ES tiesas un tiešās prasības ES tiesās

since the normal mechanism for input legitimacy, through national parliaments, was reduced as increasing areas were regulated by the EU. One response was to foster closer involvement of national parliaments in EU decision-making.[208] Another response to this legitimacy deficit was to increase the power of the EP.

K Auel and B Rittberger, The European Parliament, National Parliaments and European Integration[209]

> [W]e argued that political elites have—since the SEA—gradually empowered the European Parliament's legislative powers and thus its capacity to influence European policy-making. Even though the decisions by member states to increase the legislative powers of the European Parliament were all but uncontroversial, the introduction and transfer of sectoral policy decisions to the European level triggered what we coined a democratic 'legitimacy deficit': European political elites came to perceive that the centralisation of policy-making tasks at the European level undermined the power of domestic parliaments to control and influence their respective governments in European policy-making. The legislative empowerment of the European Parliament was thus considered to serve as a mechanism to 'compensate' for domestic 'de-parliamentarisation'.

7 COURTS

Prior to the Lisbon Treaty the Community Courts comprised the Court of Justice (ECJ), the Court of First Instance (CFI), and judicial panels.[210] The nomenclature has been altered by the Lisbon Treaty. The term 'Court of Justice of the European Union' includes the ECJ, the General Court, the successor to the CFI, and specialized courts, the new name for judicial panels. Article 19(1) TEU provides that:

> The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

(A) EUROPEAN COURT OF JUSTICE

Article 19(1) TEU states that there shall be one judge per Member State. They are appointed 'by common accord of the Governments of the Member States',[211] after consultation with a panel that reports on the suitability of the person to perform the function of an ECJ judge.[212] Judges and Advocates General of the ECJ must be chosen from persons whose independence is beyond doubt, who possess the qualifications required for appointment to the highest judicial offices in their respective countries, or are jurisconsults of recognized competence.[213] The term of office is six years, but the judge can be reappointed. The appointments are staggered, so that there will be a partial replacement

[208] Auel and Rittberger (n 206) 129–136.
[209] Ibid 136–137.
[210] R Dehousse, *The European Court of Justice* (Macmillan, 1998); A Arnull, *The European Union and its Court of Justice* (Oxford University Press, 2nd edn, 2006).
[211] Art 253 TFEU.
[212] Art 255 TFEU.
[213] Art 19(2) TEU, Art 253 TFEU.

of judges every three years.[214] The Court elects its President from amongst its own judges and appoints its Registrar.[215]

The ECJ is assisted by eight Advocates General, and that number can be raised by unanimous decision of the Council.[216] The qualifications for selection, method of appointment, and conditions of office of the Advocate General (AG) are the same as for the ECJ judges. The AG's duty is principally 'to make, in open court, reasoned submissions on cases': Article 252 TFEU. An Opinion of the AG is not required in every case.[217]

Certain Member States have appointed academics as ECJ judges, whereas others, such as the UK and Ireland, have nominated advocates or existing domestic judges. A judge or AG who, in the unanimous opinion of the other judges and Advocates General, no longer fulfils the conditions and obligations of office may be removed.[218] Judges may not hold any other political or administrative office while members of the Court and, apart from their normal replacement, their period of office may terminate on death, resignation, or on removal from office.[219]

The ECJ may sit as a full Court, a 'Grand Chamber', or in Chambers, in accordance with rules laid down by the Statute.[220] It sits as a full Court either where the case is regarded as exceptionally important, or where the subject matter warrants, such as an action for dismissal of the Ombudsman or a Commissioner.[221] The Grand Chamber consists of thirteen judges and is used when a Member State or an institution that is party to the proceedings so requests, and in particularly complex or important cases.[222] The great majority of cases are heard in Chambers of three or five judges,[223] which is vital to the Court's functioning, given its increasing case-load.

The ECJ's jurisdiction is specified in the Treaties, and many of the heads of jurisdiction will be considered within subsequent chapters. Suffice it to say for the present that the main provisions governing its jurisdiction are Article 19 TEU and Articles 251–281 TFEU. International agreements between Member States may also confer jurisdiction on the ECJ.

(B) GENERAL COURT

The Court of First Instance (CFI)[224] was established in 1988 pursuant to the Single European Act.[225] Initially the CFI had a derivative institutional status, and was described in the EC Treaty as being 'attached to the Court of Justice'. This was altered by the Nice Treaty, and the Lisbon Treaty, as we have seen, now provides that the Court of Justice of the European Union shall include the General Court, the new name for the CFI, and accords it responsibility within the sphere of its jurisdiction for the task of ensuring that the law is observed in the interpretation and application of the Treaty.[226]

The General Court comprises 'at least' one judge per Member State, thus distinguishing it from the ECJ.[227] There are no separate Advocates General on the General Court, although a judge may be

[214] Art 253 TFEU.
[215] Art 253 TFEU.
[216] Art 252 TFEU.
[217] Protocol (No 3) On the Statute of the Court of Justice of the European Union, Art 20; Art 281 TFEU contains the mechanism for amendment of the Statute.
[218] Ibid Art 6 TFEU.
[219] Ibid Art 4 TFEU.
[220] Art 251 TFEU.
[221] Statute (n 217) Art 16.
[222] Ibid.
[223] Ibid.
[224] Known in French as the *Tribunal de Première Instance*, which explains the T used before the case number when a case is registered with the CFI/General Court.
[225] Council Decision 88/591, [1988] OJ L319/1.
[226] Art 19(1) TEU.
[227] Art 19(2) TEU.

called upon to perform the task of an AG.[228] The members of the General Court shall be chosen from 'persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office'.[229] They are appointed by common accord of the Member States for six years renewable,[230] after consultation with the judicial panel that advises on judicial appointments.[231] The General Court elects its own President from amongst its judges, and appoints its Registrar.[232] It sits in Chambers of three and five judges, or sometimes as a single judge,[233] and approximately 75 per cent of cases are heard by Chambers of three judges. It may also sit as a Grand Chamber or full Court when the complexity or importance of the case demands it.[234]

There is an appeal to the ECJ within two months from the General Court's decision.[235] The appeal is limited to questions of law, and this covers 'lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court'.[236]

The rationale for the creation of the General Court was to relieve the burden on the ECJ. It was initially given jurisdiction over staff cases, competition cases brought by individuals against the Community institutions, and certain cases under the ECSC Treaty. Gradually the Council transferred to it other categories of cases. The General Court's jurisdiction is now determined by Article 256 TFEU. This will be examined in detail later. Suffice it to say for the present that the General Court has jurisdiction over most, although not all, direct actions.[237] Direct enforcement actions against Member States under Articles 258 and 259 TFEU remain, however, under the jurisdiction of the ECJ, although this can be changed through amendment of the Statute. The General Court can hear actions against decisions of specialized courts, and the General Court's rulings can be reviewed by the ECJ only in exceptional circumstances, 'where there is a serious risk of the unity or consistency of Union law being affected'.[238]

Indirect actions begin in national courts, which seek a preliminary ruling from the ECJ on EU law pursuant to Article 267 TFEU. The national court then decides the case in the light of that ruling. Prior to the Nice Treaty such cases were the preserve of the ECJ. The Nice Treaty changed this and the schema has been carried over to the Lisbon Treaty. Thus the General Court can be empowered to decide on preliminary rulings under Article 267 TFEU 'in specific areas laid down by the Statute',[239] subject to certain controls by the ECJ. The Nice IGC specified in Declarations 12 and 13 that attention should be given as soon as possible to the delineation of such areas, but there has nonetheless been no move to make this a reality by specifying the areas in which the General Court would have power over preliminary rulings.[240]

(c) SPECIALIZED COURTS

The establishment of specialized courts, hitherto judicial panels, is governed by Article 257 TFEU. The principal rationale for this development, which dates from the Nice Treaty, was to ease the

[228] Statute (n 217) Art 49.
[229] Art 254 TFEU.
[230] Art 254 TFEU.
[231] Art 255 TFEU.
[232] Art 254 TFEU.
[233] Council Decision 1999/291, [1999] OJ L114/52; Statute (n 217) Art 50.
[234] Ibid Art 50.
[235] Ibid Art 56.
[236] Ibid Art 58.
[237] The principal categories of direct actions are: annulment actions, Art 263 TFEU; actions for failure to act, Art 265 TFEU; and damages actions, Art 340 TFEU.
[238] Art 256(2) TFEU.
[239] Art 256(3) TFEU.
[240] Ch 13.

workload of the ECJ and General Court. The proposal to create a system of decentralized or regional Community courts was not taken up,[241] but the creation of a third jurisdictional level below the ECJ and the General Court was the most significant structural reform of the EU judicial system since the establishment of the General Court. A European Union Civil Service Tribunal has been created to adjudicate on staff cases.[242]

Article 257 TFEU stipulates that the European Parliament and the Council, acting via the ordinary legislative procedure, may establish specialized courts attached to the General Court to hear at first instance certain classes of action in specific areas. The European Parliament and the Council act either on a proposal from the Commission after consultation with the Court of Justice, or at the request of the Court of Justice after consultation with the Commission. Decisions given by specialized courts are normally subject to appeal only on law, subject to the caveat that there can be appeal on fact if the regulation establishing a particular specialized court so provides. The members of the specialized courts are chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They are appointed by the Council, acting unanimously.

