualrechtsschutz”, 2002, at 3578, 3579.

¹¹⁴⁸ For further developments see *ibid.*, at 165. See also Opinion of AG FENELLY in *Lemmens*, in Case C-226/97, *Lemmens*, [1998] ECR I-3711.

¹¹⁴⁹ PRECHAL, “Protection of Rights”, 2008, at 173.

¹¹⁵⁰ Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297.

¹¹⁵¹ See also Case C-97/96, *Verband deutscher Daihatsu-Händler/Daihatsu Deutschland*, [1997] ECR I-6843.

¹¹⁵² Case C-216/02, *Zuchtverband für Ponys*, [2004] ECR I-10683.

¹¹⁵³ PRECHAL, “Protection of Rights”, 2008, at 174.

¹¹⁵⁴ Case C-350/96, *Clean Car Autoservice/Landeshauptmann von Wien*, [1998] ECR I-2521; Case C-208/05, *ITC*, [2007] ECR I-181.

¹¹⁵⁵ Joined Cases C-295 to 298/04, *Manfredi*, [2006] ECR I-6619, para. 59.

¹¹⁵⁶ PRECHAL, “Protection of Rights”, 2008, at 178.

¹¹⁵⁷ Illustrated by Case C-253/00, *Muñoz and Superior Fruiticola*, [2002] I-7289.

¹¹⁵⁸ TRIDIMAS, *The General Principles of EU Law*, 2006, at 454. See also DOUGAN, *National Remedies before de Court of Justice*, 2004, at 333.

an important feature of its relations with national courts.”¹¹⁵⁹

What is more, standing of private parties to bring actions for annulment is probably one of the few domains in the CJEU’s case-law where the Court has refused to draw a parallel with the obligations it imposes on national courts. Hence, there is a clear parallel between the scope of judicial review of Union measures and that of national acts. The CJEU held in *Upjohn*¹¹⁶⁰ that Union law does not require Member States to “establish a procedure for judicial review of national decisions (...) which involves a more extensive review than that carried out by the Court in similar cases.”¹¹⁶¹ More significantly, the CJEU has aligned the conditions for interim relief in national courts as a matter of Union law with the conditions established under Articles 278 and 279 TFEU. For reasons of coherence the CJEU stated that “the interim legal protection which Community law ensures for individuals before national courts *must remain the same*, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law.”¹¹⁶² Lastly, regarding liability in damages, the Court held that:

“[t]he conditions under which the State may incur liability for damage caused to individuals by a breach of Community law *cannot, in the absence of particular justification, differ from those governing the liability of the Community* in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage (emphasis added).”¹¹⁶³

In light of the foregoing, it is undeniable that the CJEU has developed a *principle of parallelism* regarding judicial review of Member States and Union acts. Hence, one should probably doubt the words of the GC in *Greenpeace* according to which *locus standi* before Union courts should not be revised on the grounds that “in the practice of national courts in matters relating to environmental protection *locus standi* may depend merely on their having a ‘sufficient’ interest’.”¹¹⁶⁴

Lastly, the notion “of measures having an *adverse effect* on individuals” is not unknown to the CJEU’s case-law. In fact, this has been precisely the formula adopted by the CJEU – and which is currently enshrined in Article 41(2)(a) of the Charter – regarding the determination of the scope of the right to be heard. Such right was firstly acknowledged in the Union legal order in staff cases, mostly related to disciplinary proceedings, where the CJEU held that the right to be heard was a generally accepted principle of administrative law in force in the Member States which meets the requirements of sound justice and good administration.¹¹⁶⁵ In *Transocean Marine*¹¹⁶⁶, the CJEU

¹¹⁵⁹ ARNULL, “Case C432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*”, 2007, at 1776.

¹¹⁶⁰ Case C-120/97, *Upjohn*, [1999] ECR I-223, paras. 34, 35.

¹¹⁶¹ Para. 35.

¹¹⁶² Joined Cases 143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest/Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, [1991] ECR I-415, para. 20. See also LENAERTS, “The Legal Protection of Private Parties under the EC Treaty”, 1998, at 598, 599.

¹¹⁶³ Joined Cases C-46 and 48/93, *Brasserie du pêcheur/Bundesrepublik Deutschland and The Queen/Secretary of State for Transport, ex parte Factortame and others*, [1996] ECR I-1029, para. 42; Case C-352/98 P, *Bergaderm and Goupil/Commission*, [2000] ECR I-5291, para. 41.

¹¹⁶⁴ Case T-585/93, *Greenpeace and others/Commission*, [1995] ECR II-2205, para. 51.

¹¹⁶⁵ Case 32/62, *Alvis/Council*, ECR [1963] 49, paras. 2, 3.

¹¹⁶⁶ Case 17/74, *Transocean Marine Paint/Commission*, ECR [1974] 1063, para. 15.

considered that the rules about hearings in competition regulations were statutory manifestations of a more general principle pursuant to which a person *whose interests were perceptibly affected by a decision of a public authority* should be given an opportunity to express its point of view. This idea was later reiterated in *Hoffman La Roche*¹¹⁶⁷ where the CJEU accepted the existence of such a general principle where sanctions were to be imposed.¹¹⁶⁸ Scholars point out that the general trend of the Court's case-law is to acknowledge the existence of the right to be heard in situations where there is a decision that *affects adversely or significantly the interests of a private party*, either involving the application of sanctions or not.¹¹⁶⁹ In addition, it is pacific that an individual can invoke the right to be heard in cases where the Union measures have no direct legal consequences but result in reputational or indirect damage.¹¹⁷⁰ Moreover, it seems that there is a right to be heard where an individual is affected by the contested measure in a way that distinguishes it from other persons.¹¹⁷¹ In light of the above, one could argue that Articles 41 and 47 of the Charter should be considered together. In fact, although referring to different stages of the application of the law – the administrative and the judicial phases – both provisions can be said to be part of a *broad constitutional notion of due process*. Rightfully the Union courts have considered that the position of the applicant in the administrative procedure, notably its participation in administrative proceedings, may determine different outcomes on the decision on standing before the Union courts.¹¹⁷² It is submitted that in the search for a new approach to the test of individual concern, the CJEU should take into account its jurisprudence on the right to be heard, and in so doing bring consistency to its own case-law.

VI. The GC stated in *Jégo-Quéré* that the *Plaumann* approach could not “anymore” be considered as guaranteeing the right to effective judicial protection.¹¹⁷³ The use of the term “anymore” signals that circumstances have changed.¹¹⁷⁴ If in 2002 such change might have not been entirely obvious, after the Lisbon Treaty and the establishment of a renewed system of fundamental rights protection, it became fairly clear. It is thus submitted that a more flexible test

¹¹⁶⁷ Case 85/76, *Hoffmann-La Roche/Commission*, ECR [1979] 461: In fact, “observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings (para. 9).”

¹¹⁶⁸ The statement in this case is especially important, as traditionally one might have assumed that the right to be heard was more typical of judicial criminal proceedings. However, CJEU disregard the administrative nature of the proceedings and ruled on a general right to be heard.

¹¹⁶⁹ Case T-450/93, *Lisrestal/Commission*, ECR [1994] II-1177. Here, the court considered that the right to be heard was a fundamental principle that applied even in the absence of specific rules concerning the proceedings in question. The right to be heard was extended to anti-dumping regulations in Case 49/88, *AlJubail Fertilizer Company and others/Council*, ECR [1991] I-3187: “[i]t should be added that, with regard to the right to a fair hearing, any action taken by the Community institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules in question do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems (para. 16).”

¹¹⁷⁰ Case C-315/99 P, *Ismieri Europa/Court of Auditors*, ECR [2001] I-5281.

¹¹⁷¹ In Case T-260/94, *Air Inter SA/Commission*, ECR [1997] II-997 it was left unresolved the question of knowing if a proceeding that would affect an indeterminate number of undertakings had been initiated, if any or all of them would have the right to be heard. See para. 60.

¹¹⁷² See *supra* Part I, Chapter 1, Section 1.1.3(c).

¹¹⁷³ Para. 47.

¹¹⁷⁴ GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2007, at 132. Considering that the reasons for a restrictive interpretation of standing requirements “paraît plus adaptée aux réalités des temps présents” see MEHDI, “La recevabilité des recours formés par les personnes physiques et morales à l’encontre d’un acte de portée générale”, 2003, at 47.

on individual concern is imperative in light of the Lisbon reform. A test based on the existence of a “substantial adverse effect” in the interests of individuals would not only be more in line with Member States’ legal traditions – and should therefore apply *at least* to all executive acts covered by the first part of Article 263(4) TFEU – but it would also fit better with the *Plaumann* original logic according to which “the words and the natural meaning of [Article 263(4) TFEU] justify the *broadest interpretation*”; the provisions of the Treaty regarding the right of interested parties to bring an action *must not be interpreted restrictively*; and no limitation in this respect may be presumed.¹¹⁷⁵ A new test would also allow for a shift in the CJEU’s case-law from procedural to substantive issues. Furthermore, this would not be the first *volte de face* in the CJEU’s case-law on standing.¹¹⁷⁶ One should not forget that the Treaties are living instruments and can be adapted to the changing circumstances and needs if necessary by means of judicial interpretation, something that the CJEU has not hesitated to do in other instances.¹¹⁷⁷

Some scholars have been fearful that revisiting *Plaumann* opens the “floodgates of litigation” and compromises the possibility of the CJEU to work properly and deliver adequate and swift justice. Several counter-arguments can be put forward.¹¹⁷⁸ At the outset, it is supposed that “reasonable applicants will not invest their time and money in bringing judicial actions if they do not stand a chance of winning them on substantive grounds, which should deter most ludicrous actions.”¹¹⁷⁹ Moreover, as the new test would be limited to the cases of *substantial* adverse effect it would limit the number of successful complaints and preclude actions brought on the sole purpose of ensuring objective control of legality. Lastly, it should be remembered that in any direct action before the CJEU, a private litigant needs to show an *interest in the annulment*, i.e. there must be a *need to adjudicate*.¹¹⁸⁰ In this context, there seems to be confusion in the CJEU’s case-law regarding the standing requirements and the existence of an interest to sue. In *Micheli*¹¹⁸¹ the GC made a clear distinction between these requirements, holding that:

“[t]he first point to be examined is whether the applicants have an *interest in bringing an action*, since, if they have no such interest, it is not necessary to examine whether the contested decision is of direct and individual concern to them (...) (emphasis added).”¹¹⁸²

Some scholars have opposed the introduction of a separate and additional filter based on the existence of a *legal interest* in bringing proceedings, arguing that the lack of practical effects of an

¹¹⁷⁵ Para. 2. Scholars have noted the contradiction between this affirmation and the decision in *Plaumann*. See e.g., GORJÃO-HENRIQUES, *Direito da União*, 2010, at 447.

¹¹⁷⁶ See *supra* Part I, Chapter 1, Section 1.1.5.

¹¹⁷⁷ GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2007, at 132.

¹¹⁷⁸ See *infra* Chapter 3.

¹¹⁷⁹ GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2007, at 134.

¹¹⁸⁰ See e.g., Case 15/67, *Bauer/Commission*, [1967] ECR 397; Case 90/74, *Deboeck/Commission*, [1975] ECR 1123; Joined Cases 209 to 215 and 218/78 *Van Landuyck/Commission* [1980] ECR 3125. See MEGRET [et al.], *Le droit de la Communauté Économique Européenne*, 1983, at 121; Case T-177/01, *Jégo-Quéré/Commission*, [2002] ECR II-2365.

¹¹⁸¹ Case T-183/97, *Micheli and others/Commission*, [2000] ECR II-287. See also Joined Cases T-204 and 270/97, *EPAC/Commission*, [2000] ECR II-2267, paras. 153-158; Case T-326/99, *Fem Olivieri/Commission and EMEA*, [2003] ECR II-6053, paras. 66-100.

¹¹⁸² Para. 34.

action can be accommodated within the notion of direct concern.¹¹⁸³ Nonetheless, although a bit like coffee and milk – which can be served separately, but usually come together – standing and interest to sue may be conceptually distinguished.¹¹⁸⁴ In fact, standing regards the relationship between *applicant* and the *act*. Here, if the act is the *direct cause* of a *substantial adverse effect* on the interests of an individual, the latter should be deemed directly and individually concerned. By contrast, an *interest to sue* regards the relationship between the *applicant* and the *action*. An interest to sue exists if the action can have consequences in the legal position of the individual. This means that individuals must benefit from the annulment of the contested act. Such benefit consists in the elimination of the adverse repercussions on their legal position.¹¹⁸⁵ Hence, an interest to sue involves mostly a prospective approach: it is not assessed on the basis of the applicants' situation when the measure was adopted or when the action is brought, but by reference to the situation that could possibly be created if the act is annulled. According to the CJEU such interest must be personal to the applicant itself¹¹⁸⁶ and must be vested and present.¹¹⁸⁷ A hypothetical interest has been considered insufficient to base an action.¹¹⁸⁸ Notwithstanding, the CJEU is flexible when assessing the existence of an interest to litigate, a reason why such requirement has not deserved much attention or criticism from scholars.¹¹⁸⁹ In fact, the CJEU has not appeared to be “particularly receptive to suggestions that the applicant has no interest in the proceedings.”¹¹⁹⁰ It is submitted that in so far as the existence of an interest to sue assesses the *usefulness of the action*

¹¹⁸³ ARNULL, “Private Applicants and the Action for Annulment since *Codomiu*”, 2001, at 47.

¹¹⁸⁴ See LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 38, note 113.

¹¹⁸⁵ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 281, mentioning the Opinion of AG MANCINI in Joined Cases 142 and 156/84, *BAT and Reynolds/Commission*, [1986] ECR 1899. See also Case T-188/99, *Euroalliances/Commission*, [2001] ECR II-1757.

¹¹⁸⁶ Case 88/76, *Exportation des Sucres/Commission*, [1977] ECR 709, paras. 18-19; Case 204/85, *Stroghili/Court of Auditors*, [1987] ECR 389, para. 9; Case 282/85, *DEFI/Commission*, [1986] ECR 2469, para. 18; Case T-117/95, *Comman/Commission*, [1997] ECR II-95, paras. 82-84; Case T-256/97, *BEUC/Commission*, [1999] ECR II-169, para. 33; Case T-78/98, *Unione provinciale degli agricoltori di Firenze and others/Commission*, [1999] ECR II-1377, paras. 30-34; Case T-41/00, *BAT/Commission*, [2001] ECR II-1301, para. 19. Regarding federate states see Case T-214/95, *Vlaamse Gewest/Commission*, [1998] ECR II-717, para. 30; Joined Cases T-132 and 143/96, *Freistaat Sachsen and others/Commission*, [1999] ECR II-3663, para. 92; Case T-288/97, *Regione autonoma Friuli-Venezia Giulia/Commission*, [1999] ECR II-1871, para. 34; Case T-78/98, *Unione provinciale degli agricoltori di Firenze and others/Commission*, [1999] ECR II-1377, para. 39.

¹¹⁸⁷ Case T-5/99, *Andriotis/Commission and Cedefop*, [2000] ECR II-235, para. 39; Case T-141/03, *Sniace/Commission*, [2005] ECR II-1197, para. 25.

¹¹⁸⁸ Case 204/85, *Stroghili/Court of Auditors*, [1987] ECR 389, para. 11; Case T-17/01, *Rounis/Commission*, [2002] ECR I-A-63, II-301, para. 58. However an applicant may have interest in challenging an act which is no longer in force (Case 53/85, *AKZO Chemie/Commission*, [1986] ECR 1965, para. 21; Case 207/86, *Apesco/Commission*, [1988] ECR 2151; Joined Cases T-191/96 and 106/97, *CAS Succhi di Frutta/Commission*, [1999] ECR II-3181, paras. 62-63) which has been repealed (Joined Cases T-481 and 484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee/Commission*, [1995] ECR II-2941, paras. 46-48; Case T-211/02, *Tideland Signal/Commission*, [2002] ECR II-3781, paras. 48-49) or fully and implemented (Case 92/78, *Simmenthal/Commission*, [1979] ECR 777, para. 32; Joined Cases T-480 and 483/93, *Antillean Rice Mills and others/Commission*, [1995] ECR II-2305, para. 60; Case T-256/97, *BEUC/Commission*, [1999] ECR II-169, para. 18; Case C-496/99 P, *Commission/CAS Succhi di Frutta*, [2004] ECR I-3801, para. 83).

¹¹⁸⁹ An interest regarding a part of the act may be enough. See Case T-89/00, *Europe Chemi-Con (Deutschland)/Council*, [2002] ECR II-3651, para. 35. Noting however that pleas in the sole interest of the law or of the institutions are inadmissible, see LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 287. See Case 85/82, *Schloh/Council*, [1983] ECR 2105, paras. 13-14; and SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 460-463.

¹¹⁹⁰ ARNULL, “Private Applicants and the Action for Annulment since *Codomiu*”, 2001, at 47. In a set of significant cases – such as Case T-102/96, *Gencor/Commission*, [1997] ECR II-879; Case T-22/97, *Kesko/Commission*, [1999] ECR II-3775; Case C-451/98, *Antillean Rice Mills/Council*, [2001] ECR I-8949 – the Commission argued on the basis of lack of interest of the applicants, and the CG disregarded the Commissions arguments.

regarding the individual it is a more legitimate mechanism for the CJEU to control access to justice by private parties and keep its docket to manageable numbers. It would thus be convenient that the CJEU clarified the articulation between its standing case-law and the existence of an interest to sue, making the former more flexible by also taking into account the interest of the applicant in bringing the action.

VII. The saga that led to the adoption of the new Article 263(4) TFEU is rather unique in the Union's history.¹¹⁹¹ Previous amendments to the CJEU's jurisdiction had been introduced in the Treaties following the CJEU's case-law, such as the ones regarding the passive and active *locus standi* of the European Parliament. In these cases the CJEU "had taken an expansive view of its jurisdiction, arguably justified by concern for the rule of law."¹¹⁹² However, this new amendment, which also goes in the direction of expanding the CJEU's jurisdiction, has been promoted by the Member States in the first place. It is thus remarkable that the GC has not mentioned, in its assessment of individual concern in *Inuit*, the intention of Member States of liberalising access to the CJEU. More significantly, no mention of the Charter or the accession to the ECHR was made in this regard. The GC's approach seems therefore inadequate in light of the constitutional shift operated by the Lisbon Treaty and the renewed calls for the need to ensure adequate and effective judicial protection of private parties after Lisbon.

The applicants in *Inuit* brought an appeal against the GC's decision before the CJ. The case is currently pending. It is submitted that the CJ should take this opportunity to broaden the test of individual concern along the lines advocated above. However, if that happens not to be the case, it is submitted that there are *at least* two situations, where *as a matter of constitutional imperative* and in light of the Lisbon reform, standing requirements of private parties must be made more flexible. In fact, the current constitutional framework requires a reassessment of the *Plaumann* approach at least in those cases (i) where individuals bring an action for annulment on the grounds of a breach to fundamental rights, and (ii) where there is a gap of judicial protection, and as a result a breach of the fundamental right to effective judicial protection. I will now analyse these alternatives.

2.1.5 Ensuring Fundamental Rights Review

a) The Procedural Deficit of Fundamental Rights Protection

I. The protection of fundamental rights in the EU is criticized at different levels. It has been noted that the EU is still missing a true and committed human rights policy¹¹⁹³, that the sanctions against Member States which breach EU fundamental rights are ineffective¹¹⁹⁴, that the CJEU has

¹¹⁹¹ JACOBS, "The Lisbon Treaty and the Court of Justice", 2012, at 200.

¹¹⁹² *Ibid.* See *supra* Part I, Chapter 1, Section 1.1.5.

¹¹⁹³ See e.g., ALSTON; WEILER, "An 'Ever Closer Union' in Need of a Human Rights Policy", 1999, at 147-166; WEILER; FRIES, "A Human Rights Policy for the European Union", 1999, at 3-68; WEILER "Does the European Union Truly Need a Charter of Rights?", 2000, at 95; BÜRCA, "Convergence and Divergence in European Public Law", 2002, at 131.

¹¹⁹⁴ See e.g., MERLINGEN; MUDDLE; SEDELMEIER, "The Right and the Righteous?", 2001, at 59.

been unduly activist in some respects¹¹⁹⁵ and has used fundamental rights to promote market freedoms¹¹⁹⁶, and that there is a discrepancy between the external and internal promotion of human rights.¹¹⁹⁷ For purposes of this study, the focus is put on the *procedural deficit* of fundamental rights protection at the Union level.

As mentioned above, the protection of fundamental rights in the EU legal order was progressively developed throughout the process of integration.¹¹⁹⁸ However, such development took place by and large at the *substantive* level. Truth be said, there has not been a similar improvement in the number of *procedures* and *remedies* that should be available in order to guarantee effective judicial protection of those rights.¹¹⁹⁹ Neither the Charter was provided with *specific* judicial mechanisms, nor was the Union's system of judicial protection adapted to the new catalogue of fundamental rights. The Charter was thus said to have been granted "*una protezione giurisdizionale 'indifferenziata'*"¹²⁰⁰, in so far as respect for the rights included therein is ensured by the remedies and procedures designed to ensure enforcement of Union law *in general*. Scholars note that the Union bill of rights is missing an adequate and effective procedural framework that ensures full effectiveness of fundamental rights protection¹²⁰¹ and have resented the absence of specific forms of action which, by allowing a direct challenge of Union acts before the CJEU on the grounds of a breach of fundamental rights, would "boost" the status of European citizenship.¹²⁰² Briefly put, *in the current state of Union law*, scholars note that "there are little in the way of adequate remedies available to those whose fundamental rights have been breached"¹²⁰³ and that "in itself the normative judicial model, however sophisticated, does not provide sufficient guarantees so that the protection of human rights is truly effective in itself."¹²⁰⁴

Surely, one can affirm that there is a *general* deficit of judicial protection regarding individual rights at the EU level. Issues of effective judicial protection go beyond the protection of

¹¹⁹⁵ See e.g., BEAUMONT, "Human Rights", 2002, at 151.

¹¹⁹⁶ See the debate between COPPEL; O'NEILL, "The European Court of Justice", 1992, at 669-692 and WEILER; LOCKHART, "Taking Rights Seriously' Seriously", 1995, at 51-94, and "Taking Rights Seriously' Seriously", 1995, at 579-627. Noting that the CJEU "created the wrappings but put very little, if anything, inside them" see MANCINI, "Safeguarding Human Rights", 1991, at 512.

¹¹⁹⁷ KING, "Human Rights in European Foreign Policy", 1999, at 313-337; WILLIAMS, "Enlargement of the Union and Human Rights Conditionality", 2000, at 601-617; DESGAGNE, "European Union Practice in the Field International Humanitarian Law", 2001, at 455 *seq.*; DUQUETTE, "Human Rights in the European Union", 2001 at 363. Considering that the EU has shown a considerable degree of "schizophrenia" in this respect thus far and pointing to some inconsistencies in the EU system of human rights protection see SPAVENTA, "Fundamental What?", 2008, at 234;

¹¹⁹⁸ See *supra* Chapter 1, Section 1.2.1.

¹¹⁹⁹ This *paradox* is common to most international declarations of rights, except perhaps for the ECHR. See MATSCHER, "La protection judiciaire des droits de l'Homme au niveau national et international", 1991, at 32.

¹²⁰⁰ GRECO, "I diritti fondamentali nella Costituzione Europea", 2001, at 207, noting however the political procedure included in Article 7 TEU and the possible recourse to the EU *Ombudsman*. See also EHLERS, "The Fundamental Rights of the European Union", 2007, 396.

¹²⁰¹ CANOTILHO, "Constituição e déficit procedimental", 2004, at 72. See also COMOGLIO, "L'effettività della tutela giurisdizionale nella Carta dei Diritti Fondamentali dell'Unione europea", 2001, at 471 *et seq.*; FENGE, "Fundamental Rights in the European Union", 2001, at 49 *et seq.*

¹²⁰² DUARTE, "A Carta dos Direitos Fundamentais da União Europeia", 2006, at 276 *et seq.* Noting that the absence of a remedy for breach of fundamental rights would compromise progress in this field see MOREIRA, "A tutela dos direitos fundamentais da União Europeia", 2001, at 75.

¹²⁰³ DOUGLASSCOTT, "The Charter of Fundamental Rights as a Constitutional Document", 2004, at 46. Questioning whether the system of remedies offers "watertight protection to individuals suffering human rights violations by the Community" see WITTE, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", 1999, 877.

¹²⁰⁴ WEILER, "Methods of Protection of Fundamental Human Rights in the European Community", 1992, at 561.

fundamental rights and have a *horizontal dimension*: they are problematic regardless of the legal nature of the contentious right. However, said deficit of judicial protection is deemed more serious regarding the safeguard of fundamental rights granted under Union law.¹²⁰⁵ This idea is in line with the Member States commitment with the long standing process of “*valorisation des droits fondamentaux*”¹²⁰⁶ which are said to constitute “*uno dei patrimoni più preziosi della civiltà occidentale*.”¹²⁰⁷ In fact, as MAYER has put it:

“[c]’est la question du recours et de l’accès des citoyens aux droits fondamentaux qui est décisive pour la transformation vers un système dominé par les droits fondamentaux.”¹²⁰⁸

The idea that it is the task of judges to guarantee fundamental rights requires no explanation from a lawyers’ perspective. It constitutes one “*evidência normativa*”¹²⁰⁹ resulting from the existence of a charter of rights and from the basic ideas of constitutionalism, reinforced by the work of national and international courts: judges should be guarantors of fundamental rights. However, although the issue of judicial protection in the European Union has been widely discussed, it has not often been so regarding specifically the protection of fundamental rights. Nevertheless, the “greater question”¹²¹⁰ regarding these rights is how to provide the adequate judicial remedies. It is a given fact that if a true human rights policy results, firstly, from the recognition of certain rights as common heritage of mankind, such policy will not be fully satisfied with a mere formal recognition of said rights, as it requires also their *effective guarantee*.¹²¹¹ BOBBIO emblematically affirmed that the main problem regarding fundamental rights was the one regarding their respective guarantees.¹²¹² In fact, whatever the concrete remedies established in a given legal order, if a legal system does not afford individuals the possibility of obtaining satisfaction of their rights, one cannot speak about a “*una verdadera existencia jurídica de derechos*.”¹²¹³ As WEILER has put it while addressing the relationship between procedure and substance:

“[r]ights that remain hortatory or incapable of vindication, ideally by an independent judicial process to which the individual has a real rather than formal access, become little more than a deception. *Procedure is not the edifice resting on normative foundations, but the foundation itself* (emphasis added).”¹²¹⁴

¹²⁰⁵ Noting that while the guarantee of judicial protection of subjective rights *versus* public authority covers every right of the person concerned “it goes without saying that it is of particular importance with regard to the protection of human rights” see STEINBERGER, “Judicial Protection of Human Rights at the National Level”, 1991, at 149.

¹²⁰⁶ WILLEMART, “La valorisation formelle des droits fondamentaux”, 1997, at 411.

¹²⁰⁷ TROCKER, “La tutela giurisdizionale dei diritti dell’uomo tra esigenze di partecipazione e imperativi di funzionalità”, 1991, at 813. Noting also that in developed constitutional systems fundamental rights enjoy “*une protection spéciale devant les plus hautes juridictions, en particulier devant les cours constitutionnelles*” see MATSCHER, “La protection judiciaire des droits de l’Homme au niveau national et international”, 1991, at 35.

¹²⁰⁸ MAYER, “La Charte des droits fondamentaux et la Constitution européenne”, 2003, at 189, 190.

¹²⁰⁹ See IBANEZ, “Garantía judicial dos derechos humanos”, 1999, at 12.

¹²¹⁰ PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 38.

¹²¹¹ JALLES, “Os direitos da pessoa na Comunidade Europeia”, 1981, at 43; COOPER; PILLAY, “Through the Looking Glass”, 2000, at 120. See also IBANEZ, “Garantía judicial dos direitos humanos”, 1999, at 11-31; OLIVEIRA, “O processo civil na perspectiva dos direitos fundamentais”, 2002, at 38.

¹²¹² BOBBIO, “Sobre el fundamento de los derechos del hombre”, 1964-65, *apud* PECES-BARBA MARTÍNEZ, *Curso de Derechos Fundamentales*, 1999, at 568.

¹²¹³ PRIETO SANCHÍS, “El sistema de protección de los derechos fundamentales”, 1983, at 370.

¹²¹⁴ WEILER, “Procedural Dimensions of International Protection of Human Rights under the United Nations System”, 1991, at 486. By judicial protection of fundamental rights one should understand the existence of a judicial body, established by law, independent and impartial, before which individuals can claim a breach to their fundamental

Hence, “l’essentiel est dans la concrétisation des droits, non dans leurs attributions.”¹²¹⁵ In light of these considerations scholars note that all procedural law should be re-evaluated in light of the protection of fundamental rights. The concept of *action* is central in this respect: “celle de pouvoir donner aux droits fondamentaux tout leur effectivité.”¹²¹⁶ The substantive protection of fundamental rights “risque de rester lettre morte”¹²¹⁷ if it is not tagged along by adequate *procedural* mechanisms that ensure their effective application. Scholars note that if fundamental rights are, following ALEXY, to be understood mainly as principles and not rules – as the underlying structure of fundamental freedoms is finality, not conditionality, and fundamental rights do not make ‘if-then-statements’ but impose aims on their addressees¹²¹⁸ – “without a procedure for their authentic application fundamental rights are therefore – at least from a legal point of view – cheap talk.”¹²¹⁹ Thus, “l’essentiel a glissé du droit substantiel au droit processuel.”¹²²⁰ In light of these considerations, scholars note that fundamental rights without the entitlement to an individual complaint “are not satisfactory and only give scarce additional legitimacy to the Community.”¹²²¹ If the right to effective judicial protection constitutes *per se* a fundamental right, it works simultaneously as a requirement of the *complete* protection of *all other* fundamental rights.¹²²²

II. An insufficient judicial protection of fundamental rights is also questionable in light of the theories sustaining the existence of a procedural dimension of fundamental rights.¹²²³ According to these views, the proclamation of such rights at a substantive level, *maxime* through constitutional norms, implies a duty of the legislator to create adequate remedies and legal procedures which effectively protect such rights, as well as an obligation imposed on the judiciary to acknowledge that *where there is a right there must be a remedy*. Hence, according to HÄBERLE, who conceived fundamental rights as *procedural guarantees*, the procedural protection of a given fundamental right belongs to its very “essence.”¹²²⁴ GOERLICH who also studied fundamental rights

rights. See MATSCHER, “La protection judiciaire des droits de l’Homme au niveau national et international”, 1991 at 38.

¹²¹⁵ FRISON-ROCHE, “La procédure et l’effectivité des droits substantiels”, 2003, at 4.

¹²¹⁶ GREWE, “L’accès au juge”, 2003, at 30.

¹²¹⁷ MATSCHER, “La protection judiciaire des droits de l’Homme au niveau national et international”, 1991, at 30.

¹²¹⁸ ALEXY, *Theorie der Grundrechte*, 1996, at 17-158.

¹²¹⁹ ENGEL, “The European Charter of Fundamental Rights”, 2001, at 153.

¹²²⁰ FRISON-ROCHE, “La procédure et l’effectivité des droits substantiels”, 2003, at 1.

¹²²¹ ENGEL, “The European Charter of Fundamental Rights”, 2001, at 169.

¹²²² Noting that “il diritto al ‘giusto processo’ non sole è diritto fondamentale, ma è anche strumento di tutela di altri diritti sostanziali” see SPADEA, “Il giusto processo amministrativo secondo l’art. 6 della CEDU e con cenni al caso italiano”, 2000, at 368. Also noting that “un procès équitable est non seulement un support procédural indispensable à la protection d’autres droits fondamentaux mais il est analysé parfois comme une composante d’un droit substantiel” see COHEN-JONATHAN, “Conclusions générales des nouveaux développements du procès équitable au sens de la Convention européenne des droits de l’homme”, 1996, at 172.

¹²²³ The first theoretical approach to so-called procedural dimension of fundamental rights was made by HÄBERLE in the seventies. See CANOTILHO, “Constituição e défice procedimental”, 2004, at 72, 73. This author considered the constitution as a procedure, and the latter as applied constitutional law. HÄBERLE defended the need to reconcile the old theory of JELLINEK with the new constitutional realities, which were characterized by the so-called *status activus processualis*. The old substantive *status activus* was given a new content as the result of the projection in procedural law of a deeper understanding of the constitution. See SILVA, *Em Busca do Acto Administrativo Perdido*, 1998, at 331 et seq.

¹²²⁴ Paradoxically, however, this idea led scholars to identify the *effectiveness* of fundamental rights with their own existence and to consider that where a possibility of enforcement of rights was lacking there would be not only a deficit of protection, but an *ontological* deficit: there would be no right without a procedural remedy. Consequently, some rights established in some international charters of rights were questioned in their very own existence as they could not be justiciable. See IBANEZ, “Garantia judicial dos direitos humanos”, 1999, at 16-18. Thus, this author considers that the

in their *procedural consequences*¹²²⁵ considered that the proclamation of fundamental rights implies *for in of itself* the protection of their substantive content and their procedural guarantees, which are necessary to ensure their effective application. Hence, fundamental rights should be understood as *encompassing* procedural guarantees.¹²²⁶

The relevance of the procedural dimension of rights is not unknown to the European legal order. Hence, to begin with, fundamental freedoms also “convey procedural guarantees.”¹²²⁷ The prohibition of discrimination often has procedural implications, without necessitating separate procedural rights. In *Vlassopoulou*¹²²⁸, a case involving an alleged breach of the freedom of establishment of lawyers, the CJEU focused on the procedural dimension of such right, by pointing out that:

“[t]he examination made to determine whether the knowledge and qualifications certified by the foreign diploma and those required by the legislation of the host Member State correspond must be carried out by the national authorities *in accordance with a procedure which is in conformity with the requirements of Community law concerning the effective protection of the fundamental rights* conferred by the Treaty on Community subjects (emphasis added).”¹²²⁹

At another level, in the *Kadi* case the CJ found a breach of the fundamental right to property not in the violation of the substantive dimension of said right but rather on the breach of the procedural guarantees of the applicant.¹²³⁰ In fact, the CJEU held that the contested measures had been adopted in compliance with the proportionality principle. However, in determining if the right to property had been respected “in the circumstances of the case” the Court considered that “the applicable procedures must also afford the person concerned a reasonable opportunity of putting his case to the competent authorities” and that:

“[t]he contested regulation, in so far as it concerns Mr. Kadi, was adopted *without furnishing any guarantee enabling him to put his case to the competent authorities*, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him (emphasis added).”¹²³¹

Consequently, the CJEU held that there was, *in the circumstances of the case*, an unjustified restriction of the right to property.¹²³² It is particularly significant that the CJEU did not find a violation of the right to be heard. It was the lack of procedural guarantees which determined the

element of judicial protection does not belong to the *content* of fundamental rights but constitutes an autonomous and *derived* fundamental right which requires state intervention.

¹²²⁵ See CANOTILHO, “Constituição e défice procedimental”, 2004, at 74.

¹²²⁶ For further developments see SILVA, *Em Busca do Acto Administrativo Perdido*, 1998, at 334.

¹²²⁷ Noting the procedural dimension of the fundamental freedoms see EHLERS, “The Fundamental Freedoms of the European Communities”, 2007, at 192.

¹²²⁸ Case C-340/89, *Vlassopoulou/Ministerium für Justiz, Bundes-u. Europaangelegenheiten Baden-Württemberg*, [1991] ECR I-2357.

¹²²⁹ Para. 22. Also acknowledging the procedural dimension of fundamental freedoms see GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 508 with further references.

¹²³⁰ See Joined Cases C-402 and C-415/05 P, *Kadi and Al Barakaat International Foundation/Council and Commission*, [2008] ECR I-6351.

¹²³¹ Para. 369.

¹²³² See paras. 367-370.

existence of a breach of the right to property. Thus, the right to property was implicitly deemed to entail, *per se*, a procedural dimension.

The procedural dimension of fundamental rights was also object of reflection in the works of Working Group II¹²³³ and of the Discussion Circle on the CJEU established under the European Convention, which analyzed the possibility of including in the Treaties a new form of action especially created for the protection of fundamental rights.¹²³⁴ The proposal for a “fundamental rights complaint” was put forward by JÜRGEN MEYER but, having raised significant objections¹²³⁵, did not reach the Convention.¹²³⁶ Under this type of action, individuals whose fundamental rights have been violated by a legislative, administrative or judicial act of the EU, and who either have no judicial remedy or have exhausted the remedies provided under national law, could apply to the CJEU to declare that act null and void.¹²³⁷ This solution was said to fill the gap originated by the *Plaumann* approach.¹²³⁸

The creation of an European constitutional complaint intended to ensure *specifically* the protection of fundamental rights at the highest judicial level – and which therefore is said to mark “l’étape la plus évoluée de la protection de la personne”¹²³⁹ – has already been considered in the past by the European institutions¹²⁴⁰, and is not unknown to the European legal tradition. It is usually conceived as a special remedy which is brought before constitutional courts, once all other internal means of redress have been exhausted and if no other form of action is available.¹²⁴¹ Several authors have also admitted the possibility of establishing a constitutional complaint at the EU level.¹²⁴² This would be especially relevant regarding judicial protection against acts of the

¹²³³ See Working Document 21, paras. 5-7. See also Final Report of Working Group II, CONV. 354/02, 22.10.2002, at 15.

¹²³⁴ Working Document I, CERCLE I, “Access to the Court of Justice for individuals – possible amendments to Article 230, paragraph 4, of the EC Treaty”, 26/2/2003, para. 7. See also Oral Presentation of the President of the CJ (CONV. 572/03) as of 17/2/2003.

¹²³⁵ Scholars noted some of the difficulties of such form of action, notably that: (i) fundamental rights cases nearly usually raise other issues as well, (ii) it is often possible to “dress a case up” in terms of a fundamental rights violation, (iii) it would be to define the relationship between any special procedure and the normal action for annulment, (iv) it would be hard to articulate the GC’s and the CJ’s competences (v) and that, in any event, it is not only in fundamental rights cases that the existing standing rules are inadequate. See ARNULL, “From Charter to Constitution and Beyond”, 2003, at 793; BERNAT, “The *Locus Standi* of Private Applicants under Article 230 (4) EC and the Principle of Judicial Protection in the European Community”, 2003, at 48.

¹²³⁶ It was worded as follows: “[a]ny natural or legal person may contest a legal act of the Union due to a violation of any of the rights granted to it by the Charter of Fundamental Rights of the Union if no other judicial recourse is available for seeking review of the violation of the fundamental right in question. Specific requirements for the acceptance of a Fundamental Rights Complaint may be provided for.” See Discussion Circle on the Court of Justice, Working Document 3, 26/2/2003. Noting that this mechanism should also be made available regarding Member States as well, and that the jurisdiction of national courts to bring questions regarding fundamental rights should be expanded see ENGEL, “The European Charter of Fundamental Rights”, 2001, at 169. Noting that this solution might be seen to resemble the situation under the old TECSC, where pursuant to Article 33 coal and steel undertakings could challenge general decisions or recommendations of the Commission, but only where they considered them to involve a misuse of powers affecting them see USHER, “Direct and Individual Concern”, 2003, at 596.

¹²³⁷ See PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 5-48. Also suggesting this idea see ROCHÈRE, “La charte de droits fondamentaux de l’Union européenne”, 2000, at 678.

¹²³⁸ PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 41.

¹²³⁹ MATSCHER, “La protection judiciaire des droits de l’Homme au niveau national et international”, 1991, at 46.

¹²⁴⁰ See e.g., Report by the Court of Justice on Certain Aspects of the Application of the Treaty on the European Union, 1995, para. 20.

¹²⁴¹ See *infra* Section 2.1.5(b).

¹²⁴² See e.g., CALLIESS, “The Charter of Fundamental Rights of the European Union”, 2007, at 536 with further references, noting that the material safeguarding of fundamental rights and the respective enforcement can only be

legislature, as an infringement of fundamental rights might provide a “suitable ground for action against legislative acts.”¹²⁴³ Moreover, such complaint is deemed to complete the substantive protection of fundamental rights at the EU level, as the introduction of a Charter of Fundamental Rights of the Union would completely fulfil its purpose only if accompanied by an adequate remedy.¹²⁴⁴

Notwithstanding, regardless of the fact that to this date Member States did not want to introduce such mechanism in the Treaties, there are good reasons to believe that the valorisation of the procedural dimension of fundamental rights in the context of the *constitutional shift* operated by the Lisbon Treaty should have an impact on the admissibility of actions for annulment under current Article 263(4) TFEU.

b) Fundamental Rights and the Admissibility of Actions for Annulment

I. If fundamental rights without access to judicial review have “no teeth and [are] regarded as not serious”¹²⁴⁵, it is submitted that they require *per se* a more liberal approach to judicial review at the initiate of individuals. As seen above, the Lisbon reform made access to the CJEU easier with regard to regulatory acts not entailing implementing measures. Regarding other Union acts included in the first part of Article 263(4) TFEU the requirements of direct and individual concern still apply. This means that challenges to all *non-regulatory acts* and *regulatory acts entailing implementing measures* continue to be subject to the traditional standing requirements.¹²⁴⁶ Thus, the more acts are excluded from Article 263(4) TFEU *in fine*, the more an alternative approach to those conditions is needed.¹²⁴⁷ As seen above, it is submitted that the tests of direct and individual concern should be reassessed in the current constitutional framework, and in light of the *shift to fundamental rights* operated under the Lisbon Treaty. Notwithstanding, aside from of the proposals put forward thus far, it is submitted that challenges to *all kinds of Union acts* on fundamental rights

provided by special forms of proceedings of the constitutional court. Also favouring such view see SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 301 *et seq.*; ELIANTONIO; KAS, “Private Applicants and the Annulment Procedure”, 2010, at 125-127; VAN DEN BERGHE, “The EU and Issues of Human Rights Protection”, 2010, at 155. See also VILAÇA, “La nouvelle architecture judiciaire européenne et la conférence intergouvernementale”, 1996, at 5; BOTELHO, *A Tutela Directa dos Direitos Fundamentais*, 2010; MARQUES, “O acesso dos particulares ao recurso de anulação após o Tratado de Lisboa”, 2010, at 109; PAIS, “A protecção dos particulares no âmbito do recurso de anulação depois de Lisboa”, 2012, at 112, 113.

¹²⁴³ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 301, noting that a large number of German authors has demanded the introduction of such a specific remedy at the EU level. See REICH, “Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde”, 2000, at 375; CALLIESS, “Die Charta der Grundrechte der EU”, 2001, at 267 *et seq.*; PERNICE, “Die Charta der Grundrechte der EU”, 2001, at 1015.

¹²⁴⁴ SCHWARZE, “The Legal Protection of the Individual against Regulations in European Union Law”, 2004, at 302.

¹²⁴⁵ See PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 37.

¹²⁴⁶ Scholars have in the past suggested that the CJEU ought to develop more *nuanced* criteria of standing depending upon whether the act is predominantly *legislative* or purely *administrative*. See ALMEIDA, “Le recours en annulation des particuliers”, 1995, at 870; ORTEGA, *El acceso de los particulares a la justicia comunitaria*, 1999, at 206, suggesting that the Treaties should establish a new provision allowing challenges against executive regulations on a basis of an “*interés directo o suficiente*” and legislative acts on the basis of a breach of fundamental rights; WARD, “*Locus Standi* under Article 230(4) of the EC Treaty”, 2001, at 48, 49, noting the democratic deficit of measures adopted in comitology; BERROD, *La systématique des voies de droit communautaires*, 2003, at 1049; GRANGER, “Towards a Liberalization of Standing Conditions for Individuals Seeking Judicial Review of Community Acts”, 2003, at 136; CHALMERS; DAVIES; MONTI, *European Union Law*, 2012, at 424.

¹²⁴⁷ See *supra* Section 2.1.4.

grounds should be deemed admissible as long as the applicant proves *prima facie* to have been directly and personally affected by the contested act. Three arguments can be put forward to support this view.

II. Firstly, although in most of the Member States access to judicial review of legislation by individuals is generally subject to stricter conditions than review of administrative measures¹²⁴⁸, it extends usually to cases where it is believed that the contested act violated rights protected under the national constitutions.¹²⁴⁹ Thus, review on grounds of fundamental rights is considered to be the *bare minimum* in the context of judicial review of acts of public authorities at the initiative of individuals. For instance, in Germany where challenges to regulations are traditionally more limited, constitutional review is always made available.¹²⁵⁰ Indeed, Member States' laws do not in general exclude individuals from challenging legislation which violates constitutionally enshrined rights or fundamental principles of law. As AG JACOBS pointed out:

“[i]n certain Member States such as Austria, Belgium, Germany and Spain (and some of the States currently applying for membership of the European Union) legislation may be challenged by individuals directly before constitutional courts. In other Member States, such as Denmark, Greece, Ireland, Portugal and Sweden, challenges to the lawfulness of legislation may be raised before, and upheld by, the ordinary courts.”¹²⁵¹

The AG further noted that the restrictions on access to judicial review of legislation in the Member States are based on two essential premises, which are not verified at the Union level. First, in Member States legal orders there is in general a clear distinction between legislation and administrative measures, which is still lacking in the EU. Secondly, legislation in Member States is made by democratically legitimate procedures, which is not always the case regarding Union legislation.¹²⁵²

More importantly, EU legislation is in no way, as matter of principle, immune to judicial review. In fact, “the discussion about the scope of art. 263(4) TFEU is not about whether legislative acts can be challenged *at all*, but only whether they can be challenged *directly*.”¹²⁵³ Here, one should note that in some Member States review of legislation takes place directly at the initiative of individuals when fundamental rights issues are at stake. In Germany, Article 93(1)(4a) of *Grundgesetz* provides that every citizen is entitled to make a constitutional complaint to the *Bundesverfassungsgericht* regarding alleged violations of their basic rights or certain rights provided for in the Basic Law, by the action of public authorities.¹²⁵⁴ Accordingly, any law, regulation,

¹²⁴⁸ See *supra* note 855.

¹²⁴⁹ ALBORS-LLORENS, *Private Parties in European Community Law*, 1996, at 30.

¹²⁵⁰ See *supra* Part I, Chapter 1, Section 1.1.3(c)(ii).

¹²⁵¹ AG's Opinion in *UPA*, para 89.

¹²⁵² See para. 90 of the Opinion in *UPA*.

¹²⁵³ BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 547.

¹²⁵⁴ Pursuant to Article 93(1), “the Federal Constitutional Court shall rule: 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been infringed by public authority.” Also mentioning constitutional complaints at the state level existing in Bavaria (Article 120 of the Bavarian constitution), Hessen (Article 131(1) of the Constitution) and Saarland (Article 97(4) of the Constitution) see STEINBERGER, “Judicial Protection of Human Rights at the National Level”, 1991, at 190, note 273.

executive act or judicial decision which allegedly deprives the complainant of said fundamental rights may be object of this procedure. The procedure is a non-contentious one, as it is directed against the act itself and not the emanating authority.¹²⁵⁵ This procedure has proved to be a valuable tool for the protection and assessment of the scope of basic rights and it is taken seriously by citizens.¹²⁵⁶ It has been considered that the administration of justice in Germany would be unthinkable without the constitutional complaint.¹²⁵⁷ The latter is subject to a number of preconditions before it can be set in motion, in order to avoid abuse. The complaint is first examined as to its admissibility (*Zulässigkeit*) and the contested act must have been adopted by a public authority (*Akt der öffentlichen Gewalt*), which includes all acts taken by the executive, judiciary, and legislature.