(D) REFORM OF THE COURT SYSTEM

Reform of the EU Court system was long-awaited and oft-proposed, but reactions to the Nice Treaty amendments to the 'judicial architecture' were rather muted.

JHH Weiler, The Judicial Après-Nice[243]

> The actual outcome of the Conference in this area too, as with the political institutions, is an inability to break away from the scheme of the original Treaties. At the core of this architecture, and its most important feature by any perspective one may care to adopt, is the Preliminary Reference and the Preliminary Ruling. This procedure has remained substantially unchanged for half a century. A Court of First Instance with new-found dignity, Judicial Panels and all the rest notwithstanding, Europe continues to drive in its rusty and trusted 1950 model with the steering wheel firmly in the hands of the Court of Justice.
>
> Put differently, the IGC was not willing to engage in either profound rethinking or profound re-engineering of the judicial function in view of a much changed polity to the one in which the current system was set. ... And yet the context in which the judicial system is situated has changed radically in the last fifty years. The increase of size from six Member States to a potential of twenty-six is really only part of the problem, and possibly not even the most important part. Not a limited jurisdiction over some technical areas but a complex polity with jurisdiction ranging from human rights to monetary policy to difficult aspects of immigration and even citizenship. ... And then the Court itself: no longer an instance for dispute settlement, but a judicial giant which has successfully positioned itself at the constitutional centre of Europe, a Europe in which national legal orders suddenly feel under threat.

Space precludes detailed elaboration of the changes that might be made to the EU's judicial architecture, although this will be examined in part when discussing preliminary rulings.[244] Suffice

[241] H Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) 37 CMLRev 1071; JP Jacqué and J Weiler, 'On the Road to European Union: A New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27 CMLRev 185.

[242] Council Decision 2004/752/EC, Euratom of 2 November 2004, establishing the European Union Civil Service Tribunal [2004] OJ L333/7.

[243] G de Búrca and JHH Weiler (eds), *The European Court of Justice* (Oxford University Press, 2001) 217–218.

[244] Ch 13.

it to say for the present that overhaul of the judicial architecture, and the division of jurisdiction between the ECJ and General Court for both direct and indirect actions, would be desirable.[245] The Constitutional Treaty and the Lisbon Treaty had less impact on the EU Courts than on the other institutions. The Courts' role within the new constitutional scheme was considered only relatively late in the Convention proceedings, when a Discussion Circle was set up and it worked under severe time constraints. There was little consideration given to the general division of jurisdiction between the ECJ, CFI, and national courts and the Discussion Circle focused on a number of more discrete legal issues. The overall judicial architecture in the Constitutional Treaty and Lisbon Treaty therefore largely replicated the existing Treaties.[246]

(E) ADVOCATE GENERAL

The ECJ's decision-making is assisted by the office of AG. The AG is a full member of the Court and participates at the oral stage of the judicial hearing. The AG's most important task is to produce a written opinion, the 'reasoned submissions' mentioned in Article 252 TFEU, for the Court. This opinion is produced before the Court makes its decision. An AG does not have to be involved in every case and the Statute determines when this is required.[247]

The written opinion sets out the AG's view of the law, and recommends how the case should be decided. This opinion does not bind the Court, but is very influential, and is often followed by the ECJ. The AG's opinion is intended to constitute impartial and independent advice, and in practice it tends to be a comprehensive, reasoned account of the law governing all aspects of the case. It will often shed light on an ECJ judgment that is difficult to interpret.

(F) PROCEDURE BEFORE THE COURT

Procedure before the ECJ and General Court is governed by their respective rules of procedure.[248] The procedure before the ECJ takes place in two stages, the written and the oral stages.[249] The written part of the proceedings before the ECJ is normally more important than the oral. At the written stage, all applications, statements of case, defences, and any submissions or relevant documents are communicated to the parties and institutions whose decisions are being contested. The oral stage, by contrast, is limited and short. The *juge-rapporteur*, the judge assigned in a given case, prepares and presents to the Court the 'report for the hearing', which summarizes the facts of the case and the arguments of the parties. The legal representatives may make oral submissions to the Court, which can question them. This has become an important part of the oral proceedings, since it clarifies the issues which the Court considers of significance in the case.

While there is an appeal from judicial panels to the General Court and appeals on points of law from the General Court to the ECJ, there is no further appeal from the judgments of the ECJ. However, Member States, EU institutions, and parties may under certain conditions contest a judgment delivered without their being heard, where it is prejudicial to their rights.[250] There is also a mechanism

[245] P Craig, *EU Administrative Law* (Oxford University Press, 2006) ch 9.

[246] Craig (n 79) ch 4.

[247] Statute (n 217) Art 20 provides that where the ECJ 'considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General'.

[248] N Brown and T Kennedy, *The Court of Justice of the European Communities* (Sweet & Maxwell, 5th edn, 2000); K Lenaerts, 'The European Court of First Instance: Ten Years of Interaction with the Court of Justice' in D O'Keeffe and A Bavasso (eds), *Judicial Review in EU Law* (Kluwer, 2000) 97.

[249] Statute (n 217) Art 20.

[250] Ibid Art 42.

whereby any party with an interest in a particular judgment may apply to the Court to construe its meaning where this is in doubt,[251] and revision of a judgment within ten years of its being given can be sought 'on discovery of a fact which is of such nature as to be a decisive factor' and which was unknown at the time the judgment was given.[252]

The Court, while generally building on its case law, does not consider itself bound by a strict system of precedent.[253] The ECJ may explain the rationale for departure from prior case law, but will not always indicate the cases that have been 'overruled'.[254]

(G) STYLE OF THE COURT'S JUDGMENTS

The style of the ECJ's judgments stands in contrast with the AG's opinions. The ECJ's and General Court's judgments are collegiate, representing the single ruling of all judges hearing the case. There are no dissents or separately concurring judgments, and therefore divergent judicial views may be contained within the judgment. This can result in a ruling that is ambiguous on matters of importance. Further difficulties can arise because of the multiplicity of languages used before the Court. Moreover, while the AG's opinion generally considers exhaustively all the legal arguments potentially relevant to the case, the Court may prefer not to commit itself on a specific legal issue until another case arises where it is directly necessary for a decision.