A form of constitutional complaint is also available in Austria – the country where, in 1867, such type of procedure was firstly introduced.¹²⁵⁸ Here, the constitutional court has jurisdiction to review complaints against decrees (*Bescheide*) made by administrative authorities. Pursuant to Article 144(1), the Austrian Constitutional Court pronounces on decisions by administrative authorities “including the independent administrative tribunals in so far as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or the infringement of personal rights on the score of an illegal ordinance, an unconstitutional law, or an unlawful treaty.” The complaint can only be filed after all other stages of legal remedy have been exhausted.¹²⁵⁹ In Spain, the *recurso de amparo* aims to protect citizens against violations by any public power of the fundamental rights and public liberties protected under Part I, Chapter II, Articles 15 to 29 of the Spanish Constitution.¹²⁶⁰ These rights include *inter alia* the right of access to justice.¹²⁶¹ The procedure of *amparo* is reserved solely to those claims which aim at restoring or preserving the rights and freedoms for which the case was brought. Moreover, Article 79(1) of the Polish Constitution provides also for a constitutional complaint (*skarga konstytucyjna*) available for everybody, whose constitutional freedoms or rights have been violated. This remedy is not restricted to Polish citizens as “everybody” means every natural person, and also a legal entity, to the extent to which it can be entitled to constitutional rights and freedoms.¹²⁶² Chapter II of the

¹²⁵⁵ *Ibid.*, at 190.

¹²⁵⁶ For further developments regarding the German constitutional complaint see STEINBERGER, “Judicial Protection of Human Rights at the National Level”, 1991, at 189 *et seq.*

¹²⁵⁷ JACKSON, TUSHNET, *Comparative Constitutional Law*, 2006, at 532.

¹²⁵⁸ BIERNAT, “The *Locus Standi* of Private Applicants under Article 230 (4) EC and the Principle of Judicial Protection in the European Community”, 2003, at 45.

¹²⁵⁹ The original version reads as follows: “[d]er Verfassungsgerichtshof erkennt über Beschwerden gegen Bescheide der Verwaltungsbehörden einschließlich der unabhängigen Verwaltungssenaten, soweit der Beschwerdeführer durch den Bescheid in einem verfassungsgesetzlich gewährleisteten Recht oder wegen Anwendung einer gesetzwidrigen Verordnung, eines verfassungswidrigen Gesetzes oder eines rechtswidrigen Staatsvertrages in seinen Rechten verletzt zu sein behauptet. Die Beschwerde kann erst nach Erschöpfung des Instanzenzuges erhoben werden.”

¹²⁶⁰ In Spain Article 53(2) of the national constitution establishes that “[c]ualquier ciudadano podrá recabar la tutela de las libertades y derechos reconocidos en el artículo 14 y la Sección primera del Capítulo segundo ante los Tribunales ordinarios por un procedimiento basado en los principios de preferencia y sumariedad y, en su caso, a través del recurso de amparo ante el Tribunal Constitucional. Este último recurso será aplicable a la objeción de conciencia reconocida en el artículo 30.” The Constitutional Court is competent to hear “appeals against violation of the rights and liberties referred to in Article 53 (2), in the cases and forms to be established by law” (Article 161(1) (b) of the Constitution). Regarding the *amparo* before ordinary courts the procedure is “especial, preferente y sumario.”

¹²⁶¹ The *amparo* in Spain it is not available against legislative acts. See also for further developments FAVOREU, “La protection juridictionnelle des droits de l’homme au niveau interne”, 1991, at 131 *et seq.*

¹²⁶² BIERNAT, “The *Locus Standi* of Private Applicants under Article 230 (4) EC and the Principle of Judicial

Constitution contains the catalogue of rights and freedoms which can form the basis for a complaint.¹²⁶³ The complaint may only be filed against a normative act which was a ground for a judgment, against which the applicant appeals. It cannot be brought against an omission of the legislator. The applicant must also have a *legal interest* in bringing an action, which means that he/she must have suffered some kind of harm. Lastly, in Malta, the existence of specific provisions for the protection of fundamental rights was included in the national constitution as early as in 1961, and currently an application on those grounds may be filed within the First Hall of the Civil Court with the possibility of an appeal to the national constitutional court.¹²⁶⁴

These forms of action enable, as a rule, the direct challenge of normative provisions which encroach upon fundamental rights and are conceived generally as subsidiary procedures, *i.e.* are made available only to the extent that the ordinary courts have failed to uphold the applicants' constitutional rights. Similarly to the EctHR, they require exhaustion of other available remedies. The cause of action is *exclusively* the breach of fundamental rights. In order to exclude an *actio quivis ex populo* it is usually required that the applicant is directly and personally affected in his fundamental rights or liberties provided for in the constitution. Furthermore, one should note that even in Member States where such form constitutional complaint is not available to individuals, there has been an increasing tendency to create special mechanisms to ensure the protection of fundamental rights.¹²⁶⁵ For instance, in Portugal, despite the guarantee established in Article 20 of the national constitution¹²⁶⁶ scholars have noted a certain unbalance between the system as normatively established in the constitutional text and the concrete forms of action which allow for the protection of fundamental rights.¹²⁶⁷ This “*desiquilíbrio*”¹²⁶⁸ is said to contrast with the principle of the rule of law and with the values and principles enshrined on rights, liberties and guarantees included in the constitution, which should provide for an extended judicial protection of individuals against any public action. Hence, despite the reform of the system of administrative justice which was based on the principle of *complete* judicial protection (*princípio da plenitude da tutela jurisdicional*), scholars have suggested the introduction of an *amparo* appeal brought directly by individuals before the national constitutional court.¹²⁶⁹

Protection in the European Community”, 2003, at 47.

¹²⁶³ The complaint must specify which right or freedom has been allegedly violated. Generally, the Polish Constitutional Courts does not accept claims alleging an infringement of general constitutional clauses (*i.e.* of a state founded on democracy and the rule of law), but it may occasionally admit such an action. *Ibid.*

¹²⁶⁴ See GANADO, “The Procedural Aspect in Human Rights Cases in Malta”, 1991, at 605.

¹²⁶⁵ Noting that Latin European countries have increasingly reinforced the protection of fundamental rights see FAVOREU, “La protection juridictionnelle des droits de l’homme au niveau interne”, 1991, at 108. Noting that fundamental rights and their effectiveness have increasingly developed and that such development is translated not only in the possibility of individuals address constitutional courts on the basis of a breach of a fundamental right, but also in the conception of fundamental rights as “*valeurs fondamentales objectives de l’ordre juridique*” which has translated into the possibility of initiating judicial proceedings founded on the existence of mere interests see GREWE, “L’accès au juge”, 2003, at 35. For further developments see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 734 *et seq.*

¹²⁶⁶ See *supra* Chapter 1, Section 1.1.

¹²⁶⁷ See CANOTILHO, “Constituição e défice procedimental”, at 72: “[a] riqueza e completude do ‘catálogo’ dos direitos fundamentais, normativamente recortado na Constituição Portuguesa de 1976, não corresponde uma estrutura procedimental/processual adequada e eficaz para conferir plena realização prática a esses direitos.”

¹²⁶⁸ See ALEXANDRINO, *A estruturação do sistema de direitos, liberdades e garantias na Constituição Portuguesa*, 2006, at 484.

¹²⁶⁹ For further references see *ibid.*, at 485, note 2093.

III. Secondly, on the eve of the 1996 IGC, the CJEU invited Member States to consider the reform of ex-Article 230(4) EC, specifically questioning whether that provision was adequate to guarantee effective judicial protection in cases where Community measures could be in breach of fundamental rights.¹²⁷⁰ In view of that concern, scholars have also considered that fundamental rights require a more flexible approach to standing. Early on, in 1981, BEBR considered that the protection of fundamental rights could lead, in the long run, to a modification of the requirements of admissibility of an action for annulment.¹²⁷¹ In 1996, VAN GERVEN affirmed that the requirements of direct and individual concern should be construed broadly *at least* in the field of fundamental rights.¹²⁷² Thus, individuals should be entitled to *complete judicial protection* which includes the right to bring an action for annulment against normative acts.¹²⁷³ ORTEGA proposed, in 1999, that the Treaties established the possibility of challenging any act of the EU institutions which “*vulneren los derechos fundamentales en sentido estricto.*”¹²⁷⁴ EVERLING, although admitting that Union regulations should preferably be submitted to indirect review according to the German tradition, admitted that there should be at least two exceptions to this rule: one regarding the “*zone grise*”¹²⁷⁵ between regulations and decisions, which are normative acts which affect a closed group of individuals; and the other regarding challenges against regulations directly affecting the fundamental rights of private parties without the need for an intermediate act.¹²⁷⁶ Thus, in so far as “*les règlements affectent directement, sans l’intermédiaire d’un acte administrative capable d’être attaqué en justice, la position juridique du particulier protégée par des droits fondamentaux*”, standing under the action for annulment should be broadened.¹²⁷⁷ MOITINHO DE ALMEIDA has also considered that the action for annulment should be made available when the applicant is deprived of an effective or adequate remedy “*à l’égard d’un droit fondamental*”.¹²⁷⁸ WAELBROECK and VERHEYDEN admit that stricter conditions to challenge legislative acts could be acceptable in so far as access is *always* provided when the violation of fundamental rights is at stake and important matters of principle are involved.¹²⁷⁹ VANDERSANDEN also admitted excluding direct challenge against certain Union acts, *unless* they affect fundamental rights.¹²⁸⁰ EHLERS considers that, where an individual alleges the breach of a fundamental right, an action for annulment “has to be considered”¹²⁸¹ as “one can only

¹²⁷⁰ Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union, 1995, at 19, 30: “[i]t may be asked, however, whether the right to bring an action for annulment under Article 173 of the EC treaty (and the corresponding provisions of the other treaties), which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions (para. 20).”

¹²⁷¹ BEBR, *Development of Judicial Control*, 1981, at 64.

¹²⁷² VAN GERVEN, “The Role and Structure of the European Judiciary Now and in the Future”, 1996, at 213.

¹²⁷³ *Ibid.* at 222.

¹²⁷⁴ ORTEGA, *El acceso de los particulares a la justicia comunitaria*, 1999, at 193.

¹²⁷⁵ EVERLING, “L’avenir de l’organisation juridictionnelle de l’Union européenne”, 1994, at 26.

¹²⁷⁶ *Ibid.*

¹²⁷⁷ *Ibid.*

¹²⁷⁸ ALMEIDA, “Le recours en annulation des particuliers”, 1995, at 871, 872.

¹²⁷⁹ WAELBROECK; VERHEYDEN, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires”, 1995, at 441.

¹²⁸⁰ VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995, at 551.

¹²⁸¹ EHLERS, “The Fundamental Rights of the European Union”, 2007, at 396.

speak of fundamental rights as subjective rights if the protected interests of the individual can be enforced in a court of law.”¹²⁸² TOTH has suggested that the CJEU develops a *legal presumption* according to which an act of an institution which *prima facie* is likely to infringe a fundamental right protected by the ECHR automatically satisfies the conditions for admissibility.¹²⁸³ SCHOCKWEILER has also considered that challenges to acts of general application should be admitted on the grounds of their conformity with “*norms supérieures de caractère constitutionnel*”¹²⁸⁴, notably fundamental rights, as the CJEU should be considered the constitutional court of the EU. NEUWAHL, based on *Codomîu*, has questioned if the notion of individual concern must be interpreted to mean that all legal or natural persons whose fundamental rights are *affected* can automatically be said to be individually concerned¹²⁸⁵, and has proposed that “directly effective provisions of even secondary Community legislation should entail *locus standi* in direct actions against Community acts infringing them, unless there are other (effective) remedies available.”¹²⁸⁶ More significantly, the author has noted that in the EU the capacity of individuals to challenge directly applicable measures of a general legislative nature infringing their rights should perhaps be conceived in a *more generous* way than in some of the Member States.¹²⁸⁷ Accordingly:

“[a]n individual shall be deemed to be individually concerned if *prima facie* any of his individual rights under Community law has been infringed the effective protection of which must be undertaken by the Court of Justice.”¹²⁸⁸

CASSIA has considered that the CJEU should not refrain from accepting an action for annulment grounded on a breach of fundamental rights “*lorsque l'intervention des juridictions communautaires paraît mieux susceptible de protéger le requérant.*”¹²⁸⁹ Hence the invocation “*suffisamment pertinente*”¹²⁹⁰ of a fundamental rights violation should be regarded as enough to admit an action for annulment, regardless of the existence of alternative national remedies. Indeed, “*l'importance de la violation pouvant résulter de l'acte contesté, qui touche aux droits essentiels du requérant, plaide en faveur de la recevabilité du recours.*”¹²⁹¹ The author has *inclusive* read into the “classics of Union law” – to borrow a well-known expression – regarding the admissibility of actions for annulment, the *germen* of the CJEU’s will to protect fundamental rights.¹²⁹²

¹²⁸² *Ibid.* This author considers that the restrictive scope of the action for annulment and for failure to act, together with the absence of an action for performance and for a declaratory judgement are “intolerable” shortcomings of the Union’s judicial system.

¹²⁸³ TOTH, “The European Union and Human Rights”, 1997, at 518. An individual would only have to make out a *prima facie* case on human rights.

¹²⁸⁴ SCHOCKWEILER, “L’accès à la justice dans l’ordre juridique communautaire”, 1996, at 8.

¹²⁸⁵ NEUWAHL, “Article 173 Paragraph 4 EC”, 1996, at 28, noting that this proposition raises the central issue of knowing which Union rights would be considered so fundamental that their alleged infringement confers *locus standi* on an applicant.

¹²⁸⁶ *Ibid.*

¹²⁸⁷ *Ibid.*, 1996, at 29.

¹²⁸⁸ *Ibid.*, at 31.

¹²⁸⁹ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 788.

¹²⁹⁰ *Ibid.*

¹²⁹¹ *Ibid.*

¹²⁹² Hence, the decisions in *Toepfer*, *Bock*, *Les Verts*, *UEAPME*, *Codomîu* and even *Extramet*, among others less known cases, could be explained on the grounds of a breach of superior principles of law of which fundamental rights constitute an expression. See CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 745 *et seq.* Accordingly, “[e]n déclarant recevables certains recours en annulations fondés sur la violation de droits fondamentaux, les juridictions communautaires se bornent à tirer les conséquences de la notion de Communauté de droit (...).” *Ibid.*, at 767.

IV. Thirdly, accession to the ECHR may have introduced an additional argument in this regard. In fact, as seen above, in the context of accession negotiations, the Contracting Parties have envisaged a mechanism which, in proceedings to which the EU is *co-respondent* before the EctHR, affords the CJEU *sufficient time* to assess the compatibility of the contentious provision of European Union law with the ECHR rights at issue, when the CJEU has not previously had this opportunity.¹²⁹³ This possibility means that if the CJEU maintains its traditional approach to individual concern challenges regarding acts falling under the first part of Article 263(4) TFEU will in all probability be held inadmissible. In these cases, the applicants may subsequently file a complaint before the EctHR, who in the absence of a decision of the CJEU regarding the *substantive* breach of the Convention may have to refer the matter to the CJEU in the context of the co-respondent mechanism. Hence, reasons of procedural economy and reasonable due process plead in favour of the admissibility of the *first* action for annulment brought before the CJEU on the basis of a breach of Convention rights. In fact, to leave a decision on the merits regarding the validity of a Union act to a subsequent action brought before the EctHR seems, to say the least, an *artificial detour* – and therefore questionable under Articles 6 and 13 ECHR and 47 of the Charter. In light of the above, accession to the ECHR may bring an additional argument favouring the procedural dimension of fundamental rights in the EU. In this context, one should bear in mind that the overall aim of accession is to improve protection of the fundamental rights of individuals and that any solution adopted in that context should not render this protection too difficult to obtain.¹²⁹⁴

V. In light of the foregoing, it is submitted that the *formal constitutionalization* of fundamental rights at the Union level must have an impact on the admissibility of actions for annulment. As seen above, in the Lisbon Treaty fundamental rights standards became “anchored in three different sources”¹²⁹⁵ and this multilevel protection is considered “welcomed in the perspective of legal and constitutional theory.”¹²⁹⁶ Scholars noted that “the act and manner of codification is likely to give fresh impetus to human rights litigation”¹²⁹⁷ in the EU. In fact, it would be wrong to diminish the significance of the achievement:

“[s]trong protection of individual rights, whatever its political or constitutional motivations, serves both as a compass for the formulation of policy and a necessary judicial safeguard for the individual against the growing legislative and administrative powers of the Union.”¹²⁹⁸

In light of the above, it is submitted that challenges against Union acts brought on fundamental rights grounds should be *in principle* admitted. One does not ignore that some kind of “standing filter” is necessary. Otherwise, the action for annulment would become an *actio popularis*

¹²⁹³ See *supra* Chapter 1, Section 1.3.3(c).

¹²⁹⁴ LOCK, “Walking on a Tightrope”, 2011, at 1054.

¹²⁹⁵ WEISS, “Human Rights in the EU”, 2011, at 68.

¹²⁹⁶ *Ibid.*

¹²⁹⁷ ANDERSON; MURPHY, “The Charter of Fundamental Rights”, 2012, at 153.

¹²⁹⁸ *Ibid.*, at 156.

which was clearly not the intention of Member States. Furthermore, filter mechanisms are not unknown to national constitutional complaints. Thus, in Germany the applicant must have *locus standi* (*Beschwerdebefugnis*) to file a constitutional complaint. An applicant is deemed to have standing if his/her basic rights have been infringed *directly* and *immediately* by the contested act, and the former was prejudiced *personally* by it at the moment of filing the complaint.¹²⁹⁹ The possibility of an infringement in the future does not entitle a person to file a *Verfassungsbeschwerde*, and standing requirements are particularly strict when the complainant claims a violation of a right due to an omission to meet an obligation to protect his fundamental rights.¹³⁰⁰ Austrian law acknowledges the right to a constitutional complaint to the formal addressee of a decision as well as to those individuals directly affected by the measure (*Ausübung unmittelbarer Behelfs- und Zwangsgewalt* or *Individualantrag*).¹³⁰¹ In Spain, the infringement of the applicant's right or freedom must result *directly* and *immediately* from an act or omission of a public authority.¹³⁰²

Furthermore, notwithstanding the fact that under the ECHR the conditions for bringing an individual complaint do not have to coincide with the national criteria on standing¹³⁰³, it is submitted that standing on fundamental rights issues in the EU could be assessed along the lines of the notions construed by the EctHR under the ECHR.¹³⁰⁴ In this context, the EctHR has frequently stated that the rules on admissibility of individual applications under Article 34 ECHR must be applied with some degree of *flexibility* and *without excessive formalism*.¹³⁰⁵ It has also stated that account must be taken to their object and purpose¹³⁰⁶ and to those of the Convention which as a human rights treaty must be interpreted and applied so as to make its safeguards practical and effective.¹³⁰⁷ As is well known, under the ECHR, individual complaints can be brought by individuals who claim to have been *victims* of a breach of the rights included therein.¹³⁰⁸ This notion is, however, construed broadly as meaning someone *directly affected*.¹³⁰⁹ In *Klass and others*

¹²⁹⁹ In Germany, according to the case-law of the Federal Constitutional Courts the constitutional complaint it is available for persons who are personally, directly and presently affected (*selbst, unmittelbar und gegenwärtig*). See WITTE, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", 1999, at 894. The majority of constitutional complaints are directed against judicial decisions which allegedly fail to protect the applicants' constitutional rights.

¹³⁰⁰ STEINBERGER, "Judicial Protection of Human Rights at the National Level", 1991, at 191.

¹³⁰¹ MATSCHER, "La protection judiciaire des droits de l'Homme au niveau national et international", 1991, at 46.

¹³⁰² BIERNAT, "The *Locus Standi* of Private Applicants under Article 230 (4) EC and the Principle of Judicial Protection in the European Community", 2003, at 46.

¹³⁰³ *N. v. Switzerland*, Application no. 9870/82, Decision of 13/10/1983, p. 214; *Norris v. Ireland*, Application no. 10581/83, Judgement of 26/10/1988. Noting that the possibility of addressing the EctHR when access has been denied at the national level for lack of standing which seems to be the main reason for the autonomy of the national and European notions of standing is lacking at the EU level, see CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 819.

¹³⁰⁴ Noting that in the context of the Charter the "victim test" laid down by the ECHR must surely be the minimum standard for access to the CJEU as any more restrictive test is likely to fall foul of the ECHR in itself see EICKE, "The European Charter of Fundamental Rights", 2000, at 291.

¹³⁰⁵ *Ilhan v. Turkey*, Application no. 22277/93, Judgement of 27/06/2000; *Cardot v. France*, Application no. 11069/84, Judgment of 19/03/1991.

¹³⁰⁶ *Worm v. Austria*, Application no. 22714/93, Judgement of 29/08/1997.

¹³⁰⁷ *Yasa v. Turkey*, Application no. 22495/93, Judgement of 02/09/1998.

¹³⁰⁸ See Article 34 ECHR. Any parallel with Article 35 would, however, be out of place in the EU.

¹³⁰⁹ See *Open Door and Dublin Well Woman v. Ireland*, Applications nos. 14234/88; 14235/88, Judgement of 29/10/1992, which came very close to admitting an *actio popularis*. See HARLOW, "Access to Justice as a Human Right", 1999, at 193; CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 773, 774; MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*, 2012, at 31. Standing before the EctHR has also been discussed in cases involving corporate bodies, family members, minors. For further developments see MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*,

the German government had argued that the applicants were seeking a general and abstract review of the contested legislation in the light of the Convention on the basis of the purely hypothetical possibility of being subject to surveillance, as there was no implementing act regarding the applicants individually.¹³¹⁰ The EctHR confirmed that the ECHR “does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention.”¹³¹¹ Hence, in principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention: it is necessary that the law should have been *applied to his detriment*. Nevertheless, “a law may by itself violate the rights of an individual if the individual is directly affected by the law *in the absence of any specific measure of implementation*.”¹³¹² Therefore, the EctHR accepts that an individual may, “under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, *without having to allege that such measures were in fact applied to him*.”¹³¹³ In *Norris*¹³¹⁴ the Irish government had submitted that, since the legislation complained of had never been enforced against the applicant his claim was more in the nature of an *actio popularis* by means of which he sought a review *in abstracto* of the contested legislation in the light of the ECHR. The EctHR held that:

“[b]e that as it may, the Court has held that Article 25 (art. 25) of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they *run the risk of being directly affected by it* (emphasis added).”¹³¹⁵

In light of Strasbourg case-law, scholars note that the EctHR accepts complaints from potential, indirect, possible and future victims, as well as from their representatives.¹³¹⁶

Additionally, as the entitlement of a fundamental right may come close to the decision on the merits¹³¹⁷, at the admissibility stage the CJEU must consider merely a *prima facie* case.¹³¹⁸

2012, at 31, 32; WHITE; OVEY, *Jacobs, White & Ovey: The European Convention on Human Rights*, 2010, at 31-33.

¹³¹⁰ See *Klass and others v. Germany*, Application no. 5029/71, Judgement of 06/09/1978.

¹³¹¹ Para. 33.

¹³¹² The EctHR added: “[a]rticle 25 (art. 25), which governs the access by individuals to the Commission, is one of the *keystones* in the machinery for the enforcement of the rights and freedoms set forth in the Convention. This machinery involves, for an individual who considers himself to have been prejudiced by some action claimed to be in breach of the Convention, the possibility of bringing the alleged violation before the Commission provided the other admissibility requirements are satisfied. The question arises in the present proceedings whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court’s view, the effectiveness (*l’effet utile*) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention’s enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.”

¹³¹³ Para. 34. See also *Malone v. The United Kingdom*, Application no. 8691/79, Judgement of 02/08/1984; *Halford v. The United Kingdom*, Application no. 20605/92, Judgement of 25/06/1997.

¹³¹⁴ *Norris v. Ireland*, Application no. 10581/83, Judgement of 26/10/1988, paras. 28-34.

¹³¹⁵ Para. 33: “[a] law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to “run the risk of being directly affected” by the legislation in question.” Other cases where a person is virtually certain to be affected in the future see *Marckx v. Belgium*, Application no. 6933/74, Judgement of 13/06/1979; *Burden v. The United Kingdom*, Application no. 13378/05, Judgement of 29/04/2008.

¹³¹⁶ BELOFF, “Who Whom?”, 2000, at 283, 284, noting that nevertheless the Strand criteria on *locus standi* are broader than the ones applied in Strasbourg.

¹³¹⁷ Article 29(3) ECHR allows the EctHR to examine the admissibility and merits of a case at the same time. The

Expressions such as “it was for the applicants to produce, at the admissibility stage, *specific evidence* that that might be the case with respect to them”¹³¹⁹, and rejection of admissibility on the grounds of “lack of evidence”¹³²⁰ are common in the CJEU’s case-law. The notion of a *prima facie* case has also been tested within the context of interim measures.¹³²¹ Similarly, the EctHR applies the *prima facie* standard in the context of Article 13 ECHR¹³²² and Article 34 ECHR.¹³²³

The CJEU has by now given some indications that it may be willing to accept the condition of *victim of a fundamental rights violation* under Article 263(4) TFEU. In *PKK and KNK*¹³²⁴ the applicants claimed that the restrictive standing rules under Article 263(4) TFEU breached Article 6 ECHR and the CJEU “self-consciously checked whether the applicants would be regarded as victims under the ECHR.”¹³²⁵ The case involved a challenge brought by the Kurdistan Workers’ Party (PKK) and by the Kurdistan National Congress (KNK) against two Council decisions adopting restrictive measures with a view to combating terrorism.¹³²⁶ Having being found not to be individually concerned by those decisions, the second appellant contented that such restrictive interpretation conflicted with the ECHR. Here, the CJEU took the time to assess if the applicants could be considered victims under the EctHR’s case-law having, notwithstanding, considered that was not the case.¹³²⁷ In fact, the CJEU held that:

“[i]n those circumstances, the case-law of the European Court of Human Rights, as it currently stands, appears to indicate that the KNK would not be able to establish that it has the status of a victim within the meaning of Article 34 of the ECHR and therefore would not be able to bring an action before that court.

Consequently, in the circumstances of the present case no conflict between the ECHR and the fourth paragraph of Article 230 EC has been established (emphasis added).”¹³²⁸

The phrasing of the judgement suggests a clear link between the application of Article 263(4) TFEU and the condition of “victim” of a violation of fundamental rights.

joint procedure has become the standard practice of the Court in most cases. See HARRIS; O’BOYLE; BATES; BUCKLEY, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 2009, at 757.

¹³¹⁸ The CJEU is used to consider *prima facie* cases also in the field of the old TECSC which established the possibility of challenge of general decisions on the grounds of a misuse of powers. See e.g., Joined Cases 55 to 59 and 61 to 63/63, *Acciaierie Fonderie Ferriere di Modena/ECSC High Authority*, [1964] 211.

¹³¹⁹ Case T-109/97, *Molkerei Großbraunshain and Bene Nahrungsmittel/Commission*, [1998] ECR II-3533, para. 71; Case T-215/00, *La Conquete/Commission*, [2001] ECR p. II-181, para. 36.

¹³²⁰ See e.g., Case T-597/97, *Euromin/Council*, [2000] ECR II-2419, para. 49.

¹³²¹ SINANIOTIS, *The Interim Protection of Individuals before the European and National Courts*, (2006) at 17 *et seq.*; CASTILLO DE LA TORRE, “Interim Measures in Community Courts”, 2007, at 284 *et seq.*

¹³²² See *supra* Chapter 1, Section 1.3.2(b).

¹³²³ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 798 *et seq.*, with further references. In *Tauira and 18 Others v. France*, Application no. 28204/95, Decision of 04/12/1995, the Commission held that it is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim of a violation of the Convention owing to the risk of a future violation. In order for an applicant to claim to be a victim in such a situation, he must, however, produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect.

¹³²⁴ Case 229/05 P, *PKK and KNK/Council*, [2007] ECR I-439.

¹³²⁵ CRAIG; BÜRCA, *EU Law*, 2011, at 506.

¹³²⁶ Council Decision 2002/334/EC and Council Decision 2002/460/EC.

¹³²⁷ Para. 80. The CJEU mentioned the decisions in *Klass and others v. Germany*, Application no. 5029/71, Judgement of 06/09/1978; *Tauira and 18 Others v. France*, Application no. 28204/95, Decision of 04/12/1995; *Segi and Gestoras Pro-Amnistia and others v. Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, The United Kingdom and Sweden* (dec.), Applications nos. 6422/02; 9916/02, Decision of 23/05/2002.

¹³²⁸ See paras. 81-83.

In light of the foregoing, it is submitted that in order for the EU to move “from the stage of proclamation of fundamental rights to their implementation”¹³²⁹ and ensure adequate fundamental rights review, the CJEU should interpret the requirements of direct and individual concern in a more generous fashion. This could be done through at least two different techniques: either by (i) reading those concepts in light of the procedural dimension of fundamental rights, or by (ii) arguing on the basis of a new separate ground of appeal construed on the basis of the renewed system of fundamental rights protection established under the Lisbon Treaty. Whatever path the CJEU chooses to follow, it is clear that a more flexible interpretation should extend to all Union policies, including therefore the CFSP, as we shall see in more detail below.¹³³⁰ Indeed, fundamental rights currently operate within an *integrated* Union of Law.¹³³¹ The activities undertaken under the second pillar of the EU are unquestionably “particularly human rights intensive”¹³³², and have significant human rights implications.¹³³³

As a final point, one should note that the procedural dimension of fundamental rights should also be relevant at the level of preliminary references on validity. The German Constitutional Court has urged national courts to make preliminary rulings whenever there are substantial concerns about the compatibility of EU acts with the Charter.¹³³⁴ One would add that the CJEU should also take into consideration the need for fundamental rights protection when deciding the admissibility of a reference on the validity of Union measures.

2.1.6 “Plugging the gaps”: Taking Effective Judicial Protection Seriously or “Do as I do...”

I. It can be argued that whether or not one considers that the Union’s system of judicial review guarantees the right to effective judicial protection very much depends on the interpretation to be given to this concept. In reality, if this concept is perceived as an individual right of *direct* access to a court it is clear that the current interpretation of the CJEU on direct and individual concern does not guarantee adequate legal protection.¹³³⁵ By contrast, if such concept is interpreted as merely encompassing the right of access *in general*, it could be said that preliminary references on validity compensate the limited possibilities of direct access to the Union courts. However, *even if one follows this view*, in those cases where individuals are not given the possibility of mounting a challenge in national courts and of ensuring that a preliminary reference gets to Luxembourg, and nonetheless the CJEU holds the direct action inadmissible, it is hard to see how

¹³²⁹ LIMBACH, “Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe”, 2000, at 333.

¹³³⁰ See *infra* Section 2.2. See CURTIN; VAN OOIK, “The Sting is Always in the Tail”, 2001, at 106, considering that the Charter precludes the Union from adopting CFSF acts which breach fundamental rights.

¹³³¹ Questioning the role of fundamental rights review in the second pillar see PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 36.

¹³³² EICKE, “The European Charter of Fundamental Rights”, 2000, at 289.

¹³³³ DOUGLASSCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 46.

¹³³⁴ BVerfGE 1 BvR 1036/99, *Teilzeit Arbeit*. See also PERNICE, “Integrating the Charter of Fundamental Rights into the Constitution of the European Union”, 2003-2004, at 42. By contrast, noting that relying on national courts splinters the impact of the Charter, reducing its status as a constitutional document see DOUGLASSCOTT, “The Charter of Fundamental Rights as a Constitutional Document”, 2004, at 48.

¹³³⁵ BARENTS, “The Court of Justice in the Draft Constitution”, 2004, at 131.

it can be said that such a system provides for effective judicial protection of private parties.

As seen above, the CJEU has consistently held that a breach of the right to effective judicial protection, *even if proved*, does not allow it to admit an action for annulment beyond the strict limits – as understood in its case-law – of the standing conditions established in the Treaties: the CJEU’s case-law is immune to the arguments based on the need to ensure effective judicial protection.¹³³⁶ Such case-law has prevented the CJEU from filling in gaps of judicial protection in several cases, such as *Greenpeace*, *UPA* or *Jégo-Quéré*. Thus, scholars note that the CJEU “*quitte à laisser ouverte la possibilité d’un déni de justice quand aucun juge ne s’estimera compétent*.”¹³³⁷ Indeed, the principle of effective judicial protection, regardless of its constitutional value as an operating tool in the CJEU’s case-law in other instances¹³³⁸, has not proven a strong enough argument to broaden direct access precisely in those cases where it was most needed. Here, the Court “washes his hands like Pilate”, and leaves it to Member states “to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection”¹³³⁹ and if necessary “to reform the system currently in force”.¹³⁴⁰ Surprisingly, the CJEU puts itself in a position of being the only court which escapes the duty to ensure effective judicial protection of private parties.

The so-called “gap theory” remains valid after the Lisbon Treaty. In fact, although Article 263(4) TFEU has mitigated the possibilities of gaps in the judicial protection of individuals as it eliminates individual concern for regulatory acts which do not entail implementing measures, such provision continues to leave room for some *lacunae*.¹³⁴¹ Firstly, the extent to which the CJEU applies the notion of regulatory acts will determine the broadening or narrowing of the “gap situations.” In fact, regarding those acts covered by the first part of Article 263(4) TFEU – which as seen above includes at least some *legislative* acts adopted in co-decision – the deficit of protection arising from the lack of implementing measures at the national level may still arise. Regarding these acts, individuals may face difficulties in trying to mount a challenge in national courts. Furthermore, in so far as the existence of implementing measures under Article 263(4) *in fine* TFEU refers also to EU implementing acts, as the GC indicated in *Inuit*¹³⁴², there may be *administrative* Union acts which require EU implementing measures – one can imagine a delegated act requiring implementation at EU level – but which do not require the existence of national implementing measures. As it may not be clear whether these acts are covered by the last part of Article 263(4) TFEU, gaps of protection may continue to arise.¹³⁴³ Thus, in these cases, an

¹³³⁶ See *supra* Part I, Chapter 1, Section 1.1.4.

¹³³⁷ BERROD, *La systématique des voies de droit communautaires*, 2003, at 1011.

¹³³⁸ See *supra* Chapter 1, Section 1.2.2.

¹³³⁹ Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 40.

¹³⁴⁰ Case C-50/00 P, *Unión Pequeños Agricultores/Council*, [2002] ECR I-6677, para. 48.

¹³⁴¹ DUTHEIL DE LA ROCHÈRE and ILIOPOULOU took the view in that while the new Article 263(4) TFEU was certainly an improvement the condition of individual concern remained concerning all other acts of the Union. They said: “[t]his obviously restricts in a significant way the individuals’ right to challenge an EU act before the Court of First Instance. This is incompatible with the fundamental right of access to a court and to an effective judicial remedy; in fact, in certain types of cases the only effective remedy for individuals aggrieved by the adoption of normative Community measures would be the possibility of challenging them directly before the Court of First Instance in the form of an action for annulment.” See Memorandum of the House of Lords European Union Committee, *The Future Role of the European Court of Justice*, 2003-2004, at 40 and 73-74.

¹³⁴² See *supra* Section 2.1.2.

¹³⁴³ See *supra* Section 2.1.3.

individual may be forced to breach national law to “create” a case in order to test the lawfulness of Union acts.

Secondly, the Lisbon Treaty has not reviewed — and was clearly not intended to — the mechanism of preliminary rulings on validity. Such mechanism remains, in the current framework of the Treaties, a form of constitutional review not available as a matter of right to private parties. Consequently, even if an individual succeeds in mounting a legal challenge to Union law before national courts, the existence of a preliminary ruling on validity is not by definition guaranteed “with certainty and in all circumstances.”¹³⁴⁴

It is submitted that in order to *take the right to effective judicial protection seriously* — to borrow a famous expression¹³⁴⁵ — the CJEU should admit an action for annulment whenever an individual demonstrates, with a *significant degree of certainty*, that he/she will not or did not have an effective remedy at the national level.¹³⁴⁶ Surely, one is aware that the time limit set forth in Article 263(6) TFEU will make these situations rare. Nonetheless, they may still arise. The case of *Greenpeace* could serve as an obvious example, but others could be envisaged. Thus, whenever a Union act applies directly to an individual without entailing implementing measures and an individual manages to demonstrate, with *sufficient certainty*, that access to national courts is not *viable* or *effective*, the CJEU should deem such applicant to be directly and individually concerned. Moreover, if a private party succeeds in proving that national courts are not *competent* or *capable* of addressing the CJ, the CJEU should accept the direct challenge.¹³⁴⁷ Otherwise the right to effective judicial protection will be compromised. Thus, if the purpose of a remedy is to “make constitutional ideas into living truths”¹³⁴⁸, the CJEU should in the context of Article 263(4) TFEU “give life” to the constitutional protection of the right to effective judicial protection as currently established in Article 47 of the Charter.

II. The possibility of the CJEU admitting actions for annulment when no other remedy at the national level is available was discussed within Working Group II. Among the proposals of revision of Article 230(4) TEC the Working Group mentioned the possibility of providing “for direct actions against acts of general application which are of direct concern to the applicant where there is no [adequate] remedy before a national court or tribunal.”¹³⁴⁹ In a footnote it was added that “[i]t should be born in mind that this formula could oblige the Community Courts to

¹³⁴⁴ Case 70/88, *Parliament/Council (Chemobyl)*, [1990] ECR I-2041, para. 20. A challenge to Union acts through national courts could be deemed artificial *per se*, as these courts are not competent to declare Union acts invalid. See *supra* Part I, Chapter 1, Section 1.2.2(b).

¹³⁴⁵ DWORKIN, *Taking Rights Seriously*, 1978.

¹³⁴⁶ MOITINHO DE ALMEIDA restricted this approach to breaches of fundamental rights. Here, a mere doubt or possibility of lack of an effective remedy should suffice in order to admit the action. See ALMEIDA, “Le recours en annulation des particuliers”, 1995, at 872, 873.

¹³⁴⁷ Suggesting that the Treaty should include a residual clause which allowed for such solution see ORTEGA, *El El acceso de los particulares a la justicia comunitaria*, 1999, at 209.

¹³⁴⁸ *Cooper v. Aaron*, 358 US 1 (1958).

¹³⁴⁹ Working Document 21, at 6, mentioning the critical remark made by Judge SKOURIS at the hearing of 17 September, Working Document no. 19: “[n]or do I feel it is desirable to resolve this difficulty by granting individuals the right to challenge rules simply because there is no appropriate remedy at national level. As the Court of Justice has pointed out in its judgment in *Unión de Pequeños Agricultores*, at paragraph 43, a major stumbling block with that approach is that it requires the Court to be judge and interpreter of national procedural rules, which would go beyond its jurisdiction when reviewing the legality of Community measures.”

interpret, to a certain extent, national procedural law in particular cases.”¹³⁵⁰ This has been, indeed, the main objection to this solution. In fact, as seen above, although the GC’s decision in *Jégo-Quéré* and the Opinion of AG JACOBS in *UPA* “shared a common ethos”¹³⁵¹ by making use of the applicants’ concerns about the lack of effective judicial protection in order to highlight the inadequacy of the alternative routes provided by the Treaty for the review of Union acts¹³⁵², neither of them accepted that greater flexibility in the interpretation of the standing rules should be contingent on whether those alternative routes are available.¹³⁵³ AG JACOBS refused such an approach based on three major arguments. Firstly, the wording of Article 263(4) TFEU does not make any reference to the availability or absence, in particular instances, of alternative remedies in national courts.¹³⁵⁴ Secondly, the CJEU is not competent to rule on the interpretation and validity of national law and is not well placed to carry out what may in some cases be a complex and time-consuming inquiry into the details of national procedural law.¹³⁵⁵ And, thirdly, such solution would inevitably lead to inequality and a loss of legal certainty in an area of law already marked by considerable complexity.¹³⁵⁶

These arguments can, nonetheless, be rebutted. Firstly, although it is true that Article 263(4) TFEU does not make any reference to national proceedings, it is undisputed that such provision should be interpreted in light of the right to effective judicial protection as established both in the CJEU’s and ECtHR’s case-law. The latter imply the right of individual applicants to *effectively* access a court of law. What is more, one could argue the other way around, and hold that nothing in the wording of Article 263(4) TFEU precludes the conclusion that a direct action for annulment should be deemed admissible when national proceedings are not available, adequate or effective (or an interpretation of said provision in light of abovementioned principle).

Furthermore, the existence of alternative remedies in national courts – or to the lack of those remedies – has not been entirely irrelevant in the CJEU’s case-law regarding the admissibility of actions for annulment.¹³⁵⁷ In fact, the existence of gap situations is not new in the EU and has been referred to in several instances. The *Greenpeace* case provides a good example. Here, AG COSMAS put the question in an inverse perspective, opposing the view according to which the extent to which a natural person may seek and obtain judicial assistance within the national legal order should be one of the matters examined when inquiry is made into the correct interpretation

¹³⁵⁰ Working Document 21, at 6, footnote 14.

¹³⁵¹ ALBORS-LLORENS, “The Standing of Private Parties to Challenge Community Measures”, at 84.

¹³⁵² See *supra* Part I, Chapter 1, Section 1.1.4.

¹³⁵³ *Ibid.*

¹³⁵⁴ Perhaps more fundamentally, the Treaty contains no suggestion that the availability of an action under Article 173 was intended to be dependent on the absence of an alternative remedy in the domestic forum. See Opinion of AG REISCHL in Case 138/79, *Roquette Frères/Council*, [1980] ECR 3333.

¹³⁵⁵ Seen in this light, the arguments about the deficiencies of national procedural law are reserved for infringement proceedings and have no place in the context of the action for annulment. See ENCHELMAIER, “No One Slips Through the Net?”, 2005, at 214.

¹³⁵⁶ Paras. 51-53. However, in a somehow ambiguous paragraph the AG admitted in theory that in some cases standing may be granted, in a particular instance, where the application of the fourth paragraph of Article 230 EC as interpreted in the case-law would entail a denial of effective judicial protection. See para. 35 of the Opinion.

¹³⁵⁷ With further references see CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 703 *et seq.*

and application of the procedural preconditions laid down in current Article 263(4) TFEU.¹³⁵⁸ However, one should note that one thing is to make the admissibility of an action for annulment dependent on the availability of an indirect action in national legal orders, not allowing for a direct challenge when the indirect route is opened. Another thing is to argue that the direct action should be made available when the indirect action is not viable. In the latter case, the need to ensure effective judicial protection is surely more relevant.

Moreover, the legal discourse regarding the existence of alternative remedies is not entirely absent from the CJEU's case-law. LENAERTS has suggested that where a Union act requires implementation at the national level the CJEU will in principle deem a direct action *inadmissible*.¹³⁵⁹ However, the author recognizes that the CJEU has not explicitly based *admissibility* on the grounds that the applicants could not find redress in national courts.¹³⁶⁰

More significantly, one should note that in the CJEU's case-law the absence of alternative remedies has been considered relevant to hold admissible actions for annulment on other grounds. In *Geotronics*¹³⁶¹, AG TESAURO considered that the absence of other remedies should justify the admissibility of the action, when deciding on the question of knowing *if the contested act could be reviewed* by the CJEU.¹³⁶² Following the same line of reasoning, AG LA PERGOLA considered the lack of alternative remedies in *Dreyfus*¹³⁶³ as an argument *to find the appellants directly concerned*.¹³⁶⁴ Also in *Les Verts*, the lack of an alternative remedy seems to have played an important role in the CJEU's assessment of *individual concern*.¹³⁶⁵ In *Spain/Eurojust*, although the CJEU did

¹³⁵⁸ Opinion of AG COSMAS in *Greenpeace*, note 62.

¹³⁵⁹ LENAERTS, "The Legal Protection of Private Parties under the EC Treaty", 1998, at 609 *et seq.* See e.g., Case T-154/94, *CSF and CSME/Commission*, [1996] ECR II-1377, paras. 53-54. CASSIA considered that the judgement of the CJ in *Greenpeace* also suggested this solution. See CASSIA, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 255. The same author also notes that the existence of an *intérêt à agir* should be deemed demonstrated when there is no other possibility to challenge the Union act in national courts. See *supra* Section 2.1.4.

¹³⁶⁰ LENAERTS, "The Legal Protection of Private Parties under the EC Treaty", 1998, at 613. See also BERROD, *La systématique des voies de droit communautaires*, 2003, at 944, noting the the direct action *compensates* for the inexistence of national remedies.

¹³⁶¹ Case C-395/95 P, *Geotronics/Commission*, [1997] ECR I-2271. See FINES, "Case C-395/95 P, *Geotronics SA v. Commission*", 1998, at 1427-1435.

¹³⁶² In this case, the AG stated that: "[i]n these circumstances, I fail to see *before what other court* the appellant could have submitted the contested measure for a review of its legality, if not the Community judicature. (...) It is clear, however, *not only that such a remedy is precluded in principle, but also that it could in any event be of no use*, since the issue is the review of the legality of an act which is to all intents and purposes a Community measure. A national remedy could relate only to acts falling within the competence of the national authorities, such as the definitive award of the contract to another undertaking, or to the relevant contract. (...) It must therefore be allowed that it is possible to bring an action for annulment for breach of Community law against such a decision which, as we have seen, is capable of having binding, definitive legal effects on the addressee. To maintain the contrary is, in my view, tantamount to *sheltering behind the only too feeble protection of the national authorities and courts in order to strip an applicant of his right to judicial protection*, which would plainly constitute an unacceptable breach of the *most fundamental rules* on which the 'Community governed by the rule of law' which the Treaty intended to establish is based and whose values are the Court's constant guide (emphasis added) (paras. 21-23)."

¹³⁶³ Case C-386/96 P, *Dreyfus/Commission*, [1998] ECR I-2309. See also Joint Opinion in Case C-391/96 P, *Compagnie Continentale/Commission*, [1998] ECR I-2377; Case C-403/96 P, *Glencore Grain/Commission*, [1998] ECR I-2405; and Case C-404/96 P, *Glencore Grain/Commission*, [1998] ECR I-2435.

¹³⁶⁴ After finding that the appellants should be deemed directly concerned, the AG acknowledged that, "the present appellants could not submit the disputed decisions for a review of their legality before any court other than the Community court (para. 72)."

¹³⁶⁵ In fact, in the Court's own words: "[g]roupings not represented could not prevent the allocation of the appropriations at issue before the beginning of the election campaign because they would be unable to plead the illegality of the basic decision except in support of an action against the individual decisions refusing to reimburse sums greater than those provided for. It *would therefore be impossible for them to bring an action for annulment* before the Court prior to the elections or to obtain an order from the Court under Article 185 of the Treaty suspending application of

not accept the action for annulment, it pointed to an alternative procedural mean of action available under the Court's first pillar jurisdiction, which was a staff action under Article 91 of the Staff Regulations, *i.e.* under Articles 236 and 283 TEC. The CJEU considered that "*as regards the right to effective judicial protection in a Community based on the rule of law which, (...) requires that all decisions of a body with legal personality subject to Community law be amenable to judicial review*", the acts at stake were not exempted from judicial review. The existence of an alternative remedy seemed pivotal in the CJEU's refusal of admissibility.¹³⁶⁶ Finally, in *Unibet*, although having considered that the existing national remedies were sufficient *in casu*, the CJEU held that "it would be otherwise only if it were apparent from the *overall scheme* of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law."¹³⁶⁷

Secondly, by admitting an action for annulment when the "national routes are closed" the CJEU would not in any way be deciding on the validity of national law. It would be merely acknowledging its *insufficiency* to protect Union rights, an exercise which the Court is fully accustomed to perform.¹³⁶⁸ In fact, the CJEU is more than used to take national procedural law into consideration. Within the action for annulment the CJEU deals, for instance, with national concepts regarding the capacity to sue of moral entities.¹³⁶⁹ Furthermore, as Working Group II noted, the CJEU "already appreciates national procedural law, for example when judging whether a body qualifies as court or tribunal within the meaning of Article 234 or whether an action for compensation under Article 235 TEC might be barred because national rights of action *providing an effective means of protection* have not been exhausted."¹³⁷⁰ Hence, the analysis of national procedural law is far from being absent in admissibility decisions. If regarding the preliminary rulings procedure one could argue that the parties and the national judge provide the CJEU with the necessary information on national law, in the context of the action for damages the CJEU directly assesses if the national rules provide for an adequate and effective protection of the rights breached.¹³⁷¹ Here, the CJEU only accepts the invocation of the exhaustion of the national rights of action argument if the latter "provide an effective means of protection for the individual concerned" and are "capable of resulting in compensation for the damage alleged"¹³⁷², or in other

the contested basic decision (emphasis added) (para. 36)." Hence, JACQUÉ noted that it is possible to devise a "*discret écho*" of Article 13 ECHR in the Court's decision in *Les Verts*. See JACQUÉ, "Arrêt du 13 de avril 1986, *Parti écologiste 'Les Verts'* c. *Parlement européen*", 1986, at 507.