(H) ROLE OF THE COURT

The ECJ has, as noted above, various heads of jurisdiction. Its contribution to EU law has moreover been shaped through use of Article 19(1) TEU, which provides that it 'shall ensure that in the interpretation and application of the Treaties the law is observed'. This provision now applies to all EU Courts, but it has been the ECJ which has made principal use of it. It will be seen in subsequent chapters how the Court utilized this provision to extend review to cover bodies which were not expressly subject to it[255] and measures which were not listed in the Treaty.[256] In the name of preserving 'the rule of law' the Court has developed principles of a constitutional nature as part of EU law, which bind the EU institutions and Member States when they act within the sphere of EU law.[257] It is the ECJ, as interpreter of the Treaties, which adjudicates on the limits of EU competence as against the Member States.[258]

It has moreover been the ECJ that fashioned seminal principles of the EU legal order, such as direct effect, supremacy, and state liability in damages. These principles have defined the very nature of the EU, constitutionalizing it and distinguishing it from other international Treaties. They were especially significant in the years of so-called institutional malaise or stagnation. The Court rendered the Treaty and EC legislation effective when the provisions had not been implemented as required by the political institutions and the Member States.[259] This was exemplified by the ECJ's role in the creation of the internal market, requiring removal of national trade barriers, at a time when

[251] Ibid Art 43; Case 69/85 *Re Wünsche* [1986] ECR 947.
[252] Statute (n 217) Art 44.
[253] A Arnull, 'Owning up to Fallibility: Precedent and the Court of Justice' (1993) 30 CMLRev 247.
[254] See, eg, Cases C-267–268/91 *Keck and Mithouard* [1993] ECR I-6097.
[255] It subjected the Parliament to judicial review under Art 230 EC in Case 294/83 (n 188) although it was not included in the Treaty as a body subject to review. Conversely, in Case 70/88 (n 187) it allowed Parliament to bring such an action despite not being covered by the Treaty.
[256] Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.
[257] Chs 11 and 15.
[258] Ch 3.
[259] Ch 7.

progress towards completing the Single Market through legislative harmonization was hindered by institutional inaction.[260]

It is therefore important to view the ECJ's role from a dynamic, rather than static, perspective. It was suggested, after the revival of the political processes of integration leading to the SEA, that the Court should thereafter adopt a 'minimalist' role.[261] The reality is that the ECJ has not been a consistently 'activist' court at all times or in all policy spheres. It may, for example, simultaneously create new methods of enforcement,[262] while reducing its intervention in an area where the legislative institutions have become more active. The Court is moreover aware of the political environment in which it acts and its judgments are at times influenced by relatively 'non-legal' arguments made by Member States, relating to the financial impact of a ruling, or by critical responses from the public or from national and Union sources.[263]

The Court's jurisprudence cannot be properly understood without an awareness of its approach to interpretation. This is generally described as purposive or teleological, although not in the sense of seeking the precise purpose of the authors of a text.[264] The fact that the *travaux préparatoires* to the original Treaties were never published meant these were not used as a source, and this is reflected in the Court's case law.[265] In the case of secondary legislation declarations and extracts from the minutes have occasionally been relied on as aids to interpretation before the Court.[266] However in most cases it has denied the relevance of this material if it does not appear in the text of the legislation.[267]

The ECJ's teleological or purposive approach is not therefore narrowly historical. The Court rather examines the whole context in which a particular provision is situated, and gives the interpretation most likely to further what the Court considers that provision sought to achieve. This may not be the literal interpretation of the Treaty, or of the legislation, and may not comport with the express language. This aspect of the Court's methodology has attracted criticism, although it has been defended robustly by members of the academic community, by its former personnel, and by some practitioners.

The best known of the Court's early critics was Rasmussen. His thesis was that the Court sought 'inspiration in guidelines which are essentially political of nature and hence, not judicially applicable. This is the root of judicial activism which may be a usurpation of power.'[268] He did not criticize all 'activism', but rather that which he believed to have lost popular legitimacy. There were mixed reactions to Rasmussen's work from an academic community that had largely been supportive of the Court's strategy.[269] Thus Cappelletti argued that Rasmussen's critique lacked an historical dimension,

[260] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837; Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

[261] T Koopmans, 'The Role of Law in the Next Stage of European Integration' (1986) 35 ICLQ 925.

[262] See, eg, Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357; Cases C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] ECR I-1029.

[263] See, eg, Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889; Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; Case C-409/95 *Hellmut Marschall v Land Nordrhein Westfalen* [1997] ECR I-6363.

[264] A Bredimas, *Methods of Interpretation and Community Law* (North Holland, 1978); J Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford University Press, 1993); T Koopmans, 'The Theory of Interpretation and the Court of Justice' in O'Keeffe and Bavasso (n 248) 45; C Kombos, *The ECJ and Judicial Activism: Myth or Reality?* (Sakkoulas, 2010).

[265] See, eg, Case 149/79 *Commission v Belgium* [1980] ECR 3881, 3890; Case 2/74 *Reyners v Belgium* [1974] ECR 631, 666, Mayras AG.

[266] Case 136/78 *Ministère Public v Auer* [1979] ECR 437, [25]-[26]; Case 131/86 *UK v Council* [1988] ECR 905, [26]-[27].

[267] See, eg, Case 38/69 *Commission v Italy* [1970] ECR 47, [12]; Case 143/83 *Commission v Denmark* [1985] ECR 427; Case 237/84 *Commission v Belgium* [1986] ECR 1247; Case 306/89 *Commission v Greece* [1991] ECR 5863, [6], [8]; Case C-292/89 *Antonissen* [1991] ECR I-745.

[268] H Rasmussen, *On Law and Policy in the European Court of Justice* (Nijhoff, 1986) 62.

[269] M Cappelletti (1987) 12 ELRev 3; J Weiler (1987) 24 CMLRev 555; A Toth (1987) 7 YBEL 411.

that any constitutional court should have the courage to enforce its 'higher law' against temporary pressures, and that the ECJ's vision 'far from being arbitrary, is fully legitimate, for it is rooted in the text, most particularly in the Preamble and the first Articles of the EEC Treaty'.[270]

A further attack on the Court came from Sir Patrick Neill, in his 'case study in judicial activism', in which he argued that the Court was a dangerous institution, skewed by its own policy considerations and driven by an elite mission.[271] Advocate General Fennelly however pointed out that the Member States through Treaty revisions have either explicitly or implicitly approved many Court decisions.[272] Advocate General Jacobs, in defence of the Court's 'constitutional' role, argued that it plays an essential role in preserving the balance between the Union and the Member States, and in developing constitutional principles of judicial review.

F Jacobs, Is the Court of Justice of the European Communities a Constitutional Court?[273]

If then, the Court sometimes performs the task of a Constitutional Court, and if it has developed constitutional principles in its case law, we can understand why, in some quarters, the Court's activities have been misunderstood. The Court has sometimes been criticized as a 'political' Court. Such criticisms are probably based on unfamiliarity with the very notion of constitutional jurisprudence, which, as we have seen, is not familiar in all the Member States, and which requires what may seem novel judicial techniques, different approaches to interpretation, even a different conception of the law. Yet, in the Community system, which is based on the notion of a division of powers, some form of constitutional adjudication is inescapable, if indeed the Community is to be based, as its founders intended, on the rule of law.

It is true that all constitutional courts must engage with political issues, but, given the unaccountability of courts, the nature and origin of the 'unwritten' values which they promote should be critically scrutinized, as should the extent to which their decisions seem to depart from what their express powers would appear to allow. It is equally important for such judicial decision-making to be fully reasoned.[274]

The ECJ has overall pursued a policy of legal integration, giving substance to an 'outline' Treaty, thereby enhancing the effectiveness of EU law and promoting its integration into national legal systems. While excessive concentration on the Court should be avoided,[275] its role as an institutional actor in the integration process should be recognized. The nature of this role has been considered by political scientists as well as lawyers.

[270] *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) 390–391.

[271] *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum, 1995). See also T Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 LQR 95.

[272] N Fennelly, 'Preserving the Legal Coherence within the New Treaty: The ECJ after the Treaty of Amsterdam' (1998) 5 MJ 185, 198.

[273] D Curtin and D O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworths (Ireland), 1992) 25, 32. See also T Tridimas, 'The Court of Justice and Judicial Activism' (1997) 22 ELRev 199; A Arnull, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 LQR 95; G Howe, 'Euro-Justice: Yes or No?' (1996) 21 ELRev 187, 191; A Albors-Llorens, 'The European Court of Justice: More than a Teleological Court' (1999) 2 CYELS 373; Kombos (n 264); P Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 CMLRev 395.

[274] U Everling, 'The ECJ as a Decisionmaking Authority' (1994) 82 Mich LR 1294.

[275] T Koopmans, 'The Future of the Court of Justice of the European Communities' (1991) 11 YBEL 15; K Alter and S Meunier-Aitsahalia, 'Judicial Politics in the European Community' (1994) 26 Comparative Political Studies 535, 536.

For liberal intergovernmentalists the central message is that states are the driving forces behind integration, that supranational actors are there largely at their behest, and that such actors have little independent impact on the pace of integration.[276] The supranational institutions are viewed as agents for the Member States, who accord power to such institutions for their own self-interest. Thus the ECJ's powers are rationalized on the ground that the existence of proper adjudicatory mechanisms at the supranational level can prevent prisoner dilemma and free rider problems, thereby removing the possibility that the system will be undermined by states seeking to reap the rewards of membership while trying to avoid their obligations.[277]

The idea that the ECJ can be regarded as an agent of the Member States, with little if any independent impact on integration, will be questioned by lawyers, even if they disagree as to the nature of *this* impact. It would, to take but one prominent example, be difficult to rationalize the jurisprudence on citizenship in simple principal–agent terms, given that the ECJ's expansive interpretation of the relevant Treaty Articles was often given in the face of fierce opposition from the Member States.[278] It is moreover clear that political scientists who have studied the Court often disagree with liberal intergovernmentalism. Thus Stone Sweet argues against the view that the Court can be regarded as some perfect agent for Member State governments, and contends that ECJ decisions often produce 'unintended consequences' not readily foreseen by those who designed the EC.[279] In the following extract he adverts to the constitutionalization of the EU, through doctrines developed by the ECJ, such as direct effect, supremacy, and pre-emption.

A Stone Sweet, The Judicial Construction of Europe[280]

There are a number of reasons why the constitutionalization of the Rome Treaty generated an expansive logic of its own, entailing an increasing demand for law, rule clarification, and capacities for monitoring and enforcement. From the beginning the central mission of the EC was to create the conditions for the development of the Common Market. Yet impersonal exchange, across jurisdictional boundaries, is problematic for reasons that social scientists have explored at length ... As elsewhere, the success of integration has depended heavily on the extent to which the EC could develop effective organizational capacities: to guarantee property rights, to enforce competition rules, to adjudicate legal claims, to build a European framework for regulating market activities, and so on. At the very least constitutionalization accelerated this process. In my view, one can go further: the ECJ authoritatively reconstituted the Community in ways that linked the demand for and supply of European law and courts to the activities of market actors, and then to all activities governed by EC law. Constitutionalization not only positioned the courts as primary arenas for negative integration; it made them supervisors of positive integration, and creators of a growing corpus of rights which the Court found in the Treaty itself.

... With constitutionalization, the national courts too, developed into privileged sites for deliberation and rulemaking, not least because they are charged with supervising the transposition and implementation of EC law by national authorities ....

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[276] A Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473 and 'Liberal Intergovernmentalism and Integration: A Rejoinder' (1995) 33 JCMS 611, 623–625.

[277] Moravcsik, 'Preferences and Power' (n 276) 512–514. Moravcsik accepts that the ECJ has extended its powers beyond those strictly necessary for the attainment of his theory, but does not regard this as undermining his more general thesis.

[278] Ch 23.

[279] A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004) 235.

[280] Ibid 238–239. See also K Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press, 2009).

14

REVIEW OF LEGALITY: ACCESS

1 CENTRAL ISSUES

i. The EU develops policy through regulations, directives, and decisions. Any developed legal system must have a mechanism for testing the legality of such measures. This chapter is, therefore, concerned with access to justice and review of legality by the EU Courts. There are, as will be seen, a number of ways in which EU norms can be challenged, but the principal Treaty provision is Article 263 TFEU (ex Article 230 EC).

ii. Five conditions must be satisfied before an act can successfully be challenged. The relevant body must be amenable to judicial review; the act has to be of a kind which is open to challenge; the institution or person making the challenge must have standing to do so; there must be illegality of a type mentioned in Article 263(2); and the challenge must be brought within the time limit indicated in Article 263(6).

iii. The judicial interpretation of Article 230 EC was problematic, and it has in the past been very difficult for individuals to challenge the legality of EU action directly before the EU Courts. Article 263 TFEU was designed to alleviate this difficulty through amendment of Article 230 EC in the ways considered below. How far this renders it easier for non-privileged applicants to use Article 263 TFEU will be considered below.

iv. It is also possible for the validity of EU action to be challenged indirectly, via Article 267 TFEU. The inter-relationship between direct challenge under Article 263 and indirect challenge is important. The EU Courts defended their narrow interpretation of standing for direct actions by arguing that the Treaty provided a complete system of legal protection through a combination of Articles 263 and 267 TFEU. There are however, as will be seen, difficulties with this hypothesis.

2 ARTICLE 263(1): BODIES SUBJECT TO REVIEW

Article 263 TFEU is the lead provision concerning direct challenge to the legality of EU acts. Article 263(1) defines the bodies that are amenable to review.

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

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

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

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

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

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

Article 263(1) covers acts of the Council and Commission, including legislative acts, and acts of the European Central Bank, other than recommendations and opinions. It also covers acts of the European Parliament, European Council, and EU bodies, offices, or agencies intended to produce legal effects against third parties. The novelty of the Lisbon Treaty is the explicit inclusion of the European Council and EU bodies, offices, or agencies as amenable to judicial review, although prior jurisprudence had already brought agencies within the remit of judicial review.[1]

Article 263(5) stipulates that the acts setting up such EU bodies, offices, and agencies may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, etc, intended to produce legal effects in relation to them. It remains to be seen what is the nature of the conditions specified in the legislation creating such bodies.

ARTICLE 263(1): ACTS SUBJECT TO REVIEW

(A) GENERAL PRINCIPLES

Article 263(1) allows the Court to review the legality of acts,[2] other than recommendations and opinions, taken by the institutions listed in Article 263(1).[3] This clearly covers regulations, decisions and directives, which are listed in Article 288 TFEU. The ECJ has, however, held that this list is not

[1] Case T-411/06 *Sogelma-Società generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)* [2008] ECR II-2771.

[2] The Court may review acts of the Council which are intended to have legal effects irrespective of whether they have been passed pursuant to Treaty provisions: Case C-316/91 *European Parliament v Council* [1994] ECR I-625. However, decisions adopted by representatives of the Member States acting not as the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not reviewable under Art 263: Cases C-181 and 248/91 *European Parliament v Council and Commission* [1993] ECR I-3685. It will be for the Court to decide whether a measure really was an act of the institutions or whether it was an act of the Member States acting independently: ibid.

[3] The orginal formulation of Art 173 EEC only formally applied to the Council and the Commission, but the ECJ held that the acts of the European Parliament were also susceptible to review: Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339.

exhaustive, and that other acts which are *sui generis* can also be reviewed, provided that they have binding force or produce legal effects.[4]

Case 22/70 Commission v Council
[1971] ECR 263

[Note Lisbon Treaty renumbering: Arts 173 and 228 are now Arts 263 and 218 TFEU]

The Member States acting through the Council adopted a Resolution on 20 March 1970 to coordinate their approach to the negotiations for a European Road Transport Agreement (ERTA/AETR). The Commission disliked the negotiating procedure established in the Resolution, and sought to challenge it before the ECJ under Article 173.

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48 As regards negotiating, the Council decided, in accordance with the course of action decided upon at its previous meetings, that the negotiations should be carried on and concluded by the six Member States, which would become contracting parties to the AETR.

49 Throughout the negotiations and at the conclusion of the agreement, the States would act in common and would constantly coordinate their positions according to the usual procedure in close association with the Community institutions, the delegation of the Member State currently occupying the Presidency of the Council acting as spokesman.

50 It does not appear from the minutes that the Commission raised any objections to the definition by the Council of the objective of the negotiations.

51 On the other hand, it did lodge an express reservation regarding the negotiating procedure, declaring that it considered that the position adopted by the Council was not in accordance with the Treaty, and more particularly with Article 228.

52 It follows from the foregoing that the Council's proceedings dealt with a matter falling within the power of the Community, and that the Member States could not therefore act outside the framework of the common institutions.

53 It thus seems that in so far as they concerned the objective of the negotiations as defined by the Council, the proceedings of 20 March 1970 could not have been simply the expression or the recognition of a voluntary coordination, but were designed to lay down a course of action binding on both the institutions and the Member States, and destined ultimately to be reflected in the tenor of the regulation.

54 In the part of its conclusions relating to the negotiating procedure, the Council adopted provisions which were capable of derogating in certain circumstances from the procedure laid down by the Treaty regarding negotiations with third countries and the conclusion of agreements.

55 Hence, the proceedings of 20 March 1970 had definite legal effects both on relations between the Community and the Member States and on the relationship between institutions.

It is clear from *IBM* that the test as to whether an act is reviewable is one of substance, not form, and that the challenged measure must be final and not preparatory.