¹³⁶⁶ See also Joined Cases T-377, 379 and 380/00, and 260 and 272/01, *Philip Morris International/Commission*, [2003] ECR II-1, where the GC considered that individuals were not denied access to justice because conduct lacking the features of a decision could not be challenged by way of an action for annulment, since an action for non-contractual liability was available if the conduct is of such a nature as to entail liability for the Union (para. 123).

¹³⁶⁷ Para. 41. See also Opinion of AG SHARPSTON in the case, para. 36.

¹³⁶⁸ Noting that in doing this the CJEU would be merely empirically observing the factual behaviour of national courts see BOROWSKI, "Die Nichtigkeitsklage gem. Art. 230 Abs. 4 EGV", 2004, at 901.

¹³⁶⁹ ARNULL, "Private Applicants and the Action for the Annulment since *Codomiu*", 2001, at 10 *et seq.*; LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 245.

¹³⁷⁰ Working Document 21, at 6, footnote 14.

¹³⁷¹ See also BERROD; MARIATTE, "Le pourvoi dans l'affaire *Unión de Pequeños Agricultores c/Conseil*", 2002, at 10, 11.

¹³⁷² Case 175/84, *Krohn/Commission*, [1986] ECR 753, para. 27. On the rule of exhaustion of local remedies see WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 375 *et seq.* Some scholars have been critical of this rule. See *e.g.*, HARTLEY, "Concurrent Liability in EC Law", 1977, at 249 *et seq.*; OLIVER, "Joint Liability of the European Communities and the Member States", 1988, at 125 *et seq.*; VISSER, "The Concept of Concurrent liability

words if “those remedies under domestic law effectively ensure protection for individuals aggrieved by measures of Community institutions.”¹³⁷³

Furthermore, in the assessment of national procedural autonomy, the CJEU is used to review the organization and functioning of national judiciaries. In reality, “une telle interference est loin d’être inédite.”¹³⁷⁴ As seen above, EU law deeply affects national procedural law sometimes directly – through the adoption of harmonized or unified rules in this field – and other times indirectly through the case-law of the CJEU.¹³⁷⁵ EU law is, in fact, far from being neutral regarding the existence of a national remedy and the need to acknowledge the national courts’ jurisdiction in a given case.¹³⁷⁶ Although Member States are given a large margin of manoeuvre in procedural issues, the CJEU has issued decisions regarding jurisdiction, *locus standi*, time limits, as well as the duty of national courts to create new remedies as a matter of Union law, within the framework of national legal orders.¹³⁷⁷ In this context, the CJEU “ne se satisfait pas d’une attribution de compétences formelle. Il influence parfois fortement, et de manière strictement prétorienne, les procédures nationales.”¹³⁷⁸ Thus, BERROD spoke here of an “appropriation des voies de droit nationales para le droit communautaire.”¹³⁷⁹

Put briefly, the CJEU has not refrained from analyzing the scope, meaning and impact of national procedural rules on imposing on national courts the obligation to ensure adequate judicial protection of Union rights. In light of these considerations, neither the legal nature nor complexity of national procedural rules serve as an argument to justify the incompetence or inability of the CJEU to control *in concreto* the effectiveness of the national avenues.¹³⁸⁰ One should further note that, although the mere allegation by the applicants that an adequate and effective remedy is missing at the national level should not be enough to ground the admissibility of an action for annulment, to consider that the Union courts would have always to analyze and interpret national law in detail in this context would be going too far. In fact, “une chose est d’évaluer l’efficacité des voies de recours nationales, et l’on a vu que la Cour pouvait s’y employer le cas échéant, une

and its Relationship with the Principle of Effectiveness”, 2004, at 48 *et seq.*

¹³⁷³ See Case 281/82, *Unifrex/Council and Commission*, [1984] ECR 1969, paras. 11-12. See also Case 20/88, *Roquette frères/Commission*, [1989] ECR 1553, para. 15. See also Joined Cases T-481 and 484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee/Commission*, [1995] ECR II-2941, para. 72. The is a significant body of case-law where the CJEU addressed the issue of knowing if the remedy available under national law vested private parties with an adequate remedy. See Case 12/79, *Hans-Otto Wagner/Commission*, [1979] ECR 3657; Case 133/79, *Sucrimex/Commission*, [1980] ECR 1299; Case 217/81, *Interagra/Commission*, [1982] ECR 2233; Case 109/83, *Eurico/Commission*, [1984] ECR 3581; Case 81/86, *De Boer Buizen/Council and Commission*, [1987] ECR 3677; Case C-63/89, *Assurances du Crédit/Council and Commission*, [1991] ECR I-1799; Case C-282/90, *Vreugdenhil/Commission*, [1992] ECR I-1937; Case C-55/90, *Cato/Commission*, [1992] ECR I-2533; Joined Cases C-106/90, and 317 and 129/91, *Emerald Meats/Commission*, [1993] ECR I-209; Case T-167/94, *Nölle/Council and Commission*, [1995] ECR II-2589; Case T-18/99, *Cordis/Commission*, [2001] ECR II-913; Case T-30/99, *Bocchi Food Trade International/Commission*, [2001] ECR II-943; Case T-210/00, *Biret & Cie/Council*, [2002] ECR II-47.

¹³⁷⁴ GILLIAUX, “L’arrêt *Unión de Pequeños Agricultores*”, 2003, at 192.

¹³⁷⁵ See *supra* Chapter 1, Section 1.2.2.

¹³⁷⁶ GILLIAUX, “L’arrêt *Unión de Pequeños Agricultores*”, 2003, at 193.

¹³⁷⁷ See *supra* Part I, Chapter 1, Section 1.2.3(a).

¹³⁷⁸ GILLIAUX, “L’arrêt *Unión de Pequeños Agricultores*”, 2003, at 195.

¹³⁷⁹ BERROD, *La systématique des voies de droit communautaires*, 2003, at 816.

¹³⁸⁰ GILLIAUX, “L’arrêt *Unión de Pequeños Agricultores*”, 2003, at 199, considering that making admissibility of the action for annulment of individuals who are not directly neither individually concerned dependent of the inexistence or ineffectiveness of national remedies “porte une confusion malsaine entre l’action en manquement et le recours en annulations que la Cour a au demeurant déjà proscrire.”

autre est de s'assurer simplement de l'existence d'une voie de recours nationale."¹³⁸¹

Last but not least, this would be precisely one of the situations where a certain inequality before the law – if indeed verified –, would have to be *tolerated* on fundamental rights grounds, *i.e.* because of the need to ensure effective judicial protection. Notwithstanding, it is worth remembering that this judicial exercise of “plugging in the gaps” would be subsidiary, *i.e.* it would only take place in those cases where national courts could not grant adequate judicial protection.

III. By accepting to fill in gaps of judicial protection, the CJEU would be endorsing an *integrated perspective* of the Union's judicial system. Such an approach is already adopted in other areas of procedural Union law, such as the action for damages.¹³⁸² In *Unifrex*¹³⁸³, the CJEU stated that, although the action for damages should be deemed an independent form of action, “having its own particular place in the system of means of redress and subject to conditions for its use formulated in the light of its specific purpose” it must “nevertheless be viewed in the *context of the entire system* established by the Treaty for the judicial protection of the individual.”¹³⁸⁴ In *Kampffmeyer*¹³⁸⁵, where the CJEU was faced with a situation where the Commission wrongfully confirmed a decision taken by German authorities, it held that the extent of the Union's liability should only be determined after the conclusion of the actions in German courts brought by the firms affected, as the Union's liability would be merely residual. The success of the action before the CJEU was thus *made dependent* on the outcome of the national proceedings. In *Exporteurs in Levende Varkens*¹³⁸⁶ and in *Bocchi Foods*¹³⁸⁷, the GC disregarded the Commission's argument according to which the applicants should have exhausted the remedies available under national law. The GC considered on the one hand that the unlawful conduct was not attributable to the Member States but to the Union, and on the other hand that, since the Union judiciary has exclusive competence to hear actions for damages brought against the Union institutions, remedies available in national legal orders could not guarantee effective protection of the individuals' rights.¹³⁸⁸

¹³⁸¹ BERROD; MARIATTE, “Le pourvoi dans l'affaire *Unión de Pequeños Agricultores c/Conseil*”, 2002, at 11. Also noting the difference see CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 247.

¹³⁸² In *Merkur* the CJEU the Commission maintained that the applicant should be sent back to pursue its claim before the administrative and judicial authorities in Germany, on the grounds that the event giving rise to the present dispute was the refusal by the competent customs office in that Member State. If such a procedure were followed it would result in a reference to the CJ by German Courts. However, the CJEU considered that it already had the case before it and within its jurisdiction, and it was therefore bound to see whether or not the regulations were lawful. The CJEU stated: “[i]t would not be in keeping with the proper administration of justice and the requirements of procedural efficiency to compel the applicant to have recourse to national remedies and thus to wait for a considerable length of time before a final decision on his claim is made.” See Case 43/72, *Merkur/Commission*, [1973] ECR 1055, paras. 5-6.

¹³⁸³ Case 281/82, *Unifrex/Council and Commission*, [1984] ECR 1969. This type of exercise is familiar to the ECtHR. See for further developments HARRIS; O'BOYLE; BATES; BUCKLEY, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2009, at 764 *et seq.*; WHITE; OVEY, *Jacobs, White & Ovey: The European Convention on Human Rights*, 2010, at 34 *et seq.*; MOWBRAY, *Cases, Materials and Commentary on the European Convention on Human Rights*, 2012, at 33-36.

¹³⁸⁴ Para. 11.

¹³⁸⁵ Joined Cases 5, 7 and 13 to 24/66, *Kampffmeyer and others/Commission of the EEC*, [1967] ECR 245.

¹³⁸⁶ Joined Cases T481 and 484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee/Commission*, [1995] ECR II-2941, paras. 70-72.

¹³⁸⁷ Case T-30/99, *Bocchi Food Trade International/Commission*, [2001] ECR II-943, paras. 31-33.

¹³⁸⁸ See also Case T-18/99, *Cordis/Commission*, [2001] ECR II-913, paras. 26-28; Case T-52/99, *T. Port/Commission*, [2001] ECR II-981, paras. 26-28; Case T-174/00, *Biret International/Council*, [2002] ECR II-17, paras. 33-35; Case T-210/00, *Biret & Cie/Council*, [2002] ECR II-47, paras. 36-38.

Also, in the field of interim relief granted by the Union courts, the CJEU takes into account the protection afforded in national legal orders. For instance, in recent case-law, the CJEU has taken into account actions brought before national courts which may make good the damage caused, to conclude that damage caused to a third party invoked in a request for interim measures before the Union courts would not be *irreparable*.¹³⁸⁹ Furthermore, the CJEU has held that damage may not be *certain* enough if further action by national authorities is necessary for the damage to materialize.¹³⁹⁰ In several cases, interim relief was denied fully or partly due to the existence of procedures available under domestic law, including getting interim relief in national courts, where damage is caused directly by actions of Member States.¹³⁹¹ However, this possibility does not render the request before Union courts inadmissible *per se*. In *Technische Glaswerke Ilmenau*¹³⁹², the contention of the Commission that the applicant ought to have waited for the national authorities to bring proceedings for recovery of the disputed aid in the domestic courts and then have availed itself of all the remedies available before the national courts was rejected. Moreover, in the assessment of the *urgency* requirement, the CJEU has stated that there is no evidence that the suspension of a decision to finance a given project would avoid damage when national authorities have already taken a definitive decision as regards the project to be financed.¹³⁹³ Also, the CJEU considers that there is no *causal link* if damage arises not from the act itself but from the extension of its scope of application decided unilaterally by a Member State.¹³⁹⁴ Lastly, when requested by a Member State, damage is not considered *irreparable* if the Member State can take measures to limit it.¹³⁹⁵

Surely, this case-law differs from the assessment of standing of private parties under Article 263(4) TFEU. However, it highlights that the CJEU often reasons on the basis of an *integrated system of law* and is willing to ground its decisions – either on admissibility or on the merits – on the insufficient protection afforded to private parties at the national level. It is my understanding that this reasoning could be transposed to the admissibility of actions for annulment. Such an approach would allow for a more inclusive approach to the Union’s judicial system where national and Union courts *truly* function as organs of the same institution: the Union judiciary. In fact, in

¹³⁸⁹ Case T-114/06 R, *Globe/Commission*, [2006] ECR II-2627, para. 151. See also CASTILLO DE LA TORRE, “Interim Measures in Community Courts”, 2007, at 294.

¹³⁹⁰ Case T-13/99 R, *Pfizer Animal Health/Council*, [1999] ECR II-1961, para. 160; Case T-70/99 R, *Alpharma/Council*, [1999] ECR II-2027, para. 140; Case T-34/02 R, *B/Commission*, [2002] ECR II-2803, paras. 88-89; Case C-39/03 P-R, *Commission/Artegoda and others*, [2003] ECR I-4485, para. 50; Case C-156/03 P-R, *Commission/Laboratoires Servier*, [2003] ECR I-6575, paras. 41-44; Case T-264/03 R, *Schmoldt/Commission*, [2003] ECR II-5089, para. 98; Case T-420/05, *Vischim/Commission*, [2009] ECR II-3841, para. 71; Case T-416/05 R, *Olympiakes Aerogrammes/Commission*, [2006] ECR II-45, paras. 52-57; Case T-423/05 R, *Olympiaki Aeroporia Ypiresies/Commission*, [2007] ECR II-6, paras. 69 and 74-111.

¹³⁹¹ Case 310/85 R, *Deufil/Commission*, [1986] ECR 537, paras. 21-22; Case T-155/96, *Stadt Mainz/Commission*, [1996] ECR II-1655, para. 25; Case T-34/02 R, *B/Commission*, [2002] ECR II-2803, paras. 90-92; Case T-181/02 R, *Neue Erba Lautex/Commission*, [2002] ECR II-5081, paras. 106-108; Case C-521/04 P(R), *Tillack/Commission*, [2005] ECR I-3103, para. 60; Case T-85/05 R, *Dimos Ano Liosion and others/Commission*, [2005] ECR II-1721, para. 60; Case T-417/05 R, *Endesa/Commission*, [2006] ECR II-18, paras. 47-50; Case T-423/05 R, *Olympiaki Aeroporia Ypiresies/Commission*, [2007] ECR II-6, paras. 111-116.

¹³⁹² Case T-198/01 R, *Technische Glaswerke Ilmenau/Commission*, [2002] ECR II-2153, paras. 52-58, upheld on appeal.

¹³⁹³ Case T-85/05 R, *Dimos Ano Liosion and others/Commission*, [2005] ECR II-1721, para. 62.

¹³⁹⁴ Case T-85/03 R, *Government of the Cayman Islands/Commission*, not published, paras. 66-69.

¹³⁹⁵ Case C-377/98 R, *Netherlands/Parliament and Council*, [2000] ECR I-6229, para. 60.

the absence of other federal bodies, national courts remain in the CJEU's own words the "ordinary courts"¹³⁹⁶ of Union law, thereby fully integrated into the Union's judicial architecture. Instead of setting up a federal system of lower and appellate courts, headed by a supreme jurisdiction, Member States opted for a system of justice based on national judiciaries.¹³⁹⁷ This *agencement* between the Union and national judicial systems constitutes "*un tout qui permet d'embrasser le contrôle judiciaire du droit communautaire de son origine à son exécution.*"¹³⁹⁸ In this framework, to take into account the scope, nature and outcomes of national judicial proceedings in the admissibility of actions for annulment would merely reflect the CJEU's will to treat national courts as branches of the same – and indeed unique – system of judicial review. To borrow KOMAREK's words:

"[w]e must look at the EU judicial system *as a whole* – not as a mere conglomerate of the central courts in Luxembourg and the national courts in the Member States, each having a different quality – the former being "supranational" courts having tasks similar to all international courts, and the latter "wearing Community law hat" only when EU law enters their court-rooms. They all form part of the EU judiciary. While this has "become a truism" in relation to national courts (perhaps to remind them of obligations they have because of EU membership in the EU), the implications of this understanding for the Court of Justice itself seem to go unnoticed."¹³⁹⁹

IV. This understanding would further be fully coherent with the duties imposed on national courts under new Article 19(2) TEU. This provision confirms the "decentralized ethos"¹⁴⁰⁰ of the Union's judicial system, by codifying the UPA approach mentioned above¹⁴⁰¹, and has an "inherent link"¹⁴⁰² to subsidiarity. Accordingly, national courts are under an obligation to ensure effective judicial protection of private parties under Union law.

Article 19(2) TEU fulfils a twofold purpose.¹⁴⁰³ On the one hand, it serves to underline the important role of national courts in the application and enforcement of Union law¹⁴⁰⁴ and serves as a legal basis to ensure compliance by errant Member States. On the other hand, it seems to counterbalance the strict interpretation of the CJEU on *locus standi* requirements under Article 263(4) TFEU.¹⁴⁰⁵ Thus, PERNICE has argued that if Article 263(4) TFEU *per se* could be in breach of the right to effective judicial protection, reading it in conjunction with Articles 19 TEU and 51(1) of the Charter, which place a duty on national courts to ensure effective judicial protection pre-empts any breach.¹⁴⁰⁶ According to this view, it is for Member States to fill any remedial gap

¹³⁹⁶ See e.g., Case T-219/95 R, *Danielsson and others/Commission*, [1995] ECR II-3051, para. 77.

¹³⁹⁷ See also DUARTE, *Contencioso Comunitário*, 2003, at 4547; BARENTS, "The Court of Justice after the Treaty of Lisbon", 2010 at 715.

¹³⁹⁸ VANDERSANDEN, "Le système juridictionnel communautaire après Nice", 2003, at 7.

¹³⁹⁹ KOMAREK, "In the Court(s) We Trust?", 2007, at 484.

¹⁴⁰⁰ HEFFERNAN, "Effective Judicial Remedies", 2006, at 296.

¹⁴⁰¹ See *supra* Part I, Chapter 1, Section 1.1.4.

¹⁴⁰² KOMBOS, "The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC", 2005, at 16.

¹⁴⁰³ TRIDIMAS, *The General Principles of EU Law*, 2006, at 419.

¹⁴⁰⁴ This idea of judicial subsidiarity, decentralized application and reliance on national courts also underlies the system of the ECHR. See KILPATRICK, "The Future of Remedies in Europe", 2000, at 21 *et seq.*

¹⁴⁰⁵ See *supra* Part I, Chapter 1, Section 1.1.3(c).

¹⁴⁰⁶ See Memorandum of the House of Lords European Union Committee, *The Future Role of the European*

arising from such approach. However, the precise scope of this obligation remains unclear.¹⁴⁰⁷

In fact, this duty – which has been so far grounded on the principle of loyal cooperation¹⁴⁰⁸ – now finds a new normative basis in the Treaties. In this context, the Article 19(2) TEU could work as a “stronger weapon” in enforcing the obligations imposed on national courts in this respect. Some scholars have considered that under this provision national judges are incited to be *creative* in the protection of the rights of private parties, which includes the *invitation* to accept any actions which allow for the challenge of Union acts of general application, or any Union acts which individuals cannot challenge directly in Union courts.¹⁴⁰⁹ Some national courts have been particularly receptive to this *invitation*¹⁴¹⁰ and it has been recently established that a validity action can be launched against a Union measure in the absence of implementing measures.¹⁴¹¹ Taking this principle further, one could consider that Article 19(2) TEU *binds* Member States’ courts to receive challenges to the validity of primary Union rules absent of implementing measures.¹⁴¹² This would carry the potential for “considerable amelioration”¹⁴¹³ of the problems of access to justice under Article 263(4) TFEU.

Moreover, in order to make sure that no case “slips through the net”, scholars have also suggested that *Foto-Frost* be read “to relieve national courts of the duty to refer *only* where the allegation of illegality is *manifestly unfounded*, or has already been *rebutted*” by the CJEU.¹⁴¹⁴ In fact, read in light of *CILFIT*, *Foto-Frost* imposes the duty on national courts to be very suspicious of their own certainties. Hence, whenever arguments are raised regarding the illegality of a Union act and they are not obviously spurious or have been rejected by the CJEU, every national court is under

Court of Justice, 2003-2004, note 108.

¹⁴⁰⁷ TRIDIMAS, *The General Principles of EU Law*, 2006, at 420.

¹⁴⁰⁸ The principle of loyal cooperation has been the main instrument of the delimitation of the obligations of national courts in ensuring the application of Union law against Member States. This principle was expressly mentioned in the cases of *Simmmenthal*, *Factortame*, *Künhe* and *Lucchini*, which imposed extensive obligations on national courts. See *supra* Chapter 1, Section 1.2.2.

¹⁴⁰⁹ Other scholars have considered that the case-law imposes an obligation of result not on national courts but on Member States. See USHER, “Direct and Individual Concern”, 2003, at 598; CORTÉS MARTÍN, “*Ubi Ius, Ibi Remedium*”, 2004, at 257. Nonetheless, as KOCK rightfully noted, even if one extends the duties enshrined in Article 19(2) TEU to Member State legislatures – which should be deemed required to change their country’s procedural laws in order to confer on their courts such rights of review as are necessary to ensure the right to effective judicial protection – one should note that Member States are often hesitant and slow in their compliance with Union requirements to reform their legal systems. Private parties will be refused access to the national courts until the states put the required legal structures in place. Moreover, it is unlikely that every country will adopt rules which provide access to the national courts for individuals to the same extent. Therefore, there will be an inequality between applicants bringing actions in different Member States as the laws in some countries will allow access more easily than those in others. See KOCK, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 518.

¹⁴¹⁰ See *supra* Part I, Chapter 1, Section 1.2.3(a).

¹⁴¹¹ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 337; SCHWENSFEIER, *Individuals’ Access to Justice under Community Law*, 2009, at 347.

¹⁴¹² See LANG, “Actions for Declarations that Community Regulations are Invalid”, 2003, at 104 *et seq.*; WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004, at 218; TRIDIMAS, *The General Principles of EU Law*, 2006, at 418 *seq.* *Per contra*, see SCHWENSFEIER, *Individuals’ Access to Justice under Community Law*, 2009, at 349. Considering that this construction allows for a significant intrusiveness into the national procedural autonomy see LENAERTS; CORTHAUT, “Judicial Review as a Contribution to the Development of European Constitutionalism”, 2004, at 35. See also LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 91, 92, considering that in of it self this provision adds nothing to the *acquis*. However, the authors acknowledge that read against the background of the ECHR and the Charter the CJEU may be prompt to interpret Article 19(2) TEU to transform the obligation to make the best endeavours into an obligation to achieve a particular purpose.

¹⁴¹³ WARD, *Judicial Review and the Rights of Private Parties in EC Law*, 2007, at 337.

¹⁴¹⁴ ENCHELMAIER, “No One Slips Through the Net”, 2005, at 218.

an obligation to refer the question of validity to the CJEU.¹⁴¹⁵ This obligation could be construed taking into consideration the case-law of national constitutional courts regarding the right to the lawful judge mentioned above.¹⁴¹⁶ This suggestion would make preliminary references on validity operate in a more similar manner to the plea of illegality under Article 277 TFEU. Truth be said, although the CJEU refuses the application of this provision in the framework of preliminary references¹⁴¹⁷, the two mechanisms are analogous in so far as they allow for incidental review of Union acts. The CJEU has itself acknowledged the similarities.¹⁴¹⁸

However, one should note that the wording of Article 19(2) TEU merely endorses the case-law of the CJEU in this respect.¹⁴¹⁹ Such provision does not seem to have introduced a substantial change in the obligation of national courts “to make the best endeavours” which is acknowledged within the framework of national procedural autonomy. Here, the CJEU’s case-law on forms of declaratory relief that have to be available in national legal orders has been deferential towards national procedural autonomy.¹⁴²⁰ In fact, one thing is to *invite* national courts to “as far as possible” do their utmost to protect the rights of private parties under EU law; another thing is to impose on such courts an “*obligation* to achieve a particular result.”¹⁴²¹ One thing is for the CJEU to admit preliminary rulings on validity absent of implementing national measures; another thing is to impose on national courts the duty to accept any “free standing” action in order to allow a challenge to Union law, when the CJEU is not willing to do the same.¹⁴²² Furthermore, from a *conceptual* point of view, such solution conflicts with the spirit of the preliminary rulings procedure which relies on the discretionary decision of the national judge making the reference to the CJEU, and is not available as a matter of right to individuals.

Furthermore, new Article 19(2) TEU seems to have been adopted to pursue a different purpose. In fact, “from the relevant documents it appears that the inclusion of such a provision was to implicitly confirm the relevance of the principle of subsidiarity to the judicial structure of the EU.”¹⁴²³ The Discussion Circle had recommended the inclusion of a provision stating explicitly that the Union’s judicial system had a decentralized character in the sense that it comprised both Union and national courts. The *Praesidium* did not follow the recommendation — nor did it follow the French suggestion which was to introduce the expression “*juges de droit commun de l’Union*” in the provision on preliminary references —, but suggested instead the inclusion in Article 19(2) TEU of an obligation of *Member States* to provide effective judicial protection to Union rights and grant full effect to EU law, in line with the previous case-law of the CJEU.¹⁴²⁴ However, the decentralized *application* and *interpretation* of Union law must not be

¹⁴¹⁵ *Ibid.*, at 217.

¹⁴¹⁶ See *supra* Part I, Chapter 1, Section 1.2.2(b).

¹⁴¹⁷ See *supra* Part I, Chapter 1, Section 1.2.1(b).

¹⁴¹⁸ Case 216/82, *Universität Hamburg/Hauptzollamt Hamburg-Kehrwieder*, [1983] ECR 2771, para. 10.

¹⁴¹⁹ KOCK, “*Locus Standi* of Private Applicants under the EU Constitution”, 2005, at 518; BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, at 715.

¹⁴²⁰ Case C-432/05, *Unibet*, [2007] ECR I-2271, para 65. See *supra* Part I, Chapter 1, Section 1.2.2(b).

¹⁴²¹ LENAERTS; ARTS; MASELIS, *Procedural Law of the European Union*, 2006, at 92.

¹⁴²² Apparently considering that Article 19(2) imposes an obligation on national courts to enable the challenge of Union acts see TÜRK, *Judicial Review in EU law*, 2009, at 234.

¹⁴²³ BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, at 715.

¹⁴²⁴ BARENTS, “The Court of Justice in the Draft Constitution”, 2004, at 124.

mistaken for its *disapplication* or *invalidation* which as a result of the Court's case-law is centralized in the Union courts. By contrast, it is significant that the minority proposal of introducing a specific obligation of *national courts* to allow challenges to Union measures has not been taken up by the Discussion Circle.¹⁴²⁵

Hence, it does not seem that Article 19(2) TEU – even read against the background of Article 47 of the Charter and accession to the ECHR – imposes a duty on national courts to admit virtually any action against the Member States' intention to apply or implement a Union act where it appears that the applicants cannot attack the measure directly before the CJEU by means of an action for annulment. Notwithstanding, one would say that even if it is for the national judge to ensure effective protection to private parties, “il appartient logiquement au juge communautaire de déterminer de degré d'effectivité de la protection nationale.”¹⁴²⁶

In light of the above, it is submitted that if individual applicants manage to persuade the CJEU that the degree of protection afforded in national legal orders does not allow for an adequate and effective access to a court of law, the Court should hold an action for annulment admissible. Indeed, if the CJEU intends to rely on national courts to *close* the gaps of judicial protection, it must do so by sending the right signals. One could ask if it is legitimate to expect that national courts stretch the limits of their national legal systems “in the name” of Union integration when the CJEU is not willing to do the same.¹⁴²⁷ In fact, it is questionable whether the *judicial duplicity* that emerges from the CJEU's case-law on standing requirements is acceptable. Following KANT's moral imperative one should “act only in accordance with that maxim through which [one] can at the same time will that it become a universal law.”¹⁴²⁸ The obligation to provide effective remedies is shared by Union and national actors. Thus, “active steps must be taken, individually and collectively, to ensure that the avenues for direct and indirect access to European justice become truly open to traffic.”¹⁴²⁹

V. In summary, “the idea that there is a supplementing system of remedies that supports and completes the justifiably limited scope of standing is failing to adapt to the new constitutional status of the standing requirements.”¹⁴³⁰ Taking into consideration the specific features of the Union's judicial system, notably that it may be sometimes difficult or even impossible to mount a challenge to Union acts *in* and *through* national courts, it is submitted that the CJEU should admit the possibility of “plugging in gaps” where an individual demonstrates, *with a significant degree of*

¹⁴²⁵ CONV. 636/03, CERCLE I 13, Final Report of the Discussion Circle on the Court of Justice, 25.03.2003, para. 18.

¹⁴²⁶ BERROD, *La systématique des voies de droit communautaires*, 2003, at 1011.

¹⁴²⁷ See also ARNULL, “Plus Ça Change...”, 2002, at 510; CALLIESS, “Kohärenz und Konvergenz beim europäischen Individualrechtsschutz”, 2002, at 3581. BARENTS has noted that there is a difference between the Union courts' and national courts' mandates under the Treaties. In fact, whereas Article 19(1) TEU obliges the former to ensure the “observance of the law” reflecting the philosophy of a “*recours objectif*”, the wording of Article 19(2) is closer to Articles 6 ECHR and 47 of the Charter. See BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, at 717; BARENTS, “Rechter en partijen in het EU-procesrecht”, 2010, at 141-154. However, both provisions should be interpreted against the background of the Charter and of the ECHR. By historic legacy the idea of *Law* encompasses the protection of rights, *maxime* fundamental rights, an idea that the CJEU has reiterated in several occasions.

¹⁴²⁸ KANT, *Groundwork of the Metaphysics of Morals*, 1998, at 31.

¹⁴²⁹ HEFFERNAN, “Effective Judicial Remedies”, 2006, at 296.

¹⁴³⁰ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 16.

certainty, that the national routes are *ineffective* or *inadequate*. It is worth remembering that the right to effective judicial protection as a general principle of Union law has *supraconstitutional* value and prevails over Treaty provisions. The latter should therefore be interpreted in light of such principle. Hence, in those cases where individuals prove that there is a *procedural gap* they should be deemed directly and individually concerned for purposes of Article 263(4) TFEU.¹⁴³¹ This solution flows from the words of AG VAN THEMAAT in *Piraiki-Patraiki*, where the AG held that:

“[w]here protective measures adopted by the Commission are tainted by serious illegalities, to which, in view of their nature, the Member States or the Council cannot be expected to draw attention, natural or legal persons who are particularly affected by those illegalities must be able to rely upon them, *at least in so far as national legal proceedings cannot provide a satisfactory solution to their problems* (emphasis added).”¹⁴³²

The centrality of the right to effective judicial protection in the admissibility of actions for annulment is also well known to Member States’ legal orders. For instance, in French law there are situations where the *intérêt pour agir* “*en raison de son importance particulière, confère à des personnes auxquelles elle était déniée jusque là, la qualité pour agir*” in order to avoid situations of denial of justice.¹⁴³³ One can accept that, as a general rule, the CJEU should not dwell on national procedural law as it is the task of national judges to ensure, as far as possible, the admissibility of actions which grant effective judicial protection in national legal orders.¹⁴³⁴ This is especially the case when the Union act at stake requires national implementing measures. However, in the event that a private party demonstrates that it is impossible or extremely difficult to bring a suit in national courts and get it to Luxembourg for a preliminary ruling on validity, the CJEU should *take the right to effective judicial protection seriously* and accept a direct challenge.

2.1.7 TWD and *Nachi* after Lisbon: an Overlapping of Available Remedies?

The GC did not have the chance in *Inuit* to clarify whether the TWD and *Nachi* approaches remain applicable after Lisbon, and notably if they apply to regulatory acts understood as non-legislative acts of general application. As seen above, in TWD, the CJEU established that whoever undoubtedly had the right to seek the annulment of a Union act but failed to make use of it within the time limit established in current Article 263(6) TFEU may not plead the illegality of this act in proceedings before national courts.¹⁴³⁵ The extension of TWD to acts of general application has proven controversial in the literature. Scholars have considered that the extension of standing under the Lisbon Treaty may prove to have “unwanted adversarial consequences”¹⁴³⁶ if the CJEU decides to apply the TWD approach to regulatory acts.

In the wake of *Nachi Europe*, it was suggested that the CJEU had extended TWD to measures

¹⁴³¹ This should not be understood as an additional condition to direct and individual concern, which rebates the argument regarding the “hypertrophy” of the admissibility stage. See GILLIAUX, “L’arrêt *Unión de Pequeños Agricultores*”, 2003, at 199.

¹⁴³² Opinion of AG VAN THEMAAT, at 210.

¹⁴³³ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2002, at 98, note 4.

¹⁴³⁴ CASSIA, “Quelles perspectives pour la recevabilité du recours en annulation des particuliers?”, 2002, at 2829.

¹⁴³⁵ SCHWENSFEIER, “The TWD Principle Post-Lisbon”, 2012, at 157.

¹⁴³⁶ GUNDEL, “Judicial and Procedural Fundamental Rights”, 2007, at 504.

of general application.¹⁴³⁷ AG JACOBS considered, however, in *UPA* that said rule should not apply to acts of general application.¹⁴³⁸ After the judgments in *UPA* and *Jégo-Quéré*, he stated “more boldly”¹⁴³⁹ that the failure to have challenged a measure of general application in a direct action would “plainly not exclude a subsequent reference by a national court on the validity of that general measure: the *TWD* line of case-law clearly cannot be applied to general measures.”¹⁴⁴⁰ Nonetheless, in *E and F*¹⁴⁴¹ the CJ seems to have hinted that *TWD* may also apply to acts of general application. In this case, the standing of the parties before the referring court to challenge the measure in issue directly was still subject to Article 230(4) TEC and not yet to Article 263(4) TFEU. Notwithstanding, the anti-terror listing regulation at issue in *E and F* would today likely qualify as a regulatory act that does not entail implementing measures.¹⁴⁴² In other words, *E and F* would today have standing to challenge the contested act directly. Additionally, the reference in *National Farmers’ Union*¹⁴⁴³ related to a set of decisions, each addressed to all Member States. Although the case involved a Member State, the CJEU applied *TWD* to a measure which, albeit in the form of a decision, was of general application. This case-law raises the question of whether *TWD* continues to cover all situations in which natural and legal persons undoubtedly have standing to bring actions for annulment and therefore becomes applicable to measures of general application covered by Article 263(4) TFEU *in fine*. If not, criteria for distinguishing the cases in which *TWD* applies have to be elaborated.¹⁴⁴⁴

Applying *TWD* to measures of general application – and more generally to all acts not directly addressed to the applicant – is problematic since the time limit set forth in Article 263(6) TFEU will most often have passed by the time such measures become applicable to a person and thus afford sufficient interest to challenge it. Therefore the time limit as provided for by Article 263(6) TFEU does not seem “apt to ensure legal certainty and effective legal protection at the same time if *TWD* were to be applied to measures of general application.”¹⁴⁴⁵ Consequently, scholars have generally rejected the extension of *TWD* to regulatory acts. Considering the uncertainty surrounding the new *locus standi* rules this seems to be the most adequate solution.¹⁴⁴⁶ In fact, *TWD* only applies when the applicants could have *unquestionably* challenged the act directly and failed to do so. One could thus argue that as long as the CJEU has not yet clarified the scope and meaning of the new Article 263(4) TFEU the requirements of *TWD* are not verified.¹⁴⁴⁷ Nonetheless, there seem to be good reasons for considering that *TWD* should not apply *as a matter*

¹⁴³⁷ MOLONEY, “Case C-239/99, *Nachi Europe GmbH v. Hauptzollamt Krefeld*”, 2002, at 402.

¹⁴³⁸ Opinion of AG JACOBS in *UPA*, para. 65.

¹⁴³⁹ SCHWENSFEIER, “The *TWD* Principle Post-Lisbon”, 2012, at 157.

¹⁴⁴⁰ JACOBS, “Effective Judicial Protection of Individuals in the European Union, Now and in the Future”, 2003, at 338, note 10.

¹⁴⁴¹ Case C-550/09, *E and F*, [2010] ECR I-6213, paras. 45-52.

¹⁴⁴² SCHWENSFEIER, “The *TWD* Principle Post-Lisbon”, 2012, at 169.

¹⁴⁴³ Case C-241/01, *National Farmers’ Union*, [2002] ECR I-9079.

¹⁴⁴⁴ *Ibid.*

¹⁴⁴⁵ *Ibid.*, at 174.

¹⁴⁴⁶ See also USHER, “Direct and Individual Concern”, 2003, at 600. Other commentators have merely stated that *TWD* should be abandoned. See WARD, “*Locus Standi* under Article 230(4) of the EC Treaty”, 2003, at 77; WARD, “The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures”, 2004 at 220.

¹⁴⁴⁷ Noting that *TWD* would not apply before the CJEU has had the occasion to clarify the scope of Article 263(4) TFEU see BALTHASAR, “*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 548.

of principle to acts of general application¹⁴⁴⁸, and notably regulatory acts.

Firstly, these measures cannot be more binding on one person than on any other without losing their normative character and therefore cannot become of a definitive nature.¹⁴⁴⁹ It is noticeable that in *Nachi Europe* the CJEU applied TWD to a regulation “against an individual in regard to whom it must be considered to be an *individual decision*.”¹⁴⁵⁰ Thus, “inasmuch as an act of general application cannot be considered to be an individual decision with regard to a certain party, such party may challenge its validity independently of the time frame set down in art.263(6) TFEU.”¹⁴⁵¹ Secondly, it is in the interest of the coherence of any legal system to avoid the application of unlawful normative provisions. This serves the principle of legality and the rule of law.¹⁴⁵² Whereas “the application of an individual decision, even if unlawful, only disturbs the order of society in one case and leaves it otherwise intact”¹⁴⁵³, the continued application of an unlawful measure of general application continuously and repeatedly “divides reality from what it ought to be legally.”¹⁴⁵⁴ Thirdly, it is unreasonable to impose on individuals the burden of controlling the entry into force of regulatory acts in order not to lose the time limit. As a matter of fact, individuals “are not normally in a position to analyse the activity of EU legislative bodies such that they are able to act within the time limits of art.263(6) TFEU, and thus in most cases would not be able to bring challenges to EU legislative acts at all.”¹⁴⁵⁵ Fourthly, such construction would lead private parties to file pre-emptive actions for annulment which is not in the interest of the good administration of justice.¹⁴⁵⁶ Fifthly, if Article 263(4) TFEU was intended to make judicial review more widely available its interpretation should not restrict the possibilities already available in the Union legal order.¹⁴⁵⁷ Lastly, there seems to be no contradiction in allowing direct actions within a certain limitation period without excluding a possible incidental review later on. Such situations can be found in Member States’ legal orders.¹⁴⁵⁸ Also, an additional possibility of review is available for institutional actors under the plea of illegality established in Article 277 TFEU.¹⁴⁵⁹

SCHWENSFEIER has considered that TWD should not apply to measures of general

¹⁴⁴⁸ BOROWSKI, “Die Nichtigkeitsklage gem. Art. 230 Abs. 4 EGV”, 2004, at 899, 900.

¹⁴⁴⁹ SCHWENSFEIER, “The TWD Principle Post-Lisbon”, 2012, at 174.

¹⁴⁵⁰ Para. 37. The CJEU found in *Nachi* that the contested anti-dumping regulation was of individual concern to *Nachi Europe*, and that it was an individual decision regarding *Nachi Europe*. It had thus become definitive as against *Nachi Europe*. Thus, “the definitive nature thus does not become an attribute of the measure as such but of the legal relationship with certain persons.” It could be argued that the CJEU did not therefore rule on whether a general measure can become definitive *vis-à-vis* those not individually concerned. In *Eurotunnel*, *Accrington Beef*, *Roquette Frères*, and *Afton Chemical* general measures were held not to become definitive as against persons not directly and individually concerned. It is unclear whether the Court did not apply TWD because its constituent facts were not fulfilled, as the applicants had not had standing, or because of fundamental reservations against its applicability to measures of general application. See SCHWENSFEIER, “The TWD Principle Post-Lisbon”, 2012, at 169.

¹⁴⁵¹ BALTHASAR, “Locus Standi Rules for Challenges to Regulatory Acts”, 2010, at 548, 549. This approach is said to be an “appropriate compromise between the need for legal certainty and the principle of legality: where a party is affected by a measure that has the same effect as an individual decision, such party can be expected to seek direct annulment within the appropriate time frame”. Where this is not the case, TWD does not apply.

¹⁴⁵² See SCHWENSFEIER, “The TWD Principle Post-Lisbon”, 2012, at 174.

¹⁴⁵³ *Ibid.*

¹⁴⁵⁴ *Ibid.*

¹⁴⁵⁵ BALTHASAR, “Locus Standi Rules for Challenges to Regulatory Acts”, 2010, at 548.

¹⁴⁵⁶ *Ibid.*

¹⁴⁵⁷ *Ibid.*

¹⁴⁵⁸ As happens in Germany in relation to local building regulations (*Verwaltungsgerichtsordnung* § 47). See SCHWENSFEIER, “The TWD Principle Post-Lisbon”, 2012, at 175.

¹⁴⁵⁹ See *supra* Part I, Chapter 1, Section 1.3.

application, unless the natural or legal person relying on the invalidity of the contested measure was its addressee or was directly and individually concerned by it.¹⁴⁶⁰ According to this author, the newly introduced exception which allows the direct challenge of regulatory acts does not extend into the realm of the preliminary reference procedure. Thus, for the purpose of determining whether TWD applies, the considerations underlying the general case-law on individual concern still matter.¹⁴⁶¹ This means that private parties will only be prevented from challenging regulatory acts through the preliminary references procedure in so far as these are of *direct and individual concern* to them, and thus a *decision* in their regard. One would say that such interpretation makes sense. However, having questioned the conceptual scope of the test of individual concern and advocated a more liberal approach to standing, one has to go further.

To begin with, one should note that in *Nachi* the CJ considered that the regulation was to be considered an *individual decision* regarding the applicants and that the latter could *undoubtedly* have sought its annulment.¹⁴⁶² In *Wiljo* the CJEU considered that a decision was definitive against an applicant who had not been informed of the remedies available to challenge it in good time. Although, this applicant was undoubtedly directly and individually concerned by the contested decision, it is significant that in its decision the CJEU relied on the *form* of the contested act.¹⁴⁶³ This means that there are in fact two cumulative elements underlying TWD and *Nachi*: (i) one objective element, *i.e.* that the act can be considered a *decision* regarding the applicant; and (ii) one subjective element, *i.e.* that the applicant *could have unquestionably challenged* it in due time. Regarding the first element, it is important to stress that genuine acts of general application even if they directly and individually concern the applicant are not *as a matter of principle* subject to the TWD preclusive effect. This conclusion was relevant before the entry into force of the Lisbon in so far as the criteria for establishing individual concern were similar but not identical to the ones used to establish the normative nature of the act.¹⁴⁶⁴ It becomes, nonetheless, more relevant after Lisbon inasmuch the test for individual concern should be revisited in order to clearly allow the challenge against any Union acts which have substantial adverse effects on the interests of private parties.¹⁴⁶⁵ The second element of TWD and *Nachi* takes into account the individual's *capability* of challenging the act. In TWD the awareness of the applicant that it had standing to bring an action for annulment seems to have been a determinant factor.¹⁴⁶⁶ As a consequence, the correct reading of the TWD doctrine seems to be that the preclusive effect applies if the fact that applicants had standing "can be held against them."¹⁴⁶⁷ As mentioned above, the *rationale* underlying the TWD

¹⁴⁶⁰ SCHWENSFEIER, "The TWD Principle Post-Lisbon", 2012, at 175.

¹⁴⁶¹ *Ibid.*

¹⁴⁶² See para. 37 of the *Nachi* judgement.

¹⁴⁶³ SCHWENSFEIER, "The TWD Principle Post-Lisbon", 2012, at 161.

¹⁴⁶⁴ That is the reason why scholars considered that there would have been doubts regarding standing to challenge regulations and so TWD conditions were not fulfilled. However, the issue could be resolved by taking into consideration the objective element of the test, which the CJEU clarified in *Nachi*, *i.e.* that *true* regulations are not subject to the TWD clause. According to the CJEU, the normative nature of an act should be determined taking account its contents and not its form.

¹⁴⁶⁵ See *supra* Section 2.1.4.

¹⁴⁶⁶ See *supra* Part I, Chapter 1, Section 1.3.

¹⁴⁶⁷ SCHWENSFEIER, "The TWD Principle Post-Lisbon", 2012, at 159. See also SCHWENSFEIER, *Individuals' Access to Justice under Community Law*, 2009, at 285.

seems to be the following: “persons who undoubtedly had standing to bring an action for annulment and who could have been expected to be diligent enough to safeguard their rights through an action for annulment but failed to do so within good time cannot subsequently be allowed to avoid the application to them of that Union measure.”¹⁴⁶⁸ This requires that the individual has the possibility to know that he/she has standing and can be held accountable for not having previously challenged the act.¹⁴⁶⁹ In the pre-Lisbon context this was only true in reality regarding acts which could be considered individual decisions regarding the applicants, and there was therefore a clear link between the objective and subjective elements of *TWD* and *Nachi*. After Lisbon, one will have to wait and see if the CJEU is willing to liberalise and clarify the tests on direct and individual concern, notably regarding acts of general application. Until such clarification takes place it is hard to see how a failure to bring a direct challenge can be held against individuals. Nonetheless, if over time standing requirements become absolutely clear it is arguable that the *TWD* “guillotine” strikes again. Notwithstanding, as a consequence of the *rationale* underlying such principle, *TWD* should only apply in exceptional circumstances of abuse of procedural rights.¹⁴⁷⁰ In fact, these seem to be the only situations where a failure to mount a direct challenge can be held against individuals. It is thus conceivable that private parties challenge incidentally in national courts Union acts of general application, including those which are of direct and individual concern to them, if it was not *reasonably required* that such applicants took action within the time limit set forth in Article 263(6) TFEU.

This solution aligns *TWD* and *Nachi* with the case-law of the CJEU regarding the plea of illegality and the current wording of Article 277 TFEU, which covers all acts of general application adopted by an institution, body, office or agency of the Union.¹⁴⁷¹ Furthermore, by restricting *TWD* and *Nachi* to those acts which individuals could have obviously challenged directly but on their account failed to do so and, consequently, intentionally tried to circumvent the time limit set forth in Article 263(6) TFEU by launching an indirect challenge, this approach enhances effective judicial protection of private parties and corresponds to a more *subjectivist* approach to judicial

¹⁴⁶⁸ SCHWENSFEIER considers that in spite of the criticism in legal writing, the *TWD* case-law is consistent with this *rationale*, except for the requirement to plead the illegality of a measure in a national court for *TWD* to apply. See SCHWENSFEIER, “The *TWD* Principle Post-Lisbon”, 2012, at 168. However, it seems that things go the other way around: it is precisely because *TWD* encompasses a subjective element of censure to the individual’s *inertia* that it does not apply when the question of validity is raised by the national judge *ex motu proprio*.