[4] Case C-57/95 *France v Commission (Re Pension Funds Communication)* [1997] ECR I-1627; Case C-370/07 *Commission v Council (CITES)* [2009] ECR I-8917, [42]. Moreover, if an EU institution which has the power to take reviewable decisions delegates that power to another institution, the Court will not be prevented from reviewing the acts of such a delegate.

Case 60/81 International Business Machines Corporation v Commission [1981] ECR 2639

[Note Lisbon Treaty renumbering: Arts 86 and 173 are now Arts 102 and 263 TFEU]

IBM sought the annulment of a Commission letter notifying it of the fact that the Commission had initiated competition proceedings against it, in order to determine whether it was in breach of Article 86. The letter was accompanied by a statement of objections, with a request that the company reply to it within a specified time. The Commission objected that the impugned letter was not an act challengeable under Article 173.

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9. In order to ascertain whether the measures in question are acts within the meaning of Article 173 it is necessary, therefore, to look to their substance. According to the consistent case-law of the Court any measure the legal effects of which are binding on, and capable of affecting the legal interests of the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article.

10. In 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.

11. It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case.

12. Furthermore, it must be noted that whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step.

The applicant failed.[5] The letter was merely the initiation of the competition procedure, a preparatory step leading to the real decision at a later stage. The statement of objections did not, in itself, alter IBM's legal position, although it might indicate, as a matter of fact, that it was in danger of being fined later.[6]

[5] See also Cases C–133 and 150/87 *Nashua Corporation v Commission and Council* [1990] ECR I–719; Case C–282/95 *Guérin Automobiles v Commission* [1997] ECR I–503; Case T–81/97 *Regione Toscana v Commission* [1998] ECR II–2889; Case C–159/96 *Portuguese Republic v Commission* [1998] ECR I–7379; Case C–180/96 *United Kingdom v Commission* [1998] ECR I–2265; Cases T–377, 379, 380/00, 260 and 272/01 *Philip Morris International Inc v Commission* [2003] ECR II–1; Case C–240/92 *Portuguese Republic v Commission* [2004] ECR I–10717; Case C–131/03 P *R J Reynolds Tobacco Holdings Inc v Commission* [2006] ECR I–7795; Case T–195/08 *Antwerpse Bouwwerken NV v European Commission* [2009] ECR II–4439; Cases T–335 and 446/04 *Co-Frutta Soc coop v European Commission*, 19 Jan 2010.

[6] Compare Case 53/85 *AKZO Chemie BV v Commission* [1986] ECR 1965 and Case C–39/93 P *Syndicat Français de l'Express International (SFEI) v Commission* [1994] ECR I–2681. See also Cases T–10–12 and 15/92 *SA Cimenteries CBR* [1992] ECR II–2667; Case C–25/92 R *Miethke v European Parliament* [1993] ECR I–473; Case C–480/93 *Zunis Holding SA, Finan Srl and Massinvest SA v Commission* [1996] ECR I–1; Case T–120/96 *Lilly Industries Ltd v Commission* [1998] ECR II–2571.

(B) NON-EXISTENT ACTS

The general principle is that a reviewable act will have legal effect until it is set aside by the ECJ or the General Court,[7] and the challenge must be brought within the time limit specified in Article 263(6). The exception is where acts are tainted by particularly serious illegality, and are deemed to be 'non-existent'. Three consequences flow from the ascription of this label: the normal time limits for challenge do not apply, since the act cannot be cloaked with legality by the passage of time; such acts do not have any provisional legal effects; and non-existent acts are not actually susceptible to annulment, because there is no 'act' to annul.

A judicial finding that an act is non-existent will, however, have the same effect in practice as if it had been annulled. Thus in *BASF*[8] the CFI found that a Commission decision in competition proceedings against the PVC cartel was non-existent because: the Commission could not locate an original copy of the decision duly authenticated in the manner required by the Rules of Procedure; it appeared that the Commissioners had not agreed on the precise text of the decision; and it had been altered after it had been formally adopted. The non-existence of a measure should, said the CFI, be raised by the Court of its own motion at any time during the proceedings. The ECJ[9] took a different view on appeal: the defects were not so serious as to make the act non-existent, but the decision was tainted by sufficient irregularity to be annulled.

(C) LIMITATIONS ON REVIEW

(i) *Area of Freedom, Security, and Justice*

Prior to the Lisbon Treaty the ECJ had only limited power to review the legality of acts under what was the Third Pillar dealing with Police and Judicial Cooperation in Criminal Matters (PJCC). The ECJ was nonetheless creative in the construction of its powers.[10] The Lisbon Treaty has now brought the provisions concerning the Area of Freedom, Security, and Justice within the main fabric of the Treaty.[11] The normal principles of judicial review apply to this area, subject to the caveat that the ECJ cannot review the validity or proportionality of operations by the police or law enforcement agencies, or the exercise of responsibilities of Member States with regard to the maintenance of law and order, and the safeguarding of internal security.[12]

(ii) *Common Foreign and Security Policy*

The Lisbon Treaty has, as we have seen, 'de-pillarized' the Treaties, but the rules pertaining to the Common Foreign and Security Policy (CFSP) remain distinct. The general principle is that the Union Courts have no jurisdiction over CFSP acts.[13] This is subject to two exceptions.

First, the ECJ has jurisdiction to monitor compliance with Article 40 TEU, which provides in essence that exercise of power under the CFSP shall not encroach on competences under the TFEU, and vice versa.

Secondly, the Union Courts can also rule on proceedings, brought in accordance with Article 263(4) TFEU, to review the legality of decisions providing for restrictive measures against natural or legal

[7] Case C-137/92 P *Commission v BASF AG* [1994] ECR I-2555.
[8] Cases T-79, 84-86, 89, 91-92, 94, 96, 98, 102, 104/89 *BASF AG v Commission* [1992] ECR II-315.
[9] Case C-137/92 P (n 7).
[10] Case C-354/04 P *Gestoras Pro Amnistia, Olano and Errasti v Council* [2007] ECR I-1579.
[11] Arts 67-89 TFEU.
[12] Art 276 TFEU.
[13] Art 24 TEU, Art 275 TFEU.

persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU, which is concerned with the CFSP. It is moreover clear from *Kadi*[14] that review of such measures will not be precluded because they were adopted pursuant to Security Council Resolutions of the United Nations: it was not for the Union Courts to review such Resolutions, but the existence of such Resolutions could not prevent review of the EU regulations giving effect to them within the EU, since that would offend against the notion that all EU acts were amenable to judicial review.

ARTICLE 263(2)–(3): STANDING FOR PRIVILEGED AND QUASI-PRIVILEGED APPLICANTS

Article 263(2) states that the action may be brought by a Member State, the European Parliament, the Council, or the Commission. It appears from this that these applicants are always allowed to bring an action, even where the decision is addressed to some other person or body. EU law does not oblige a Member State to bring an action under Article 263 or 265 TFEU for the benefit of one of its citizens, although EU law does not preclude national law from containing such an obligation.[15]

The status accorded to the European Parliament in review proceedings has altered over time. Prior to the Maastricht Treaty it was not accorded any formal privileged status. In the '*Comitology*' case[16] the ECJ rejected the Parliament's argument that it should have the same unlimited standing as other privileged applicants. The issue was considered again in the '*Chernobyl*' case,[17] where the ECJ took a different view, and held that the EP could have a quasi-privileged status so as to protect its own prerogatives. Article 173(3) EEC was re-drafted so as to reflect the legal position in the *Chernobyl* judgment: the Parliament had standing to defend its own prerogatives.[18] The Nice Treaty then added the European Parliament to the list of privileged applicants.

The Court of Auditors, the European Central Bank (ECB), and the Committee of the Regions are covered by Article 263(3) TFEU, so that they have standing only to defend their own prerogatives.

The European Council is included in the bodies amenable to review. It is not, however, listed among either the privileged or quasi-privileged applicants who are entitled to seek judicial review. There is thus an asymmetry built into Article 263 TFEU, which does not apply to the other EU institutions. The European Council is accorded the right to bring an action for failure to act under Article 265 TFEU, which makes the position under Article 263 TFEU look all the more odd. There could well be instances in which the European Council might wish to bring an action.[19] The ECJ in the past interpreted the predecessor to Article 263 TFEU so as to enable the European Parliament to defend its prerogatives, justifying this on the ground that it was necessary to safeguard the institutional balance under the Treaty. It could draw on this precedent and afford the European Council claimant status, at the very least as a quasi-privileged applicant.

Bodies, offices, and agencies of the Union also suffer from the infirmity of being defendants without any separate recognition as applicants. There could be instances in which an EU agency might wish to argue that Union legislation or a delegated act had wrongfully impinged on its terrain, as laid down in

[14] Cases C–402 and 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351.

[15] Case C–511/03 *Netherlands v Ten Kate Holding Musselkanaal BV* [2005] ECR I–8979.

[16] Case 302/87 *European Parliament v Council* [1988] ECR 5615.

[17] Case C–70/88 *European Parliament v Council* [1990] ECR I–2041. See also Case C–156/93 *European Parliament v Commission* [1995] ECR I–2019; Case C–187/93 *European Parliament v Council* [1994] ECR I–2855; Case C–360/93 *European Parliament v Council* [1996] ECR I–1195.

[18] K Bradley, 'Sense and Sensibility: *Parliament* v *Council* Continued' (1991) 16 ELRev 245; J Weiler, 'Pride and Prejudice—*Parliament* v *Council*' (1989) 14 ELRev 334.

[19] P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010) ch 4.

its empowering legislation. These bodies, offices, or agencies might seek to bring an action as a non-privileged applicant. Most agencies have legal personality and could therefore count as legal persons for the purposes of Article 263(4) TFEU. They would however then have to satisfy the criteria in that Article, including the test for standing.

5 ARTICLE 263(4): STANDING FOR NON-PRIVILEGED APPLICANTS

Article 263(4) allows a natural or legal person to bring an action in three types of case. The first is straightforward: the addressee of a decision can challenge it before the ECJ or General Court (GC). The second is where the act is of direct and individual concern to the natural or legal person or persons, the assumption being that the person or persons are not the immediate addressees of the act. The third type of case is where there is a regulatory act, which does not entail implementing measures, in which case the claimant must show direct concern, but does not need to prove individual concern.

(A) DIRECT CONCERN

An applicant must show that the act was of direct concern if it is to be accorded standing. The general principle is that a measure will be of direct concern where it directly affects the legal situation of the applicant and leaves no discretion to the addressees of the measure, who are entrusted with its implementation. This implementation must be automatic and result from EU rules without the application of other intermediate rules.[20] It can be difficult to determine whether there is some autonomous exercise of will between the original decision and its implementation.[21]

Cases 41–44/70 NV International Fruit Company v Commission
[1971] ECR 411

[Note Lisbon Treaty renumbering: Art 173 is now Art 263 TFEU]

The Community adopted a regulation which limited the import of apples from third countries from 1 April 1970 to 30 June 1970. The regulation provided for a system of import licences, which were granted to the extent to which the Community market allowed. Under this system, a Member State notified the Commission, at the end of each week, of the quantities for which import licences were requested during the preceding week. The Commission then decided on the issue of licences in the light of this information. The challenge was to a regulation applying this scheme to a particular week. The ECJ found individual concern and then considered whether the applicant was directly concerned.

[20] Case C-386/96 *Société Louis Dreyfus & Cie v Commission* [1998] ECR I-2309; Case T-54/96 *Oleifici Italiana SpA and Fratelli Rubino Industrie Olearie SpA v Commission* [1998] ECR II-3377; Case T-69/99 *Danish Satellite TV (DSTV) A/S (Eurotica Rendez-vous Television) v Commission* [2000] ECR II-4039; Case C-486/01 P *National Front v European Parliament* [2004] ECR I-6289, [34]; Case 15/06 P *Regione Siciliana v Commission* [2007] ECR I-2591, [31]; Cases C-445 and 455/07 P *Ente per le Ville Vesuviane v Commission* [2009] ECR I-7993, [45]; Case C-343/07 *Bavaria NV and Bavaria Italia Srl v Bayerischer Brauerbund eV* [2009] ECR I-5491, [43]; Case T-16/04 *Arcelor SA v European Parliament and Council*, 2 Mar 2010, [97].

[21] Case T-12/93 *Comité Central d'Entreprise de la Société Anonyme Vittel v Commission* [1995] ECR II-1247; Case T-96/92 *Comité Central d'Entreprise de la Société Générale des Grands Sources v Commission* [1995] ECR II-1213; Case T-509/93 *Richco Commodities Ltd v Commission* [1996] ECR II-1181; Cases T-172, 175, and 177/98 *Salamander and others v European Parliament and Council* [2000] ECR II-2487.

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23. Moreover, it is clear from the system introduced by Regulation No 459/70, and particularly from Article 2(2) thereof, that the decision on the grant of import licences is a matter for the Commission.

24. According to this provision, the Commission alone is competent to assess the economic situation in the light of which the grant of import licences must be justified.

25. Article 1(2) of Regulation No 459/70, by providing that the 'Member States shall in accordance with the conditions laid down in Article 2, issue the licence to any interested party applying for it' makes it clear that the national authorities do not enjoy any discretion in the matter of the issue of licences and the conditions on which applications by the parties concerned should be granted.

26. The duty of such authorities is merely to collect the data necessary in order that the Commission may take its decision in accordance with Article 2(2) of that regulation, and subsequently adopt the national measures needed to give effect to that decision.

27. In these circumstances as far as the interested parties are concerned, the issue of or refusal to issue the import licences must be bound up with this decision.

28. The measure whereby the Commission decides on the issues of the import licences thus directly affects the legal position of the parties concerned.

29. The applications thus fulfil the requirements of the second paragraph of Article 173 of the Treaty and are therefore admissible.

The decision in the *International Fruit* case[22] can be compared to the following judgment by the Court.[23]

Case 222/83 Municipality of Differdange v Commission [1984] ECR 2889

The Commission authorized Luxembourg to grant aid to steel firms, on the condition that they undertook reductions in capacity. The applicant municipality argued that it was directly and individually concerned by this decision, *inter alia*, on the ground that the reduction in production capacity and closure of factories would lead to a reduction in local taxes.

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10. In this case the contested measure, which is addressed to the Grand Duchy of Luxembourg, authorizes it to grant certain aids to the undertakings named therein provided that they reduce their production capacity by a specified amount. However, it neither identifies the establishments in which the production must be reduced or terminated nor the factories which must be closed as a result of the termination of production. In addition, the Decision states that the Commission was to be notified of the closure dates only by 31 January 1984 so that the undertakings affected were free until that date to fix, where necessary with the agreement of the Luxembourg government, the detailed rules for the restructuring necessary to comply with the conditions laid down in the Decision.

11. That conclusion is, moreover, confirmed by Article 2 of the Decision according to which the capacity reductions may also be carried out by other undertakings.

[22] See also Case 207/86 *Apesco v Commission* [1988] ECR 2151, [12]; Cases T-132 and 143/96 *Freistaat Sachsen and others v Commission* [1999] ECR II-3663, [89]–[90]; Cases T-366/03 and 235/04 *Land Oberösterreich and Austria v Commission* [2005] ECR II-4005, [29].

[23] See also, eg, Case 69/69 *Alcan Alumininium Raeren v Commission* [1970] ECR 385; Case 62/70 *Bock v Commission* [1971] ECR 897.

12 It follows that the contested Decision left to the national authorities and undertakings concerned such a margin of discretion with regard to the manner of its implementation and in particular with regard to the choice of factories to be closed, that the Decision cannot be regarded as being of direct and individual concern to the municipalities with which the undertakings affected, by virtue of the location of their factories, are connected.

(B) INDIVIDUAL CONCERN: LEGAL ACTS UNDER THE LISBON TREATY

Applicants must, as seen above, prove individual concern under Article 263(4) TFEU in relation to an act addressed to another person, unless it is a regulatory act that does not entail implementing measures. The meaning of this exception, which was introduced by the Lisbon Treaty, will be considered below. The present discussion will focus on the meaning of individual concern. Analysis of the existing law must however take account of changes to the categories of legal act by the Lisbon Treaty. The typology and hierarchy of legal acts were considered in a previous chapter, to which reference should be made.[24]

The relevance of this for present purposes is as follows. Article 230(4) EC was the predecessor to Article 263(4) TFEU, but the wording was subtly different. Article 230(4) stated that a decision addressed to another person might be of individual concern to the applicant, and that an act in the form of a regulation might in reality be a decision that was of direct and individual concern to the applicant. It therefore contained an invitation to look behind the form of the measure to its substance, in the sense that the ECJ or CFI could decide that a measure in the form of a regulation was in reality a decision that was of direct and individual concern.