¹⁴⁶⁹ *TWD* could thus be summarised as establishing an exclusive relationship between the action for annulment and the preliminary reference on validity, subject to the *explicit* proviso that applicants have had standing and subject to the *implicit* proviso that applicants must have been in a position to know of their standing and the act to be challenged. See SCHWENSFEIER, “The *TWD* Principle Post-Lisbon”, 2012, at 160. It remained open, however, in how far *TWD* was limited to the facts of the case: *TWD* had positive knowledge of the decision, which was clearly personal in scope and clearly concerned it directly and individually under settled case-law, and it was informed of the available remedies. Also, this reading better serves the co-operative spirit of the preliminary reference procedure.

¹⁴⁷⁰ WYATT proposed to confine *TWD* to cases of abuse of process requiring that the procedural choice made by the person concerned results in delay that would prejudice third parties or to the public interest; such prejudice would be absent if an unjust enrichment brought about by the delay, e.g. through the payment of customs duties, could be remedied by the payment of interest. The same, however, would not suffice to remedy the competitive disadvantages for other undertakings, which may be irreparable. See WYATT, “The Relationship between Actions for Annulment and References on Validity after *TWD Deggendorf*”, 1997 at 65-66. At another level, Article 27(2) ECHR states that the Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an *abuse of the right of petition*.

¹⁴⁷¹ Noting that the new wording provides an improvement in that it is less prone to a formalistic misreading of the provision see at SCHWENSFEIER, “The *TWD* Principle Post-Lisbon”, 2012, at 173.

review of Union acts, even if it entails the possibility of overlapping remedies and leaves room for double protection.

2.2 The CJEU's Jurisdiction over the CFSP under the Lisbon Treaty

2.2.1 The Unified and Extended Jurisdiction of the CJEU

I. Although the exclusion of the CJEU's jurisdiction over the second pillar has long been considered "*déplorable*"¹⁴⁷², the Lisbon Treaty is said to have generally confirmed the *status quo* regarding the role of the Union judicature over the CFSP. Nonetheless, some of the amendments introduced in this field do represent a significant step forward, even if "the lack of clarity as to the actual extent of the exclusion of the jurisdiction of the Court leaves some scope for ambiguity."¹⁴⁷³

The new provisions are almost entirely inherited from the CT. With the abolition of the pillar structure, Article I-29 CT was probably one of the most important changes included therein.¹⁴⁷⁴ According to said provision the jurisdiction of CJEU was unified and extended virtually to all Union law.¹⁴⁷⁵ This solution was later imported by the Lisbon Treaty and is now enshrined in Article 19 TEU. However, pursuant to Article 275 TFEU, the CJEU does not have jurisdiction with respect to the provisions relating to the CFSP nor "with respect to acts adopted on the basis of those provisions."¹⁴⁷⁶ Notwithstanding, para. 2 of the same provision provides for two exceptions: firstly, the CJEU will have jurisdiction to monitor compliance with Article 40 TEU which establishes the limits of the CFSP *vis-à-vis* other Union competences and *vice-versa*; and, secondly, the CJEU may rule on proceedings, brought in accordance with the conditions laid down in Article 263(4) TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V TEU.

The first exception (to the exception) is due to the very structure of the Union. As stated above, notwithstanding the merging of the pillars, the Lisbon Treaty maintains the peculiar status of the CFSP to some degree and has not entirely suppressed its intergovernmental features.¹⁴⁷⁷ Not having been integrated as a Union competence, the CFSP will therefore continue to operate alongside the external action of the Union in other areas. Consequently, the decision-making

¹⁴⁷² EVERLING, "L'avenir de l'organisation juridictionnelle de l'Union européenne", 1994, at 33.

¹⁴⁷³ KETVEL, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy", 2006, at 78.

¹⁴⁷⁴ *Ibid.*

¹⁴⁷⁵ Nevertheless, the partial extension of the CJEU's jurisdiction to the second pillar was not without controversy. The Discussion Circle on the CJEU considered, notably: (i) whether Article 46 TEU should be repealed, and the jurisdiction of the Court fully extended to CFSP matters under the same conditions as those applying to other Union policies; (ii) whether there should be a right for the institutions of the Union and the Member States to bring an action of annulment against CFSP acts, on the grounds that they were taken in violation of the CT or of a rule of International law binding the Union or the Member States; and (iii) whether there should be a possibility for national courts to request a preliminary ruling on interpretation, when they have to decide cases involving the implementation of CFSP measures at the national level. See Discussion Circle on the Court of Justice, Working Document 10, 10/3/2003. See also DENZA, "Lines in the Sand", 2004, at 259-272. In the end, most proposals proved politically unacceptable for the Member States, and the result was incorporated in Article III-376 CT. For a critique see CORTHAUT, "An Effective Remedy for All?", 2005, at 116 *et seq.*

¹⁴⁷⁶ Noting that this lack of legal protection is more serious than the one included in the previous TEU since the new provisions in the field of foreign and defence policy contain a considerable number of innovations see BARENTS, "The Court of Justice in the Draft Constitution", 2004, at 128. See also MESQUITA, *A Actuação Externa da União Europeia depois do Tratado de Lisboa*, 2011, at 221, discussing the scope of the limitation to the CJEU's jurisdiction.

¹⁴⁷⁷ See *supra* Introduction.

process in the field of external relations has not been fully harmonized: different legal instruments remain in place as well as different institutional and voting arrangements. Consistency of the external action of the Union will become, consequently, a major concern in this respect.

The second exception relates to the recent cases regarding the “war on terrorism”, which involved the adoption of restrictive measures against private parties by the Union institutions. The legal basis for such action proved controversial in the Union courts and the lack of the CJEU’s jurisdiction to review those measures was highly criticised among scholars and lawyers.¹⁴⁷⁸ The new exception is said to close that specific gap of protection in the EU legal order. Thus, scholars note that under Article 275 TFEU “due to the institutional changes in the field of external policy, the role of the Court of Justice as a constitutional adjudicator will be strengthened.”¹⁴⁷⁹

II. The decision to generally exclude the CJEU’s jurisdiction in CFSP matters can be attributable to a number of reasons.¹⁴⁸⁰ Firstly, Member States are generally averse to the involvement of the Union judiciary over CFSP issues, “fearing it might constrain their sovereignty in the field of international politics.”¹⁴⁸¹ Considering that these are sensitive areas where Member States are reluctant to surrender their sovereign rights to the EU – “national security remains at the heart of national sovereignty”¹⁴⁸² –, it seems logical that, when doing it, they refuse the authority of the CJEU in these matters. This is so, notwithstanding the fact that courts have traditionally exercised some judicial self-restraint with regard to highly political issues – pursuant to a “political questions” or “act of government” doctrines¹⁴⁸³ –, which should probably not be different at the EU level.¹⁴⁸⁴

Secondly, commentators argue that the nature of the powers exercised by the EU in the field of the CFSP would make it difficult for the courts to exercise judicial review.¹⁴⁸⁵ In fact, due to the generic formulation of its objectives, the vague nature of its provisions and the fact that, as a general rule, the CFSP cannot be implemented by means of strong legislative instruments – currently excluded pursuant to Articles 24(1) and 31(1) TEU – CFSP measures would not be amenable to judicial review. Moreover, these measures tend to be “essentially short-term in character”¹⁴⁸⁶ adopted in response to certain specific situations, crisis or international negotiations,

¹⁴⁷⁸ See, e.g., BROWN, “*Kadi v. Council of the European Union and Commission of the European Communities*”, 2006, at 460; VLCEK, “Acts to Combat the Financing of Terrorism”, 2006, at 491-507; EECKHOUT, “Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions”, 2007, at 183-206; ECKES, “Judicial Review of European Anti-Terrorism Measures”, 2008, at 74-92.

¹⁴⁷⁹ BARENTS, “The Court of Justice after the Treaty of Lisbon”, 2010, at 718.

¹⁴⁸⁰ See COLLINS, “Foreign Relations and the Judiciary”, 2002, at 485.

¹⁴⁸¹ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 79. The two declarations in the Lisbon Treaty regarding the CFSP still show some uneasiness among Member States regarding the powers of the EU in this field. See Declarations nos. 13 and 14.

¹⁴⁸² TRYBUS, “The EC Treaty as an Instrument of European Defence Integration” 2002, at 1347, noting that this feeling contributed to the failure of the Defence Community in 1954 and the separate treatment of national security issues outside the framework of the TEC.

¹⁴⁸³ KOSKENNIEMI, *International Law Aspects of the European Union*, 1998, at 27 seq.

¹⁴⁸⁴ See *infra* Section 2.2.4.

¹⁴⁸⁵ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 80.

¹⁴⁸⁶ DENZA, *The Intergovernmental Pillars of the European Union*, 2002, at 312.

and “are not designed to establish a permanent framework of mutual legal obligations”¹⁴⁸⁷ between the Member States. In fact, as a general rule, CFSP measures are directed primarily at Member States and do not – or should not – contemplate rights and/or obligations for individuals. They belong to the realm of classic International law, are usually not self-executing and, therefore, not directly applicable in national legal orders and not able to produce direct effect. Nonetheless, the alleged “soft nature” of CFSP measures does not always imply the lack of legal effects from both an institutional and the individuals’ perspective. It is unquestionable that the Union is increasingly adopting instruments which may affect individuals, either directly or indirectly. The cases litigated before the Union courts regarding the Council’s decisions on the fight against terrorism provide the best example. More recently, the measures adopted, for instance, against Iran are far-reaching and have a clear normative content.¹⁴⁸⁸ Measures appointing officials for certain tasks¹⁴⁸⁹; deploying forces to certain countries¹⁴⁹⁰; establishing restrictive measures, not necessarily of an economic nature¹⁴⁹¹; foreseeing certain experts actions¹⁴⁹²; forbidding the use of certain products¹⁴⁹³; or concerning the temporary reception by Member States of certain individuals and granting them national permits for entry into and stay in their territory, unquestionably affect *directly* the interests of a number of individuals.¹⁴⁹⁴ Moreover, the temporary nature of such measures does not necessarily lessen the intensity of those effects.

Thirdly, it is clear that some Member States want to avoid the CJEU’s intervention in these matters fearful of the solutions the Court might dictate. The intervention of the CJEU might lead to the so-called spill-over effect of typical EC principles, such as supremacy and direct effect – that should, probably, now be considered as principles of *Union law* – to the area of the CFSP, even if one can argue that these principles already applied here before.¹⁴⁹⁵ One could say that, although understandable, these fears are perhaps exaggerated. In fact, it is hard to envisage a situation of “judicial runaway powers”¹⁴⁹⁶, with the Union courts substituting politically sensitive decisions taken by the Member States and the Union institutions in the field of CFSP for their own judgment: “[e]xperience has shown that whenever the CJEU has had the opportunity to hear disputes touching upon matters involving to some extent the exercise of political discretion by national authorities, it has generally demonstrated a considerable degree of self-restraint.”¹⁴⁹⁷

¹⁴⁸⁷ *Ibid.*

¹⁴⁸⁸ E.g., Council Decision 2010/413/CFSP. See EECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 284, noting that not all CFSP acts require a TFEU counterpart, and even when that is the case in so far as the CFSP act is excessively detailed such implementation will be merely artificial.

¹⁴⁸⁹ E.g., Council Joint Action 2003/537/CFSP; Council Decision 2012/325/CFSP.

¹⁴⁹⁰ E.g., Council Joint Action 2004/570/CFSP; Council Joint Action 2003/681/CFSP.

¹⁴⁹¹ E.g., Common Position 97/193/CFSP. More recently, Council Decision 2011/101/CFSP; Council Decision 2010/232/CFSP; Council Decision 2012/36/CFSP; Council Decision 2011/782/CFSP.

¹⁴⁹² E.g., Council Decision 98/627/CFSP.

¹⁴⁹³ E.g., Common Position 95/379/CFSP.

¹⁴⁹⁴ E.g., Common Position 2002/400/CFSP.

¹⁴⁹⁵ See LENAERTS; CORTHAUT, “The Role of Primacy in Invoking Norms of EU Law”, 2006, at 287-315; CRAIG; BÚRCA, *EU Law*, 2008, at 352. *Per contra*, see NICOL, “Democracy, Supremacy and the ‘Intergovernmental’ Pillars of the European Union”, 2009, at 218-227.

¹⁴⁹⁶ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 80.

¹⁴⁹⁷ *Ibid.* The Opinion of AG JACOBS in Case C-120/94, *Commission/Hellenic Republic*, [1996] ECR I-1513 constitutes a good example of what could be the CJEU’s position in this respect. Also in Joined Cases C-402 and 415/05 P, *Kadi and Al Barakaat International Foundation/Council and Commission*, [2008] ECR I-6351 the CJ’s decision to

2.2.2 The Scope and Meaning of Article 275 TFEU

I. As indicated above, review by the CJEU of the *decisions* adopted by the Council on the basis of Chapter 2 of Title V TEU providing for restrictive measures against natural or legal persons is now possible under Article 275 TFEU. This novelty is consistent with new Article 215(2) TFEU that expressly authorizes the Council to adopt *measures* not only for the interruption or reduction of economic and financial relations with a third country, but also against natural or legal persons and groups or non-State entities. This is apparently the only instance where individuals are allowed to address the CJEU with respect to a CFSP measure.

The Discussion Circle on the CJEU under the European Convention considered the possibility of giving individuals the right to initiate proceedings before the Union courts for the annulment of any CFSP decisions which were of direct and individual concern to them, or to claim damages based on the illegality of such acts (without the courts having the right to annul the act or declare it void).¹⁴⁹⁸ These proposals were refused at a later stage, and the current solution is inherited from the CT.

Before Lisbon, there was no explicit provision for the possibility of adopting economic and financial sanctions against individuals on the basis of the TEC, given that Articles 301 and 60 TEC referred to measures taken against third States. Nevertheless, the Council gave these provisions a broad interpretation, using them as a legal basis for the adoption of sanctions against natural or legal persons exercising physical control over part of the territory of a third country, or effectively controlling the government of a third country, as well as against those entities or persons associated with them, or providing them with financial support.¹⁴⁹⁹ Both the GC and the CJ, although on different grounds, upheld the lawfulness of this practice.¹⁵⁰⁰ The Lisbon Treaty created the necessary legal basis for the adoption of restrictive measures against individuals. The Treaty seems to have gone one step further than the previous decisions of the CJEU as it seems to allow for the adoption of restrictive measures of a *non-economic* nature. Furthermore, since Article 75 TFEU was maintained as the successor of Article 60 TEC, its articulation with Article 215(2) TFEU is not entirely clear.¹⁵⁰¹ Nevertheless, under the current Treaties the Council may adopt CFSP decisions

maintain the effects of the regulation for a period that could not exceed three months from the date of the judgment shows some deference to the political process. See *infra* Section 2.2.4.

¹⁴⁹⁸ See Discussion Circle on the Court of Justice, Working Document 10, 10/3/2003, p. 2; CONV. 689/1/03, 16.04.2003, p. 2.

¹⁴⁹⁹ KETVEL, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy", 2006, at 107.

¹⁵⁰⁰ For a critical view see VLCEK, "Acts to Combat the Financing of Terrorism", 2006, at 501.

¹⁵⁰¹ Considering that Article 75 could be used to deal with "internal terrorism" and Article 215 with "external terrorism" and that this view would also fit well with the fact that a visa ban is possible under the Article 75 but not Article 215, see HINAREJOS, *Judicial Control in the European Union*, 2009, at 155-156. By contrast, considering that Article 75 TFEU appears to serve as a legal basis for EU-autonomous sanctions regimes and Article 215 TFEU for the adoption of UN lists, irrespective of whether the measures target internal or external terrorists, see ECKES, "Sanctions against Individuals", 2008, at 221. In this view Article 75 TFEU would allow the adoption of sanctions against individuals in the similar position of *Segi*. These lists would be subject to the general jurisdiction of the CJEU (Article 19 TEU). Furthermore, noting that Articles 75 TFEU and 215 TFEU no longer function as Siamese provisions and that the legal complexities involving their application has already become evident in the Case C-130/10, *European Parliament/Council*, [2012] see VAN ELSUWEGE, "EU External Action after the Collapse of the Third Pillar Structure", 2010, at 1010 *seq.* As a matter of fact, the distinction between the internal dimension of security falling under the provisions of the AFSJ and the external dimension covered by the CFSP is as difficult as legally decisive as it will determine the choice of the correct legal basis, the decision-making procedure of a given measure and the scope of

that foresee restrictive measures against individuals. These measures may be implemented either by more specific Council decisions that impose sanctions on individuals, or directly by the Member States, as happens nowadays with visa bans.¹⁵⁰²

II. Taking into consideration this new competence, the jurisdiction of the CJEU was extended to cover restrictive measures adopted against individuals.¹⁵⁰³ This extension leaves, however, room for a certain degree of ambiguity. At the outset, whereas Article 275 TFEU limits the CJEU's jurisdiction to *decisions*, Article 215(2) TFEU does not specify the *type of act* through which restrictive measures can be imposed and the Council has already adopted regulations under Article 215(2) TFEU.¹⁵⁰⁴

Furthermore, questions arise regarding the scope and nature of CFSP acts adopted in the context of Chapter 2 of Title V of the TEU. In fact, there is nothing to suggest that CFSP decisions cannot be regarded as decisions for purposes of Article 288 TFEU.¹⁵⁰⁵ Pursuant to this provision decisions may be either acts of individual or general application. As seen above, standing requirements differ depending on the normative scope of a measure. In fact, individuals may challenge the validity of acts addressed to them without the need to show *locus standi* requirements. However, regarding *normative* acts, individuals have to prove direct and individual concern; or in the case of regulatory acts which do not require implementing measures, direct concern. Besides the fact that the CJEU may disregard the form of the act, and focus on its contents to review its legality¹⁵⁰⁶, it may prove difficult to assess the (non)regulatory nature of a CFSP act under Article 263(4) TFEU. In fact, the Treaty states that CFSP *decisions* cannot have a legislative character.¹⁵⁰⁷ It has been suggested that the exclusion of legislative nature of CFSP measures is due and is in accordance with the exclusion of the CJEU's jurisdiction over such acts.¹⁵⁰⁸ Conversely, it could be argued that there is at least one type of CFSP acts that can have a *normative* nature and that is reviewable by the CJEU, which are the acts mentioned in Article 275(2) TFEU. Nonetheless, one

the CJEU's jurisdiction. In this case AG BOT considered that the contested regulation had been adopted under the correct legal basis which was Article 215(2) TFEU as its main purpose was to combat international terrorism and it was part of the system set up by the EU to take forward international action decided on within the Security Council. The AG added that Article 75 would be used to "in spheres outside the CFSP in which the European Union enjoys complete freedom." See in particular paras. 81, 82 of the Opinion. The CJEU considered that the regulation had been adopted under the correct legal basis without further considerations as to the relationship between Articles 75 and 215 TFEU.

¹⁵⁰² E.g., Council Common Position 2002/145/CFSP.

¹⁵⁰³ It seems that the competence of the CJEU to annul CFSP acts should be considered at the same level as the "regular" legality review competence, applied in other Union policy areas. It has been suggested that a ruling on the irrelevance or inefficacy of such an act in the Union legal order would be perhaps more pertinent. The CJEU might, at the most, annul any provisions taken in implementation of intergovernmental measures. See BARATTA, "Overlaps between European Community Competence and European Union Foreign Policy Activity", 2002, at 58-59. Before the Lisbon Treaty, it remained doubtful whether the combined effect of former Articles 46(e) and 47 TEU resulted in the conferral upon the CJEU, in respect of provisions of Title V TEU, of the same powers of judicial review which it enjoyed under the TEC. This was not an issue in respect of third pillar acts, given that former Article 35 TEU granted the CJEU the jurisdiction to rule on actions for annulment in respect of some category of acts adopted in the field of PJCCM. Under Lisbon, it is clear that the annulment competence granted to the CJEU under Article 275 TFEU is the same as under the general provisions of the Treaties, notably under Articles 19(1) TEU and 263 TFEU. Consequently, legality review by the CJEU takes place under the same terms in respect of both Treaties.

¹⁵⁰⁴ E.g., Regulation (EU) 1286/2009.

¹⁵⁰⁵ CREMONA, "The Two (or Three) Treaty Solution", 2012, at 51.

¹⁵⁰⁶ Case 22/70, *Commission/Council (ERTA)*, [1971] ECR 263; Case 60/81, *IBM/Commission*, [1981] ECR 2639.

¹⁵⁰⁷ The Treaty states this twice. See Articles 24(1) and 31(1) TEU.

¹⁵⁰⁸ EECKHOUT, "The EU's Common Foreign and Security Policy after Lisbon", 2012, at 283.

thing is certain: these acts are not to be adopted within the legislative procedures – a conclusion which can easily be inferred from the provisions regarding the CFSP decision-making procedures established in the TEU.¹⁵⁰⁹ CFSP acts will thus be *non-legislative measures* adopted tendentiously by unanimity by the European Council and the Council of Ministers.

However, this does not necessarily mean that CFSP measures should be considered *regulatory acts* for purposes of Article 263(4) TFEU. In fact, if the notion of regulatory act is restricted to administrative, secondary acts of general application, it is doubtful that CFSP acts can ever be considered as such.¹⁵¹⁰ Nevertheless, it is clear that those acts have a more limited “democratic pedigree.” Although such measures may provide for implementation by the Council¹⁵¹¹, the European Parliament does not have a direct say in CFSP matters, which means that CFSP decisions benefit only from one type of representative democracy: through the Member States in the Council.¹⁵¹² Consequently, taking into account the *rationale* behind the challenge against regulatory acts as acts subject to a less intensive democratic control, standing of individuals should be more readily accepted regarding CFSP acts.¹⁵¹³ However, considering the *special* nature of these measures, it is far from clear whether the CJEU will be willing to endorse such view.

Regardless of their legislative, regulatory or *sui generis* legal nature, the extension of the CJEU’s jurisdiction to review CFSP acts is fully in line with the *Segi*’s *dictum* according to which *any acts*, regardless of their form or nature which are *intended to produce legal effects vis-à-vis private parties* must be subject to judicial review.¹⁵¹⁴ It should be noted that Article 263(1) TFEU also submits to judicial review acts of the European Council which are intended to produce legal effects regarding third parties. This phrasing, together with the *Segi* decision, suggests that effective application of the measure to an individual case is not necessary. This understanding further supports a non-formalistic interpretation of the term “decision” included in Articles 215(2) and 275 TFEU. Hence, in so far as a CFSP act *whatever its form or nature* has the *same effect* of a decision imposing restrictive measures on individuals it should be deemed reviewable under Article 275 TFEU. Taking this reasoning further, one could say that as long as a CFSP act is intended to *produce legal effects vis-à-vis third parties* it should be deemed reviewable under Articles 263(4) and 275 TFEU.

Secondly, the meaning of the expression “restrictive measures” remains unclear. It is doubtful, notably, whether it should be understood as limited to measures of an *economic nature*, or whether it covers all measures which may affect individuals, such as visa bans.¹⁵¹⁵ Surely, Article 215(2) TFEU was added with the specific purpose of providing a legal basis for the adoption of restrictive measures of an economic nature against individuals. However, Article 275(2) TFEU does not refer to restrictive measures taken under Article 215(2) TFEU, but more generally to all

¹⁵⁰⁹ Considering that this straightforward reading is difficult to satisfy in light of effective treaty interpretation, and that the exclusion of legislative acts must have a substantive meaning see *ibid.*, at 280.

¹⁵¹⁰ TÜRK, *Judicial Review in EU law*, 2009, at 168.

¹⁵¹¹ Articles 24(1) and 26(2) TEU.

¹⁵¹² EECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 280. The author considers that as a consequence CFSP acts should not have a normative content.

¹⁵¹³ See *supra* Section 2.1.2.

¹⁵¹⁴ See *supra* Part I, Chapter 2, Section 2.2.3.

¹⁵¹⁵ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 116.

restrictive measures taken “on the basis of Chapter II of Title V.” It may be argued, therefore, that individuals may challenge the legality of restrictive measures affecting their rights and interests, irrespective of the object against which such measures are directed.¹⁵¹⁶ In addition, one may wonder if the term “restrictive measures” should be restricted to the measures which *name individuals*. If the answer is affirmative, the jurisdiction of the CJEU will be reduced. If the answer is negative, this means that unnamed individuals may challenge the validity of such measures as long as they can satisfy standing requirements.¹⁵¹⁷

Thirdly, it is questionable whether the competence attributed to the CJEU under Article 275(2) *in fine* is confined to the initial foreign policy acts or extends to the implementing measures. One may reasonably consider that the adoption of implementing measures under Article 215 TFEU should be compared to the mechanism in force under the previous version of the Treaties, where there was a CFSP instrument followed by an EC measure adopted under Articles 60, 301 and 308 TEC, which could be challenged through the normal avenues offered by the TEC. The solution introduced in the Lisbon Treaty would mean that, as a rule, both the implementing and general act would be outside the CJEU’s jurisdiction. Surely, Article 275(2) TFEU would bring these measures back into the Court’s jurisdiction. However, a literal interpretation of this provision seems to allow only a direct action brought by individuals which would mean that the current regime would have the “surprising effect” of reducing the Court’s jurisdiction.¹⁵¹⁸ As a matter of fact, the possibility established under Article 275(2) *in fine* TFEU does not extend to privileged applicants. Plus, challenges seem to be limited to direct actions, as opposed to what happened before Lisbon, as these measures could be reviewed under the preliminary references procedure. To avoid this conclusion another interpretation of Article 275(2) TFEU has to be put forward. Scholars have pointed to three possible alternative interpretations. First, it would be possible for the Court to (i) consider that the first paragraph of this provision only affects CFSP decisions adopted directly under the CFSP chapter but not decisions adopted under Article 215 TFEU. The latter would not be part of the CFSP exception and could thus be challenged directly by private and privileged applicants, and indirectly *via* the preliminary references mechanism. This interpretation would be in line with the historical evolution of Article 275 TFEU as the CT had a more specific wording and excluded only the provisions of Chapter II Title V of the CFSP from the jurisdiction of the Court, and not their implementing acts.¹⁵¹⁹ Alternatively, the Court could (ii) interpret Article 275(2) TFEU extensively, granting individuals the possibility to exercise direct and indirect review. In fact, it has been argued that once it is accepted that restrictive measures are subject to the jurisdiction of the CJEU, there is no reason why the review of their legality should be confined to the direct action. The possibility of a challenge in the context of a preliminary reference should not, therefore, be excluded.¹⁵²⁰ Under this view, privileged applicants would

¹⁵¹⁶ *Ibid.*

¹⁵¹⁷ See HINAREJOS, “Judicial Control of CFSP in the Constitution”, 2006, at 285.

¹⁵¹⁸ HINAREJOS, *Judicial Control in the European Union*, 2009, at 158. See also CORTHAUT, “An Effective Remedy for All?”, 2005, at 121.

¹⁵¹⁹ See Article III-376(1) CT. See HINAREJOS, *Judicial Control of CFSP in the Constitution*, 2006, at 382.

¹⁵²⁰ HINAREJOS, *Judicial Control in the European Union*, 2009, at 158; BARENTS, “The Court of Justice after the Lisbon Treaty”, 2010, at 718.

remain however excluded. Finally, the CJEU could (iii) combine both interpretations, widening as far as possible its jurisdiction to review CFSP measures.¹⁵²¹

It is submitted that it is desirable that the CJEU avoids an interpretation of Article 275 TFEU that restricts its previous jurisdiction. Logically, the CJEU should consider that the *purpose* of Article 275(2) TFEU is to extend the possibilities for individuals to challenge general acts establishing restrictive measures beyond the possibilities of challenging the implementing ones, without having the effect of restricting the jurisdiction granted before.

Lastly, one should note that Article 275(2) TFEU does not provide for the possibility to claim damages for the illegality of a CFSP act. It cannot be ruled out, however, that the Union may incur non-contractual liability for acts adopted in the framework of the CFSP, or their effects: “[a]s the EU becomes increasingly involved in election monitoring, peace-keeping missions and crisis-management operations around the world, appointing special envoys to supervise their implementation, it is likely that challenges will be brought in relation to the particular conduct of those acting in its name, or for the personal injuries suffered by officers of the Member States while serving in such operations.”¹⁵²² In several cases, it will be possible to hold that those operations are in fact under the control of the Member States, and consequently to deny the liability of the Union. However, this may not be the case with respect to the stationing of military or police forces in the framework of the security and defence policy¹⁵²³, operations which are usually launched by a CFSP measure (in general, a Council joint action) and are conducted in the framework of international agreements concluded by the Union and under the responsibility of the Union.¹⁵²⁴ The liability of the Union has already been invoked in the context of the adoption and implementation of restrictive measures against individuals in the cases of *Segi* and *Gestoras Pro-Amnistía*, mentioned above.¹⁵²⁵ Also, in the *Royal Olympic Cruises*¹⁵²⁶ case, a number of Greek companies brought an application for compensation against the Union before the GC for the loss allegedly suffered as a result of the imposition of sanctions against the Federal Republic of Yugoslavia, indirectly questioning the legality of measures adopted on the basis of Title V TEU.¹⁵²⁷

III. In light of all the above, it is submitted that there is still room for a certain dose of ambiguity, uncertainty and incompleteness concerning the protection of private parties with regard to CFSP measures. Indeed, if “the catalogue of exceptions to judicial review should be

¹⁵²¹ HINAREJOS, *Judicial Control in the European Union*, 2009, at 159. See also MESQUITA, *A Actuação Externa da União Europeia depois do Tratado de Lisboa*, 2011, at 232.

¹⁵²² KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 116. Considering that the current Treaties allow for an action for damages brought by individuals in the field of the CFSP see SALTINYTE, “The Jurisdiction of the European Court of Justice over Issues Relating to the Common Foreign and Security Policy”, 2010, at 272.

¹⁵²³ See KOUTRAKOS, “Inter-Pillar Approaches to the European Security and Defence Policy”, 2001, at 435-453; WESSEL, “The EU as a Black Widow”, 2001, at 405-434; SARI, “Status of Forces and Status of Mission Agreements under the ESDP”, 2008, at 67-100.

¹⁵²⁴ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 117.

¹⁵²⁵ See *supra* Part I, Chapter 2, Section 2.2.3.

¹⁵²⁶ Case C-49/01, *Royal Olympic Cruises and others/Council and Commission* (Unpublished).

¹⁵²⁷ See *supra* Part I, note 1623.

unequivocal, closed and conducive to legal certainty”¹⁵²⁸ that is “something that the language of Article 275 TFEU has arguably failed to attain.”¹⁵²⁹ Such gaps of protection are evidently more serious when the violation of fundamental rights is at issue. Notwithstanding, the *constitutional shift* that took place in Lisbon introduced enough elements in the Treaties that support the view that the CJEU’s jurisdiction over the CFSP should be exercised according to the general principles of Union law, in particular those regarding the protection of rights of private parties. Hence, the *pro actore* approach advocated above¹⁵³⁰ should extend to the realm of the second pillar, thereby contributing to enhance the *subjective* dimension of individual rights under the CFSP.

2.2.3 Expanding Jurisdiction over CFSP Measures: a Move towards Constitutionalism

a) The European Union as a Single System of Law and the Role of the Principle of Supremacy

I. Despite the abandonment of the “constitutional concept”¹⁵³¹ and the consequent “impression of incremental change through amendment”¹⁵³² left by the Lisbon Treaty, the latter aimed to create a *single* European Union. Hence, although some “pillar talk”¹⁵³³ continues to take place after Lisbon, scholars have considered that the CFSP should increasingly be treated from the point of view of constitutionalism. In fact, the creation of the CFSP as a separate part of the EU’s constitutional structure and the management of this dualism “remains a key challenge for the Union.”¹⁵³⁴

The “legal case for unity”¹⁵³⁵ was put forward long before the entry into force of the Lisbon Treaty. In fact, the so-called *Reflexwirkung* between the pillars was difficult to ignore. Scholars considered that the EU constituted a single legal system, to which the CFSP and the old PJCCM were mere subsystems.¹⁵³⁶ In fact, several elements of unity were already present in the previous version of the Treaties¹⁵³⁷ and some German authors went as far as considering that the Union constituted already a single organization with legal personality, having absorbed the former three Communities.¹⁵³⁸ The main consequence of this line of thought was to consider that the general

¹⁵²⁸ HINAREJOS, *Judicial Control in the European Union*, 2009, at 165.

¹⁵²⁹ *Ibid.*

¹⁵³⁰ See *supra* Section 2.1.1.

¹⁵³¹ Council Doc. 11218/07, paras. 1 and 3.

¹⁵³² CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 40.

¹⁵³³ EECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 266.

¹⁵³⁴ VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 987.

¹⁵³⁵ VON BOGDANDY, “The Legal Case for Unity”, 1999, at 887. See also CURTIN; DEKKER, “The Constitutional Structure of the European Union”, 2002, at 59 *et seq.*; CREMONA, “The Union as a Global Actor”, 2003, at 553 *et seq.*

¹⁵³⁶ CURTIN; DEKKER, “The EU as a Layered International Organization”, 1999, 83-136; WESSEL, “The Constitutional Relationship between the European Union and the European Community”, 2003, at 5 *seq.*; HERRMANN, “Much Ado about Pluto?”, 2008, at 24.

¹⁵³⁷ Among which the most obvious were (i) the reference included in Article 1(2) TEU, (ii) the single list of objectives of the Union (Article 2 TEU), (iii) the single institutional framework (Article 3 TEU), (iv) the European Council as an organ of the Union (Article 4 TEU), (v) the amendment of the Treaties and accession to the Union procedures common to both Treaties (Article 48 and 49 TEU).

¹⁵³⁸ See VON BOGDANDY; NETTESHEIM, “*Ex Pluribus Unum*”, 1996, at 267-289. Considering the EU as a “process” see EVERLING, “Reflections on the Structure of the European Union”, 1992, at 1060, and the EU as a “trinity” and not a “unity” see WEILER, “Neither Unity nor Three Pillars”, 1993, at 49 *et seq.*

principles developed by the CJEU under the TEC would apply to the TEU, notably supremacy and direct effect. The cases of *Pupino* on indirect effect, of *Segi* on judicial review, and of *Advocaten voor de Wereld* on fundamental procedural rights, suggested that the EU was developing as a legal order based on some *common key principles*, partially imported from the EC. In fact, the Union courts “increasingly applied a holistic approach for the interpretation of non-Community provisions in the pre-Lisbon period.”¹⁵³⁹

The CT seemed to solve the questions surrounding the “unity question” by bringing together, under one Treaty, all Union policies and establishing a new legal person called the European Union.¹⁵⁴⁰ Under the Lisbon Treaty, such unity has been formally created, although two separate subsystems of one legal order were maintained. Nonetheless, if one regards “a legal order as a set of norms all ultimately deriving their authority and legitimacy from the same source, the new interrelationship between the Treaties makes it clear that we are now talking about one single Union legal order.”¹⁵⁴¹ In fact, the two treaties are carefully “knitted together.”¹⁵⁴² The unity between them results essentially from Article 1 TEU and Article 1 TFEU.¹⁵⁴³ The Treaties have the same legal value and “EC priority is removed.”¹⁵⁴⁴ Thus, as DOUGAN has put it, the two Treaties together with their Protocols “should be read as a seamless ensemble of primary law for the Union.”¹⁵⁴⁵ Accordingly, there is one single set of Union objectives¹⁵⁴⁶ and one single set of legal acts which applies across the Treaties. The consistency provision, *i.e.* Article 7 TFEU, refers to all policies and activities of the Union and to all its objectives, which are defined in the TEU.¹⁵⁴⁷

The existence of a formal unity of a given legal order allows for the presumption of a single will of the rule enactor, coherent and free of contradictions. However, the issue does not lie here with the quest for formal unity, under one single legal personality, but with the search for a substantial unity, where CFSP measures share the nature of all other Union acts. In this context, the EU legal order has been accused of being a very incoherent legal order of a constitutional character, or as the GC has put it in *Yusuf and Kadi*, as encompassing “integrated but separate legal orders.”¹⁵⁴⁸ The Lisbon Treaty has not completed the trend for a *substantial* legal unity but has introduced sufficient elements that enable the CJEU to build said unity on solid foundations.

¹⁵³⁹ VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 989. There seems to be certain circularity in these arguments: the EU is considered to be a single system of law because it is based on common key principles, and at the same time the fact that it should be considered a unified system justifies the development of those principles.

¹⁵⁴⁰ See LENAERTS; GERARD, “The Structure of the Union According to the Constitution for Europe: the Emperor is Getting Dressed”, 2004, at 289 *et seq.*

¹⁵⁴¹ CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 44.

¹⁵⁴² For further developments see *ibid.*, at 45 *et seq.* One of the signs of the Treaties’ unity is the the existence of inter-Treaty references. Article 215 TFEU regarding the adoption of restrictive measures against third countries is precisely one of those cases, as reference is made there to the adoption of a CFSP decision under the TEU.

¹⁵⁴³ Noting that neither of the Treaties would be able to stand alone see *ibid.*, at 44.

¹⁵⁴⁴ *Ibid.*, at 45. In fact all the references in former Articles 1, 2 and 3 TEU have disappeared. Also noting this change see EECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 273.

¹⁵⁴⁵ DOUGAN, “The Treaty of Lisbon 2007”, 2008, at 624.

¹⁵⁴⁶ See Articles 2 and 3 TEU.

¹⁵⁴⁷ CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 46.

¹⁵⁴⁸ See Case T-306/01, *Yusuf and Al Barakaat International Foundation/Council and Commission* [2005], ECR II-3533; and Case T-315/01, *Kadi/Council and Commission*, [2005] ECR II-3649, para. 125.

II. Hence, contrary to what happened pre-Lisbon, Article 21(2) TEU lays down one single set of overall objectives for the development and the implementation of the action of the Union on the international scene.¹⁵⁴⁹ The Treaty establishes the need for consistency between the different areas of the Union's external action, and between these and the other policies of the Union. The same can be said of the task, entrusted to the Council and the Commission – assisted by the EU High Representative for Foreign Affairs, a double-hatted entity – to ensure consistency and to cooperate to that effect.¹⁵⁵⁰ These institutional innovations aim to overcome the dualist nature of the EU external relations.¹⁵⁵¹ Also, the principle of consistency became amenable to judicial review which, notwithstanding the political and vague content of such notion, should not be deemed without consequences.¹⁵⁵² Furthermore, Article 22(1) TEU states that the European Council shall adopt European decisions identifying “the strategic interests and objectives of the Union.” These acts seem to be the heirs of the former common strategies, but they are no longer instruments of the CFSP, having become instruments of general application in the conduct of the Union's external relations. Consequently, they are subject to the jurisdiction of the CJEU, “insofar as they do not concern the CFSP” (*ex vi* Article 275 TFEU). Moreover, due to the merging of the pillars and the explicit recognition of the legal personality of the EU, it became necessary to devise a single procedure for the negotiation and conclusion of international agreements. The new treaty-making procedure is laid down in Article 218 TFEU and is modelled on previous Article 300 TEC. In the field of the CFSP only some specificities have been maintained.¹⁵⁵³ It is also uncontroversial that the common provisions included in the TEU, which include the principle of the rule of law, “refer to the Union and are clearly intended to be common to the Union as a whole and to govern the TFEU and actions governed by TFEU competences.”¹⁵⁵⁴ Lastly, the Treaty of Lisbon has changed the rule/exception relationship that existed between the EU and EC Treaties: whereas previously, there was no application of EC rules to the EU unless specified, under the Lisbon Treaty the same rules will apply throughout unless a specific exception is made.¹⁵⁵⁵

In light of the above, the move from one CT to the two Lisbon treaties, and the consequent separation and distinctive features of the CFSP should not be exaggerated. The “specific rules and procedures”¹⁵⁵⁶ to which the CFSP is subject do not compromise the existence of one single legal

¹⁵⁴⁹ See also EECKHOUT, “The EU's Common Foreign and Security Policy after Lisbon”, 2012, at 267.

¹⁵⁵⁰ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 102. See Articles 18(4) TEU, 16(6) TEU and 26(2) TEU.

¹⁵⁵¹ VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 987.

¹⁵⁵² See WESSEL, “The Inside Looking Out”, 2000, at 1135-1171. Before Lisbon, the control of this obligation was left to the political institutions, which could lead to “a certain bias in favour of the division of competence questions rather than concerns of consistency.” See VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 1013. By contrast, the CJEU can now clarify the meaning of *consistency* obligations. Noting that in most language versions of the Treaties the word used in the referred provisions is closer to “coherence” than “consistency”, and that consequently this requirement entails more than avoiding legal contradictions and presupposes a quest for synergy and added value between the different actions of the Union see *ibid.*, at 1014.

¹⁵⁵³ The scope of the CJEU's jurisdiction to review these agreements can also be questioned. See MARTINS, *The Court of Justice and the Collapsing of the Pillars*, 2011, at 58 *et seq.*

¹⁵⁵⁴ CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 48.

¹⁵⁵⁵ *Ibid.*, at 49.

¹⁵⁵⁶ Article 24 TEU.

order.¹⁵⁵⁷ The Union is one single legal person and actor in the field of external relations.¹⁵⁵⁸

III. In the framework of a unified legal order, it is arguable that the same general principles of EU law apply to all Union policies. For purposes of this dissertation the principle of supremacy occupies a central place as it entails significant jurisdictional consequences.

The CT was the first and only constitutional text of the European Union to expressly establish a primacy clause in its Article I-6.¹⁵⁵⁹ Such clause was later abandoned in the Lisbon Treaty, a decision associated with the *de-constitutionalization* of the Treaties.¹⁵⁶⁰ Nonetheless, the Lisbon Treaty included a Declaration on the matter which recalls that, in accordance with well-settled case-law of the CJEU, “the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case-law.”¹⁵⁶¹ Indeed, under the Lisbon Treaty with the creation of a single and unified system of law, one may assume that supremacy and direct effect are to be considered a feature of all Union law and, thus, fully applicable to PJCCM and CFSP measures.

Regarding the PJCCM it seems difficult to deny that the principle of supremacy now extends to the whole of the former third pillar.¹⁵⁶² Accordingly, all procedural guarantees at the Union level were extended to these policies. The control of national action has, therefore, been taken out of the exclusive hands of national courts and has been shared with the CJEU. Direct and indirect access to Union courts is fully granted under the rules that govern the *normal* jurisdiction of the CJEU, with the only exception provided for in Article 276 TFEU.¹⁵⁶³ However, the point is less clear regarding second pillar measures and one could argue that the CJEU is deprived of the opportunity to clarify the issue directly. With the creation of a unified legal order, CFSP measures can be said to have lost their nature as public international law and have become binding *as a*

¹⁵⁵⁷ CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 51.

¹⁵⁵⁸ Hence, CREMONA has considered that “without denying the specificity one may say that there is a presumption that, where no special rule for the CFSP is mentioned, the general rules will apply.” See *ibid.*, at 51.

¹⁵⁵⁹ See Article I-6 CT.

¹⁵⁶⁰ See e.g., BURCA, “The EU on the Road from the Constitutional Treaty to the Lisbon Treaty”, 2008, at 10.

¹⁵⁶¹ Declaration no. 17. Moreover, the IGC decided to attach to said Declaration an opinion of the Council Legal Service on the primacy of EC law, which acknowledging that “primacy of EC law is a cornerstone principle of Community law” and “inherent to the specific nature of the European Community”, states that it’s non-inclusion in the Treaty “shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.” The wording of the opinion is in contrast with the collapsing of the Communities as it mentions EC law as supreme to national law, when all references to EC law should be abolished pursuant to Article 2 of the Lisbon Treaty. This discrepancy may, however, be relevant in the discussion about the application of the principle of supremacy beyond the former Community policies and its extension to the whole of Union law.

¹⁵⁶² Considering that in *Advocateen Voor de Wereld*, the CJ implicitly extended supremacy to the third pillar see LECZYKIEWICZ, “Constitutional conflicts and the third pillar”, 2008, at 230-242. By contrast, considering that the CJ could not have done that within the context of Article 35 TEU and that the judgment was not clear in this issue see HINAREJOS, “Recent human rights developments in the EU courts”, 2007, at 802. However HINAREJOS suggests that the Belgian *Arbitragehof* arguably considered that the framework decision had primacy over national law and that the CJEU left the door open to declare primacy of the whole third pillar over national law. See HINAREJOS, “The Lisbon Treaty *Versus* Standing Still”, 2009, at 105 and 107.

¹⁵⁶³ Before Lisbon some scholars noted already that supremacy applied in this field regardless of the fact that the Member States had made the declarations foreseen in Article 35 TEU. All national courts were bound to apply a ruling of the CJEU on the validity or interpretation of a pre-Lisbon JHA measure on a reference from a Member State which has so agreed. Hence, the *Pupino* principle would also have to be applied by the courts of Member States which had not made such declarations. This conclusion was supported by the right of intervention granted to such Member States in Article 35(1) TEU references pursuant to Article 35(4) TEU. See CARRUTHERS, “The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs”, 2009, at 792-793.

matter of Union law. This means that these acts acquired “stronger effects”¹⁵⁶⁴ which could be relevant from the perspective of judicial control. One should recall the decision of the German Constitutional Court in the *Brunner* case.¹⁵⁶⁵ In its ruling, Karlsruhe considered that as the jurisdiction of the CJEU was only excluded in respect of provisions of the Treaties which did not confer powers to the Union to take measures which have direct effect on holders of constitutional rights within the Member States, no such measures could claim precedence over national law. It was the limited effect of TEU measures on the individuals’ position that justified the limited jurisdiction of the CJEU over those acts. However, if such measures breached constitutional guarantees, then they would be subject to review by German courts.¹⁵⁶⁶

Surely, the lack of direct effect of Union measures¹⁵⁶⁷ is not a definitive reason to exclude supremacy, as those measures could at least exclude the application of inconsistent national rules.¹⁵⁶⁸ In these cases, the principle of supremacy can still have a significant impact on the individuals’ legal position. However, the main question here is to know whether the arguments used by the Court in *Costa* and *Simmenthal*¹⁵⁶⁹ can be transferred to the Union as a whole. One could argue that pursuant to Article 24(3) TEU the Treaties acknowledged the binding character of CFSP activities and that pursuant to Article 28(2) TEU Member States limited their sovereignty in this field.¹⁵⁷⁰ However, this does not imply the automatic application of all former EC principles to the CFSP, especially considering the limited jurisdiction of the CJEU in this respect. The competence of the Court to ensure the uniform application of EU law seems to be a crucial feature of the principle of supremacy.¹⁵⁷¹ Moreover, the fact that the CFSP should probably not be regarded as a typical Union competence¹⁵⁷² may lead to the conclusion that it is not subject to preemption.

To acknowledge supremacy of all Union measures over national law has important consequences at the level of judicial control, as it means not only that national courts will have to give primacy to EU law standards over national law¹⁵⁷³, but also that the *Foto-Frost* principle may be applicable in all fields of Union law, which would preclude national courts to rule on the invalidity of a CFSP measure. Some scholars have argued that due to the limited jurisdiction of the CJEU over the second pillar *Foto-Frost* should preferably not apply in this field.¹⁵⁷⁴ Surely, one could admit

¹⁵⁶⁴ HINAREJOS, *Judicial Control in the European Union*, 2009, at 127.

¹⁵⁶⁵ BVerfGE, 89, 155, *Brunner*.

¹⁵⁶⁶ HINAREJOS, “The Lisbon Treaty Versus Standing Still”, 2009, at 112-113.

¹⁵⁶⁷ Considering that CFSP decisions may produce direct effect see CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 52.

¹⁵⁶⁸ Case C-194/94, *CIA Security*, [1996] ECR I-2201; Case C-443/98, *Unilever Italia SpA/Central Food SpA*, [2000] ECR I-7535. See CRAIG; BÚRCA, *EU Law*, 2011, at 207-211.

¹⁵⁶⁹ Case 106/77, *Amministrazione delle finanze dello Stato/Simmenthal*, [1978] ECR 629.

¹⁵⁷⁰ VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 991.

¹⁵⁷¹ CREMONA considers that primacy may apply to some CFSP decisions but not to all of them. See CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 53.

¹⁵⁷² See *supra* Introduction.

¹⁵⁷³ LOUIS, “The Court in the Constitution”, 2006, at 138, noting that national courts will be able to decide on both the “justiciabilité” of these norms and their direct effect and primacy.

¹⁵⁷⁴ HINAREJOS, *Judicial Control in the European Union*, 2009, at 127. Considering that where the CJEU cannot be reached with a preliminary question, the responsibility of national courts to ensure effective judicial protection should translate into their empowerment to review EU secondary law see LECZYKIEWICZ, “‘Effective judicial protection’ of human rights after the Lisbon”, 2010, at 342 *et seq.* It was also doubtful whether the *Foto-Frost* principle applied within the context of the former third pillar. See WARD, “The Limits of the Uniform Application of Community Law and

a situation where there is primacy of Union law but the CJEU has no powers to enforce it: in this scenario it would be up to national courts exclusively to decide on the supremacy of EU law.¹⁵⁷⁵ But even if one agrees that national courts should enforce EU standards in cases of conflicting national and EU law, the inevitable consequence of such decentralized system of review would be the fragmentation of Union law.¹⁵⁷⁶ Furthermore, the lack of abstract control of CFSP measures at the Union level is likely to drive some national – *maxime* constitutional – courts to exercise their jurisdiction in the future, regardless of their duties *as Union courts*.¹⁵⁷⁷ A conflict between national courts and the CJEU would be nothing new and would be covered – insofar as fundamental rights are at stake – by the so-called *Solange*-formulas that spread amongst national constitutional courts of some Member States.¹⁵⁷⁸ Moreover, national courts may feel bound to monitor the exercise of Union competences beyond the control exercised by the CJEU under Articles 40 TEU and 263 TFEU. In fact, in some cases the contentious issue may lie not in the internal division of competence between the institutions within the Union legal order, but instead in the separation of powers between the Union and Member States. In these situations one should expect national courts to feel compelled to ensure that Union action remains *intra vires*.¹⁵⁷⁹

Summing up, before Lisbon, constitutional review of second pillar measures by national courts could arguably take place as the CFSP would be considered mainly as public international law. After Lisbon, with the extension of the principle of supremacy to the whole of Union law the situation is less clear. In fact, from now onwards one could assume that CFSP measures cannot be reviewed against national standards. Moreover, the extension of the *Foto-Frost* principle to the second pillar would preclude national courts from exercising any kind of review, according to national or Union standards. This solution creates an obvious *gap of protection* in those situations where the CJEU considers that it does not have jurisdiction to issue a preliminary ruling on the case.

It has been noted that the fact that the jurisdiction of the CJEU has been extended with reference to an action for annulment under Article 275 TFEU does not seem to preclude the possibility of matters being raised in the context of a preliminary ruling on the validity of the acts of the institutions.¹⁵⁸⁰ Moreover, the CJEU has already disregarded the form of the act in the context

Effective Judicial Review”, 2000, at 222-223; ARNULL, *The European Union and its Court of Justice*, 2006, at 134-136; CLOOTS, “Germes of Pluralist Judicial Adjudication”, 2010, at 652; Opinion of AG MENDOZZI in Case C-355/04 P, *Segi and others/Council*, [2007] ECR I-1657, paras. 121-138. Also considering that national courts should be empowered to review second and third pillar acts see VAN GERVEN, “The Role and Structure of the European Judiciary Now and in the Future”, 1996, at 214.

¹⁵⁷⁵ VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 991: to apply a strong doctrine of supremacy without the possibility of making a preliminary ruling would put the national courts in a potentially precarious position.

¹⁵⁷⁶ Under the CT it would have been arguable that the CJEU was competent to give guidance in situations where primacy of CFSP measure was involved, although this would probably imply the Court overstepping the limits of its jurisdiction. See HINAREJOS, *Judicial Control in the European Union*, 2009, at 151, note 114.

¹⁵⁷⁷ HINAREJOS, *Judicial Control in the European Union*, 2009, at 174.

¹⁵⁷⁸ BVerfGE, 73, 339, *Solange II*. Advocating a pluralist approach in the adjudication made by Union and national courts, see CLOOTS, “Germes of Pluralist Judicial Adjudication”, 2010, at 668 *et seq.* See also KUMM, “Who is the final Arbiter of Constitutionality in Europe?”, 1999, at 351-386.

¹⁵⁷⁹ BVerfGE, 89, 155, *Brunner*. See HERDEGEN, “Maastricht and the German Constitutional Court”, 1994, at 235-262; GRIMM, “The European Court of Justice and National Courts”, 1996-7, at 229-242.

¹⁵⁸⁰ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 90.

of an action involving the application of third pillar measures, to consider the possibility of a preliminary ruling on the validity of a common position. It is worth remembering that in *Segi* and *Gestoras pro Amnistia*, the CJEU extended its substance over form approach to the categorisation of legislative acts under the TEC to PJCCM common positions. The CJEU held that a common position adopted under Article 34(2)(a) TEU was “*not supposed* to produce of itself legal effects in relation to third parties.”¹⁵⁸¹ Subsequently, the CJEU extended the scope of acts capable of being referred for a preliminary reference under Article 35(1) TEU to include “all measures adopted by the Council and intended to produce legal effects in relation to third parties.” Hence, if a national court was in doubt as to whether a common position did produce legal effects it could refer the issue to the CJ. If the latter concluded that the common position did produce such effects it could rule on the interpretation or validity of the act. By distinguishing between *true* and *false* common positions¹⁵⁸², the CJ ended up introducing a new category of PJCCM acts into Article 35(1) TEU that should be treated on the same basis as framework decisions and decisions.¹⁵⁸³

The extent to which this reasoning is applicable to second pillar acts is unclear. Nonetheless, some scholars have considered that although it appears that in the case of *Segi* the individual was left without any judicial protection, the CJEU acknowledged that the nature of Union law had change and that the exclusion of judicial review by the CJEU was no longer justifiable in light of the rule of law. Hence, since the right of access to justice was made depended upon *the legal effects of the measures on the position of the individual*, it could be argued that in so far as CFSP measures entail legal effects regarding individuals, they have to be subject to judicial review.¹⁵⁸⁴ One would add that this reasoning applies beyond the wording of Article 275 TFEU which flows also from the *Segi* decision.

Surely, allowing for a preliminary ruling is not the same as making it mandatory along the lines of the *Foto-Frost* case-law. Nonetheless, one could argue that if the CJEU is willing to extend supremacy to the whole of Union law, within the framework of a unified legal order, it should assume jurisdiction to ensure the uniform application of EU standards and the coherence of the system of judicial review. Hence, supremacy may constitute one more compelling reason to expand the jurisdiction of the Union courts under the Lisbon Treaty.

b) Article 19(1) TEU and the Duty to Ensure the Rule of Law

I. Although the exclusion of the CJEU’s jurisdiction under the Lisbon Treaty looks, at first glance, very similar to the one included in the Nice Treaty, it should be noted that there is a fundamental change underlying it. In fact, whereas pursuant to the old TEU jurisdiction of the CJEU over the second pillar was generally excluded, *except* in those areas where it was expressly conferred to it and which were exhaustively listed in Article 46 TEU, the current jurisdiction of the

¹⁵⁸¹ See Case C-355/04 P, *Segi and others/Council*, [2007] ECR I-1657, paras. 51-54.

¹⁵⁸² LENAERTS, “Le Traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l’Union”, 2009, at 735.

¹⁵⁸³ See CARRUTHERS, “The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs”, 2009, at 790. See *supra* Part I, Chapter 2, Section 2.2.3.

¹⁵⁸⁴ ECKES, “Sanctions against Individuals”, 2008, at 213.

CJEU extends, *as a general rule*, over the entire text of the Treaties, except for those instances where it is expressly excluded by virtue of Article 275 TFEU.¹⁵⁸⁵ In fact, whereas Article 46 TEU was worded in a positive way – “the Court shall have jurisdiction” – the new Article 275 TFEU clearly establishes a limitation and exception stating that the CJEU “shall not have jurisdiction.”¹⁵⁸⁶ Even if it may be argued that the practical effect of both norms is the same, there is a clear change of perspective: under Lisbon that which previously constituted the rule regarding the CJEU’s jurisdiction over the CFSP has now become the exception.

This inversion has significant implications at the interpretative level. Indeed, according to an ancient rule of interpretation, provisions establishing exceptions or limitations should be interpreted narrowly, in opposition to provisions establishing rules or benefits which should be interpreted broadly: *favorabilia amplianda, odiosa restringenda*. Surely, such a rule cannot be understood strictly and in the abstract. Nonetheless, the change of perspective underlying the new provisions leaves room for a new conception on the CJEU’s jurisdiction over CFSP measures.

II. In this context, the role of Article 19(1) TEU should not be underestimated. Surely, as a Union institution, the CJEU does not escape the principle of conferral.¹⁵⁸⁷ However, as stated above, this principle maintains an uneasy relationship with the principle of the rule of law established in Article 19(1) TEU. One should note that Article 19(1) TEU, which imposes the duty on the Court to ensure that “in the interpretation and application of the Treaties the law is observed” – an obligation that may have to be complied with beyond the wording of the Treaties¹⁵⁸⁸ – applies to the whole body of Union law, whereas it could be argued that former Article 220 TEC applied solely with regard to EC law.¹⁵⁸⁹

Article 19(1) TEU does not establish any limitations to the CJEU’s jurisdiction. It implies the exclusive, independent and mandatory jurisdiction of the CJEU, which precludes notably the jurisdiction of other international courts or tribunals.¹⁵⁹⁰ This jurisdiction implies also, as seen above, the exclusive competence of the CJEU to declare a given Union act invalid.¹⁵⁹¹ What is more, if at an early stage the CJEU refused an extensive interpretation of Article 19(1) TEU, by refusing to acknowledge a change in its jurisdiction¹⁵⁹², in later case-law the CJEU applied such provision to broaden the scope of its competences. Indeed, it became clear that, if in certain cases the Court declined jurisdiction, it would be difficult and eventually impossible to comply with the obligation to ensure the rule of law. Thus, there have been several cases where the CJEU adopted a broad reading of its jurisdiction under the Treaties. The cases of *Les Verts*, *Chernobyl*, *Busseni* and

¹⁵⁸⁵ See also MESQUITA, *A Actuação Externa da União Europeia depois do Tratado de Lisboa*, 2011, at 226.

¹⁵⁸⁶ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 100.

¹⁵⁸⁷ Case 12/63, *Schlieker/ECSC High Authority*, [1963] ECR 85; Opinion 2/94, [1996] ECR I-1759.

¹⁵⁸⁸ FERNANDEZ ESTEBAN, *The Rule of Law in the European Constitution*, 1999, at 112.

¹⁵⁸⁹ Article 19 TEU corresponds to former Articles 220 TEC, 31 TECSC and 136 EURATOM. In Case 221/88, *ECSC/Busseni*, [1990] ECR I-495 the CJEU confirmed that despite their different wording the three articles encompassed substantially the same idea.

¹⁵⁹⁰ Case C-459/03, *Commission/Ireland*, [1996] ECR I-4635, para. 123; Opinion 1/91, [1991] ECR I-6079, para. 35, and Opinion 1/00, [2002] ECR I-3493, paras. 11-12.

¹⁵⁹¹ See *supra* Part I, Chapter 1, Section 1.2.2(b).

¹⁵⁹² Case 66/76, *CFDT/Council*, [1977] ECR 305; Case 1/82, *D./Luxembourg*, [1982] ECR 3709.

Zwartveld referred to above constitute emblematic decisions in so far as they show that with regard to the jurisdiction of the CJEU the principle of conferral should not be understood strictly.¹⁵⁹³

In this respect, some scholars spoke of the doctrine of inherent jurisdiction, which finds its origins in common law systems, and which considers that jurisdiction can be derived exclusively from the function of the body exercising it.¹⁵⁹⁴ Such doctrine allows for the possibility of introducing changes to the jurisdiction of the courts, by expanding its scope and filling in gaps of protection. Notwithstanding, it applies with limitations. Firstly, it implies the respect of the law. Secondly, it hardly justifies the creation of new remedies or provisions at a substantive level, even if they could contribute to the adequate functioning of a given legal order.¹⁵⁹⁵

Even if one rejects the direct application of the doctrine of inherent jurisdiction to the CJEU, it is submitted that Article 19(1) TEU by establishing the rule of the unified jurisdiction of the Court should be interpreted as extensively as possible, in order not to preclude or limit the review of CFSP acts when such review is deemed necessary in light of the constitutional principle of the rule of law, and notably fundamental rights protection. Such an extensive interpretation implies, by definition, to disregard the wording of the Treaties, “stretching” them as much as possible, when necessary to comply with the spirit of Article 19(1) TEU and with the CJEU’s obligation to ensure the respect for the rule of law. It should be remembered that the rule of law involves an objective and a subjective dimension. From a subjective perspective, the principle of the rule of law applied to the individuals’ legal position, translates into the protection of fundamental rights and the notion of effective judicial protection of private parties, notably into the fundamental right of access to justice.¹⁵⁹⁶ As a consequence, and as suggested above, the combined interpretation of Articles 6 and 19(1) TEU with Article 275 TFEU should compel the CJEU to accept actions for annulment brought by individuals against *any CFSP acts which are intended to produce legal effects vis-à-vis private parties* under the same conditions advocated above with regard to Article 263(4) TFEU.¹⁵⁹⁷

c) The Impact of the new Article 40 TEU as a “Two Way Street”

I. As seen above, former Article 47 TEU allowed for an extension of the jurisdiction of the CJEU over second pillar measures. In fact, when drawing the line between the pillars the CJEU was in fact exercising its jurisdiction over TEU measures indirectly¹⁵⁹⁸ for having been adopted under an incorrect legal framework. This occurred whenever the Court decided on the legal basis

¹⁵⁹³ See *supra* Part I, Chapter 1, Section 1.1.5.

¹⁵⁹⁴ ARNULL, “Does the Court of Justice Have Inherent Jurisdiction?”, 1990, at 702; FERNANDEZ ESTEBAN, *The Rule of Law in the European Constitution*, 1999, at 117.

¹⁵⁹⁵ ARNULL, “Does the Court of Justice Have Inherent Jurisdiction?”, 1990, at 702. How far has the CJEU itself respected such limitations is in and of itself controversial. The establishment of an action to ensure the state liability for breaches of EU law may be a good example of the CJEU’s activism in this respect. See Joined Cases C-6 and 9/90, *Franovich and Bonifaci/Italy*, [1991] ECR I-5357, and Joined Cases C-46 and 48/93, *Brasserie du pêcheur/Bundesrepublik Deutschland and The Queen/Secretary of State for Transport, ex parte Factortame and others*, [1996] ECR I-1029.

¹⁵⁹⁶ See *supra* Introduction.

¹⁵⁹⁷ See *supra* Section 2.1.

¹⁵⁹⁸ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 91.

of acts adopted under the TEC and the TEU, but also in respect of acts adopted within the second and third pillar in the framework of the TEU. Article 47 TEU was widely viewed as a collision norm, derogating the application of the *lex posterior* rule in the relation between the two treaties. Under the Lisbon Treaty its function has slightly changed, as the non-affectation clause now protects both *acquis* and works both ways. Thus, the Lisbon Treaty introduced important amendments regarding cross-pillar litigation and the application of the competences provision, now included in Article 40 TEU.¹⁵⁹⁹

As the new Article 40 TEU makes the old Article 47 TEU work reciprocally, read in combination with Articles 1 TEU and Article 1(2) TFEU it may have significant jurisdictional consequences. Despite the obvious difference in the wording of former Article 47 TEU and current Article 40 TEU, there seems to be a substantial different approach to the question of competences under the Lisbon Treaty. The wording of the two provisions differs essentially because the first purpose of the latter – that of preventing the TEU from superseding the EC and EURATOM Treaties – has become redundant, following the disappearance of the European Communities.¹⁶⁰⁰ Accordingly, Article 40 TEU does not separate treaties but policies and institutional powers.¹⁶⁰¹ Moreover, at first glance, Article 40 TEU would seem stricter than former Article 47 TEU, as it only refers to the question of the definition of powers and competences under the Treaties. The expression “nothing in this Treaty” adopted in the former version could be considered much broader as it virtually referred to any aspect regarding the application of the TEU. However, Article 47 TEU was essentially interpreted as a “competences provision” – not having been tested in other instances – and, in this respect, Article 40 TEU can be considered as encompassing a change in the previous philosophy, by making the old provision workable in both directions. In this context, the second paragraph of Article 40 TEU is new and is seen as the “logical consequence of the equal value of the two Treaties.”¹⁶⁰²

Hence, under Article 40 TEU the CJEU may be called upon to intervene “not only where action taken pursuant to the CFSP exceeds the limits of CFSP competence, thus impinging on the Union’s general competence, but also – conversely – where the action of the Union exceeds the limits of Union competence, and impinges on the CFSP.”¹⁶⁰³ The provision’s aim is no longer to protect the *acquis communautaire* but the prevention of mutual interference between the CFSP and other Union policies.¹⁶⁰⁴ This is in line with Article 1(2) TEU which states that both Treaties have the same legal value.

This two-way street could be seen as “the fusion of two functions the Court has already been

¹⁵⁹⁹ One should note that under Lisbon, there is no longer a rule solving a competence dispute between the collapsed third pillar and other Union policies. This means, that from now onwards the CJEU should apply here its general “centre of gravity test”, developed in the field of the old Community law, to determine the correct legal basis of a given measure. See CULLEN; CHARLESWORTH, “Diplomacy by Other Means”, 1999, at 1243 *et seq.* See Case C-300/89, *Commission/Council (Titanium dioxide)*, [1991] ECR I-2867, paras. 17-21.

¹⁶⁰⁰ The new provision does not cover action within the EURATOM.

¹⁶⁰¹ CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 55.

¹⁶⁰² *Ibid.*

¹⁶⁰³ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 103-104; EECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 273.

¹⁶⁰⁴ HINAREJOS, *Judicial Control in the European Union*, 2009, at 153.

exercising under two different Treaty headings”.¹⁶⁰⁵ In fact, as seen above, the Court has protected EC competences from EU encroachment under Article 47 TEU, but it has also performed the converse task by enforcing the principle of conferral of powers without the need to invoke Article 47 TEU.¹⁶⁰⁶ However, this is nothing new. Thus, the correct reading of Article 40 TEU would have to be to consider that in cases of cross-pillar litigation where a measure has two inseparable central aims/components the prevalence of a given Union legal basis over the CFSP one would no longer automatically occur. In fact, most scholars have considered that there was a modification in the *rationale* of the provision and pointed out that Article 40 TEU precludes any hierarchical interpretation and absolute dominance of Union competences over the CFSP, and would therefore preclude an *Small Arms* type of approach.¹⁶⁰⁷ Thus, the new provision “removes the Community priority”¹⁶⁰⁸ rule, which was the “heart of Article 47 TEU.”¹⁶⁰⁹ Consequently, under the new Treaties, when security and development objectives are pursued equally, without one being incidental to the other, the non-CFSP legal base would no longer mechanically prevail and the instrument would have to be adopted exceptionally on a dual legal basis.¹⁶¹⁰ This issue is, however, far from being uncontroversial.¹⁶¹¹

At first glance, under Article 40 TEU the overlaps between the CFSP and other external policies may become more troublesome, since the provisions of the CFSP no longer contain separate objectives¹⁶¹², the CFSP applies to “all areas of foreign policy”¹⁶¹³, and those more specific CFSP objectives are broadly defined.¹⁶¹⁴ Hence, it is presumed that the institutions will often refer,

¹⁶⁰⁵ *Ibid.*

¹⁶⁰⁶ See *supra*, Part 1, Chapter 2, Section 2.2.2.

¹⁶⁰⁷ See e.g., VAN VOOREN, “The *Small Arms* Judgment in an Age of Constitutional Turmoil”, 2009, at 243.

¹⁶⁰⁸ CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 56.

¹⁶⁰⁹ *Ibid.*

¹⁶¹⁰ HELISKOSKI, “Small Arms and Light Weapons within the Union’s Pillar Structure”, 2008, at 911.

¹⁶¹¹ By contrast, some commentators have argued that the position of the CJEU adopted in the *Small Arms* case should be maintained and priority should continue be given to a non-CFSP competence whenever one is available. See CREMONA, “A Constitutional Basis for Effective External Action?”, 2006. The main argument in support for this view relates to the scope of the CFSP, deemed to cover “all areas of foreign policy.” Thus, the CFSP should be regarded as a general competence (*lex generalis*) of the Union, as opposed to the specific competences in distinct areas of foreign policy (*lex specialis*), so that primacy would be given to the latter whenever possible. See also EECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 274. *Per contra*, see HELISKOSKI, “Small Arms and Light Weapons within the Union’s Pillar Structure”, 2008, at 911. Other scholars have tried to find the right interpretation for Article 40 TEU in the type of acts that can be adopted under the CFSP. Hence, the “demarcation between the CFSP and other external policies could thus depend upon the legal character of the measures at stake, i.e. on the question whether legislative action is needed or not, rather than on the somewhat artificial exercise of balancing overlapping objectives”. See VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 1005.

¹⁶¹² Regarding the CFSP, the Lisbon Treaty started by changing substantially the CFSP objectives. The new Article 21(2) TEU lists the objectives towards which the Union must point all its external action, regardless of the specific competence conferring article, which might be seen as an attempt to substantially increase the overall policy coherence of the Union. The objectives therein listed were taken both from the TEU and TEC and more specifically from former Articles 131, 174, 177 TEC and 11 TEU. From now on, each of these objectives will have to accommodate to the others at the external level. Hence, the new Article 21 TEU does not contain specific CFSP objectives when compared to old Article 11 TEU. Notably, the “preservation of international peace and security” figuring in the general EU objectives is no longer linked specially to the CFSP competence. As KOSKENNIEMI points out, everyone agrees that it is difficult to separate foreign policy from other aspects of policy and that the most credible conception of security is a comprehensive one. See KOSKENNIEMI, “International Law Aspects of the Common Foreign and Security Policy”, 1998, at 36. This is said to constitute the “original sin” of the overall EU external action EECKHOUT, “The EU’s Common Foreign and Security Policy after Lisbon”, 2012, at 269.

¹⁶¹³ See also HERRMANN, “Much Ado about Pluto?”, 2008, at 47; CREMONA, “The Two (or Three) Treaty Solution”, 2012, at 56.

¹⁶¹⁴ Article 21(2)(c) TEU.

when adopting legal acts, to several objectives.¹⁶¹⁵ Such multiplicity will not make the task of delimiting the CFSP and other external policies easier. To know whether the CJEU will return to pre-Lisbon law and case-law to determine what is a CFSP objective or not is a matter for speculation.¹⁶¹⁶

Nonetheless, one may argue that certain specific CFSP aims remain.¹⁶¹⁷ Nonetheless, it is possible to consider that in the absence of specific CFSP objectives the discussion over twofold external acts should be decided by taking into consideration essentially the content of the measure. Thus, under Lisbon, the objectives of a given action do not, in and of themselves, entail the solution for the question of competences at the external level, as they are not linked with a particular type of competence. Hence, even if one measure pursues different objectives and should integrate all of them pursuant to Article 21 TEU, there will still be the need to choose the correct legal basis for the adoption of such measure. The question of the determination of the correct legal basis persists. The point is supported by the regular references in specific conferring articles which state that these policies shall be conducted in the context of the principles and objectives of the Union's external action (e.g. Article 208 TFEU).¹⁶¹⁸ Moreover, Article 40 TEU does not bar cross-referencing to objectives linked with other competences, as long as such references respect Article 21(2) TEU and the duty of consistency laid down in Articles 23(3) TEU and 7 TFEU. However, when objectives pursued by a given measure imply the existence of certain provisions in such measure that involve the exercise of different competences – under the CFSP and other Union policy – a dual legal basis will be required. Notwithstanding, it seems that a mere incidental aim or component does not require a separate legal basis.¹⁶¹⁹ It would have to be an equally ranged aim or component.

The novelty in this respect seems to be the possibility of such a dual legal basis, which was precluded under the *Small Arms* doctrine and former Article 47 TEU. In favour of this possibility it may be argued that we are no longer dealing with separate legal orders, or legal acts of a wholly different nature, but rather with different procedures and institutional roles.¹⁶²⁰ Article 218 TFEU suggests that such a dual legal basis is possible regarding international agreements.¹⁶²¹ Thus, the case for a dual legal basis could also be construed for other Union acts.

Nonetheless, according to the CJEU's case-law, when a twofold act is at stake it will be possible to adopt such act under a dual legal basis as long as they do not entail different decision-making procedures.¹⁶²² One could say that, regarding the combination of a CFSP with a non-CFSP legal basis there will be, in the majority of cases, a procedural incompatibility given the diverging

¹⁶¹⁵ EECKHOUT, "The EU's Common Foreign and Security Policy after Lisbon", 2012, at 275, noting that in some cases they are required to do so. See Article 205 TFEU.

¹⁶¹⁶ Considering that the Court main continue to devise CFSP objectives within the list of Article 21 TEU see VAN ELSUWEGE, "EU External Action after the Collapse of the Third Pillar Structure", 2010, at 1006.

¹⁶¹⁷ EECKHOUT, "The EU's Common Foreign and Security Policy after Lisbon", 2012, at 267, 268.

¹⁶¹⁸ VAN VOOREN, "The *Small Arms* Judgment in an Age of Constitutional Turmoil", 2009, at 245.

¹⁶¹⁹ See Case C-91/05, *Commission/Council (Ecowas)*, [2008] ECR I-3651, para. 73.

¹⁶²⁰ CREMONA, "The Two (or Three) Treaty Solution", 2012, at 58.

¹⁶²¹ See also CREMONA, "The Two (or Three) Treaty Solution", 2012, at 57; EECKHOUT, "The EU's Common Foreign and Security Policy after Lisbon", 2012, at 275.

¹⁶²² Case C-300/89, *Commission/Council (Titanium dioxide)*, [1991] ECR I-2867, paras. 17-21.

decision making procedures and instruments. Thus, the existence of a cross-pillar legal basis will be, in practice, precluded.¹⁶²³ However, there have been, in this respect, some developments in the Court's case-law that may allow the use of a dual legal basis. The CJEU has held that the use of the ordinary legislative procedure may be compatible with a provision where the Council acts as a sole legislator¹⁶²⁴ suggesting that there is no procedural incompatibility in combining Articles 39 TEU and 16 TFEU as joint legal bases.¹⁶²⁵ Recently, in Opinion 1/08¹⁶²⁶, the Court not only admitted the involvement of the European Parliament in the field of the common commercial policy but also allowed the combination of different voting rules within the Council. This decision shows that the procedural incompatibility between unanimity and qualified majority voting is not absolute.¹⁶²⁷ Hence, one may argue that despite the procedural complexities of a given case, a compromise for a dual legal basis seems possible under Article 40 TEU.¹⁶²⁸

II. Taking into account the possibility of the use of dual legal basis under Article 40 TEU, one should question the exercise of the CJEU's jurisdiction over these measures. EECKHOUT has considered that in so far as Article 40 TEU aims to protect the procedures and powers of Union policies, if a CFSP act produces effects beyond the ones allowed in the Treaties, then it must be deemed reviewable under said provision.¹⁶²⁹ Furthermore, it has been noted that a prejudice for the *acquis* may not derive exclusively from the choice of legal basis of a given measure. It may also be the result of the substance of a measure, which although lawfully adopted under the CFSP, violates other Treaty provisions regarding the powers of the institutions or the procedural rules of the decision-making process. PEERS suggested the example of a properly adopted money laundering framework-decision which would compel Member States to breach ex-Article 56 TEC: "[i]f the Treaty does not give the Council competence to adopt measures that should fall within the scope of the EC Treaty, the argument goes, it cannot logically give the Council competence to compel Member States to breach the EC Treaty."¹⁶³⁰ In other words, even where it does not entail an

¹⁶²³ Case C-300/89, *Commission/Council (Titanium dioxide)*, [1991] ECR I-2867, para. 18.

¹⁶²⁴ Case C-155/07, *Parliament/Council*, [2008] ECR I-8103, paras. 77-79. See also Joined Cases C-402 and C-415/05 P, *Kadi and Al Barakat International Foundation/Council and Commission*, [2008] ECR I-6351, paras. 235-236; Case C-166/07, *Parliament/Council*, [2007] ECR I-7135, para. 69.

¹⁶²⁵ CREMONA, "The Two (or Three) Treaty Solution", 2012, at 58.

¹⁶²⁶ Opinion 1/08, [2009] ECR I-11129.

¹⁶²⁷ VAN ELSUWEGE, "EU External Action after the Collapse of the Third Pillar Structure", 2010, at 1007. In light of this more liberal case-law EECKHOUT has questioned "whether there are genuinely huge obstacles to an act being based on, say, CFSP provisions in the TEU, and Article 209 TFEU on development cooperation, which provides for the ordinary legislative procedure." As happened "in *International Fund for Ireland*, that procedure would simply need to be combined with unanimity in the Council." See EECKHOUT, "The EU's Common Foreign and Security Policy after Lisbon", 2012, at 276, noting however the practical difficulties of this solution.

¹⁶²⁸ Even if the use of a dual legal basis is difficult to conceive given the diverging decision making procedures and instruments, the linkage between the CFSP and EU decisions by way of "mutual deference" is not impossible and has already been tested in legal regimes on economic sanctions and anti-terrorism policies. See HILLION; WESSEL, "Competence distribution in EU external relations after *Ecowas*", 2009, at 586. Moreover, the Lisbon Treaty makes consistency subject to judicial review which could allow for possible re-equilibrium competence and coherence concerns in the CJEU's case-law. Just as the duty of cooperation has helped protect and promote the Community's interest based on Article 10 TEC, the duty to ensure coherence of Union's external action could lead to various procedural obligations binding on the institutions. *Ibid.* at 581. See also NEUWAHL, "Foreign and Security Policy and the Implementation of the Requirement of Consistency Under the Treaty on European Union", 1997, at 227 *et seq.*; XUEREB, "Loyalty and Solidarity", 2005, at 17 *et seq.*; NEFRAMI, "The Duty of Loyalty", 2010, at 325 *et seq.*

¹⁶²⁹ EECKHOUT, "The EU's Common Foreign and Security Policy after Lisbon", 2012, at 283.

¹⁶³⁰ PEERS, "Who's Judging the Watchmen?", 1998, at 402.

actual reduction of other Union competences through an unlawful choice of legal basis, the activities carried out by the Member States within the framework of the second pillar may still negatively affect the powers of the institutions, and prejudice the specific procedures laid down in the TFEU.¹⁶³¹ This happens, for instance, when the action of the Union in the field of foreign policy has to be followed by implementing activity undertaken in the context of another Union policy.¹⁶³² The question which then arises is whether a CFSP instrument imposes legal obligations on the Union and produces legal effects within the framework of other Union policies, or if instead this kind of interference should be ruled out because it runs the risk of other Union procedures not only being substituted for, but subordinated to the decision-making in the field of the CFSP.¹⁶³³ In this context, it could be argued that Article 40 TEU allows for some *substantive* review of CFSP acts.

Notwithstanding, regardless of the impact of Article 40 TEU on the scope of review applied by the CJEU, this provision may also entail important *procedural consequences*. In fact, if an individual brings a challenge against an act adopted under a CFSP and a non-CFSP legal basis, it is hard to see how the jurisdiction of the CJEU can be limited to the *non-CFSP act*. If the two legal bases are inextricably linked and the contested provisions of the act cannot be imputable exclusively to the *non-CFSP* legal basis, it is submitted that standing should be assessed under Article 263(4) TFEU and not under Article 275 TFEU. Hence, *Community-priority* may still be relevant in this context. The CJEU could draw inspiration here from its previous case-law regarding the extension of jurisdiction over the second and third pillars when *associated* with a first pillar issue.¹⁶³⁴ As seen above, under the former TEU, there was room for an extension of the CJEU's jurisdiction over second and third pillar acts when first pillar matters were expressly made applicable within the field of the intergovernmental pillars.¹⁶³⁵ Thus, when *associated* with first pillar issues, the CJEU exercised *first pillar jurisdiction* over second and third pillar measures. The same could be said about the CFSP under the Lisbon Treaty, notably when twofold acts are at stake.

All in all, the interactions between the CFSP and other Union policies are likely to give rise

¹⁶³¹ Some authors considered, however, that a distinction should be drawn between the obligation of the Council not to breach the TEC/TFEU and the judicial enforceability of such obligation. Article 47 TEU surely imposed such an obligation, but an interpretation of this provision that would have allowed the Court to conduct a substantive review of third and second pillar measures would only be possible to the extent that the Court had such powers under the TEU. In practical terms, this view would amount to allow such review regarding third pillar measures within the framework of Article 35 TEU and to preclude any review whatsoever regarding second pillar measures, as no procedural vehicles were available to the Court. See HINAREJOS, *Judicial Control in the European Union*, 2009, at 132-133.

¹⁶³² There are several examples of this type of encroachment in the Community activities, as often a given action under the CFSP has to be implemented by measures adopted under another Union policy. This was, for instance, the case in the adoption of economic sanctions against third countries and individuals consisting of a Council decision (generally, a common position) adopted on the basis of Title V TEU, followed by a Community regulation based on Article 301 EC (and/or on Article 60 EC, in the case of financial sanctions) adopted by qualified majority following a proposal by the Commission. For further developments see KETVEL, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy", 2006, at 94-96; MARTINS, *The Court of Justice and the collapsing of the pillars*, 2011, at 91 *et seq.*

¹⁶³³ BARATTA, "Overlaps between European Community Competence and European Union Foreign Policy Activity", 2002, at 54.

¹⁶³⁴ See *supra* Part I, Chapter 2, Section 2.2.2.

¹⁶³⁵ Here, one should note that former Articles 28 and 41 TEU have been changed under Lisbon. Article 28 TEU (which became Article 41 of the new TUE) merely refers to budgetary issues within the second pillar, and Article 41 TEU was revoked.

to legal disputes not only touching upon the delimitation of competences between the Union and the Member States, but testing the very boundaries of the CJEU's jurisdiction.¹⁶³⁶

2.2.4 Reasons for Judicial Self-Restraint: a “Political Questions” Doctrine for the EU?

I. An extended jurisdiction of the CJEU over CFSP measures does not necessarily entail the long feared judicial activism in a field where Member States entrusted the political process with the most sensitive choices. As is well known, according to the “act of state” or “political questions” doctrines¹⁶³⁷ national courts cannot – or should not – interfere with the political choices defined by the executive, especially those discretionary choices where the latter enjoys a wide margin of discretion.

The “political questions” doctrine has long been recognised in U.S. law.¹⁶³⁸ It was first – and somewhat paradoxically – established in the *Marbury v. Madison* judgment¹⁶³⁹ of the U.S. Supreme Court, and has shaped “profoundly the way power is exercised in the United States.”¹⁶⁴⁰ It is based essentially on the idea that foreign affairs are different from all other matters of states and that, therefore, its conduct should be immune to judicial review. Those advocating this theory usually argue on the basis of practical necessity or prudential considerations, as the nature of the issues involved in the conduct of foreign affairs involves complex and difficult policy choices that should not be solved by courts. Nonetheless, the doctrine is not without dispute. Recent scholarship has questioned its adequacy, and has highlighted the inconsistency of its application in the case-law of American courts, advocating the submission of foreign affairs matters to the jurisdiction of the courts.¹⁶⁴¹ In fact, “every action taken in the name of foreign policy, defence strategy, or national security has a broad range of consequences”¹⁶⁴², not necessarily limited to the scope of the executive, and “if competing constitutionally or legally protected interests of private citizens, businesses, and legislators are to be accorded their fair weight, it is in the courts that credible weighing must occur.”¹⁶⁴³

Generally speaking, this doctrine has not been followed in Europe. Although based on different approaches, European courts have considered that matters of foreign policy are not exempted from judicial review, and have tried to find more accurate criteria to distinguish those areas where the courts' intervention is legitimate and necessary from the ones where courts should not enter. Hence, in France, originally, judges followed the so-called *théorie du mobile politique* and considered themselves incompetent to control whether an act was lawful if there were political

¹⁶³⁶ KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, 97.

¹⁶³⁷ COLLINS, “Foreign Relations and the Judiciary”, 2002, at 504 *seq.*

¹⁶³⁸ See e.g. *Colegrove v. Green*, 328 US 549 (1946). More recently, in *Al Odah. v. United States*, No. 03-343 (2003) the U.S. Federal Appeals Court held that the writ of *habeas corpus* did not extend to Guantanamo Bay Cuba (technically non-sovereign U.S. territory as leased from Cuba) and thus it could not review detention of Al-Qauida suspects there.

¹⁶³⁹ *Marbury v. Madison*, 5 US (1 Cranch) 137, 176-178 (1803).

¹⁶⁴⁰ FRANCK, *Political Questions/Judicial Answers*, 1992, at 3. See also HENKIN, *Foreign Affairs and the United States Constitution*, 1996; HENKIN, “Is There a ‘Political Question’ Doctrine?”, 1976, at 597-625.

¹⁶⁴¹ FRANCK, *Political Questions/Judicial Answers*, 1992, at 7 *et seq.*

¹⁶⁴² *Ibid.*, at 9.

¹⁶⁴³ *Ibid.*

reasons underlying it.¹⁶⁴⁴ This approach changed with the decision of the *Conseil d'État* in the case *Prince Napoléon*.¹⁶⁴⁵ Nonetheless, the category of *actes du gouvernement* persisted, although progressively limited. In time, this notion ended up including only those decisions of high governmental responsibility which require a high degree of sensitivity and knowledge in matters in which courts are not competent to give judgment.¹⁶⁴⁶ Nowadays, this concept is limited to acts regarding the relationship between the executive branch and the legislative power and the conduct of international relations.¹⁶⁴⁷ Accordingly, the *Conseil d'État* refused an action brought by Greenpeace against the President's decisions to resume a batch of nuclear tests¹⁶⁴⁸, and the same happened with a presidential decision to suspend financial aid to Iraq¹⁶⁴⁹, as these acts were not separable from the conduct of international affairs. However, the so-called *actes détachables*, i.e., those foreign policy acts which have domestic effects but which can be separated from the conduct of international relations will be subject to judicial control. A good example could be the building permit granted to a foreign embassy.¹⁶⁵⁰

In Germany, the *Bundesverfassungsgericht* has also expressly rejected a "political questions" doctrine and has reviewed foreign policy matters for their compatibility with fundamental rights in the Basic Law. In the *Saarstatut*¹⁶⁵¹ case, the Federal Constitutional Court, faced with a Treaty between Germany and France that created a special status for the Saar, did not accept the government's argument that the issue at stake was essentially of a political nature and therefore non-justiciable. According to the *Bundesverfassungsgericht*, foreign policy measures must comply with the requirements of the *Grundgesetz* as any other piece of legislation, and as the guardian of the constitution the Constitutional Court will assume jurisdiction to review such acts. This understanding was later confirmed in the *Grundlagenvertrag*¹⁶⁵² case which again involved the conclusion of an international treaty, and was extended to all foreign policy acts in the case of *Rudolph Hess*.¹⁶⁵³ Notwithstanding, although assuming jurisdiction in these cases the German Constitutional Court admits a greater space of discretion for the executive in certain fields of foreign policy.¹⁶⁵⁴ Indeed, the *Grundgesetz* does not allow the Court to replace the political choices

¹⁶⁴⁴ HINAREJOS, *Judicial Control in the European Union*, 2009, at 169. See *Conseil d'Etat*, 1/5/1822, *Laffite*; *Conseil d'Etat*, 9/5/1867, *Duc d'Aumale*.

¹⁶⁴⁵ *Conseil d'Etat*, 19/2/1875, *Prince Napoléon*.

¹⁶⁴⁶ AUBY; FROMONT, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne*, 1971, at 232; BELL; BOYRON; WHITTAKER, *Principles of French Law*, 2008, at 179.

¹⁶⁴⁷ *Tribunal des Conflits*, 2/2/1950, *Radiodiffusion Française*.

¹⁶⁴⁸ *Conseil d'Etat*, 29/9/1995, *Greenpeace*.

¹⁶⁴⁹ *Conseil d'Etat*, 23/9/1992, *GISTI-MRAP*.

¹⁶⁵⁰ *Conseil d'Etat*, 22/12/1978, *Vo Thang Nghia*. Noting that this concept has been constantly enlarged see HINAREJOS, *Judicial Control in the European Union*, 2009, at 170 note 160.

¹⁶⁵¹ BVerfGE 4, 157, *Saarstatut*.

¹⁶⁵² BVerfGE 36, 1, *Grundlagenvertrag*.

¹⁶⁵³ BVerfGE 55, 349, *Rudolph Hess*. In the *Rudolf Hess* case, the court reviewed the German Government's failure to negotiate with the Allied governments for the release of an imprisoned Nazi war criminal. The *Bundesverfassungsgericht* evaluated also a treaty normalising relations with Poland and the Soviet Union, in *The Eastern Agreements Case* (BVerfGE 40, 141, *Ostverträge*) and it has even reviewed the deployment of Pershing missiles on German soil for compatibility with the GG (BVerfGE 66, 39, *Nachrüstung Materielle Begründung*; BVerfGE 1, 68, *Atomwaffenstationierung Materielle Begründung*). See DOUGLASSCOTT, "The Charter of Fundamental Rights as a Constitutional Document", 2004, at 47.

¹⁶⁵⁴ Noting that "it has been easy to obtain judicial review of treaty and foreign policy issues raising constitutional questions in Germany, but such cases are difficult to win." See DOUGLASSCOTT, "The Charter of Fundamental Rights as a Constitutional Document", 2004, at 47 note 48.

of the Government for those of its own. This is the only meaning that some judicial self-restraint in foreign affairs is allowed in Germany. Nonetheless, even here, the *Bundesverfassungsgericht* will decide if the executive went beyond the limits of its discretion and whether its actions were guided by an erroneous belief about the legal constraints on its discretion.¹⁶⁵⁵ Also the Court will consider if the means used were arbitrary or if bad faith can be proven.¹⁶⁵⁶

In sum, the “political questions” doctrine has no European tradition, as foreign policy measures are not *a priori* considered to be out of the realm of judicial control.¹⁶⁵⁷ Nonetheless, national courts have in certain cases showed some degree of self-restraint in order to avoid a violation of the balance of powers established under the national constitutions.¹⁶⁵⁸

II. Similarly, in the European Union legal order, there is no general legal tradition encompassing or promoting the adoption of such a doctrine. Nevertheless, the issue has been mentioned in a few significant cases.¹⁶⁵⁹ Firstly, in his Opinion in the case of the *Macedonian Sanctions*¹⁶⁶⁰, in what has been described as the “EU judicial text which comes closest to establishing some kind of political question doctrine in the framework of EU constitutional law”¹⁶⁶¹, AG JACOBS dismissed the possibility that a matter might escape judicial control on account of the political nature of the issues raised. The case involved the application of the safeguard clause established under current Article 347 TFEU. When discussing the question of knowing whether Greece was entitled to invoke such provision on the ground of war or serious international tension constituting a threat of war, the AG expressly stated that “clearly it cannot be argued (...) that the matter is non-justiciable.”¹⁶⁶² It was plain from the terms of the Treaty that the CJEU must have the power to review whether the conditions for invoking such provision were satisfied.

More recently, in his Opinion in the *Kadi* case, AG MADURO disregarded the relevance of such doctrine in the EU legal order. In the case, the Council, the Commission and the United Kingdom Government had argued that, as a matter of general principle, it was not for the CJEU to cast doubt on EU measures that implement resolutions which the Security Council considered necessary for the maintenance of international peace and security, invoking the notion of “political questions”, holding that the specific subject-matter at issue in the case did not lend itself to judicial review. They claimed also that the ECtHR took a similar position in this respect. It must be recalled that the GC had decided in the case that it had no jurisdiction to review the validity of the measures at stake – as this would imply an indirect review of United Nations acts – except for in

¹⁶⁵⁵ BVerfGE 55, 349, Rudolph Hess.

¹⁶⁵⁶ BVerfGE 46, 160, Schleyer. See FRANCK, *Political Questions/Judicial Answers*, 1992, at 107-125.

¹⁶⁵⁷ For a discussion in Portugal see QUEIROZ, *Os actos políticos no Estado de Direito*, 1990, at 169 *et seq.*

¹⁶⁵⁸ See Opinion of AG DARMON in Case 241/87, *MacLaine Watson/Council and Commission*, [1990] ECR I-1797, paras. 66-94. For discussion see Memorandum of the House of Lords European Union Committee, *The Future Role of the European Court of Justice*, 2003-2004, at 30-33.

¹⁶⁵⁹ See Case 93/78, *Mattheus/Doego*, [1978] ECR 2203.

¹⁶⁶⁰ Case C-120/94, *Commission/Hellenic Republic*, [1996] ECR I-1513.

¹⁶⁶¹ EECKHOUT, *External Relations of the European Union*, 2011, at 452.

¹⁶⁶² Para. 50.

light of *ius cogens* principles.¹⁶⁶³ Some scholars saw in this decision a *sui generis* application of the “political questions” doctrine. Indeed, one may consider that the lowering of review standards by the GC worked as an attempt to protect the political prerogatives of the Security Council.¹⁶⁶⁴ AG MADURO rejected these views, considering that “the claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights.”¹⁶⁶⁵ Hence, the fact that the measures at issue were intended to suppress international terrorism should not inhibit the CJEU from fulfilling its duty to preserve the rule of law. In doing so, rather than trespassing into the domain of politics, the Court would be reaffirming the limits that the law imposes on certain political decisions.¹⁶⁶⁶ In light of these considerations, the AG concluded that there was no reason for the CJEU to depart from its usual interpretation of the fundamental rights invoked by the appellant. No marginal or limited review was necessary or advisable as a consequence of the *political* nature of the case.¹⁶⁶⁷

At a different level, several “EU law classics” have involved questions that may easily be qualified as of being of a political nature and the CJEU has not refused to apply therein the general principles of Union law, notably on human rights protection. For instance, the cases of *Van Duyn*¹⁶⁶⁸, *Shingara*, and *Johnston* – which concerned classical free movement issues – involved the interpretation of concepts such as public policy, public order, or public security. In fact, it has been noted that, although treated separately within the framework of the Treaties, national defence has inevitable commercial implications: “exports, public procurement and competition are substantial parts of the internal market established by the EC Treaty” and “they affect the defence sector just like any other part of the industry”.¹⁶⁶⁹ Hence, the founding fathers had to find a balance between the objectives of the internal market and the interests of national security, which is mentioned in several provisions of the Treaties.¹⁶⁷⁰ The CJEU has not hesitated to interpret such provisions notably in light of the principle of proportionality although with different degrees of intensity.¹⁶⁷¹ Thus, in *Centro-Com*¹⁶⁷², the CJEU held that although the organization of armed forces fell within the competence of Member States, the national legislation at stake had to comply

¹⁶⁶³ Case T-315/01, *Kadi/Council and Commission*, [2005] ECR II-3649, paras. 226-231.