Article 263(4) TFEU contains nothing expressly equivalent to this, *and* the structure of the provisions on legal acts renders this more difficult for the following reason. This is primarily because the test for a legislative act is formalistic, not substantive, in nature: enactment by a legislative procedure.[25] It is also because there are requirements that must be satisfied for the passage of delegated acts,[26] and thus the consequence of re-classifying a legislative act as a delegated act, or vice versa, would inevitably be to condemn it as invalid, since it would not have been enacted by the proper procedure or subject to the proper conditions. It will therefore be difficult for an individual to contend that the Union Courts should look to the substance of a measure *across* the categories of legal act.

It would still be possible in principle for the Courts to undertake this task *within* a particular category of legal act. Thus an applicant might contend that although a regulation was a legislative act because it was made in accordance with the legislative procedure, it was nonetheless of direct and individual concern. The very fact that the definition of a legislative act is formalistic might assist the applicant in this respect, but it is nonetheless likely to face an uphill task in proving individual concern, given the meaning of this term explained below, and given also the label 'legislative act' attached to such measures. To take another example, an applicant might contend that a delegated act in the form of a regulation was of direct and individual concern to it.

(C) INDIVIDUAL CONCERN: *PLAUMANN* AND DECISIONS

Applicants must prove individual concern under Article 263(4) in relation to acts addressed to another person, unless the act is a regulatory act that does not entail implementing measures. The present

[24] Ch 4.
[25] Art 289 TFEU.
[26] Art 290 TFEU.

discussion focuses on the meaning of individual concern, and we begin by considering its application to cases where the legal act takes the form of a decision addressed to another.

Case 25/62 Plaumann & Co v Commission
[1963] ECR 95

[Note Lisbon Treaty renumbering: Art 173 is now Art 263 TFEU]

In 1961 the German Government requested the Commission to authorize it to suspend the collection of duties on clementines imported from non-member countries. The Commission refused the request and addressed its answer to the German Government. The applicant was an importer of clementines who contested the legality of the Commission's decision.

THE ECJ

Under the second paragraph of Article 173 of the EEC Treaty 'any natural or legal person may institute proceedings against a decision ... which, although in the form of ... a decision addressed to another person, is of direct and individual concern to the former'. The defendant contends that the words 'other person' in this paragraph do not refer to Member States in their capacity as sovereign authorities and that individuals may not therefore bring an action for annulment against the decisions of the Commission or of the Council addressed to Member States.

However the second paragraph of Article 173 does allow an individual to bring an action against decisions addressed to 'another person' which are of direct and individual concern to the former, but this article neither defines nor limits the scope of these words. The words and the natural meaning of this provision justify the broadest interpretation. Moreover provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively. Therefore, the treaty being silent on the point, a limitation in this respect may not be presumed.

...

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguisnes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.

For these reasons the present action for annulment must be declared inadmissible.

(i) *The Plaumann Test: Pragmatic and Conceptual Difficulties*

The *Plaumann* test is still the leading authority and remains so after the Lisbon Treaty for those cases where individual concern must be proven. It is therefore important to dwell on the test and its application so as to understand why private applicants have found it so difficult to succeed.

The *test* stipulates that applicants can only be individually concerned by a decision addressed to another if they are in some way differentiated from all other persons, and by reason of these distinguishing features singled out in the same way as the initial addressee. There can however be more than one applicant who is individually concerned. The *application of the test* to the facts is equally important: the applicant failed because it practised a commercial activity that could be carried on by any person at any time. This reasoning can be criticized on both pragmatic and conceptual grounds.

In *pragmatic terms* the application of the test is economically unrealistic. If a limited number of firms is pursuing a trade this is the result of the ordinary principles of supply and demand. If there were a sudden surge of desire for clementines, the existing firms would normally import more of the produce. The argument that the activity of importing clementines can be undertaken by any person, that the number may alter significantly, and that therefore the applicant is not individually concerned is thus unconvincing. Moreover, even if there were incentives for other traders to enter the relevant industry, this might take a considerable time, and might well not occur during the period of application of the contested decision.[27]

The ECJ's reasoning is also open to criticism in *conceptual terms*, since it renders it literally impossible for an applicant to succeed, except in a very limited category of retrospective cases. The *Plaumann* test has to be applied at some point in time. There are only three choices. The relevant question could be asked when the contested determination was made, when the application for review was lodged, or at some future, undefined date. It has been held that the test for standing must be judged when the application for review is lodged.[28] This is sensible. However it is scant comfort to the applicant in a *Plaumann*-type case to be told that standing will be judged at the time the application is lodged, but then to be told the application fails because the activity of clementine-importing could be carried out by anyone at any time. On this reasoning no applicant could ever succeed, subject to the caveat considered below, since it could always be argued that others might engage in the trade at some juncture. This serves, in reality, to shift the focus to choice three: some future, ill-defined date. The possibility of *locus standi* is like a mirage in the desert, ever receding and never capable of being grasped.

The *Plaumann* test effectively prevented virtually all direct actions by private parties to challenge decisions addressed to others,[29] except where the challenged decision had a retrospective impact.[30] The ECJ and CFI reiterated the *Plaumann* test for individual concern and applied it in the same manner as in *Plaumann* itself. Many of the cases concerned challenges to decisions made under the Common Agricultural Policy. The EU Courts however applied the test in other areas.[31]

(ii) *Open and Closed Categories: Pragmatic and Conceptual Difficulties*

The preceding argument might be opposed by contending that the applicant in *Plaumann* was properly rejected, since he was a member of an open rather than closed category of applicants, and hence was not individually concerned. An open category is regarded as one where the membership is not fixed at the time of the decision. A closed category is one in which it is thus fixed. There are however practical and conceptual problems with this reasoning.

In *practical terms*, the language of open categories is used to rule out standing for any applicant, even if there is only a very limited number presently engaged in that trade, on the ground that others

[27] A point made by the applicants in Case 11/82 *AE Piraiki-Patraiki v Commission* [1985] ECR 207, although ignored by the ECJ.

[28] Case T-16/96 *Cityflyer Express Ltd v Commission* [1998] ECR II-757, [30].

[29] Case 1/64 *Glucoseries Réunies v Commission* [1964] ECR 413; Case 38/64 *Getreide-Import Gesellschaft v Commission* [1965] ECR 203; Case 11/82 *Piraiki-Patraiki* (n 27); Case 97/85 *Union Deutsche Lebensmittelswerke GmbH v Commission* [1987] ECR 2265; Case 34/88 *CEVAP v Council* [1988] ECR 6265; Case 191/88 *Co-Frutta SARL v Commission* [1989] ECR 793; Case 206/87 *Lefebvre Frère et Soeur SA v Commission* [1989] ECR 275; Case T-398/94 *Kahn Scheepvaart v Commission* [1996] ECR II-477; Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd Flugegesellschaft mbH v Commission* [1999] ECR II-179.

[30] Cases 106 and 107/63 *Alfred Toepfer and Getreide-Import Gesellschaft v Commission* [1965] ECR 405; Case 62/70 *Bock v Commission* [1971] ECR 897; Case 11/82 *Piraiki-Patraiki* (n 27).

[31] Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) v Commission* [1995] ECR II-2205, upheld on appeal, Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) v Commission* [1998] ECR I-1651. See also Case T-117/94 *Associazione Agricoltori della Provincia di Rovigo v Commission* [1995] ECR II-455; Case T-60/96 *Merck & Co Inc v Commission* [1997] ECR II-849; Case T-192/95 R *Danielsson v Commission* [1995] ECR II-3051.

might undertake the trade thereafter. If the presence of such notional, future traders renders the category open, this ignores the practical economics that determine the number of those who supply a product.