¹⁶⁶⁴ For a critical perspective see GRILLER, “International Law, Human Rights and the Community’s Autonomous Legal Order”, 2008, at 528-553; HINAREJOS, *Judicial Control in the European Union*, 2009, at 141; TRIDIMAS; GUTIERREZ-FONS, “EU Law, International Law and Economic Sanctions Against Terrorism”, 2009, at 901-971.

¹⁶⁶⁵ Para. 34. More specifically, addressing the “sensitive nature” of the questions *sub judice* the AG stated that, it is precisely “when the risks to public security are believed to be extraordinarily high, [that] the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process.” In these instances, “the courts should fulfil their duty to uphold the rule of law with increased vigilance (para. 35).”

¹⁶⁶⁶ Quoting AHARON BARAK, the former President of the Supreme Court of Israel see para. 45.

¹⁶⁶⁷ In its decision, the CJ did not address the point, although its decision to review anti-terrorism legislation in light of EU fundamental rights standards may be seen as an implicit refusal of such a doctrine.

¹⁶⁶⁸ Case 41/74, *Van Duyn/Home Office*, [1974] ECR 1337.

¹⁶⁶⁹ TRYBUS, “The EC Treaty as an Instrument of European Defence Integration”, 2002, at 1347.

¹⁶⁷⁰ See e.g., Articles 346, 347, 36, 45(3), 46(1) and 65(1)(b) TFEU.

¹⁶⁷¹ For further developments see TRYBUS, “The EC Treaty as an Instrument of European Defence Integration”, 2002, at 1350 *seq.*

¹⁶⁷² Case C-124/95, *Centro-Com*, [1997] ECR I-81. See SAMSIMENOT, “Les conflits de compétence entre la Communauté européenne et les Etats-membres dans le domaine des sanctions économiques édictées par le Conseil de sécurité de l’ONU”, 1998, at 83 *et seq.*

with Community law.¹⁶⁷³ The rule preventing women from joining the Royal Marines in *Sirdar*¹⁶⁷⁴, and the rule confirming women's access to the army medical and military music services in *Kreil*¹⁶⁷⁵ were found to be in breach of the EC rules on sex discrimination. By contrast, in *Dory*¹⁶⁷⁶, the rule that made military service compulsory only for men was held to be compatible with such rules.¹⁶⁷⁷ It has been noted that these decisions have both the effect of rejecting a “political questions” doctrine *vis-à-vis* Member States' action, and of extending the CJEU's jurisdiction by including the possibility of review of certain national *political* measures.¹⁶⁷⁸

Put briefly, both primary and secondary Union law involve the application of concepts closely connected with foreign affairs and with a certain political content that compel national and Union courts to adjudicate in sensitive matters. In all these cases, the CJEU has never refrained from applying the general principles of Union law, and in particular the Union's standards of fundamental rights protection. Even when being deferential towards national legal orders and acknowledging a certain margin of appreciation of national authorities, the CJEU has always highlighted the need to respect the basic principles on which the Union legal order is based in what may be considered as *political* or *sensitive* cases.

III. Nonetheless, the exercise of limited judicial control over executive discretionary choices has been advocated by the Union courts in certain policy areas. The CJEU has indeed refused to replace the institutions' or the Member States' political choices. Hence, in the case of the *Macedonian Sanctions* referred to above, AG JACOBS proposed some degree of judicial self-restraint, by acknowledging that the “paucity of judicially applicable criteria” should limit the scope and intensity of the judicial review that should be carried out by the Court on what was essentially a decision of a political nature.¹⁶⁷⁹ When deciding on the question whether Greece had made an improper use of the powers provided for in current Article 347 TFEU, the Commission had itself recognized that the intensity of that review should be limited on account of the wide margin of appraisal enjoyed by the Member States under such provision. Accordingly, the AG considered that it was clear that the scope of the judicial review to be exercised under that provision was “extremely limited – not just because of the terminology of that and the preceding Article but also *because of the nature of the subject-matter*.”¹⁶⁸⁰ In fact, Article 347 TFEU recognizes that foreign policy remains essentially a matter for the individual Member States, at least under the original version of the Treaty. Moreover, determining whether a trade embargo is a suitable means of pursuing a

¹⁶⁷³ HINAREJOS, *Judicial Control in the European Union*, 2009, at 60.

¹⁶⁷⁴ Case C-273/97, *Sirdar*, [1999] ECR I-7403.

¹⁶⁷⁵ Case C-285/98, *Kreil*, [2000] ECR I-69.

¹⁶⁷⁶ Case C-186/01, *Dory*, [2003] ECR I-2479.

¹⁶⁷⁷ It seems difficult to draw the line between measures which the CJEU considers as involving a fundamental policy choice and where, consequently, allowing EC rules to apply would have the effect of giving the EC competence to regulate the matter, from those situations where such fundamental policy choice is not at stake and where Member States' action is subject to proportionality review. Such difficulty could explain the different outcomes of the mentioned cases. See HINAREJOS, *Judicial Control in the European Union*, 2009, at 61.

¹⁶⁷⁸ Noting that “une conception aussi large de la protection juridictionnelle devrait conduire à écarter les limitations du contrôle juridictionnel justifiées par la nature de certains actes” see PICOD, “Le droit au juge en droit communautaire”, 1998 at 151, considering that the French theory is not adequate regarding violations of EU law.

¹⁶⁷⁹ Para. 50.

¹⁶⁸⁰ Para. 65.

political dispute between a Member State and a third State is “essentially a decision of a political nature.”¹⁶⁸¹ It has been considered that this Opinion achieved a “difficult balance between the interests at play”¹⁶⁸², by showing the awareness to the CJEU of the sensitive context in which decisions with foreign policy implications need to be taken, and at the same time by refusing to regard the role of the CJEU as subordinate to the political power of the Member States.¹⁶⁸³

Subsequently, in other cases involving the application of autonomous Union anti-terrorism measures, the GC considered that EU standards of protection would apply, not without saying that the Council’s wide discretion in this field meant that judicial review had to be limited:

“[b]ecause the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds *must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power.* That limited review applies, especially, to the Council’s assessment of the factors as to appropriateness on which such decisions are based (emphasis added).”¹⁶⁸⁴

In fact, the application of a marginal review would “amount to a better balance between, on the one hand, respect for the special nature of foreign affairs and, on the other hand, respect for the rule of law and fundamental rights of individuals.”¹⁶⁸⁵ The new possibility to review this kind of restrictive measures pursuant to Article 275 TFEU will allow the Court to strike such balance right.¹⁶⁸⁶

Lastly, in other fields, the CJEU has also taken a cautious approach when considering questions related to the international obligations of the Member States,¹⁶⁸⁷ and when addressing the legal issues raised by the adoption of trade measures with significant foreign and security policy implications under the common commercial policy, as shown by the case-law of the Court on economic sanctions and exports of dual-use goods.¹⁶⁸⁸

¹⁶⁸¹ *Ibid.*

¹⁶⁸² KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, at 81.

¹⁶⁸³ The CJ ended up not having the opportunity to rule on the issue since the case was discontinued, following a political settlement of the dispute.

¹⁶⁸⁴ Case T-228/02, *Organization des Modjahedines du Peuple d’Iran/Council*, [2006] ECR II-4665, para. 159. See also GC’s decisions in Case T-229/02, *PKK and KNK/Council*, [2005] ECR II-539; Case T-327/03, *Al Aqsa/Council*, [2007] ECR II-79; Case T-341/07, *Sison/Council*, [2009] ECR II-3625; Case T-253/04, *Kongra-Gel/Council*, [2008] ECR II-46. See also CANANEIA, “Return to the Due Process”, 2007, at 896 *et seq.*; ECKES, “Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council and UK (OMPI)*”, 2007, at 1117-1129; SPAVENTA, “Fundamental What?”, 2008, at 233-255; TRIDIMAS; GUTIERREZ-FONS, “EU Law, International Law and Economic Sanctions against Terrorism”, 2009, at 901-971; SPAVENTA, “Case T-256/07, *People’s Mojahedin Organization of Iran v. Council*”, 2009, at 1239-1263; VAN DEN BERGHE, “The EU and Issues of Human Rights Protection”, 2010, at 132 *et seq.*

¹⁶⁸⁵ VAN ELSUWEGE, “EU External Action after the Collapse of the Third Pillar Structure”, 2010, at 1000.

¹⁶⁸⁶ This understanding is also in line with the so-called doctrine of the margin of appreciation. Here, the CJEU acknowledges that where a Union institution is called upon to make complex assessments it enjoys a wide measure of discretion, the exercise of which is subject to judicial review restricted to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers and that the competent authority did not clearly exceed the boundaries of its discretion. See Case C-120/97, *Upjohn*, [1999] ECR I-223, para. 34. For further developments see CRAIG, *EU Administrative Law*, 2012, at 400 *et seq.*

¹⁶⁸⁷ See KETVEL, “The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy”, 2006, 81, mentioning Case C-62/98, *Commission/Portugal*, [2000] ECR I-5171.

¹⁶⁸⁸ *Ibid.*, at 82.

IV. It is submitted that, looking at the matter juristically, there is no reason why the conduct of the CFSP or any other political issues should be immune *as a matter of principle* to judicial review.¹⁶⁸⁹ This is not in conformity with the common constitutional traditions of Member States. Foreign affairs are not excluded from the EctHR's jurisdiction, nor are they immune from challenge for violation of fundamental rights in the national context.¹⁶⁹⁰ Moreover, one should add that "the patterns of political (as opposed to judicial) oversight of executive action in the field of foreign policy differ widely between national legal systems, on the one hand, and the Union, on the other".¹⁶⁹¹ At the Union level, there is no effective parliamentary control in matters of foreign policy. The political checks are limited to action within the Council. If it is true that "judicial control must be respectful of the political patterns of representation and accountability"¹⁶⁹² the case can be made for a more extensive role of the CJEU in this respect.

In light of the above, there should be no category of acts excluded *a priori* and automatically from the CJEU's jurisdiction (primary justiciability¹⁶⁹³). Nevertheless, considerations may militate in favour of limiting the grounds of review of certain CFSP measures (secondary justiciability¹⁶⁹⁴). In fact, the inclusion of the CFSP in the TEU and not the TFEU is not merely "an anomalous historical legacy of the pre-existing treaty structure."¹⁶⁹⁵ It emphasizes the separation of the CFSP from other Union policies. This *peculiar* nature should be taken into account in the exercise of jurisdiction. Hence, in so far as the CJEU's exercises jurisdiction over CFSP acts some judicial self-restraint may be advisable. This should be assessed on a casuistic basis, taking into account the subject-matter and the facts of each individual case. In so far as Article 275 TFEU reflects the separate nature of the CFSP *vis-à-vis* other Union policies it should be understood mostly – if not exclusively – as entailing such marginal standard of review.

Hence, firstly, regarding acts of a clear political nature (e.g., acts establishing the main principles and objectives of CFSP), the CJEU should not replace the views of the political institutions. This category of acts should, nonetheless, be considered narrowly. Secondly, regarding other discretionary choices of the institutions (e.g., acts establishing the means to be adopted to achieve those goals), the CJEU should apply its traditional marginal standard of review, or a variation of it, as long as it limits review to certain unreasonable or manifestly absurd choices made by the legislator. Thirdly, regarding all kinds of CFSP acts (political, discretionary and strictly legal ones) the CJEU should always review procedural aspects, notably competences and decision-making issues. Fourthly, for reasons of coherence, the margin of review applied by the CJEU to Member State and Union action should follow the same principles, except where it is reasonably

¹⁶⁸⁹ *Ibid.*, 119.

¹⁶⁹⁰ See also DOUGLASSCOTT, "The Charter of Fundamental Rights as a Constitutional Document", 2004, at 47, noting that in *Abasi* the Court of Appeal held that it had jurisdiction to review, on behalf of a British subject detained at Guantanamo, the nature of the Foreign Secretary's position to make representations (*R. (on the application of Abasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] U.K.H.R.R. 76).

¹⁶⁹¹ HINAREJOS, *Judicial Control in the European Union*, 2009, at 172.

¹⁶⁹² *Ibid.*, at 173.

¹⁶⁹³ DALY, "Justiciability and the 'Political Question' doctrine", 2010, at 163 *et seq.*

¹⁶⁹⁴ *Ibid.*

¹⁶⁹⁵ CREMONA, "The Two (or Three) Treaty Solution", 2012, at 49.

justified that the European or national nature of the case determines otherwise. Finally, the CJEU should create its own “political questions” doctrine. In fact, in a European Union based on the rule of law, it is for the CJEU to decide on the adequate standard of review applicable to each type of Union act. The legitimacy of the Court’s choices is to be found in the reasoning underlying to its decisions, which is by implication subject to public scrutiny.

3. DEALING WITH CASELOAD: THE REFORM OF THE UNION’S JUDICIAL SYSTEM

3.1 From Jurisdictional Subsidiarity to the Limits of the Judicial System

I. It has been suggested that CJEU’s restrictive approach to direct access by individuals to the Union courts is justified by concerns with caseload. It could be argued that broadening access by individuals to the Union courts is indeed susceptible of “*entraver le bon fonctionnement de la juridiction*.”¹⁶⁹⁶ Considering the expansion of Union competences operated under the Lisbon Treaty, and the corresponding extension of the CJEU’s jurisdiction, it may be questioned whether the EU courts are sufficiently equipped and prepared to deal with an additional increase in their workload. That is all the more worrying as the number of cases brought to this date have put the Court “under a great deal of pressure”¹⁶⁹⁷ and the current backlog of cases is already fairly significant.¹⁶⁹⁸

Surely, “the usefulness of a certain procedural form of action cannot be reduced to its numeric expression”¹⁶⁹⁹ and “*une juridiction digne de se nom ne pouvait pas rester guidée, dans ses raisonnements, par tels arguments a-juridiques*.”¹⁷⁰⁰ Nonetheless, regardless of the fact that within the reform of the Union’s system of judicial review issues of effective judicial protection should be put on the top of the agenda, the debate should not take place in isolation: it should be assessed against the backdrop of the system as a whole¹⁷⁰¹ and it should take *reality* into consideration. That is not to say that systemic considerations should take preference in the debate. However, the discussion about broadening access to justice in the EU must take into account the practical impact of reform on the functioning of the judiciary. Thus, although the majority of scholars consider that material and practical concerns cannot constitute a reason to limit access to justice by individuals¹⁷⁰², any discussion or proposals which ignore caseload-related problems run the risk of being deemed unrealistic or impracticable. In fact, it is clear that the right of access to justice cannot be developed and extended indefinitely: “*ouvrir tous les recours à toute personne à tout niveau*,

¹⁶⁹⁶ GILLIAUX, “L’arrêt *Unión de Pequeños Agricultores*”, 2003, at 200.

¹⁶⁹⁷ STRASSER, “Evolution & Effort”, 1995-1996, at 51.

¹⁶⁹⁸ Documenting the growth in the case load see e.g., KOOPMANS, “The Future of the Court of Justice of the European Communities”, 1991, at 16-18; STRASSER, “Evolution & Effort”, 1995-1996, at 55-68; TURNER; MUNOZ, “Revising the Judicial Architecture of the European Union”, 1999, at 1-93; SCHEPEL; BLANKENBURG, “Mobilizing the European Court of Justice”, 2001, at 12 et seq.

¹⁶⁹⁹ ALEXANDRINO, *A estruturação do sistema de direitos, liberdades e garantias na Constituição Portuguesa*, 2006, at 491.

¹⁷⁰⁰ CANEDO, “L’intérêt à agir dans le recours en annulation”, 2000 at 509. CASSIA has held that “[a]ucune barrière imposée à l’accès au prétoire ne peut trouver une justification acceptable pour une raison purement matérielle, telle que celle fondée sur l’encombrement des juridictions (...)”. See CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2003 at 195.

¹⁷⁰¹ HEFFERNAN, “Effective Judicial Remedies”, 2006, at 304.

¹⁷⁰² See *supra* Part I, Chapter 1, Section 1.1.6.

c'est ne pas tenir en compte du principe de réalité."¹⁷⁰³

II. In this context, HARLOW notes that the CJEU uses standing as a "rationing device to keep its case-load down to manageable numbers."¹⁷⁰⁴ By adopting a strict interpretation of standing requirements the CJEU discourages direct actions and encourages individuals to litigate before national courts. Here, where standing is granted generously, national avenues mitigate the strictness of standing requirements under Article 263(4) TFEU. This approach seems to be in accordance with the CJEU's views on the Union's judicial system. In fact, some scholars have considered that the CJEU's case-law on standing is justified by a *certain idée* of the Union's judicial system, according to which the CJEU would in time act "more like a high court of appeals"¹⁷⁰⁵ of Union law, with courts of Member States and other Union courts meanwhile established functioning as courts of first instance. Thus, the CJEU pushes litigation through national courts and encourages the latter to accept all kinds of actions based on Union law and to use the preliminary references mechanism when necessary to enable them to give judgment. Such an approach seems perfectly in line with jurisdictional subsidiarity which basis the Union's judicial architecture. Given the fact that Union law is directly applicable in national legal orders and that national authorities are under an obligation to do their utmost to ensure the effectiveness of Union law and protect Union rights, national judiciaries must constitute the *primary judicial forum* where disputes are resolved. Hence, the limitations imposed on standing of individuals to bring direct actions may be said to be justified by a certain conceptual view of the Union's system of judicial protection. With this approach the CJEU "kills two birds with one stone": it preserves its jurisdiction as the "Supreme Court for the Union"¹⁷⁰⁶ and keeps its caseload to manageable numbers.

Surely, this view has several drawbacks. At the outset, it has "the effect of drawing the attention to the disparity of national standing requirements, provoking demands for harmonization."¹⁷⁰⁷ More significantly, as seen above, whereas the decentralized model of administration of justice seems to function rather well regarding questions of interpretation of EU law, the same cannot be said about questions of validity. In fact, within the framework of the centralized model of control of legality of Union law – a product itself of the CJEU's own case-law – this approach has given rise to significant "*defizite des Individualrechtsschutzes*."¹⁷⁰⁸

III. The issue of caseload is common to pretty much every judicial system in Europe, and probably in the world. It has been said that "in sheer numbers of years, the time problem for

¹⁷⁰³ ROCHÈRE, "Droit au juge", 1996, at 139, 141. Noting that the caseload of the CJEU remains an important issue and prevents any radical liberalisation of the standing rules despite the requirement of effective judicial protection see PARFOURU, "Locus Standi of Private Applicants under the Article 230 EC Action for Annulment", 2007, at 364.

¹⁷⁰⁴ HARLOW, "Access to Justice as a Human Right", 1999, at 194.

¹⁷⁰⁵ RASMUSSEN, "Why is Article 173 Interpreted against Private Plaintiffs?", 1980, at 122.

¹⁷⁰⁶ TRIDIMAS, "The European Court of Justice and the Draft Constitution", at 113.

¹⁷⁰⁷ HARLOW, "Access to Justice as a Human Right", 1999, at 194.

¹⁷⁰⁸ VON DANWITZ, "Die Garantien effektiven Rechtsschutzes im Recht der Europäischen Gemeinschaft", 1993, at 1111.

parties seeking justice is less European than national.”¹⁷⁰⁹ The EU system is, however, said to be “*au bord de l’asphyxie*.”¹⁷¹⁰ Without being too dramatic one could say that if the average reasonable amount of time that the CJEU should be handling decisions is one year¹⁷¹¹, than the Court is clearly not meeting the expectations.¹⁷¹² The reasons for such overload are well known and have been fully documented elsewhere.¹⁷¹³ Besides the general fact that “societies are more litigation-oriented”¹⁷¹⁴ and make “increasing demands on the delivery of justice”¹⁷¹⁵ – which has brought about a “litigation explosion”¹⁷¹⁶ resulting in an unprecedented caseload for courts and tribunals, and forcing the objective of providing ideal justice to be balanced against other interests and constraints limiting the effectiveness of the judicial system¹⁷¹⁷ – there are specific European causes for the current situation.¹⁷¹⁸ Among them, scholars commonly point to the enlargement of the EU¹⁷¹⁹; the expansion of competences of the EU resulting from the Treaties¹⁷²⁰ and from the case-law of the CJEU¹⁷²¹; the extension of the Court’s jurisdiction¹⁷²²; the increasingly complexification and specialization of Union law¹⁷²³; the success of EU harmonization initiatives¹⁷²⁴; the growing awareness of Union law by lawyers¹⁷²⁵; and the language diversity which poses “bottleneck problems of translation.”¹⁷²⁶

In face of this “litigation boom”, some scholars draw attention to the limits of the judicial system and the adjudicative process. In fact, defining the role for law means also defining a role for the adjudicative process, and that requires recognizing its *limits*.¹⁷²⁷ KOMESAR notes that all forms of law depend on imperfect structures and involve difficult institutional choices.¹⁷²⁸ Thus, to understand what law is or ought to be, one must consider both supply and demand, *i.e.* both the

¹⁷⁰⁹ RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1078.

¹⁷¹⁰ VANDERSANDEN, “Le système juridictionnel communautaire après Nice”, 2003, at 3.

¹⁷¹¹ As suggested by RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1083.

¹⁷¹² The statistics are available in the CJEU’s website: www.curia.europa.eu.

¹⁷¹³ See *e.g.*, KOOPMANS, “The Future of the Court of Justice of the European Communities”, 1991, at 18 *et seq.*; CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001, at 183 *et seq.*

¹⁷¹⁴ EECKHOUT, “The European Courts after Nice”, 2003, at 323.

¹⁷¹⁵ *Ibid.*, at 325.

¹⁷¹⁶ KOMAREK, “In the Court(s) We Trust?”, 2007, at 486.

¹⁷¹⁷ *Ibid.*

¹⁷¹⁸ See LENAERTS, “The Unity of European Law and the Overload of the ECJ”, 2006, at 213 *et seq.*

¹⁷¹⁹ See *e.g.*, ROLDÁN BARBERO, “La reforma del poder judicial en la Comunidad Europea”, 2001, at 80; LOUIS, “The Court in the Constitution”, 2006, at 137; VESTERDORF, “A Constitutional Court for the EU?”, 2006, at 86; RASMUSSEN, “Present and Future European Judicial Problems after Enlargement and the Post-2005 Ideological Revolt”, 2007, at 1681.

¹⁷²⁰ RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1081; LOUIS, “The Court in the Constitution”, 2006, at 137.

¹⁷²¹ EECKHOUT, “The European Courts after Nice”, 2003, at 323, 324, speaking about a “hidden-expansion” coming from case-law itself. The broadening of entities which can refer questions to the CJEU also contributes to increase the caseload of the CJ. See KOVAR, “L’évolution de l’article 177 du traité CE”, 1994, at 47-48; USHER, “Les renvois à titre préjudiciel”, 1994, at 62, noting the expansion of the geographical scope of preliminary references, as the CJEU has also accepted references from the French Polynesia (Joined Cases C-100 and 101/89, *Kaefer and Procacci/French State*, [1990] ECR I-4647) and the Island of Man (Case C-355/89, *Department of Health and Social Security/Barr and Montrose Holdings*, [1991] ECR I-3479).

¹⁷²² VESTERDORF, “A Constitutional Court for the EU?”, 2006, at 86.

¹⁷²³ EECKHOUT, “The European Courts after Nice”, 2003, at 324.

¹⁷²⁴ CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001, at 184.

¹⁷²⁵ *Ibid.*

¹⁷²⁶ RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1081.

¹⁷²⁷ KOMESAR, *Law’s Limits*, 2001, at 3.

¹⁷²⁸ *Ibid.*, at 10.

ability of courts to deliver legal protections and the need for these protections¹⁷²⁹: that means understanding and choosing among alternative decision makers such as courts, markets, communities, and political processes.¹⁷³⁰ Analyzing law, rights, and the role of courts in the light of supply and demand issues means coping with the reality of institutional behaviour. In this context, courts should be deemed most needed where alternative decision makers such as political processes, markets, and informal communities work least well.¹⁷³¹

In addition, all nations around the world must face the reality of societal institutions operating at high numbers and complexity. The rule of law depends on the workings of the courts and the courts cannot be assumed to be “motionless black boxes big enough”, able enough to deliver society’s needs for clarity, stability, and protection against the excesses of government. The rule of law must be built upon the institutions of law, and its reality and validity are dependent upon the real workings of and choices among several institutions.¹⁷³² When and whether the courts and, therefore, the rule of law are the best strategies for providing these goals as any others is the essential issue and it can be adequately addressed only by considering the degree and form of political malfunction with which a nation is faced and the abilities and resources of the real adjudicative process available to deal with the issue.¹⁷³³

KOMESAR points to three distinctive structural elements of the court system when compared to other institutions as the political process and the market. First, the adjudicative process is more formally defined and has more formal requirements for participation than the other two institutions. Second, the adjudicative process is much smaller – its physical resources and personnel are far fewer – than the political or market processes. More importantly, it is far more difficult to increase in size. Third, judges, the central officials of the judicial process, are more independent from the general population than either their market or political counterparts. These three basic characteristics – higher threshold access cost, limited scale, and judicial independence – are related.¹⁷³⁴ Two other facets of the adjudicative process have to be taken into consideration: competence and scale. Competence means the ability of trials (the adversarial process) and of triars (judges and juries) to investigate, understand, and make the substantive social decisions that may be presented to them. Scale means the resources or budget available to the judiciary and the constraints on the expansion of the size of the adjudicative process. Scale and competence interact with each other and with the determinants of litigation (stakes and costs) to determine the

¹⁷²⁹ In fact, if one focus solely on questions of supply and, therefore, solely on the characteristics of the courts, one will often waste the courts by using them where they are least needed. By contrast, if one focus solely on the demand side of the law and on the failings of the other decision-making institutions, one will set tasks for law and courts that far exceed their capacity. See *ibid.*, at 3.

¹⁷³⁰ *Ibid.*

¹⁷³¹ KOMESAR notes that the literature is replete with descriptions of the malfunction biases, and evils of the market or the political process and, in response calls for judicial intervention. This is the demand side approach to the analysis of law, rights, and the judicial role. But there is also a supply side approach that stresses the failings any malfunctions of the courts and calls for decreased judicial activity and a greater role for markets and political processes. For what it’s worth, neither judicial activism nor judicial restraint can be supported by an examination of the attributes of only one institution, i.e. by single institutionalism. Because institutions move together and tend to deteriorate as numbers and complexity increase, revelations even of severe institutional malfunction are of limited and decreasing relevance to public policy and law: the only real way to define the role of the courts is institutional comparison. See *ibid.*, at 175, 176.

¹⁷³² *Ibid.*, at 173.

¹⁷³³ *Ibid.*

¹⁷³⁴ KOMESAR, “Comparative Constitutional Law and Comparative Institutional Analysis”, 2011, at 5.

institutional ability of the adjudicative process.¹⁷³⁵

IV. Nonetheless, this approach works as a “two way street.” In fact, if one needs to ask courts to expand their role, one should stress the demand side and show how the alternatives are working badly. *Per contra*, if one wants courts to back-off one should stress the supply side and focus on the flood of cases, the substantive difficulty of decisions and the dangers of adjudicative mistakes.¹⁷³⁶ Moreover, if all institutions deteriorate when numbers and complexity are high, one could argue that the decision on the allocation of decision-making cannot depend on this factor *per se*. In addition, it is worth noticing that comparative institutional analysis has focused mainly on the discussion regarding the scope or standard of review that courts should apply. Hence, scholars dwell on the need for judicial activism or judicial restraint.¹⁷³⁷ However, any analogy with the debate on the admissibility of judicial actions has to be done carefully as it entails the risk of jeopardizing the fundamental right of access to justice.¹⁷³⁸

Nonetheless, the idea that the court system is not unlimited and cannot provide for an adequate and complete answer to every case must be taken into consideration in the discussion on access to justice in the EU. Although this issue has a predominant *factual* instead of *legal* nature, it is far from being strictly a practical problem. In fact, caseload issues pose legal questions. At the outset, they can give rise to conflicts between the “sub-rights” included in the right to effective judicial protection: notably, the right of access to justice and the right to justice within a reasonable time. This “intra-conflict” has already given rise to litigation in Strasbourg.¹⁷³⁹ Furthermore, delays can reach a point where justice is effectively denied.¹⁷⁴⁰ At the EU level, time constraints are particularly worrisome regarding preliminary references as the time spent here adds up to the time taken by national proceedings.¹⁷⁴¹ Also the quality of decisions is bound to suffer.¹⁷⁴² Hence, *more*

¹⁷³⁵ *Ibid.*, at 7. KOMESAR notes that recent work on the CJEU’s shows a court responding with creative judicial activism both to malfunction in the political processes of the states of Europe and to the weakness of the political branches of the European Union. Yet increasing strains on the resources and competence of the CJEU, as well as the increasing ability of the European Union political branches, may be changing the role of the CJEU. See KOMESAR, *Law’s Limits*, 2001, at 183, 184.

¹⁷³⁶ KOMESAR, *Law’s Limits*, 2001, at 178.

¹⁷³⁷ MADURO has pointed to the need for comparative institutional analysis within the context of current Article 36 TFEU. In this respect, the author stresses that: “[t]he capacity of the courts is *limited by their structure* (measures brought to court are supposed to be exceptional events and not part of an everyday participation in the regulatory process). Moreover, they often lack expertise and have high *administrative costs*, are subject to information problems (information is closely dependent on those who are sufficiently organised to participate in the judicial process), and may decide issues without hearing some of the affected interests (some interested parties are unable to participate for lack of standing). Above all, they face questions of legitimacy, which has consequences for the acceptance of their decisions and their authority (emphasis added).” See MADURO, “Reforming the Market or the State?”, 1997, at 60. This approach has echoes in the CJEU’s doctrine of the margin of appreciation. It is argued here that courts are not well-equipped or well-placed to undertake *de novo* review: “[t]he finding and evaluation of the facts is quintessentially a matter accorded to the initial decision-maker, who will normally have dealt with many such cases and hence have developed an understating and expertise in the relevant area that a generalist court cannot match.” See CRAIG, *EU Administrative Law*, 2012, at 400 *et seq.* If courts would make *de novo* rulings in factually complex cases this would seriously overburden courts. This fact is acknowledged by Union courts which repeatedly considered that their role is not to substitute decisions on the facts.

¹⁷³⁸ Accordingly, CRAIG has said that alternatively to limiting access, “another more legitimate mechanism of docket control is by limiting the intensity of judicial oversight.” See CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001, at 187.

¹⁷³⁹ See BERMS, “Conflicting Human Rights”, 2005, at 305 *et seq.*

¹⁷⁴⁰ SHELTON, “Ensuring Justice with Deliberate Speed”, 2000, at 338.

¹⁷⁴¹ Scholars generally consider that the preliminary rulings mechanism is “*víctima de su propio éxito*”. See VAN GERVEN, “The Role and Structure of the European Judiciary Now and in the Future”, 1996, at 211; ROLDÁN

access to justice will not necessarily mean *better* justice. As DE WITTE has put it, “increasing the possibility for some parties to have access to the European Courts would be of no avail if all parties had to wait even longer than today for a ruling from those Courts.”¹⁷⁴³ In this context, the need for judicial filters and judicial discretion is nothing new. However, courts cannot *decide to not decide* cases merely on the basis of caseload.¹⁷⁴⁴ As RASMUSSEN has noted, the time consumption question “is wrapped in tissues of legitimacy”: it is “not just a matter of logic and calculations” and “not a zero-sum game.”¹⁷⁴⁵

Thus, if it is “*indudable que una justicia lenta es una justicia menos justa*”, it is pivotal to combine swift justice with the “*garantías procesales que el mismo Tribunal de Justicia ha comprendido y estimulado para el orden interno.*”¹⁷⁴⁶ In light of these considerations, the admission that “law has limits” does not necessarily require a restrictive approach to direct access by individuals to the CJEU. Standing should not serve as a main tool to control caseload. It should be construed based on the principle of effective judicial protection and on the role of citizens and civil society in the legal system. These principles should not be sacrificed because of workload problems. In fact, the *rationale* underlying the establishment of *locus standi* requirements – both in administrative and constitutional judicial systems – is merely to avoid an *abuse* of the fundamental right of access to justice and to define a *balance* between the judicial power and the prerogatives of the legislative and executive powers.¹⁷⁴⁷

3.2 A *Certiorari* Approach for the Union Courts: *de Minimis non Curat* the CJEU?

I. As growing caseload is a common feature to many legal systems¹⁷⁴⁸, courts and legislatures have found ways of ensuring that “frivolous cases are identified early and eliminated quickly so that meritorious claims can be fully considered.”¹⁷⁴⁹ Considering the specific features of the Union’s judicial architecture, where the CJEU deals on a daily basis with high technical legal questions, which are not only not “crystallised”¹⁷⁵⁰ at the national level but in certain issues cannot be so¹⁷⁵¹, scholars have questioned “how on earth can the ECJ be able to cope with this kind of job and ensure high quality in its constitutional rulings, in the absence of some form of control over its

BARBERO, “La reforma del poder judicial en la Comunidad Europea”, 2001, at 81.

¹⁷⁴² WEILER, “Epilogue: the Judicial *Après Nice*”, 2001, at 219; VESTERDORF, “A Constitutional Court for the EU?”, 2006, at 85.

¹⁷⁴³ WITTE, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, 1999, at 887.

¹⁷⁴⁴ As it is also not possible to reduce time limits sacrificing rights to defence. See EVERLING, “L’avenir de l’organisation juridictionnelle de l’Union européenne”, 1994, at 21.

¹⁷⁴⁵ RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, 37(5), 1078. In Case C-461/03, *Gaston Schul Douane-expéditeur*, [2005] ECR I-10513, the CJEU held that: “[re]ducing the length of the proceedings cannot serve as justification for undermining the sole jurisdiction of the Community Courts to rule on the validity of Community law (para. 23).” The creation of the General Court was motivated by concerns with caseload but also with effective judicial protection of individuals. See e.g., ROLDÁN BARBERO, “La reforma del poder judicial en la Comunidad Europea”, 2001, at 89 *et seq.* See *supra* Part I, note 867.

¹⁷⁴⁶ ROLDÁN BARBERO, “La reforma del poder judicial en la Comunidad Europea”, 2001, at 92.

¹⁷⁴⁷ CASSIA, *L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, 2003, at 30.

¹⁷⁴⁸ SHELTON, “Ensuring Justice with Deliberate Speed” 2000, at 338.

¹⁷⁴⁹ *Ibid.*, 337.

¹⁷⁵⁰ EECKHOUT, “The European Courts after Nice”, 2003, at 322.

¹⁷⁵¹ Noting that the Treaties contain much more than national constitutions, which explains the role of the CJEU as a constitutional and supreme court see LENAERTS, “The Rule of Law and the Coherence of the Judicial System of the European Union”, 2007, at 1651.

own judicial diary.”¹⁷⁵² In fact, “the experience of other supreme courts has shown that once the number of cases exceeds a certain, indeterminate level, the ability of lower courts to absorb jurisprudence declines, the perceived significance of each decision drops, and the respect for and reputation of the supreme court as the ultimate arbiter of the law disintegrates.”¹⁷⁵³ This may already be happening with the CJEU. Thus, although the Union’s judicial architecture is similar to legal systems where there is a supreme court, these courts have more control over their work than the CJEU, through systems of *certiorari* or leave to appeal.

As is well known, *certiorari* mechanisms allow for courts to control their own workload. They are typically adopted in common law systems, usually at the level of high courts, and allow for the re-examination of actions of a trial court, or inferior appeals court. In Roman law, an action of *certiorari* was suggested in terms of reviewing a case although the term was also used in writing to indicate the need or duty to inform other parties of a court’s ruling. Historically, in England and Wales, *certiorari* was issued to bring the record of an inferior court into the King’s Bench for review or to remove indictments for trial in that court. It involves now a general remedy to bring decisions of an inferior court or tribunal or public authority before the superior court for review so that the court can determine whether to quash such decisions.¹⁷⁵⁴

Notwithstanding, the most famous *certiorari* system is the one adopted in the U.S.A. Hence, in the European discussion on access to the CJEU “commentators look at the US system with interest as it allows the Supreme Court control of its docket.”¹⁷⁵⁵ Here, someone who is dissatisfied with the ruling of one of the court of appeals can request the U.S. Supreme Court to review the decision. This request is named a petition for writ of *certiorari* and the Supreme Court can either refuse to take the case or grant writ of *certiorari*. Review on writ of *certiorari* is not a matter of right, but of judicial discretion, and according to Rule 10 of the Rules of the U.S. Supreme Court a petition for writ of *certiorari* will be granted only for compelling reasons.¹⁷⁵⁶ Before the Evarts Act of 1891¹⁷⁵⁷, the cases that could reach the Supreme Court were heard *as of right*, meaning that the Court was required to issue a decision in each of those cases. As the United States expanded in the nineteenth century, the federal judicial system became increasingly strained, with the Supreme Court having a backlog several years long. The Evarts Act solved some of these problems by

¹⁷⁵² EECKHOUT, “The European Courts after Nice”, 2003, at 323.

¹⁷⁵³ STRASSER, “Evolution & Effort”, 1995-1996, at 53.

¹⁷⁵⁴ *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147; [1969] 2 WLR 163.

¹⁷⁵⁵ CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001, at 199. See also RASMUSSEN, “Why is Article 173 Interpreted against Private Plaintiffs”, 1980, at 126; STRASSER, “Evolution & Effort”, 1995-1996, at 81; SCOREY, “A New Model for the Communities’ Judicial Architecture in the New Union”, 1996, at 231; JACQUÉ, “L’avenir de l’architecture juridictionnelle de l’Union”, 1999, at 448; HEFFERNAN, “A European *Certiorari* Revisited”, 2003, at 367 *et seq.*; HEFFERNAN, “Community Courts Post-Nice”, 2003, at 907 *et seq.*; ALLOT, “Preliminary Rulings”, 2005, at 545; BERMANN, “The ‘Highest Court’ in Federal Systems”, 2006, 91-96; ROSENFELD, “Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court”, 2006, 33-64. Considering that AGs might have a decisive role in the selection of cases should a *certiorari* system be introduced see VAN GERVEN, “The Role and Structure of the European Judiciary Now and in the Future”, 1996, at 222, although the author considers that such system should only be adopted if other measures for the Court to control its docket fail. In Canada, where the judicial system is closer to the EU than the U.S.A., the Canadian Supreme Court also applies a *certiorari* mechanism. See MACLACHLIN, “The Structure and Role of a Supreme Court in a Federal System”, 2006, 145-152.

¹⁷⁵⁶ The U.S. Supreme Court’s *certiorari* process is covered in Rules 10-16 of Rules of the U.S. Supreme Court.

¹⁷⁵⁷ Evarts Act, 26 Stat. 826, 1891. For further developments see FALLON; MELTZER; SHAPIRO, *Hart and Wechsler’s, The Federal Courts and the Federal System*, 2003, at 1552.

transferring most of the Supreme Court's direct appeals to the newly created circuit courts of appeals, whose decisions in those cases would in certain cases be final. Later, the Judiciary Act of 1925 cut back dramatically on obligatory Supreme Court review and subsequent legislation consolidated the movement towards reduction of the right of appeal to the Supreme Court.¹⁷⁵⁸ However, the Supreme Court did not completely give up its judiciary authority, because it gained the ability to review the decisions of the courts of appeals at its discretion through writ of *certiorari*. Under this system, scholars note that 95% of the cases brought to the U.S. Supreme Court are dismissed on the ground that they are "uncertworthy", i.e. they do not raise issues of general importance or lead to major injustice.¹⁷⁵⁹

II. Truth be said, a *certiorari* approach is not entirely unknown to the EU legal order. As seen above, for instance, in *Extramet*, *Codorniu*, and *Les Verts* the CJEU came to positive decisions on admissibility most probably because it *felt* that those cases *deserved* a decision on the merits. Some scholars have clearly held that those decisions were delivered because of the substantive *injustice* stemming from the cases.¹⁷⁶⁰ Hence, it has been considered that regarding actions for annulment the CJEU decides firstly if it wants to hear the case, and subsequently tries to justify its decision to admit (or not) the action. AG MADURO seems to have implicitly suggested such an approach in *Spain/Eurojust*, where he considered that the action should be deemed admissible in so far as it dealt with linguistic diversity, "an essential requirement of Union law" and "one of the essential aspects of the protection granted to the national identities of the Member States."¹⁷⁶¹ Some scholars have suggested that regarding the challenges of EU regulations "in those rare cases where it is reasonably arguable that a regulation violates a general principle of Union law, private applicants should *always* be able to challenge them."¹⁷⁶² Also, as seen above, in English law the applicants' sufficient interest to challenge an act of a public authority is determined also in light of whether or not they have a *strong case on the merits* and there is a growing trend to admit that the greater the merit of the petition, the lesser the degree of individual involvement required to bring an action for judicial review.

Certiorari mechanisms are certainly very attractive for overburdened courts, as they allow them the privilege to "decide what to decide"¹⁷⁶³, and thereby provide them with some "breathing space."¹⁷⁶⁴ However, in the discussion on the possibility of adopting a European *certiorari* one should not disregard the profound differences between the American and European judicial

¹⁷⁵⁸ See *ibid.*, at 1554. Nonetheless, the U.S. Supreme Court still retains albeit limited some appellate jurisdiction. See *ibid.*, at 1580.

¹⁷⁵⁹ MANCINI, "The U.S. Supreme Court and the European Court of Justice", 1997, at 7. A minimum of four of the nine Justices are required to grant a writ of *certiorari*, which is referred to as the "rule of four." See FALLON; MELTZER; SHAPIRO, *Hart and Wechsler's, The Federal Courts and the Federal System*, 2003, at 1608, 1609; JACKSON, TUSHNET, *Comparative Constitutional Law*, 2006, at 553.

¹⁷⁶⁰ See *supra* Part I, Chapter 1, Section 1.1.3(c)(ii).

¹⁷⁶¹ Para. 24.

¹⁷⁶² See ALBORS-LORENS, *Private Parties in European Community Law*, 1996, at 229. The author seems to suggest that in cases where fundamental principles of Union law are invoked no *locus standi* requirements should apply. See *supra* Chapter 2, Section 2.1.4.

¹⁷⁶³ MANCINI, "The US Supreme Court and the European Court of Justice", 1997, at 9.

¹⁷⁶⁴ VESTERDORF, "A Constitutional Court for the EU?", 2006, at 87.

systems. The crucial one is “that the U.S. system is an appellate system whereas the EU is a referral one.”¹⁷⁶⁵ This means that in the U.S.A., if the Supreme Court declines to hear a case, there will still be a decision emanating from federal courts on the point of federal or constitutional law which is in issue. Conversely, if the CJEU decides not to hear a case, there will be no Union court decision on that matter. Surely, national courts are deemed to be Union courts. However, the introduction of a *certiorari* mechanism in the EU would mean that, in addition to the *CILFIT*’s exceptions, the national judge could decide in definitive terms a point of EU law.

More importantly, *certiorari* mechanisms are usually established within the framework of judicial appeals.¹⁷⁶⁶ They serve to limit the possibilities of a case being reviewed by a higher court, but they do not apply to first instance jurisdiction. The reason for that lies obviously with the need to ensure *as a matter of right* that all cases can be brought before a court of law at least one time.¹⁷⁶⁷ Furthermore, *certiorari* usually operates at a second level of appeals, so that the issue has been reviewed by two different courts before. Thus, in the U.S.A., in states which do not have intermediate appellate courts, supreme courts operate under a *mandatory review* regime in order to preserve the right to one appeal.¹⁷⁶⁸ Moreover, in the field of administrative law, where the common law writ of *certiorari* was historically used by lower courts in the U.S. for judicial review of decisions made by an administrative agency after an adversarial hearing, some states have retained this use of the writ of *certiorari* in state courts while other states have replaced it with statutory procedures. In the federal courts, this use of *certiorari* has been abolished and replaced by a civil action under the Administrative Procedure Act in a United States district court or in some circumstances a petition for review in a United States court of appeals.¹⁷⁶⁹ In light of these considerations, EVERLING has rightfully noticed that, in the EU, *certiorari* mechanisms cannot be adopted in first instance proceedings:

“[s]i la Cour pouvait rejeter quelques recours directs, les requérants concernés n’auraient aucune possibilité d’agir en justice. Ce serait contraire au principe de l’Etat de droit... Les juridictions nationales, en tout cas celles d’Allemagne, voudraient certainement essayer de combler une telle lacune, ce qui pourrait mener à une érosion de l’unité du droit communautaire.”¹⁷⁷⁰

III. Hence, it is submitted that any *certiorari* approach to be adopted at the Union level must take into account the particular features of the Union’s judicial system. In this context, there are

¹⁷⁶⁵ CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001, at 199, 200, considering that this does not mean that the idea should be ruled out: it means only that the analogies with appellate systems must be treated with caution. See also HEFFERNAN, “A European *Certiorari* Revisited”, 2003, at 379.

¹⁷⁶⁶ They operate at the appellate level, which means that issues have been previously debated in court before reaching them. See EECKHOUT, “The European Courts after Nice”, 2003, at 323.

¹⁷⁶⁷ Noting that *certiorari* mechanisms seem to be viable only in appellate systems see HEFFERNAN, “Community Courts Post-Nice”, 2003, at 928-932.

¹⁷⁶⁸ Moreover, mandatory review remains in place in states where the death penalty exists.

¹⁷⁶⁹ The Administrative Procedure Act provides that any person is entitled to judicial review of agency action if he/she suffers *legal wrong* or is *adversely affected or aggrieved* within the meaning of a relevant statute. Based on this provision, the U.S. Supreme Court considers that a party must be “injured in fact” and must show that “the interest he is seeking to protect” is “arguably within the zone of interests protected or regulated by the statute in question.” See STEIN; VINING, “Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context”, 1976, at 235 *et seq.*; FALLON; MELTZER; SHAPIRO, *Hart and Wechsler’s, The Federal Courts and the Federal System*, 2003, at 157 *et seq.*

¹⁷⁷⁰ EVERLING, “L’avenir de l’organisation juridictionnelle de l’Union européenne”, 1994, at 24.

three factors that must be taken into consideration in any CJEU's decision *not to decide* a case: (i) if there has been a previous judicial decision in that case; (ii) if, in case of refusal, there will be a gap judicial of protection; and (iii) if the case requires a decision on the merits, given its implications either for the individual or the public interest.¹⁷⁷¹

In light of these criteria, the possibility of *certiorari* in actions for annulment seems very remote.¹⁷⁷² Also, regarding preliminary references on validity, such an approach could be problematic as there may be a problem of access to justice.¹⁷⁷³ By contrast, a *certiorari* approach would be admissible regarding appeals from the GC's decision to the CJ.¹⁷⁷⁴ Also, within the context of actions for infringement or actions for damages, if the breach is deemed rather unimportant or individuals have been already somehow compensated, *certiorari* could make sense.

Nonetheless, as mentioned above, the pressure on the CJEU's docket comes primarily from the preliminary reference procedure.¹⁷⁷⁵ In this context, it is submitted that a *certiorari* approach could be adopted regarding preliminary rulings on *interpretation*, as in these cases a primary judicial intervention by a court having full jurisdiction to decide on the merits of the case is by definition ensured.¹⁷⁷⁶ Preliminary references must be seen as a deviation from the normal organization of the judicial process, and not as its natural component.¹⁷⁷⁷ National courts are *true* Union courts and should be called upon to make EU law decisions by themselves without the mandatory assistance from the CJ.¹⁷⁷⁸ It is worth remembering that preliminary references were modelled according to procedures dealing with constitutional questions only, important because of their very nature, and not questions concerning the interpretation of ordinary civil, criminal, or administrative legislation.¹⁷⁷⁹ However, currently there is no mechanism ensuring that only *important* questions arise before the CJEU, thereby reducing its workload regarding preliminary

¹⁷⁷¹ Hence, in cases of concrete norm control, the German Constitutional Courts submits the referrals by ordinary courts to a strict scrutiny as to the relevance of the question posed by an ordinary court for the solution of the case pending. This includes search for alternative interpretations that avoid the constitutional conflict. Ordinary courts are put under a high burden of argumentation. Regarding constitutional complaints German law requires that the Court has to accept the case if the constitutional issue has not yet been decided or if the dismissal would cause great harm to the complainant. See GRIMM, "Constitutional Issues in Substantive Law", 2006, at 280, 281.

¹⁷⁷² *Per contra*, suggesting that the direct and individual concern tests should be changed to a test based on a *sufficient interest* with an appropriate filtering mechanism to ensure that only appropriate cases are dealt with by the CJEU see LORD DANIEL BRENNAN, "The Future of the European Court of Justice", 2006, at 80.

¹⁷⁷³ Notwithstanding, should the CJEU decide to revoke *Foto-Frost*, it could be argued that the CJEU could decline jurisdiction, unless it considers that the issue deserves a decision on the merits, given for instance the increasing number of national decisions finding a Union measure invalid.

¹⁷⁷⁴ See, e.g., EVERLING, "L'avenir de l'organisation juridictionnelle de l'Union européenne", 1994, at 24.

¹⁷⁷⁵ EECKHOUT, "The European Courts after Nice", 2003, at 325. Analysing docket pressure of preliminary references see e.g., SWEET; BRUNELL, "The European Court, National Judges, and Legal Integration", 2000, at 117-127; TRIDIMAS "Knocking on Heaven's Door", 2003, at 9-50.

¹⁷⁷⁶ See also CRAIG; BURCA, *EU Law*, 2011, at 477 *et seq.* For discussion on filtering mechanisms in preliminary references see BEBR, "The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty", 1988, at 681; EVERLING, "L'avenir de l'organisation juridictionnelle de l'Union européenne", 1994, at 24, 25; USHER, "Les renvois à titre préjudiciel", 1994, at 63; STRASSER, "Evolution & Effort", 1995-1996, at 77 *et seq.*; ARNULL, "Judicial Architecture or Judicial Folly?" 1999, at 519; RASMUSSEN, "Remedying the Crumbling EC Judicial System", 2000, at 1092; CRAIG, "The Jurisdiction of the Community Courts Reconsidered", 2001, at 197; EECKHOUT, "The European Courts after Nice", 2003, at 325; TRIDIMAS "Knocking on Heaven's Door", 2003, at 37.

¹⁷⁷⁷ KOMAREK, "In the Court(s) We Trust?", 2007 at 476.

¹⁷⁷⁸ Also stressing the need to rely on national courts as Union courts see SCOREY, "A New Model for the Communities' Judicial Architecture in the New Union", 1996, at 231.

¹⁷⁷⁹ KOMAREK, Jan, "In the Court(s) We Trust?", 2007 at 476.

references.¹⁷⁸⁰ Every national court or tribunal may address the CJ regardless of the importance of the question referred. Thus, it has been suggested that preliminary references are “another infant disease”¹⁷⁸¹ of the Union legal order.

In light of the foregoing one could argue that if in 1991 it could be doubted if the Union legal system had achieved a degree of maturity and stability that could justify the introduction of a *certiorari* approach¹⁷⁸², meanwhile the time may have come to reflect on whether the CJ should give a ruling on the interpretation of every provision of EU law or whether its role should be more that of a genuine “Supreme and Constitutional Court” of the Union, in a more mature legal system.¹⁷⁸³ MANCINI considered that “if the Court ever acquires the power to indulge in agenda-setting, the customs classification of shoes and sandals will not be high on the agenda.”¹⁷⁸⁴ AG JACOBS lost patience not with shoes and sandals but with pyjamas and night dresses.¹⁷⁸⁵ In light of these considerations, CRAIG suggested that the CJ should concentrate on questions which are *fundamental* from the point of view of the uniformity and development of Union law.¹⁷⁸⁶ STRASSER discussed the possibility of CJEU limiting admissibility to cases which have a *significant impact* on Union law.¹⁷⁸⁷ VESTERDORF spoke about *truly important questions* which involve the safeguarding of consistency of EU law and main constitutional issues.¹⁷⁸⁸

Thus, it is submitted that regarding questions of interpretation of EU law, more trust should be put in national courts.¹⁷⁸⁹ It could be said that there is an obvious risk for the unity of Union law. However, not only in EU law “the goal of uniformity is pushed to absurdity”¹⁷⁹⁰ but also “more precedents do not mean necessarily more uniformity.”¹⁷⁹¹ To begin with, problems seem to stem from an “unclear meaning of uniformity in general.”¹⁷⁹² Furthermore, scholars have appealed to the differentiation in EU law¹⁷⁹³ and have questioned the aim of uniformity in absolute terms as

¹⁷⁸⁰ *Ibid.*, at 484.

¹⁷⁸¹ ALLOT, “Preliminary Rulings”, 2000, at 538.

¹⁷⁸² KOOPMANS, “The Future of the Court of Justice of the European Communities”, 1991, at 30.

¹⁷⁸³ KOMAREK, “In the Court(s) We Trust?”, 2007, at 479. See also Opinion of AG JACOBS in C-136/00, *Danner*, [2002] ECR I-8147, at 38.

¹⁷⁸⁴ MANCINI, “The US Supreme Court and the European Court of Justice”, 1997, at 7.

¹⁷⁸⁵ See paras. 16-21 of the Opinion of the AG in Case C-338/95, *Wiener/Hauptzollamt Emmerich*, [1997] ECR I-6495.

¹⁷⁸⁶ It could be said that the CJEU already applies some kind of filters regarding the admissibility of preliminary references, by refusing questions which are merely hypothetical, irrelevant to the resolution of the case, not articulated enough to enable the CJ to give a meaningful response, and whose factual or legal framework is insufficient. For a critical overview see e.g., BARAV, “Le renvoi préjudiciel communautaire”, 1997, at 14; O’KEEFE, “Is the Spirit of Art. 177 Under Attack?”, 1998, at 509-536; SCHEPEL; BLANKENBURG; “Mobilizing the European Court of Justice”, 2001, at 40. However, one should note the CJEU has not so far used its powers to control de admissibility of references as “a means of introducing *certiorari* through the back door.” The CJEU remains “a highly deferential and welcoming court.” See TRIDIMAS, “Knocking on Heaven’s Door” 2003, at 22. Admissibility control is mostly exercised to filter out the cases where the CJ cannot give a meaningful reply and not as a mechanism to reduce the case-law.

¹⁷⁸⁷ STRASSER, “Evolution & Effort”, 1995-1996, at 77.

¹⁷⁸⁸ VESTERDORF, “A Constitutional Court for the EU?”, 2006, at 87.

¹⁷⁸⁹ See also HARLOW, “A Common European Law of Remedies”, 2000, at 82; KOMAREK, “In the Court(s) We Trust?”, 2007, at 467-491; EDWARD, “CILFIT and *Foto-Frost* in their historical and procedural context”, 2010, at 183. Also noting that the full accomplishment of the role of national judges as “*juges de droit commun*” of Union laws should “remain the cornerstone of the future judicial system of the European Union” see LENAERTS, “The Rule of Law and the Coherence of the Judicial System of the European Union”, 2007, at 1659.

¹⁷⁹⁰ KOMAREK, “In the Court(s) We Trust?”, 2007, at 468; EDWARD, “CILFIT and *Foto-Frost* in their historical and procedural context”, 2010, at 183, 184.

¹⁷⁹¹ *Ibid.*, at 471.

¹⁷⁹² *Ibid.* Noting that truly uniformity is not the main concern but supremacy of Union law see KOMAREK, “In the Court(s) We Trust?” 2007, at 472.

¹⁷⁹³ DOUGAN, *National Remedies before de Court of Justice*, 2004.

Union law claims for itself.¹⁷⁹⁴ In fact, all mechanisms of case filtration existing in various jurisdictions confirm that “some questions are not important enough to be decided by the supreme interpretative authority of the system.”¹⁷⁹⁵ The U.S. Supreme Court sometimes leaves the lower or state courts to work out a new rule and intervenes only after some decisions have significantly differed among these courts.¹⁷⁹⁶ Thus, the intensity of the U.S. Supreme Court’s control over the application of federal law by lower courts is relatively low, as it believes that it “can best serve the needs of the national law by laying down broad principles, leaving their application and elaboration largely to the federal courts of appeals and the state appellate courts.”¹⁷⁹⁷

The Union legal system should not be different. Furthermore, selecting less important cases would not have a major impact regarding uniform application of Union law.¹⁷⁹⁸ One could say that these cases would “by definition, be those where uniformity of view was not of paramount importance.”¹⁷⁹⁹ If divergences occur, then the CJEU could accept a reference and grant *certiorari*. It is common that the U.S. Supreme Court grants a writ of *certiorari* to resolve a “circuit split” when the federal appeals courts in two (or more) federal judicial circuits have ruled differently in similar situations.¹⁸⁰⁰

Lastly, one should note that in preliminary references “mutual responsibilities apply.”¹⁸⁰¹ Thus, in addressing the application of the *acte clair* doctrine, BROBERG has suggested that the *CILFIT*’s criteria should nowadays be read as requiring that a national court of last instance is not obliged to make a preliminary reference where the correct application of Union law “does not leave any reasonable doubt as to the manner in which the question raised is to be resolved.”¹⁸⁰² The cases which must be referred for a preliminary ruling are those where there is a general question going beyond the main action before the national court and where there is a genuine need for uniform interpretation.¹⁸⁰³

IV. In this context, it is worth to draw a parallel between the CJEU and the EctHR which

¹⁷⁹⁴ KOMAREK, “In the Court(s) We Trust?”, 2007, at 471 *et seq.*

¹⁷⁹⁵ *Ibid.*

¹⁷⁹⁶ *Ibid.*

¹⁷⁹⁷ HELLMAN, “The Shrunk Docket of the Rehnquist Court”, 1996 at 433. As C. SHAPIRO observes: “[t]he Supreme Court, [...], has cast itself not as a source of justice for individual litigants or the forum to correct aberrations in the application of law, but rather as providing the structure and guidance necessary for the lower courts to correct or avoid errors.” See SHAPIRO, “The Limits of the Olympian Court”, 2006, at 279.

¹⁷⁹⁸ Addressing the issue of selection of preliminary references see also VAN GERVEN, “The Role and Structure of the European Judiciary Now and in the Future”, 1996, at 220.

¹⁷⁹⁹ CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001, at 200.

¹⁸⁰⁰ These are often called percolating issues.

¹⁸⁰¹ STRASSER, “Evolution & Effort”, 1995-1996, at 52. Traditionalists have considered that a *certiorari* mechanism would undermine the prevailing co-operative relationship between national courts and the CJEU. It could be argued that the way national court will react to a *certiorari* system is anyone’s guess. The system could encourage national courts to engage in the procedure more seriously and exercise greater care in the formulation of request. See HEFFERNAN, “A European *Certiorari* Revisited”, 2003, at 380.

¹⁸⁰² BROBERG, “*Acte Clair* Revisited”, 2008 at 1390. The author suggests that the CJ should take into account the general relevance of the interpretation and the importance of the measure to be interpreted; and the adoption of the so-called Swedish model where courts of last resort would have to explain why they decided not to make a reference, if one of the parties argued that a clarification of a point of EU law is necessary.

¹⁸⁰³ This formulation would allow an alignment with the formula included in Article 104(3)(2) of the Rules of Procedure, which has not been much used by the CJ. See Opinion of AG TIZANNO in Case C-99/00, *Lyckeskog*, [2002] ECR I-4839. Analysing Article 104(3) as a mechanism to re-balance supply and demand of preliminary references see TRIDIMAS, “Knocking on Heaven’s Door”, 2003, at 18 *et seq.*

has also long struggled with issues of caseload.¹⁸⁰⁴ In order to deal with these problems, recent Protocol no. 14 to the ECHR introduced a new admissibility criterion for individual claims brought before the Strasbourg court. According to said protocol, which amended Article 35(3)(b) ECHR, the EctHR shall declare inadmissible any individual application if it considers that the applicant *has not suffered a significant disadvantage*. This admissibility criterion was specifically introduced to deal with the caseload which the EctHR has been facing since the beginning of its own creation.¹⁸⁰⁵

The new admissibility criterion is said to give the EctHR more flexibility in the admission of applications in order to enable in the long term a more rapid disposal of unmeritorious cases, and to allow the Court the possibility to concentrate its resources on the most important cases.¹⁸⁰⁶ It is said to reflect the old Latin maxim *de minimis non curat praetor*¹⁸⁰⁷, which has been so far not entirely absent from the jurisprudence and the system of the Strasbourg court.¹⁸⁰⁸ Having been created in Roman times, taking into account the prestige of the functions of the *praetor*, this maxim is now adopted both in civil and common law countries in different areas of the law. Its purpose is “to inject reason into technical rules of law and to round-off the sharp corners of our legal structure.”¹⁸⁰⁹ As the expression of a *common sense of justice* and as a *rule of reason*, this maxim is deemed necessary to close quickly judicial debates that should never have begun in order to save courts from a flow of trivial cases, which would waste their time and resources.¹⁸¹⁰

There are a number of factors that are commonly taken into account by courts when applying this principle or any of its variations.¹⁸¹¹ INESI proposes a “theory of *de minimis*”¹⁸¹² which reflects the factors commonly considered by courts. His theory is based on the statement that the

¹⁸⁰⁴ For a comparative study between the case management techniques adopted in the U.S.A. and the EctHR see SHELTON, “Ensuring Justice with Deliberate Speed”, 2000, at 339 *et seq.*

¹⁸⁰⁵ This new criterion will surely give rise to “a certain juridical insecurity” and it is not clear yet whether it will indeed contribute to the reduction of the workload of the EctHR. See VANNESTE, “A New Inadmissibility Ground”, 2005, at 81; RUEDIN, “*De Minimis Non Curat* the European Court of Human Rights”, 2008, at 104. The first estimates seem to evaluate its impact as rather small, as according to the simulation of the Study Group of the Registry only about five 5% of the applications should be affected by this admissibility condition (Steering Committee for Human Rights, Impact Assessments of Some of the Reform Proposals Under Consideration, 12/3/2003, CDDH-GDR(2003) 017, para. 10).

¹⁸⁰⁶ See, e.g., VANNESTE, “A New Inadmissibility Ground”, 2005, at 69; *et seq.* BOILLAT, “Le Protocole no. 14”, 2006, at 8; RUEDIN, “*De Minimis Non Curat* the European Court of Human Rights”, 2008, at 81 *et seq.* In the context of the changes introduced by Protocol no. 14 this was surely one of the most controversial ones. See BERGER, “Le ‘préjudice important’ selon le Protocole No. 14 à la Convention Européenne des Droits de l’Homme, 2007, at 81 *et seq.* The Parliamentary Assembly of the Council of Europe, in its Opinion no. 251, issued in 28 April 2004, declared that it could not accept the proposal to add a new admissibility criterion because of its vagueness, subjectivity and because it was likely to create serious injustice and “would exclude only 1,6 % of existing cases (para. 11).”

¹⁸⁰⁷ Although it is doubtful that Roman civil process law knew the formula and that trivial matters were generally excluded before the *praetor*, the origins of the maxim seem to lie in Roman law, for instance in Justinian's Digest (D.4.1.4): “[s]cio illud a quibusdam observatum, ne propter satis minimam rem uel summam, si maiori rei uel summae praeiudicetur, audiatur is qui in integrum restitui postulat” (“I know that it has been the practice of some magistrates not to hear a person who asks for *restitutio in integrum* in respect of a very trivial matter or sum, if this would prejudice a claim in respect of a more substantial matter or sum”). See RUEDIN, “*De Minimis Non Curat* the European Court of Human Rights”, 2008, at 82.

¹⁸⁰⁸ *Ibid.*, at 94 *et seq.* Scholars have also considered that “the introduction of the no significant disadvantage admissibility criterion is an express sign that the principle of full and generalized right to an international remedy for every human rights victim is not applicable in the framework of the ECHR.” See VANNESTE, “A New Inadmissibility Ground”, 2005, at 80-83; RUEDIN, “*De Minimis Non Curat* the European Court of Human Rights”, 2008, at 104.

¹⁸⁰⁹ RUEDIN, “*De Minimis Non Curat* the European Court of Human Rights”, 2008, at 84, note 18.

¹⁸¹⁰ *Ibid.*, at 90.

¹⁸¹¹ For further developments, see *ibid.* at 87 *et seq.*

¹⁸¹² INESI, “A Theory of *De Minimis* and a Proposal for its Application in Copyright”, 2006, at 945 *et seq.* See also NEMEROFSKY, “What Is a ‘Trifle’ Anyway?”, 2001-2002, at 324 *et seq.*

purposes of the maxim share a common insight: “there are times when the social costs of applying black-letter law to a particular legal violation outweigh the benefits.”¹⁸¹³ This approach implies obviously a systemic approach to the issue of judicial protection. In the context of the ECHR, the relevant question is whether it is in the best interest of European society that the Court adjudicates every case irrespective of its triviality (“individual justice”) or if the Court should rather concentrate its resources on substantial cases (“quasi-constitutional justice”). The debate about the fundamental mission of the EctHR took place during the elaboration process of Protocol no. 14.¹⁸¹⁴

The central problem of the new admissibility criterion is the interpretation of the notion of significant disadvantage.¹⁸¹⁵ Here, some scholars have pointed to the difference between non-derogable and derogable rights: any violation of a non-derogable right will result in a significant disadvantage for the victim. Concerning derogable rights, further guidance may be found in the annex to an impact assessment made by a Study Group of the Registry, which simulated the application of the new admissibility condition. According to such report, for instance, regarding the length of procedures under Article 6 ECHR, “what is at stake for the applicant” – home, reputation, family, employment, or deprivation of liberty – would help to define whether there is a significant disadvantage. For complaints brought under Article 13 ECHR, *there would be a significant disadvantage whenever no remedies are at the applicant’s disposal*.¹⁸¹⁶ Surely the question whether the disadvantage is significant or not cannot be answered in absolute terms. The EctHR will have to consider the particular circumstances of the case. Thus, regarding breaches to Article 6 the subjective criterion of “what is at stake for the applicant” reinforces the idea that the EctHR will have to follow a casuistic approach and may have difficulties in developing clear-cut criteria for the application of the new admissibility condition.¹⁸¹⁷

It is worth noticing that the *purpose* of this innovation was not to reduce the right of individual petition. On the contrary, the drafters’ intention was to safeguard the right of individual petition and to guarantee the long-term efficiency of the EctHR.¹⁸¹⁸ Thus, aware that the “no significant disadvantage” criterion may lead to the rejection of cases actually warranting an

¹⁸¹³ INESI, “A Theory of *De Minimis* and a Proposal for its Application in Copyright”, 2006, at 957.

¹⁸¹⁴ See Council of Europe, “Explanatory report to Protocol No. 14”, 2004, para. 10 (“[a]t the same time – and this was one of the major challenges in preparing the present protocol – it was vital that reform should in no way affect what are rightly considered the principal and unique features of the Convention system. These are the judicial character of European supervision, and the principle that any person claiming to be the victim of a breach of the rights and freedoms protected by the Convention may refer the matter to the Court (right of individual application.”); Position paper of the European Court of Human Rights on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee for Human Rights of 4 April 2003 (CDDH(2003)006 final), September 26, 2003, CDDH-GDR(2003) 024, para. 31. On Protocol 14 see CONSEIL DE L’EUROPE, *La réforme du système européen des droits de l’homme*, 2004; CDDH, *La réforme de la Convention Européenne des Droits de l’Homme*, 2009.

¹⁸¹⁵ According to Article 20(2) of Protocol no. 14, the new admissibility criterion will only be applied by Chambers and the Grand Chamber of the Court during the two years following the entry into force of Protocol no. 14, in order to give them the opportunity to develop clear criteria for its application. The concept of disadvantage is not entirely new in the system of the ECHR, as it is relevant in the context of Article 41 ECHR. However, the concept is new in the admissibility stage, as it does not coincide with the notion of victim. Because of the obvious similarity between the notion of *préjudice* or disadvantage in the context of Article 41 ECHR. See RUEDIN, “*De Minimis Non Curat* the European Court of Human Rights”, 2008, at 100 *et seq.*

¹⁸¹⁶ Transposing these criteria to the reality of the European Union’s judicial system it seems that the new test established under Protocol 14 may not prove a significant hurdle in accessing the EctHR on the grounds of Articles 6 and 13 ECHR. See *supra* Chapter 1, Section 1.3.2.

¹⁸¹⁷ RUEDIN, “*De Minimis Non Curat* the European Court of Human Rights”, 2008, at 102.

¹⁸¹⁸ Council of Europe, “Explanatory Report to Protocol No. 14”, 2004, para. 39.

examination on the merits, the drafters introduced two “safety valves.” Thus, even if the applicant has not suffered a significant disadvantage, the Court may declare the application admissible if “respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.”¹⁸¹⁹ The cases warranting an examination on the merits will notably include cases which, notwithstanding their trivial nature, raise serious questions affecting the application or interpretation of the Convention or important questions concerning national law, or cases concerning questions of interest to many persons.¹⁸²⁰ Moreover, “no case may be rejected (...) which has not been duly considered by a domestic tribunal.”¹⁸²¹ This ensures that every case will receive *at least* one judicial examination whether at national level or European level. This clause reflects the principle of subsidiarity within the framework of the ECHR and underlines the fact that domestic courts have the task to consider all complaints related to ECHR rights, irrespective of their triviality.¹⁸²²

The new admissibility criteria adopted within the ECHR could serve as an inspiration for a possible *certiorari* filter to establish at the Union level. Surely, from an institutional point of view, the EctHR and the CJEU operate at very different levels. Thus, the adoption of a *de minimis* approach by the CJEU would have to accommodate to the features of the Union’s judicial system. Again, it seems questionable whether the *rationale* behind such an approach fits questions of validity of Union law, especially when the protection of fundamental rights is at stake. In fact, the issue here is, at least in some cases, about the *first* access to justice. By contrast, regarding questions of interpretation of Union law, a *de minimis* approach could easily be envisaged. Notwithstanding, those two safeguards should remain applicable. It is worth to remember that decisions such as *Van Gend en Loos* and *Costa* were delivered in cases whose facts surely did not qualify as important. Thus, the selection of *important cases* should not be assessed taking into account solely the *facts* of the cases, but in light of the relevance of the *questions* of EU law raised by such cases.

3.3 The Issue of Judicial Reform

I. The problems posed by the CJEU’s workload are as “notoriously difficult to resolve”¹⁸²³ as they are “notoriously unattractive to politicians.”¹⁸²⁴ Notwithstanding, it is worth emphasising that an increase in the number of individual applications before the CJEU, even if verified, “would not be insuperable”¹⁸²⁵ and “need not undermine the [Union] judicature’s ability to carry out its task and deliver speedy justice.”¹⁸²⁶ Union courts have other mechanisms available which allow for the

¹⁸¹⁹ Article 35(3)(b) ECHR.

¹⁸²⁰ The wording of this safeguard clause is drawn from the second sentence of Article 37(1) *in fine* ECHR where it fulfils a similar function in the context of decisions to strike applications out of the Court’s list of cases. Consequently, its interpretation should not be too difficult.

¹⁸²¹ Article 35(3)(b) ECHR *in fine*.

¹⁸²² RUEDIN, “*De Minimis Non Curat* the European Court of Human Rights”, 2008, at 104.

¹⁸²³ ARNULL, “The Action for Annulment”, 2000, at 190.

¹⁸²⁴ *Ibid.*

¹⁸²⁵ Opinion of AG JACOBS in *UPA*, para. 79.

¹⁸²⁶ *Ibid.*, para. 80. Noting that a broad interpretation of Article 263(4) TFEU, notably allowing challenges of all legislative acts which are of direct concern and do not entail implementing measures would not necessarily lead to an increase in the number of actions brought given the fact that the majority of Union acts are non-legislative acts, and that the time limit set forth in Article 263(6) “can be expected to keep the case load at acceptable levels” see BALTHASAR,

control of their caseload. The joinder of cases raising the same point of law and the dismissal by reasoned order of manifestly unfounded petitions pursuant to Article 111 of the Rules of Procedure of the GC constitute good examples of such mechanisms. Furthermore, “given the complexity of the present case law on standing, and the detailed reasoning contained in the orders of the [General Court] in particular on issues of individual concern, it would hardly require considerable extra effort to dismiss such applications on substantive grounds.”¹⁸²⁷

For what it is worth, the efficiency of the CJEU handling the caseload could, if needed, be increased by further procedural and jurisdictional reforms. In fact, for what it is worth, the issue of caseload should be dealt *primarily* at the level of jurisdictional reform.¹⁸²⁸ Some of those reforms have already been implemented¹⁸²⁹ and the amendment of the Rules of Procedure of the CJ and the GC is now subject to a more flexible procedure.¹⁸³⁰ Accelerated and urgent proceedings have also been introduced.¹⁸³¹ The first judicial panel – which under the Lisbon Treaty became the first specialized court – was created for staff cases.¹⁸³² The possibility of creating more of such courts remains open.¹⁸³³ Also, the increase of the number of judges and staff at the CJEU is not unprecedented¹⁸³⁴ although it should be considered wisely in order to avoid the creation of a “mammoth court”¹⁸³⁵ more difficult to manage than it already is.¹⁸³⁶ In addition, scholars have put

“*Locus Standi* Rules for Challenges to Regulatory Acts”, 2010, at 546.

¹⁸²⁷ Opinion of AG JACOBS in *UPA*, para. 80.

¹⁸²⁸ See also SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 501. Under this view, the right to effective judicial protection prevails over functional and organizational issues regarding the management of the CJEU’s work. As seen above, the Opinion in *UPA* constitutes a good example of a clear *subjectivist* approach to the fundamental right of access to justice in the CJEU’s case-law. For discussion of the issue of judicial reforms see e.g., JACQUÉ; WEILER, “Sur la voie de l’Union européenne, une nouvelle architecture judiciaire”, 1990, at 441 *et seq.*; ARNULL, “The Community Judicature and the 1996 IGC”, 1995, at 599-601; SCOREY, “A New Model for the Communities’ Judicial Architecture in the New Union”, 1996, at 224-231; HAMON, “La réforme du système juridictionnel communautaire”, 1997, at 7-12; JACQUÉ, “L’avenir de l’architecture juridictionnelle de l’Union”, 1999, at 443-449; TURNER; MUNOZ, “Revising the Judicial Architecture of the European Union”, 1999, 1-93; EDWARD, “Reform of Article 234 Procedure”, 2000, 119-142; CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001, 177-214; JOHNSTON, “Judicial Reform and the Treaty of Nice”, 2001, 499-523; KAPTEYN, “Reflections on the Future of the Judicial System of the European Union after Nice”, 2001, 173-190; RUIZJARABO, “La réforme de la Cour de justice opérée par le traité de Nice et sa mise en oeuvre future”, 2001, at 705-725; WEILER, “Epilogue: the Judicial After Nice”, 2001, 215-226; LENAERTS, “The Rule of Law and the Coherence of the Judicial System of the European Union”, 2007, at 1651 *et seq.*; PAIS, “A cooperação judiciária com a entrada em vigor do Tratado de Lisboa”, 2012, at 68.

See also the Report by the Court of Justice on Certain Aspects of the Application of the Treaty on the European Union, 1995; Contribution of the Court of First Instance to the 1996 Intergovernmental Conference, 1995; Document on the Future of the Judicial System of the European Union (Proposals and Reflections), May 1999, by the two courts, published in *Human Rights Law Journal*, 1998-1999, 20(7-11), 427-435; Contribution of the two courts for the IGC, 28/2/2000 (CONFER/VAR 3964/00); Report by the Working Party on the Future of the European Communities’ Court System, 19/1/2000 or the so-called *Duè* Report; Additional Contribution of the Commission for the IGC Regarding the Institutional Reform: the Reform of the Union Judiciary, 1/3/2000; European Parliament Resolution Containing the European Parliament’s Proposals for the Intergovernmental Conference (14094/1999-C5-0341/1999 - 1999/0825(CNS)). Regarding the preparation of the CT and the Lisbon Treaty the CJEU did not present any paper on its views on the Union’s judicial system.

¹⁸²⁹ For an overview of the Nice reforms see SKOURIS, “Self-Conception, Challenges and Perspectives of the EU Courts”, 2006, at 19-31.

¹⁸³⁰ See Article 256 TFEU.

¹⁸³¹ See *supra* Part I, note 871.

¹⁸³² See LAVRANOS, “The New Specialized Courts within the European Judicial System”, 2005, at 261-272.

¹⁸³³ Scholars have suggested the creation of a specialized court for instance in the field of patent law. See e.g., SKOURIS, “Self-Conception, Challenges and Perspectives of the EU Courts”, 2006, at 27.

¹⁸³⁴ VANDERSANDEN, “Pour un élargissement du droit des particuliers d’agir en annulation contre les actes autres que les décisions qui leur sont adressées”, 1995 at 550.

¹⁸³⁵ VAN GERVEN, “The Role and Structure of the European Judiciary Now and in the Future”, 1996, at 217. See also SCHUIJBHNE, “A Court within a Court”, 2009, at 174.

¹⁸³⁶ Against the augmentation of the number of judges see e.g., KOOPMANS, “The Future of the Court of Justice of

forward several proposals as it seems consensual that we are asking too much of the CJEU in its present configuration.¹⁸³⁷

Thus, almost all kinds of changes in the Rules of Procedure have been suggested¹⁸³⁸ including recourse to mediation¹⁸³⁹, the reform of the language regime in order to spare time with translation¹⁸⁴⁰, the use of databases and technology information¹⁸⁴¹, among other solutions which aim at expediting the CJEU's decision-making process.¹⁸⁴² Furthermore, there is consistent literature advocating for the need to reform of the GC either by allowing for specialization within the court¹⁸⁴³ or through the creation of more specialized courts.¹⁸⁴⁴ Scholars have suggested the transfer of all direct actions to the GC¹⁸⁴⁵ and its transformation into a first instance court with full jurisdiction.¹⁸⁴⁶ The transfer or sharing of preliminary references with the GC has also been put forward¹⁸⁴⁷, a possibility which although made possible in the Treaty of Nice, was never implemented.¹⁸⁴⁸ The issue is far from being uncontroversial, as some scholars consider that

the European Communities", 1991, at 24, 25; ARNULL, "Refurbishing the Judicial Architecture of the European Community", 1994, at 313; EVERLING, "L'avenir de l'organisation juridictionnelle de l'Union européenne", 1994, at 21. Suggesting that the number of judges of the GC should be decided in a purely functional basis and that AGs would work as a rule in the GC, and exceptionally in the CJ see WEILER, "Epilogue: the Judicial *Après* Nice", 2001, at 223.

¹⁸³⁷ *Ibid.*, at 220.

¹⁸³⁸ See e.g., JACOBS, "Recent and Ongoing Measures to Improve Efficiency of the European Court of Justice", 2004, 823-830.

¹⁸³⁹ SCHONBERG, "Coping with Judicial Over-Load", 2001, at 333-357.

¹⁸⁴⁰ See, e.g., STRASSER, "Evolution & Effort", 1995-1996, at 94 *et seq.*; ARNULL, "Judicial Architecture or Judicial Folly?", 1999, at 522; SKOURIS, "Self-Conception, Challenges and Perspectives of the EU Courts", 2006, 29 *et seq.* Considering the wording of Article 281 TFEU which excludes from the ordinary legislative procedure the modifications to the linguistic regime of the courts, the probability of a change happening is reduced.

¹⁸⁴¹ EECKHOUT, "The European Courts after Nice", 2003, at 330.

¹⁸⁴² See e.g., STRASSER, "Evolution & Effort", 1995-1996, at 89 *et seq.*; RASMUSSEN, "Remedying the Crumbling EC Judicial System", 2000, at 1095 *et seq.*; CRAIG, "The Jurisdiction of the Community Courts Reconsidered", 2001 at 189.

¹⁸⁴³ Favouring specialization within the GC itself see VAN GERVEN, "The Role and Structure of the European Judiciary Now and in the Future", 1996, at 218; WEILER, "Epilogue: the Judicial *Après* Nice", 2001 at 223.

¹⁸⁴⁴ Scholars have suggested specialized courts in certain areas, notably in the field of customs. See e.g., KOOPMANS, "The Future of the Court of Justice of the European Communities", 1991, at 28.

¹⁸⁴⁵ See WAELBROECK, "Le transfert des recours directs au Tribunal de première instances des Communautés européennes", 1994, at 92; STRASSER, "Evolution & Effort", 1995-1996, at 79.

¹⁸⁴⁶ CRAIG, "The Jurisdiction of the Community Courts Reconsidered", 2001 at 194. Regarding the transfer of infringement procedures to the GC as possible although a mechanism should be set in motion which allowed the GC *ex officio* or at the request of the parties to refer a case which affects the unity and consistency of Union law to the CJ see LENAERTS, "The Rule of Law and the Coherence of the Judicial System of the European Union", 2007, at 1659. Also favouring the transfer of all infringement actions to the GC, except those having a "constitutional dimension" see VILAÇA, "L'évolution du système juridictionnel communautaire avant et après Maastricht", 1995, at 196, 197; VESTERDORF, "A Constitutional Court for the EU?", 2006, at 89. Considering that the CJ should retain jurisdiction over actions which raise issues of *constitutional significance* see ARNULL, "Refurbishing the Judicial Architecture of the European Community", 1994, at 304.

¹⁸⁴⁷ See EVERLING, "L'avenir de l'organisation juridictionnelle de l'Union européenne", 1994 at 30; VILAÇA, "L'évolution du système juridictionnel communautaire avant et après Maastricht", 1995, at 199; SCOREY, "A New Model for the Communities' Judicial Architecture in the New Union", 1996, at 229; RASMUSSEN, "Remedying the Crumbling EC Judicial System", 2000, 1098 *et seq.*; CRAIG, "The Jurisdiction of the Community Courts Reconsidered", 2001 at 205; WEILER, "Epilogue: the Judicial *Après* Nice", 2001 at 224, considering that highest courts should have the right to appeal to the CJ if not satisfied with the decision of the GC; EECKHOUT, "The European Courts after Nice", 2003, at 331; TRIDIMAS, "Knocking on Heaven's Door", 2003, at 20; LENAERTS, "The Unity of European Law and the Overload of the ECJ", 2006, at 232 *et seq.*; AZIZI, "Opportunities and Limits for the Transfer of Preliminary Reference Proceedings to the Court of First Instance", 2006, 241-256; BAUDENBACHER, "Concentration of Preliminary References at the ECJ or Transfer to the High Court/CFI", 2006, 267-272; LOUIS, "The Court in the Constitution", 2006, at 141; LENAERTS, "The Rule of Law and the Coherence of the Judicial System of the European Union", 2007, at 1656; LENAERTS, "The Unity of European Law and the Overload of the ECJ", 2006, at 232-236.

¹⁸⁴⁸ Against de transfer of preliminary references to the GC see e.g., VAN GERVEN, "The Role and Structure of the European Judiciary Now and in the Future", 1996, at 215; ARNULL, "Judicial Architecture or Judicial Folly?", 1999, at 524; RUIZ-JARABO, "La réforme de la Cour de justice opérée par le traité de Nice et sa mise en oeuvre future", 2001, at 711, 712; ARNULL, "The Past and Future of the Preliminary Rulings Procedure", 2003, at 353, 354. See Opinion of

preliminary rulings are “*la voie royale*”¹⁸⁴⁹ among the procedures entrusted with the Union judiciary and should therefore rest with the CJ. In any case, the impact of such transfer might not be significant in the time taken by the references as it would merely redistribute work.¹⁸⁵⁰ In fact, preliminary rulings involve a “*conflit qui pourrait être qualifié d’existentiel*”¹⁸⁵¹, i.e. to know how to cope with the increasing number of references and to maintain its nature as a “*pierre angulaire*”¹⁸⁵² of the Union’s judicial system. The procedure was labelled thus as a “paradox of success”¹⁸⁵³: the more it is used the greater burden puts on the CJEU risking its own functioning. In this context, as statistics demonstrate that almost three quarters of preliminary references come from lower courts¹⁸⁵⁴, some commentators have proposed the repeal of first or lower instance courts right to communicate with the CJEU.¹⁸⁵⁵ The issue is once again far from uncontroversial.¹⁸⁵⁶ Alternatively, mechanisms of docket control of preliminary references have been proposed¹⁸⁵⁷, along with the elimination of the obligation to refer for courts of last instance regarding questions of interpretation, as long as the Council, Commission or Member States may ask them directly¹⁸⁵⁸; the overruling of the *CILFIT* case-law¹⁸⁵⁹; the creation of a centralised body which could provide assistance to national courts to decide if the requisites of *acte clair* are verified¹⁸⁶⁰; or the “green light” mechanism by which national courts should propose the answer to the question referred and inform the CJEU of constitutional and other concerns that the national legal order has on the case.¹⁸⁶¹ The existence of the right of appeal from all the GC’s decisions to the CJ has also been questioned.¹⁸⁶²

AG COLOMER in Case C-17/00, *De Coster*, [2001] ECR I-9445, at 9466-9468.

¹⁸⁴⁹ VANDERSANDEN, “Le système juridictionnel communautaire après Nice”, 2003, at 12.

¹⁸⁵⁰ STRASSER, “Evolution & Effort” 1995-1996, at 79.

¹⁸⁵¹ VANDERSANDEN, “Le système juridictionnel communautaire après Nice”, 2003, at 12.

¹⁸⁵² *Ibid.*

¹⁸⁵³ WEILER, “The European Court, National Courts and References for Preliminary Rulings”, 1985. Or as “victim of its own success”, see KOOPMANS, “La procédure préjudicielle?”, 1987, at 347-357.

¹⁸⁵⁴ KOMAREK, “In the Court(s) We Trust?”, 2007, at 478.

¹⁸⁵⁵ RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1104 *et seq.* KOMAREK has suggested limiting the preliminary ruling procedure to courts of last instance as a rule, with two exceptions: “[a]s a necessary exception to 1, when a lower court considers that one or more arguments for invalidity, put forward by the parties or as the case may be raised by it of its own motion, are well-founded, it must stay proceedings and make a reference to the Court for a preliminary ruling on the act’s validity. As a possible exception to 1, the Council can decide which EU law measures may be subject to preliminary references from lower courts.” See KOMAREK, “In the Court(s) We Trust?” 2007, at 467; and STRASSER, “Evolution & Effort”, 1995-1996, at 75 *et seq.*

¹⁸⁵⁶ Against the possibility of limiting the possibility to refer to courts of last instance see TIZZANO, “Le transfert des recours directs”, 1994, at 82; CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001, at 196; LENAERTS, “The Unity of European Law and the Overload of the ECJ”, 2006, at 239.

¹⁸⁵⁷ RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1077.

¹⁸⁵⁸ See ARNULL, “Judicial Architecture or Judicial Folly?”, 1999, at 521.

¹⁸⁵⁹ RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1107 *et seq.*, considering that *CILFIT*’s conditions are too strict. Discussing the reconsideration of both *CILFIT* and *Foto-Frost* see e.g., LENAERTS, “The Unity of European Law and the Overload of the ECJ”, 2006, at 220 *et seq.*

¹⁸⁶⁰ BROBERG, “Acte Clair Revisited”, 2008, at 1390.

¹⁸⁶¹ See JACOBS, “Further Reform of the Preliminary Ruling Procedure”, 2005, at 204 *et seq.* See also WEILER, “Epilogue: the Judicial Après Nice”, 2001 at 226; HEFFERNAN, “Effective Judicial Remedies”, 2006, at 301 *et seq.* See also JOHNSTON, “Judicial Reform and the Treaty of Nice”, 2001, at 521, noting that this solution could lay the foundations for a European *certiorari*, by encouraging national courts to deliver a judgment *nisi* that would become definitive unless the CJEU took the reference.

¹⁸⁶² Favouring the limitation of appeals to the CJ to those of “*portée générale et notamment constitutionnelle*” see EVERLING, “L’avenir de l’organisation juridictionnelle de l’Union européenne”, 1994 at 31. Favouring the limitation of rights of appeal to the CJ only where there is a *point of general legal interest* see CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001 at 195. Also considering that the judicial cooperation involved in preliminary rulings “*casa mal con el doble grado de jurisdicción*” see ROLDÁN BARBERO, “La reforma del poder judicial en la Comunidad Europea”, 2001, at 106. Considering that the existence of a double “*degré de jurisdiction*” is not an absolute

Furthermore, some scholars have suggested a division of competences between the GC and the CJ based on the distinction between legality and constitutionality review.¹⁸⁶³ As seen above, under the Lisbon Treaty such distinction became more straightforward as there is now a formal distinction between legislative and administrative acts.¹⁸⁶⁴ A more ambitious proposal has been put forward by JACQUÉ and WEILER, whose “architectural metaphor”¹⁸⁶⁵ involved the creation of four regional courts which would be intended to ensure proximity to the citizens.¹⁸⁶⁶ The CJEU itself has considered the possibility of decentralized national judicial bodies which could be competent to receive preliminary rulings in certain territorial areas.¹⁸⁶⁷ SCOREY has proposed the creation of a two tier structure of a European High Court and Supreme Court, similar to the UK’s system. The High Court would have specialized divisions, which could be located in different regions, and the Supreme Court would monitor the consistency and coherence of Union law similarly to the German *Gemeinsamer Senat*.¹⁸⁶⁸ In time, the Supreme Court could evolve to a Constitutional Court if Member States so wished and consideration could be given to the introduction of a *certiorari* mechanism.¹⁸⁶⁹

II. An efficient court may be defined as one which “within a reasonable period of time, gives just and intellectually compelling decisions.”¹⁸⁷⁰ To achieve such aim Member States have so far opted for “incremental reform.”¹⁸⁷¹ It is questionable whether these reforms provide for a long-

dogma and that it is not necessary regarding states and institutions see TIZZANO, “Le transfert des recours directs”, 1994 at 80. *Per contra*, see WAELBROECK, “Le transfert des recours directs au Tribunal de première instances des Communautés européennes”, 1994 at 92. WEILER has suggested that appeals by individuals should be made dependent either on a decision of the court *ad quem* or of the court *a quo*. See WEILER, “Epilogue: the Judicial Après Nice”, 2001 at 224.

¹⁸⁶³ EECKHOUT, “The European Courts after Nice”, 2003, at 332, 333. Questioning the separation between constitutionality and legality review see WAELBROECK, “Le transfert des recours directs au Tribunal de première instances des Communautés européennes”, 1994, at 90 *et seq.*

¹⁸⁶⁴ Notwithstanding, some controversial cases might create certain confusion on the edges: for instance, the case of an administrative act breaching directly a fundamental right, or cases of mixed questions.

¹⁸⁶⁵ SCOREY, “A New Model for the Communities’ Judicial Architecture in the New Union”, 1996, at 225.

¹⁸⁶⁶ JACQUE; WEILER, “On the Road to European Union”, 1990, 185-207. VAN GERVEN has considered the solution undesirable unless such regional courts could take the form of specialized courts. See VAN GERVEN, “The Role and Structure of the European Judiciary Now and in the Future”, 1996, at 215. Favouring the solution proposed by WEILER and JACQUE see STRASSER, “Evolution & Effort”, 1995-1996, at 81. Questioning the solution see VILAÇA, “L’évolution du système juridictionnel communautaire avant et après Maastricht”, 1995, at 201. WEILER and HALTERN have also suggested the creation of a Constitutional Council for the EU composed by members of the national constitutional courts and presided by the President of the CJEU —, competent to decide competence issues between the States and the Union which would decide possible conflicts after the adoption of a given measure but before its entry into force. See WEILER; HALTERN, “The Autonomy of the Community Legal Order”, 1996, at 447. Also making a proposal for the creation of a separate Constitutional Court see Report by the European Constitutional Group, A proposal for a European Constitution, December 1993, Part II 2b, at 13. See for discussion, ZWAAN, “Her voorstel van de European Constitutional Group van een Europese Grondwet”, 1995, at 252 *et seq.*; VAN GERVEN, “The Role and Structure of the European Judiciary Now and in the Future”, 1996, at 215; EECKHOUT, “The European Courts after Nice”, 2003, at 322; HÄBERLE, “Role and Impact of Constitutional Courts in a Comparative Perspective”, 2006, 65-78; VESTERDORF, “A Constitutional Court for the EU?”, 2006, at 83-90;

¹⁸⁶⁷ Document of May 1999. Also favouring the regionalization and delocalization of Union courts see RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1077; CRAIG, “The Jurisdiction of the Community Courts Reconsidered”, 2001 at 207; VANDERSANDEN, “Le système juridictionnel communautaire après Nice”, 2003, at 4; By contrast, against the regionalisation of the Union judiciary see EVERLING, “L’avenir de l’organisation juridictionnelle de l’Union européenne”, 1994 at 28; and against decentralisation see ARNULL, “Judicial Architecture or Judicial Folly?” 1999, at 519.

¹⁸⁶⁸ Suggesting the possibility of introducing a mechanism similar to the German *Organklage* see EVERLING, “L’avenir de l’organisation juridictionnelle de l’Union européenne”, 1994, at 27.

¹⁸⁶⁹ SCOREY, “A New Model for the Communities’ Judicial Architecture in the New Union”, 1996, at 229 *et seq.*

¹⁸⁷⁰ ARNULL, “Refurbishing the Judicial Architecture of the European Community”, 1994, at 297.

¹⁸⁷¹ TRIDIMAS, “Knocking on Heaven’s Door”, 2003, at 47.

term solution. The EU judicial architecture is said to be “crumbling”¹⁸⁷² or in “need of rethinking.”¹⁸⁷³ In WEILER’s words “Europe continues to drive in its rusty and trusted 1950 model with the steering wheel firmly in the hands of the Court of Justice.”¹⁸⁷⁴ The CJEU meanwhile became a “judicial giant” and a “lucky victim of its own spectacular success.”¹⁸⁷⁵ Consequently, discussions on the judicial architecture are dominated by one “overriding concern”¹⁸⁷⁶ with caseload. ARNULL once said that the back of an envelope would suffice to jot down a blueprint for the reform of Europe’s judicial system.¹⁸⁷⁷ WEILER submitted that the back of a postal stamp in that envelope could do the job just well.¹⁸⁷⁸ EECKHOUT contended that both statements were correct as long as the designers would limit their blueprint to basic contours, or used a micro print.¹⁸⁷⁹ However, the issue “bites” deeper. In fact, the debate is more than “oil to creaking cogs”¹⁸⁸⁰ to allow the system to cope with the increasing workload: it requires “recasting of roles and relationships to meet an altogether more complex political and legal challenge.”¹⁸⁸¹ Indeed:

“[t]here is still a lot of reflection to take place on the appropriate foundations for the judicial architecture. Reflection on what could and should be the functions of the European judiciary, in the concrete context of the way in which EU law and the European Courts currently operate, but also from a more general perspective on the role of the judiciary.”¹⁸⁸²

This is not the place to embark on a more profound analysis regarding the Union’s judicial architecture. Nonetheless, in light of all the above, it is submitted that:

*“[s]i le congestionement du prétoire de la Cour est assurément une préoccupation légitime, celui-ci ne devrait à notre avis en aucun cas servir de prétexte à refuser des réformes qui s’imposent dans un souci de protection juridictionnelle adéquate, ni a fortiori à affaiblir un système judiciaire lui-même parfois lacunaire.”*¹⁸⁸³

Consequently, the reform of the Union’s judicial system should not “*dénaturer des caractéristiques de la juridiction communautaire, comme serait le cas, par exemple, si l’accès à la Cour finissait par devenir trop difficile ou, surtout, si la qualité de l’institution était compromise.*”¹⁸⁸⁴ Increasing caseload and duration of proceedings are given facts and should not be either dramatized or ignored. Justice takes time and speed for in of itself is not a virtue.¹⁸⁸⁵ The image of judge BRIGLIALOCA hesitating

¹⁸⁷² RASMUSSEN, “Remedying the Crumbling EC Judicial System”, 2000, at 1071.

¹⁸⁷³ WEILER, “Epilogue: the Judicial *Après* Nice”, 2001, at 215.

¹⁸⁷⁴ *Ibid.*, at 217.

¹⁸⁷⁵ *Ibid.*, at 218.

¹⁸⁷⁶ EECKHOUT, “The European Courts after Nice” 2003, at 315.

¹⁸⁷⁷ ARNULL, “Judicial Architecture or Judicial Folly?”, 1999, at 516.

¹⁸⁷⁸ WEILER, “Epilogue: the Judicial *Après* Nice”, 2001, at 222.

¹⁸⁷⁹ EECKHOUT, “The European Courts after Nice”, 2003, at 315.

¹⁸⁸⁰ WEILER, “Epilogue: the Judicial *Après* Nice”, 2001, at 226. Noting that there is always a risk that the current balance “*venga rotto, senza che se ne riesca a costruire uno altrettanto valido*” see ADAM, “Verso la riforma del sistema giurisdizionale dell’Unione”, 2000, at 160.

¹⁸⁸¹ WEILER, “Epilogue: the Judicial *Après* Nice”, 2001, at 226.

¹⁸⁸² EECKHOUT, “The European Courts after Nice”, 2003, at 315.

¹⁸⁸³ WAELBROECK, “Vers une nouvelle architecture judiciaire européenne”, 2000, at 4.

¹⁸⁸⁴ TIZZANO, “Le transfert des recours directs”, 1994, at 85. Noting the improving efficiency is a process which can only go so far as it should never endanger the very *raison d’être* of the Court’s role and position within the European judicial architecture see SKOURIS, “Self-Conception, Challenges and Perspectives of the EU Courts”, 2006, at 22. Noting that “*dans une Union européenne en construction, dont le ‘déficit démocratique’ a été souvent mis en évidence, l’existence d’un système juridictionnel de qualité est la meilleure garantie du respect des principes de l’Etat de droit*” see WAELBROECK, “Le transfert des recours directs au Tribunal de première instances des Communautés européennes”, 1994, at 96.

¹⁸⁸⁵ FELIX FRANKFURTER stated that: “[i]n any event, mere speed is not a test for justice. Deliberate speed is.

in rolling the dice in the famous opera by RABELAIS is emblematic.¹⁸⁸⁶ Thus, if high numbers and increased complexity put a significant amount of pressure in the Union's judicial system, the latter should not give into them. The overload of the court system is deemed a "*mal nécessaire*"¹⁸⁸⁷ of modern societies which intend to ensure a large access to justice, based on the rule of law. It is the price to be paid for such option, if one intends to make such notions into living truths and not leave them in the realm of political discourse.

Deliberate speed takes time. But it is time well spent." See *First Iowa Coop v. Power Comm'n*, 328 US 152, 188 (1946). See BESSIN, "La temporalité de la pratique judiciaire", 1998, at 331; COULON, "Réflexions sur la durée de la justice et le temps économique", 1999, at 235 *et seq.*

¹⁸⁸⁶ RABELAIS 1993: "[a]lfinché il processo, ben ventilato, crivellato, e dibattuto, arrivi in prosiegua di tempo alla sua maturità ed il giudizio della sorte, sopravvenendo a sua volta, sia in più santa pace accettato dalla parte condannata."

¹⁸⁸⁷ CANEDO, "L'intérêt à agir dans le recours en annulation du droit communautaire", 2000, at 510.

CONCLUSION

I. The issue of access of individuals to the CJEU took us back to 1986, the year of the Portuguese accession to the European Communities, and the year in which the CJEU rendered two landmark judgments which based this dissertation. In *Les Verts*, the CJEU considered that the European Treaties established a complete system of legal remedies and procedures designed to allow it to review the legality of the measures adopted by the European institutions and the Member States. In *Johnston* the CJEU acknowledged the principle of effective judicial protection as a general principle of Union law which underlies the common constitutional traditions of Member States, and is laid down in Articles 6 and 13 ECHR. Still, the *bridge* between these two judgments has not been fully built in the case-law of the CJEU, and as a result there has been room for uncertainties, ambiguities and insufficiencies in what concerns the judicial protection of private parties *vis-à-vis* the EU.

II. In the first part of this dissertation, I tried to explain such *flaws* on the basis of the *objectivist, institutional and systemic* approach that has underlied the CJEU's views on the Union's system of judicial protection and which was emblematically established in *Les Verts*. In fact, despite of the textual constraints imposed by the original Article 173(2) TEEC and its successors, the possibilities afforded to individuals of directly challenging the validity of Union acts have been curtailed mostly as a consequence of the CJEU's strict approach to judicial review at the initiative of private parties.

Indeed, the case-law of the CJEU on the admissibility of actions for annulment starts by focusing on the *type* and *legal nature* of the contested act instead of the impact of such measure on the individual's legal position. The result has been a complex set of cases where the CJEU dwelled on the search for a consistent distinction between "disguised decisions" and "true regulations" which in practice curtailed any possibilities of successful challenges to Union acts other than those addressed to the applicants, in particular against regulations and directives. Furthermore, the standing requirements of private parties have been subject to a restrictive interpretation. To begin with, the notion of direct concern has given rise to uncertainty and fluctuations in its application. Notwithstanding, by far the major obstacle to access by individuals to the Union courts has been the CJEU's interpretation on the requirement of individual concern, which regardless of some more liberal decisions issued in certain policy fields, generally reproduces the so-called *Plaumann* formula. As a consequence, most actions are deemed inadmissible. *Plaumann* – based either on the closed category approach or the abstract terminology test – seems to have been mainly conceived to avoid challenges against acts of general application. Notwithstanding, since *Codorniu*, there have been cases where the CJEU admitted challenges against *true* normative acts, mostly in the field of anti-dumping, even if one can argue that these measures are much akin to administrative acts of individual application. In addition to its inadequacy to the reality of the market and its disconformities with Member States legal traditions, the *Plaumann* approach seems to suffer from a

radical conceptual difficulty in so far as it is neither based on the entitlement of rights nor interests of private parties. Such approach has been applied in a casuistic manner and scholars speak of a “*droit d'accès au juge communautaire à géométrie variable*.”¹⁸⁸⁸

More significantly, the CJEU's case-law on the admissibility of actions for annulment has been immune to the plaintiffs' arguments based on the need to ensure effective judicial protection, as the cases of *UPA* and *Jégo-Quéré* illustrate. By refusing to operate outside *Plaumann*, the CJEU puts the right to effective judicial protection into the complete system of legal remedies and procedures established in *Les Verts* and refuses to analyse if the alternative routes to the action for annulment do indeed provide for an adequate and effective protection. According to the CJEU it is the national courts' mission and not its own to fill in possible gaps of judicial protection. Thus, the system as it stands is not questioned in the light of fundamental rights protection.

In contrast with the literal and restrictive approach regarding the possibilities of *subjective* control of legality in the EU, the CJEU has not hesitated to adopt a broad interpretation of other *objective* and *institutional* elements inherent to the action for annulment, notably, the scope and exercise of its own jurisdiction, and the passive and active *locus standi* of institutional actors. Furthermore, it was submitted that the CJEU's views of the Union's judicial architecture together with its concerns with caseload and docket control also suggest a *systemic* and *objective* approach to the system of judicial protection in the EU.

What is more, the alternative routes to the direct access by individuals to the Union courts put forward by the CJEU have proved inadequate, precisely because of the *objectivist* conceptual approach underlying to the CJEU's case-law on the scope and nature of such avenues. In this context, preliminary references on validity occupy a central place, given the limited impact of the plea of illegality and the specific nature of the action for damages. However, at the outset, it is doubtful that the CJEU has imposed on national courts the duty to accept all kinds of judicial actions, notably free-standing and declaratory actions which allow for a preliminary ruling on validity. Such an obligation would turn national courts into “rubber-stamp” desks for access to the CJEU, and would not fit well with the CJEU's case-law on national procedural autonomy, particularly on the principle of effectiveness of Union law, and on artificial litigation. Thus, individuals may find themselves deprived of the right of access to justice in so far as Union acts do not require national implementing measures. In these situations, individuals may be forced to break the law in order to have access to justice, which is deemed unacceptable by both the EctHR and the CJEU itself. Furthermore, within the framework of the system of concentrated review of Union law created under *Foto-Frost*, national courts are not competent to declare any Union act, either executive or legislative, as invalid, which means that, whenever the question on invalidity is necessary to enable them to give judgment, they have to refer it to the CJEU. It may be questioned if such system compromises the right to the lawful judge. In addition, preliminary rulings are not available *as of right* to private parties. Preliminary references are conceived as a mechanism of judicial cooperation which operates *juge à juge*. They are a non contentious procedure which

¹⁸⁸⁸ BERROD; MARIATTE, “Le pourvoi dans l'affaire *Unión de Pequeños Agricultores c/Conseil*”, 2002, at 7.

excludes any initiative of private parties who are merely invited to participate. According to the CJEU, preliminary references are essentially an *objectivist* form of constitutional review, whose purpose is mainly to ensure the uniform application and supremacy of Union law, and safeguard the Court's own jurisdiction. In this framework, national judges retain full discretion regarding the decision to refer and the scope of the questions to be referred. Hence, even if individuals succeed in mounting a challenge to Union law in national courts, they will have no guarantee that the national court will refer the question of validity to the CJ. This feature differentiates this mechanism from the plea of illegality invoked before Union courts. Moreover, there is no adequate enforcement mechanism from the point of view of individuals, which ensures compliance with the obligation to refer a question on invalidity. All things considered, it is hard to maintain that preliminary rulings on validity provide "with certainty and in all circumstances" for an adequate and effective alternative means of judicial review.

The TWD and *Nachi* approaches make the articulation between direct actions and preliminary rulings on validity even more problematic. In fact, further to the uncertainties surrounding the case-law on *locus standi* of private parties to bring an action for annulment, these rulings added a considerable degree of uncertainty regarding (i) the type of acts which are precluded from being indirectly challenged, (ii) the conditions under which individuals are prevented from doing so because they *undoubtedly* had standing to challenge such acts directly and (iii) the duties of national courts in this regard. More significantly, these rulings imply yet again a *systemic* and *objectivist* approach to the system of judicial remedies in the EU. Individuals' protection is secondary in this case-law. Furthermore, the fact that the CJEU does not apply these rulings to the plea of illegality invoked by privileged and semi-privileged applicants before the Union courts creates a disparity in the protection of individuals which discloses an *institutional preference* in the system of judicial review in the EU.

Additionally, the CJEU's case-law regarding judicial review in the field of the intergovernmental pillars suggests an *institutional* and *objectivist* trend as well. In fact, facing the limitations imposed by the former TEU, the CJEU did not hesitate to adopt a broad reading of Articles 46 and 47 TEU when institutional matters and disputes were at stake. Moreover, this case-law entails the CJEU's will of submitting the intergovernmental pillars to the logic of the so-called *Community method*, either on the basis of the unity of the Union legal order or of the supremacy of the TEC. *Per contra*, the CJEU has not adopted a similar approach when the protection of individuals' rights was at stake, not even through the avenues offered by the combined application of said provisions with former Article 6(2) TEU and Article 220 TEC. Despite the *Pupino* approach – and regardless of the fact that the latter is mostly relevant regarding the challenge of Member States' action –, the "war on terror" cases illustrate the gaps of judicial protection in the field of the intergovernmental pillars by confirming the unwillingness of the CJEU to annul second and third pillar acts. The overture demonstrated in the CJ's *Segi* judgment stopped short in so far as the CJEU refused to extend the Community principles of rights protection to the second and third pillars. As a result, the degree of judicial protection of private parties available under the former

TEU was even lower than the one established in *Les Verts*.

In drawing attention to the objective elements, the institutional preference and the systemic views enshrined in the CJEU's case-law I brought to the fore the institute of institutional guarantees, as a reflex of the *objective* dimension of fundamental rights. As a matter of fact, it may be argued that there are echoes of the original logic of institutional guarantees in the CJEU's case-law on the right to effective judicial protection. It seems possible to identify three features which institutional guarantees and the CJEU's case-law have in common: (i) first, the *systemic* approach to issues of judicial protection; (ii) second, the idea of a *de minimis* protection of rights; and (iii) third, the lack of direct applicability. This analogy reinforces the idea that in the *Les Verts* approach to the Union's system of judicial protection the *subjective* dimension of the fundamental right of access to justice is significantly undervalued.

II. In the second part of the dissertation I argued that the entry into force of the Lisbon Treaty requires the CJEU to adopt a more *subjectivist* approach to the issues of judicial protection in the EU. Such subjectivist approach is anchored in the *Johnston* verdict which laid the first stone on the issues of effective judicial protection in the EU. It was submitted that new Article 6 TEU involves a *paradigm shift* regarding fundamental rights protection in the EU. In this context, the right of access to judicial review in the EU legal order needs to be reconsidered after Lisbon: access to the Union judges should not be regarded as exceptional anymore.

The right to individual access to justice – “*élément majeur du patrimoine juridique de l'Europe, exigence essentielle de toute société démocratique*”¹⁸⁸⁹ – was considered by the ECtHR as a “key component of the machinery for protecting the rights and freedoms set forth in the Convention”¹⁸⁹⁰ and by the CJEU as a general principle of EU law the respect of which must be ensured in the Union legal order. Thus, although the CJEU has in the past consistently held that the respect of fundamental rights forms part of the general principles of Union law guaranteed by the Union courts, the formal constitutionalization of the Charter of Fundamental Rights must have a procedural impact. In fact, it is noticeable that the first European catalogue of fundamental rights has accorded an entire chapter to procedural fundamental rights. This is surely a reflex of the revalorisation of the procedural dimension of rights and of the focus on remedies as a form of overcoming the dichotomy between substance and procedure. Article 47 of the Charter is said to reflect the common constitutional traditions of Member States and should be deemed to ensure a unitary conception of a *European model of justice* which allows for comprehensive judicial protection of individuals. Surely, Article 47 did not introduce the principle or the right to effective judicial protection *ex novo* in the Union legal order. Since the *Johnston* ruling the CJEU has consistently held that the requirement of judicial control of any decision of a public authority reflects a general principle of EU law stemming from the constitutional traditions of Member States. However, this case-law was mainly forged in the context of enforcing Union law against Member States. Although

¹⁸⁸⁹ LENAERTS, “Le Traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l'Union”, 2009, at 709.

¹⁸⁹⁰ *Mamatkulov and Askarov v. Turkey*, Applications nos. 46827/99 46951/99, Judgement of 04/02/2005, para. 122.

the CJEU has already suggested that such principle also binds the European institutions, it was submitted that the current formal constitutionalization of procedural guarantees should allow for a clearer expansion of the *Johnston* principle to the judicial review of Union acts. Hence, from a conceptual point of view, effective judicial protection of private parties as a matter of Union law should *cut loose* from the principle of effectiveness of EU law. It is clear that the Union as well as Member States should be held responsible for the breaches of individual rights. The Union cannot become the “new King who can do no wrong”, while insisting on the Member States’ obligations to enforce Union law and protect Union rights. As a consequence, *Les Verts* should be re-read in light of *Johnston*. The said complete system of legal remedies and procedures should be assessed against the backdrop of the fundamental right to effective judicial protection. The latter should receive the same flexible and broad interpretation that it has received when Member State action is at stake. As a result of this *conceptual shift towards fundamental rights*, the CJEU may have to disregard the explanations attached to the Charter if a conflict between Article 47 and other Treaty provisions emerges.

In parallel, accession to the ECHR may represent an additional incentive to question the effectiveness and adequacy of the current system of judicial protection in the EU. As is well known, accession has been on the EU agenda for several years, and after the CT, the Lisbon Treaty finally cleared the road. Although the EctHR has already considered that it will control Member States’ action as a matter of Union law, it has not accepted so far direct complaints against the Union institutions since the EU is not a party itself to the ECHR. Nonetheless, the *Matthews* and *Bosphorus* rulings read together allow the EctHR sufficient leeway to control, albeit indirectly, the effectiveness of the Union’s system of judicial protection. In fact, not only may the validity of CFSP acts be controlled under *Matthews*, but also the *equivalent protection/manifest deficient* formulas provide the EctHR with enough margin of manoeuvre to hold Member States responsible for a breach of the guarantees established in Articles 6 and 13 ECHR as a consequence of Union law. Nevertheless, accession will have the clear advantage of submitting the Union’s judicial system to the *direct* watch of the Strasbourg Court. In this context, the EctHR has already condemned systems of administrative justice that are unduly restrictive and do not allow for a *practical* and *effective* opportunity for challenges against executive action brought by private parties. Furthermore, the submission of second pillar acts to the EctHR’s jurisdiction seems incontestable since the latter extends to foreign policy issues and action of the Union in this field has already given rise to litigation in Strasbourg. All things considered, the procedural insufficiencies of the Union’s system of judicial protection do not seem to live up to the ECHR standards. One should note that Luxembourg and Strasbourg have not always seen eye to eye on the scope of procedural guarantees under the ECHR.

II. In light of the foregoing, it was submitted that the changes introduced by the Lisbon Treaty regarding the challenge of Union acts by private parties, notably in Articles 263(4) and 275 TFEU, should be interpreted in light of the need to ensure effective judicial protection of private

parties. The renewed system of fundamental rights protection should translate into the adoption of a *pro actore* approach, i.e. an approach which facilitates access by individuals to the CJEU.

In light of this approach it was submitted that the notion of regulatory acts established in Article 263(4) TFEU must be interpreted broadly in order to include all acts which are adopted under the *form of a regulation* or perform some sort of *regulatory function* regardless of the process for their adoption. There are good reasons to believe that the approach adopted by the GC in the recent *Inuit* case is unduly restrictive considering the specific features of the Union legislation and of the Union's system of judicial review. Thus, not only should all acts adopted within special legislative procedures be deemed regulatory acts under Article 263(4) TFEU, but also a substantive criterion, which looks beyond form and procedure, could be adopted. Following the *Köster* line of cases, it was submitted that in so far as provisions included in a formally legislative act are not limited to the essential policy choices of a given area, these provisions should be reviewable as regulatory acts. This approach is also supported by the history, wording and *rationale* of the new provision, and is more in line with the previous case-law of the CJEU according to which it is the contents and not the form of the act which determines its reviewability, thus ensuring that the individuals' right of access to justice is in no way excluded or restricted by the Union institutions choice of legal instrument.

Regarding the test of direct concern and the requirement of "not entailing implementing measures", it was submitted that they should be understood as two different criteria. The new drafting of Article 263(4) TFEU *in fine* offers an opportunity for the CJEU to separate the two requirements. Hence, the test of direct concern should be limited to the assessment of the *chain of causality* between the act and the applicant. Here, the act must *directly affect* the legal or factual position of the applicants. Furthermore, if the act requires *in abstracto* the adoption of implementing measures this fact alone should not suffice to submit it to the first part of Article 263(4) TFEU in so far as these measures do not involve the exercise of discretion. If this is the case, then the second part of the test of direct concern as currently framed by the CJEU should be deemed to be automatically fulfilled and the contested measures should be understood as *not entailing implementing measures*. This means that, for instance, "regulatory directives" could still be subject to Article 263(4) TFEU *in fine*, without the need to demonstrate individual concern.¹⁸⁹¹ Finally, considering that the new provision was adopted with the specific purpose of closing gaps of judicial protection, the notion of implementing measures should be limited to those measures which individuals may challenge directly either in national or Union courts.

Regarding the test of individual concern, contrary to the GC's decision in *Inuit*, it was submitted that *Plaumann* should not survive Lisbon. As the *rationale* underlying this test seems to be to prevent challenges against acts of general application, *Plaumann* is more than ever in need of re-visitation. This argument finds support in Member States' legal traditions. In fact, in French oriented systems, which are the majority in the EU, a mere personal and direct *intérêt* suffices to ground a challenge to any act of the administration. This formula includes the entitlement of mere

¹⁸⁹¹ *Per contra* see CAMPOS; CAMPOS, *Manual de Direito Europeu*, 2010, at 468.

factual interests. These notions are construed broadly and standing is not usually an obstacle in accessing administrative courts. This is also the tradition in common law systems. In England, besides the fact that a *sufficient interest* is deemed enough to ground an action for judicial review, judges take into account the fact that the applicant has a strong case on the merits in order to admit the action. Furthermore, in German oriented systems although standing is based on the notion of individual rights – identified and determined pursuant to the so-called *Schutznormtheorie* –, evolution is ongoing and there is an increasing tendency to interpret such concept broadly. Scholars have argued on the basis of fundamental rights protection that standing should be granted when the act causes some kind of harm to the applicants. In light of this evolution, there is a wide consensus in the scholarship that *Plaumann* should be changed. Such change would allow for a shift in the CJEU's case-law from procedural issues to substantive issues. Most commentators have put forward tests based on the French *intérêt* and some authors have even considered the admissibility of public interest litigation. AGs within the CJEU have also put forward some proposals. The most famous one was AG JACOB's test in *UPA*, according to which an individual should be deemed individually concerned where a *measure has or is liable to have a substantial adverse effect on his interests*. In so far as this test is more realistic in economic terms, easier to apply and capable to being applicable to all Union policies, it is probably the best test put forward so far. It was further submitted that this test is corroborated by another set of indications coming from the CJEU's case-law. Firstly, *locus standi* before national courts *as a matter of Union law* has also been construed broadly and based either on the entitlement of rights or interests of private parties, in order to ensure a maximization of the rights granted under Union law. Thus, a principle of parallelism, which is embodied in the case-law in other areas should probably be adopted here. Secondly, the idea of measures having an *adverse effect* on individuals underlies the scope of the right to be heard and is well known to the CJEU. Thus, it was submitted that in looking for an alternative to *Plaumann* the CJEU should consider Articles 41 and 47 of the Union Charter jointly as part of a broad constitutional notion of due process. Lastly, the CJEU should take the opportunity and merge – or a least more clearly articulate –, its case-law on the existence of an interest to sue with its case-law on standing. In so far as the existence of a legal interest in litigation allows for the control of the usefulness of a particular cause of action it should be deemed a more suitable means to avoid spurious cases.

Notwithstanding, without compromising the need to revisit and liberalise *Plaumann*, it was submitted that there are, *as a matter of constitutional imperative*, two situations where standing of individuals needs to be made more flexible. On the one hand, whenever an individual proves *prima facie* to have been directly and personally affected in his/her fundamental rights by the contested act the action should be deemed admissible. This solution would embody the so-called *procedural dimension of fundamental rights* and should extend to all Union acts, therefore also including the CFSP. The procedural dimension of fundamental rights is not unknown to the European legal tradition and has been acknowledged by the CJEU itself. The introduction of a fundamental rights complaint, existing in some Member States, has been discussed at the

European level. Several scholars have noted that the requirement of individual concern should be construed in order to allow for actions based on fundamental rights violations and the Draft agreement on Accession to the ECHR may introduce an additional argument to allow review of Union acts on grounds of fundamental rights. In this context, it was submitted that the CJEU could find inspiration in Strasbourg's case-law on the admissibility of individual complaints under Article 35 ECHR, which the CJEU may have already started to do, as the case of *PKK and KNK* illustrates.

On the other hand, whenever an individual demonstrates with a sufficient degree of certainty that it cannot indirectly challenge the validity of a Union act, notably because it cannot mount a challenge in national courts or the national judge cannot adequately and effectively address the CJ for a preliminary reference on validity, the CJEU should accept a direct action. This approach would involve a *volte-de-face* in the CJEU's case-law which has until now disregarded the arguments put forward by private parties on the basis of the need to ensure effective judicial protection by highlighting the existence of situations of denial of justice. Although the CJEU has refused to accept actions on this grounds, the existence of alternative remedies and protection in national courts is far from being absent from the CJEU's assessment in admissibility decisions. Furthermore, dealing with concepts of national procedural law would be nothing new for the CJEU which already has a large body of case-law on the adequacy and effectiveness of national remedies to ensure the protection of Union rights and the application of Union law. This solution would reflect the *inclusive nature* of the Union's judiciary which integrates national courts as well as Union courts, and would be fully coherent with the duties imposed on national courts under Article 19(2) TEU. It is clear that the protection of private parties under Union law is a matter for both national and Union judges.

A, *TWD* and *Nachi* should apply with parsimony after Lisbon. To begin with, in so far as the CJEU's has not yet had the time to clarify the new standing rules the requirement of "absolutely clear standing" fails. Nonetheless, it may be questioned whether *TWD* is in of itself applicable to acts of general application. It was submitted that *TWD* and *Nachi* should apply restrictively to those exceptional circumstances where the failure to mount a direct challenge can be held against the individual. This seems to be the main *rationale* underlying the *TWD* approach which should therefore be limited to those cases of abuse of procedural rights.

Lastly, the CJEU's limited jurisdiction over the second pillar also needs to be reassessed in light of the paradigm shift operated by the Lisbon Treaty. It is undeniable that the Union is increasingly adopting CFSP acts which can directly affect individuals. Hence, in the light of the *pro actore* approach hereby advocated the CJEU should adopt a non formalistic and flexible interpretation of the terms "decisions" and "restrictive measures" included in Article 275 TFEU. This means that the CJEU should extend its substance over form approach to review *any type of act* which has the same effect as decisions imposing restrictive measures on individuals. Furthermore, *decisions* for purposes of the combined application of Articles 275 and 263(4) TFEU may in some cases be considered *regulatory acts*. Also, the concept of restrictive measures should be understood

broadly including therefore all measures that affect individuals regardless of its nature and despite the fact that the applicants are individually named. Furthermore, Article 275 TFEU should be understood as limited to the initial foreign policy acts and as not extending to the Union implementing measures which are subject to the general jurisdiction of the CJEU. These views are corroborated by several elements enshrined in the Treaties that support a flexible approach to the exercise of CJEU's jurisdiction. Firstly, the idea of a *unique* and *unified* legal order, under one single legal personality and one single set of objectives, pleads for the application of the general principles of Union law to the CFSP. Among those principles, supremacy has a pivotal role as it entails significant jurisdictional consequences in light of *Foto-Frost*. Secondly, the role of Article 19(1) TEU should not be underestimated. The CJEU has suggested in the past that the principle of conferral should not be understood strictly. Under Lisbon the exclusion of jurisdiction over CFSP acts should be regarded as an exception and therefore interpreted narrowly. The duty to ensure the respect for the rule of law encompasses the need to protect fundamental rights through judicial proceedings. As a result, the combined interpretation of Articles 6 and 19(1) TEU and Article 275 TFEU should allow for the admissibility of actions for annulment against *any CFSP acts which are intended to produce legal effects vis-à-vis private parties*. Lastly, taking into account the possibility of a dual legal basis under the new Article 40 TEU, it can be argued that challenges against acts adopted with two legal bases may be brought under the general jurisdiction of the CJEU regardless of the fact that they have a CFSP component. Hence, regarding twofold acts Article 263(4) TFEU prevails over Article 275 TFEU. As a last observation, it was made clear that the new extended jurisdiction of the CJEU over the CFSP should not preclude some degree of judicial self-restraint in matters of foreign policy. Although a "political questions" doctrine has no European legal tradition and has been expressly rejected by several AGs and the CJEU in the past, the specific nature of foreign affairs may justify a marginal standard of review regarding certain CFSP acts. Article 275 TFEU justifies such an approach.

In the final chapter of the dissertation I tried to put the debate on the effective judicial protection of private parties in the EU in the context of what is already considered an overburdened CJEU. WINSTON CHURCHILL once said that "it is always wise to look ahead, but difficult to look further than you can see."¹⁸⁹² Further to the fact that the fear of being drowned in cases does not justify *per se* a restrictive approach to direct access by individuals to the CJEU, there is in reality no indication that there might be a *tsunami* of cases if access is broadened. Nonetheless, taking into consideration the "litigation boom" in modern societies scholars have questioned the allocation of cases to courts and have drawn attention to the limits of the adjudicative process. In this context, although one can imagine the adoption of some kind of filter mechanisms which would allow the CJEU some degree of discretion to control its workload, it is difficult to agree to the adoption of such solutions when first instance jurisdiction is at stake and gaps of judicial protection arise. Notwithstanding, a *certiorari* approach could be envisaged within other judicial proceedings, notably preliminary rulings on interpretation. In the search for an EU *certiorari* it was

¹⁸⁹² COOTE, *A Self Portrait*, 1954, at 278.

submitted that inspiration could be found in the solution adopted by Protocol no. 14 to the ECHR regarding access to the EctHR. All in all, one should not lose sight that issues of caseload should primarily be dealt with at the level of judicial reform. Scholars have put forward numerous proposals that are worth revisiting, as long as in the course of reform the fundamental premises on which the Union legal order is based are not endangered.

Europe has changed immensely since the times of the Cold War when the first European Treaties were first signed. It is no longer conceived just as a “giant Heathrow duty-free shop, as a customer’s union with goods, services and capital flowing unhindered”¹⁸⁹³, but became competent to adopt all kinds of acts – directives resembling regulations, measures of general application which apply exclusively to certain individuals and which are included either in legislative or executive acts, CFSP acts with wide-ranging effects – which interfere with the daily life of European citizens in increasingly rights sensitive areas. This profound change highlights the democratic deficit of Union activities.¹⁸⁹⁴ In parallel, there is also a significant *judicial deficit*. It is striking that the protection offered by the Union’s judicial system falls behind the ECHR and national standards. This means that the more Member States transfer competences to the Union the less guarantees of judicial protection will be available to individuals.¹⁸⁹⁵ In times of other well-known European *deficits* and *crisis* it would be all the more convenient that the CJEU did not contribute to the perpetuation of long identified *lacunae* regarding the judicial protection of private parties in the Union legal order. After all, as someone has put it, it is the CJEU’s own authority which is endangered if “there is any impression of judicial deficit or lack of authority.”¹⁸⁹⁶

¹⁸⁹³ MANCINI, G. F., “The US Supreme Court and the European Court of Justice”, 1997, at 16.

¹⁸⁹⁴ See SNELL, “‘European Constitutional Settlement’, an Ever Closer Union, and the Treaty of Lisbon”, 2008, at 619- *et seq.*

¹⁸⁹⁵ See SCHERMERS; WAELBROECK, *Judicial Protection in the European Union*, 2001, at 451; QUADROS; MARTINS, *Contencioso da União Europeia*, 2007, at 174.

¹⁸⁹⁶ KOMBOS, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC”, 2005, at 17.

ANNEX I

CHALLENGES BROUGHT BY PRIVATE PARTIES AGAINST COMMUNITY/UNION ACTS
*PRELISBON*THE *LES VERTS* APPROACH: OBJECTIVIST, INSTITUTIONAL AND SYSTEMIC APPROACH TO
JUDICIAL REVIEW OF COMMUNITY/UNION ACTS

FIRST PILLAR – ARTICLES 164 TEEC/220 TEC AND 173 TEEC/230 TEC			
1	Reviewable acts	ERTA: “[a]ll measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.” IBM: “[a]ny measure the legal effects of which are binding on , and capable of affecting the interests of , the applicant by bringing about a distinct change in his legal position”; and, “[o]nly if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure.”	Part I, Chapter 1, Section 1.1.2(a)
2	Type of acts: (i) decisions; (ii) decisions in form of decisions; addressed to others; (iii) decisions in form of regulations.	<i>Producteurs</i>: “[t]he essential characteristics of a decision arise from the limitation of the persons to whom it is addressed, whereas a regulation, being essentially of a legislative nature, is applicable not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety”; “[a] measure which is applicable to objectively determined situations and which involves immediate legal consequences in all Member States for categories of persons viewed in a general and abstract manner cannot be considered as constituting a decision, unless it can be proved that it is of individual concern to certain persons within the meaning of the second paragraph of Article 173”; and, “[i]n doubtful cases whether one is concerned with a decision or a regulation, it is necessary to ascertain whether the measure in question is of individual concern to specific individuals.” <i>Zuckerfabrik Watenstedt</i>: “[a] measure does not lose its character as a regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which it applies at any given time as long as there is no doubt that the measure is applicable as a result of an objective situation of law or of fact which it specifies and which is in harmony with its ultimate objective. Furthermore, the fact that a legal provision may have different practical effects on the different persons to whom it applies in no way contradicts its nature as a regulation provided that the situation to which it refers is objectively determined.” <i>Codorniu</i>: “[a]lthough it is true that according to the criteria in the second paragraph of Article 173 of the Treaty the contested	Part I, Chapter 1, Section 1.1.2(b)

		provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them.” UPA: “[a] measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain natural or legal persons and is thus in the nature of a decision in their regard.” Exceptional case: <i>Vischim</i>: challenge against a directive which was considered to be of direct and individual concern.	
3	Direct Concern	<i>E.g., DSTV</i>: “[t]he measure must directly affect the legal situation of the person concerned and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules.” <i>Bock and Piraiki Patraiki</i>: even if the Member State addressee enjoys some discretion, when it is clear, either from the declaration of the latter or from the circumstances of the adoption of the decision, how the discretion will be used Questionable whether the test requires a legal entitlement.	Part I, Chapter 1, Section 1.1.3(b)
4	Individual Concern	<i>Plaumann</i>: “[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that <i>decision</i> affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.” “True” decisions – automatically fulfilled – <i>International Fruit Company</i>. Decision addressed to others – closed class approach, i.e. one where the membership is fixed and determined at the time the measure comes into force (+ the applicant adopted a particular cause of action). Regulations – closed class approach and abstract terminology test (<i>e.g., Abertal</i>: “[t]he Court has consistently held that the possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question”). Directives - closed category approach and abstract terminology test. More liberal approaches in sector-specific case-law (competition, anti-dumping and state aids) and isolated cases (<i>e.g., Roquettes Frères, Sofrimport, UEAPME, Les Verts, Extramet, Codorníu</i>).	Part I, Chapter 1, Section 1.1.3(c)

5	<i>TWD</i> and <i>Nachi</i>	<i>TWD</i>: a decision is definitive against a <i>third party</i>, where the latter could have “undoubtedly” challenged such act and cannot be challengeable indirectly through the use of preliminary references. <i>Nachi</i>: same understanding extends to anti-dumping regulations.	Part I, Chapter 1, Section 1.3
SECOND PILLAR – ARTICLE 46 TEU			
1	Reviewable acts	No review at the initiative of private parties [except for first pillar matters made applicable to the second pillar (<i>Hautala</i>); and breaches of Article 47 TEU].	Part I, Chapter 2
THIRD PILLAR – ARTICLES 46 AND 35 TEU			
1	Reviewable acts: Seventeen Member States which accepted the jurisdiction of the CJEU	Review of first pillar matters made applicable to the third pillar (<i>Svenska Journalistförbundet</i>); and breaches of Article 47 TEU. Mere indirect review of framework decisions and decisions (conventions?), and measures implementing them through preliminary references. <i>Segi</i>: “[i]t has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act. Therefore, a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position adopted on the basis of Article 34 EU, as is the case in this instance for part of Common Position 2001/931 and in any event for Article 4 thereof and the Annex thereto, and which has serious doubts whether that common position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.”	Part I, Chapter 2
2	Reviewable acts: Ten Member States which did not accept jurisdiction of the CJEU	No review at the initiative of private parties [except for first pillar matters made applicable to the third pillar (<i>Svenska Journalistförbundet</i>); and breaches of Article 47 TEU].	Part I, Chapter 2

**CHALLENGES BROUGHT BY PRIVATE PARTIES AGAINST UNION ACTS *POST*LISBON:
THE JOHNSTON APPROACH: SUBJECTIVIST *PRO ACTORE* APPROACH TO JUDICIAL REVIEW
OF UNION ACTS**

GENERAL JURISDICTION OF CJEU – ARTICLES 19(1) TEU AND 263(4) TFEU			
1	Reviewable acts	All Union acts which are intended to produce legal effects <i>vis-à-vis</i> individuals, understood as <i>actes faisant grief</i> .	Part II, Chapter 2 Section 2.1.1
2	Acts addressed to individuals	Acts of individual application, according to <i>Producteurs</i> – no standing requirements.	Part II, Chapter 2 Section 2.1.1
3	Regulatory acts	Notion: all Union measures which are adopted under the <i>form of regulation</i> (i.e., all Union regulations) or which perform some sort of <i>regulatory function</i> regardless of their form and of the procedure for their adoption (i.e., all regulatory directives and decisions). If <i>Inuit</i> case-law prevails (regulatory acts as non-legislative acts of general application): a) All provisions included in legislative acts which are not the essential elements of the subject-matter envisaged (<i>Köster</i>). b) All acts adopted without adequate and effective participation of Parliament, e.g., within special legislative procedures (“democratic-pedigree” argument).	Part II, Chapter 2 Section 2.1.2
3	Direct concern and implementing measures	a) Test of direct concern: the measure is the cause of effects/harm in the legal or factual situation of the applicants. b) Notion of implementing measures: measures that imply the exercise of genuine discretion and can be challenged directly by individuals in national or Union courts.	Part II, Chapter 2 Section 2.1.3
4	Individual concern	a) Scope of application: (i) non-regulatory acts (i.e., legislative directives and legislative decisions which do not perform any kind of regulatory function) which entail implementing measures that individuals may challenge directly in national or Union courts; and (ii) regulatory acts which require implementing measures that individuals may challenge directly in national or Union courts. If <i>Inuit</i> case-law prevails: all legislative acts which involve adequate and effective participation of Parliament and concern the essential elements of a given policy. b) Test of individual concern: the measure has or is liable to have a substantial adverse effect on the interests of the applicant.	Part II, Chapter 2 Section 2.1.4

5	Fundamental rights review (<i>de minimis</i> alternative to new test on individual concern)	<i>Prima facie</i> breach of fundamental rights along the lines of EctHR's case-law on the notion of victim. (PKK and KNK).	Part II, Chapter 2 Section 2.1.5
6	"Plug the gaps" (<i>de minimis</i> alternative to new test on individual concern)	Whenever a Union act applies directly to an individual without entailing implementing measures and an individual demonstrates, with sufficient certainty, that access to national courts is not viable or effective, or that national courts are not competent or capable of addressing the CJ for a preliminary reference, the CJEU should deem the applicant directly and individually concerned and therefore admit the action.	Part II, Chapter 2 Section 2.1.6
8	<i>TWD</i> and <i>Nachi</i>	Restricted to those acts which individuals could have obviously challenged directly, on their account failed to do so, and consequently intentionally tried to circumvent the time limit set forth in Article 263(6) TFEU by launching an indirect challenge.	Part II, Chapter 2 Section 2.1.7
CFSP – Article 275 TFEU			
1	Reviewable acts	Scope of application: restricted to the initial CFSP act and not extending to the implementing acts. Notion: any CFSP act which is intended to produce legal effects <i>vis-à-vis</i> individuals.	Part II, Chapter 2 Section 2.2
2	Standing requirements	Same as under Article 263(4) TFEU. CFSP acts as regulatory acts?	Part II, Chapter 2 Section 2.2
PJCCM - PROTOCOL 36 TO THE LISBON			
1	Article 10 postpones the entry into force of the newly extended jurisdiction of the CJEU to the PJCCM to a maximum limit of five years counting from the date of the entry into force of the revision Treaty, with respect to the Third Pillar acts existing on 1/12/2009. Until then Article 35 TEU remains applicable with regard to such acts.		Part II, Chapter 2 Section 2.1.1

ANNEX II

TABLE OF CORRESPONDENCE OF MOST CITED PROVISIONS

	ROME/SEA/MAASTRICHT	AMSTERDAM/NICE	LISBON
Principle of loyal cooperation	5 TEEC	10 TEC	4(3) TFEU
Sources of Law	137 TEEC	189 TEC	288 TFEU
CJEU's general jurisdiction	164 TEEC	220 TEC	19(1) TEU
Action for annulment	173 TEEC	230 TEC	263 TFEU
Preliminary rulings	177 TEEC	234 TEC	267 TFEU
Plea of illegality	184 TEEC	241 TEC	277 TFEU
Action for damages	215 TEEC	288 TEC	340 TFEU
CJEU's jurisdiction under the TEU	L TEU	46 TEU	—
Control of EC/EU competences	M TEU	47 TEU	40 TEU
Fundamental rights protection	F TEU	6 TEU	6 TEU

ABSTRACT

This dissertation deals with the old topic of EU law regarding access by individuals to the Court of Justice of the European Union (CJEU) to challenge the validity of Union acts. The study is based in two landmark judgments rendered by the CJEU in 1986, *i.e.* *Les Verts* and *Johnston*, and it argues that the bridge between these two decisions has not been fully built in the CJEU's case-law, which has left room for uncertainties, ambiguities and insufficiencies in what concerns the judicial protection of private parties *vis-à-vis* the EU.

In light of the *Les Verts* judgment, the dissertation argues that the CJEU's case-law is dominated by an objectivist, institutional and systemic approach which has given rise to gaps of judicial protection of private parties in the Union legal order and underlies the inability of the CJEU to fill in such *lacunae*. In this context, the dissertation stresses (i) the restrictive interpretation of standing requirements of private parties to bring an action for annulment; (ii) the irrelevance of the finding of a breach of the right to effective judicial protection at the Union level; (iii) the generous view to other objective and institutional dimensions of the Union system of judicial review; and the (iv) systemic concerns regarding the docket control of the CJEU combined with a certain view of the Union judicial architecture said to be fundamentally anchored in national judiciaries. Furthermore, it is submitted that the alternative routes to the direct access by individuals to the Union courts put forward by the CJEU have proved inadequate and ineffective, because of the objectivist, institutional and systemic conceptual approach underlying to the CJEU's case-law on the scope and nature of such avenues. At this point, the dissertation discusses the issue of national procedural autonomy, the nature of preliminary references, and the *TWD* doctrine. Additionally, it is argued that the CJEU's case-law regarding judicial review in the field of the former intergovernmental pillars suggests an institutional and objectivist trend as well. In drawing attention to the objective elements, the institutional preference and the systemic views enshrined in the CJEU's case-law the dissertation brings to the fore institutional guarantees, as a reflex of the objective dimension of fundamental rights.

In contrast with the previous approach, it is argued that the entry into force of the Lisbon Treaty requires the CJEU to adopt a more subjectivist approach to the issues of judicial protection of individuals in the EU. Such an approach is anchored in the *Johnston* verdict which laid the first stone regarding such issues in the Union legal order. It is submitted that the new Article 6 TEU involves a paradigm shift regarding fundamental rights protection in the EU. In this context, the dissertation discusses the procedural impact of the formal constitutionalization of the Charter of Fundamental Rights and of the accession to the European Convention on Human Rights. The changes introduced by the Lisbon Treaty regarding judicial review of Union acts at the initiative of individuals are discussed in light of said constitutional shift. The dissertation puts forward several proposals regarding the interpretation of Article 19 TEU and Articles 263(4) and 275 TFEU – taking into consideration the recent GC's decision in the case of *Inuit* – in light of the *pro actore* approach which should arguably underlie to the CJEU's case-law in this regard. Lastly, the issue of a more generous approach to direct access by individuals to the Union courts is discussed in view of the CJEU's workload concerns. The possibility of a European *certiorari*, among other possible judicial reforms, is analysed therein.

RESUMO

A presente dissertação, que tem por objeto o acesso dos particulares ao Tribunal de Justiça da União Europeia (TJUE) — um tema clássico de Direito da União Europeia — assenta em duas decisões fundamentais proferidas pelo TJUE, em 1986, nos casos *Les Verts* e *Johnston*. Considera-se aqui que a “ponte” entre os dois referidos acórdãos não foi totalmente estabelecida na jurisprudência do TJUE, abrindo espaço para incertezas, equívocos e insuficiências no que diz respeito à tutela jurisdicional dos particulares na União Europeia.

À luz do acórdão *Les Verts*, a dissertação começa por considerar que a jurisprudência do TJUE adota uma abordagem objetivista, institucional e sistémica que tem dado origem a lacunas na proteção jurisdicional dos particulares, e justifica a incapacidade do mesmo tribunal no suprimento das referidas lacunas. Neste contexto, chama-se a atenção para (i) a interpretação restritiva das condições em que aos particulares é permitido intentar uma ação de anulação; (ii) a irrelevância do argumento fundado na violação do direito fundamental à tutela jurisdicional efetiva na apreciação da admissibilidade de ações de anulação; (iii) a abordagem generosa que o TJUE tem adotado relativamente a outras dimensões objetivistas e institucionais do sistema de controlo jurisdicional da validade de atos da União; e (iv) as preocupações sistémicas relativas ao controlo do volume de processos que o TJUE tem de decidir, associadas a uma certa visão da arquitetura judiciária europeia, considerada fundamentalmente ancorada nas jurisdições nacionais. A acrescer a estas considerações, chama-se ainda a atenção para o facto de os meios de tutela alternativos ao acesso direto dos particulares aos tribunais da União se demonstrarem inadequados e ineficazes, precisamente em virtude da abordagem objetivista, institucional e sistémica que subjaz à jurisprudência do TJUE no que diz respeito ao âmbito e à natureza jurídica dos referidos meios de tutela. A este propósito, a dissertação discute, em particular, o princípio da autonomia processual dos Estados-membros, a natureza jurídica do mecanismo do reenvio prejudicial e o sentido e alcance da doutrina *TWD*. Acrescenta-se ainda que a jurisprudência do TJUE relativamente ao controlo jurisdicional da validade de atos da União no domínio dos chamados “pilares intergovernamentais” sugere igualmente uma tendência objetivista e institucional. Salientando os elementos objetivos, a preferência institucional e a visão sistémica que decorrem da jurisprudência do TJUE nesta matéria, a dissertação chama à colação a figura das garantias institucionais, enquanto reflexo da dimensão objetiva dos direitos fundamentais.

Rompendo com a abordagem anterior, considera-se então que a entrada em vigor do Tratado de Lisboa impõe que o TJUE adote uma orientação dita subjetivista relativamente à tutela jurisdicional dos particulares na União Europeia. Esta nova abordagem funda-se em primeira linha no acórdão *Johnston* que lançou a primeira pedra nesta matéria na ordem jurídica da União. Na verdade, o novo artigo 6.º do Tratado da União Europeia implica uma mudança de paradigma constitucional no que diz respeito à proteção dos direitos fundamentais na União Europeia. Neste contexto, a dissertação discute o impacto processual da constitucionalização formal da Carta dos Direitos Fundamentais da União, e bem assim da adesão à Convenção Europeia dos Direitos do Homem. À luz da referida mudança de paradigma constitucional, analisam-se as alterações introduzidas pelo Tratado de Lisboa no que respeita ao controlo da validade de atos da União por iniciativa dos particulares. A este propósito, tomando em consideração a recente decisão do Tribunal Geral no caso *Inuit*, a dissertação propõe diversas soluções relativas à interpretação dos artigos 19.º do Tratado da União Europeia e 263.º § 4 e 275.º do Tratado relativo ao Funcionamento da União Europeia à luz do princípio *pro actore* que deverá alegadamente orientar a jurisprudência do TJUE nestas matérias. Por último, é discutida a questão do alargamento do acesso dos particulares ao TJUE tendo em conta as preocupações veiculadas pelo tribunal relativamente ao aumento do volume de processos que pode ameaçar comprometer o adequado funcionamento do sistema judicial da União. Aqui, analisa-se a possibilidade de criação de um mecanismo europeu de *certiorari*, juntamente com outras reformas jurisdicionais que têm sido objeto de debate e reflexão na comunidade jurídica.

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