In *conceptual terms*, to regard any category as open merely because others might notionally undertake the trade leads to bizarre results, since any decision with a future impact would be unchallengeable because the category would be regarded as open. The *Plaumann* test is based on the assumption that some people have attributes that distinguish them from others, and that they possess these attributes when the contested decision is made. The fact that others might acquire these attributes later, by joining that trade, does not mean that they are presently part of that category. The matter can be put quite simply. The fact that I may wish to become 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.

(b) INDIVIDUAL CONCERN: *PLAUMANN*, REGULATIONS, AND DIRECTIVES

An applicant may also claim to be individually concerned by a legal act that takes the form of a regulation or a directive.

(i) *The Abstract Terminology Test*

There were initially two tests in the case law: the closed category test[32] and the abstract terminology test. The latter was stricter than the former, and became the general test applied by the Court. It is exemplified by *Calpak*, and many other judgments:[33]

Cases 789 and 790/79 Calpak SpA and Società Emiliana Lavorazione Frutta SpA v Commission
[1980] ECR 1949

[Note Lisbon Treaty renumbering: Arts 173 and 189 are now Arts 263 and 288 TFEU]

The applicants were producers of William pears, and they complained that the calculation of production aid granted to them was void. Under the terms of an earlier regulation, production aid was to be calculated on the basis of the average production over the previous three years, in order to avoid the risk of over-production. The applicants alleged that the Commission had abandoned this method of assessing aid, and had based its aid calculation on one marketing year, in which production was atypically low. The applicants also claimed that they were a closed and definable group, the members of which were known to, or identifiable by, the Commission.

[32] The ECJ adopted a closed-category approach in cases that dealt with a completed set of past events: Cases 41–44/70 *International Fruit Company BV v Commission* [1971] ECR 411; Case 100/74 *Société CAM SA v Commission* [1975] ECR 1393; Case C-354/87 *Weddel v Commission* [1990] ECR I-3487.

[33] Cases 103–109/78 *Beauport v Council and Commission* [1979] ECR 17; Case 162/78 *Wagner v Commission* [1979] ECR 3467; Case 45/81 *Alexander Moksel Import-Export GmbH & Co Handels KG v Commission* [1982] ECR 1129; Cases 97, 99, 193 and 215/86 *Asteris AE and Greece v Commission* [1988] ECR 2181; Case 160/88 R *Fédération Européenne de la Santé Animale v Council* [1988] ECR 4121; Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605; Case C-309/89 *Codorniu SA v Council* [1994] ECR I-1853.

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> 7. The second paragraph of Article 173 empowers individuals to contest, *inter alia*, any decision which, although in the form of a regulation, is of direct and individual concern to them. The objective of that provision is in particular to prevent the Community institutions 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 the measure.
>
> 8. By virtue of the second paragraph of Article 189 of the Treaty the criterion for distinguishing between a regulation and a decision is whether the measure is of general application or not....
>
> 9. A provision which limits the granting of production aid for all producers in respect of a particular product to a uniform percentage of the quantity produced by them during a uniform period is by nature a measure of general application within the meaning of Article 189 of the Treaty. In fact the measure applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner. The nature of the measure as a regulation is not called in question by the mere fact that it is possible to determine the number or even identity of the producers to be granted the aid which is limited thereby.

The abstract terminology test placed those who challenged an act in the form of a regulation in a difficult position. The purpose of allowing such challenge was, as the ECJ recognized in *Calpak*, to prevent the Community institutions from immunizing matters from attack by the form of their classification. This was the rationale for permitting a challenge when the regulation was in reality a decision, which was of direct and individual concern to the applicant. This required, as acknowledged in *Calpak*, the Court to look behind the *form* of the measure in order to determine whether in *substance* it really was a regulation or not.

The problem with the abstract terminology test was that, rather than looking behind form to substance, it came perilously close to looking behind form to form. A regulation would be accepted as a true regulation if, as stated in *Calpak*, it applied to 'objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner'. However, it was always possible to draft norms in this manner, and thus to immunize them from attack, more especially as the Court made clear that knowledge of the number or identity of those affected would not prevent the norm from being regarded as a true regulation.

The ECJ made it clear prior to the Lisbon Treaty that a non-privileged applicant could in principle challenge the legality of a directive, even though Article 230(4) EC did not make this explicit. This conclusion has been reinforced by Article 263(4) TFEU, which is framed in terms of challenge to legal acts, and this clearly includes directives. The applicant nonetheless has an uphill struggle to show individual concern.[34]

(ii) Codorniu *and* Plaumann

If a regulation was found to be a 'true regulation' on the basis of the abstract terminology test then traditionally the Court would simply conclude that the applicant was not individually concerned. The Union Courts modified this legal stance and became willing in principle to admit that a regulation

[34] Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605; Case T-99/94 *Asociacion Española de Empresas de la Carne (ASOCARNE) v Council* [1994] ECR II-871; upheld on appeal, Case C-10/95 P [1995] ECR I-4149; Case T-135/96 *UEAPME v Council* [1998] ECR II-2335, [63]; Cases T-172, 175, and 177/98 *Salamander AG v Parliament and Council* [2000] ECR II-2487; Case T-94/04 *EEB v Commission* [2005] ECR II-4919; Case T-16/04 *Arcelor* (n 20) [100]-[123].

might be a 'true' regulation as judged by the abstract terminology test, but to accept that none the less it might be of individual concern to an applicant.

Case C-309/89 Codorniu SA v Council [1994] ECR I-1853

The applicant challenged a regulation which stipulated that the term *crémant* should be reserved for sparkling wines of a particular quality coming from France or Luxembourg. The applicant made sparkling wine in Spain and held a trade mark which contained the word *crémant*. However, other Spanish producers also used this term. The Council argued that the measure was a regulation within the *Calpak* test, and that it could not be challenged, irrespective of whether it was possible to identify the number or identity of those affected by it.

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18. As the Court has already held, the general applicability, and thus the legislative nature, of a measure is not called in question by the fact that it is possible to determine more or less exactly the number or even identity of the persons to whom it applies at any given time, so long as it is established that it applies to them by virtue of objective legal or factual situation defined by the measure in question in relation to its purpose....

19. Although 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.

20. Natural or legal persons may claim that a contested provision is of individual concern to them only if it 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 (... *Plaumann*...).

21. Codorniu registered the graphic trade mark 'Gran Cremant de Codorniu' in Spain in 1924. By reserving the right to use the term 'crémant' to French and Luxembourg producers, the contested provision prevents Codorniu from using its graphic trade mark.

22. It follows that Codorniu has established the existence of a situation which from the point of view of the contested provision differentiates it from all other traders.

The willingness to accept that a legal act could be a true regulation as judged by the abstract terminology test and yet that it could be of individual concern was a liberalizing move. However an applicant still had to show individual concern in accordance with the *Plaumann* test. While there were some exceptions,[35] the dominant approach post-*Codorniu* was 'pure *Plaumann*'. Applicants were denied standing because the ECJ and CFI applied the *Plaumann* test in the same manner as in *Plaumann* itself. The fact that the applicant operated a trade which could be engaged in by any other person served to deny individual concern. The possibility of determining the number or identity of the persons to whom a measure applied did not suffice for individual concern.[36]

Thus in *Buralux*[37] the applicants were linked companies which challenged a regulation concerning shipment of waste. The ECJ held that the mere fact that it was possible to determine the number

[35] Cases T-480 and 483/93 *Antillean Rice Mills NV v Commission* [1995] ECR II-2305, [70], [76]; Cases T-32 and 41/98 *Government of the Netherlands Antilles v Commission* [2000] ECR II-20; Case T-33/01 *Infront WM AG v Commission* [2005] ECR II-5897.

[36] Case C-362/06 P *Markku Sahlstedt v Commission* [2009] ECR I-2903.

[37] Case C-209/94 P *Buralux SA v Council* [1996] ECR I-615. See also Case T-472/93 *Campo Ebro Industrial SA v Council* [1995] ECR II-421; Case T-489/93 *Unifruit Hellas EPE v Commission* [1994] ECR II-1201; Case T-116/94 *Cassa*

or even identity of those affected did not mean that the regulation was of individual concern to them, so long as the measure was abstractly formulated.[38] Individual concern was determined by the *Plaumann* test.[39] The applicants failed to satisfy this test since they were affected only as 'economic operators in the business of waste transfer between Member States, in the same way as any other operator in that business'.[40] The fact that the applicants were the only companies engaged in shipment of waste between France and Germany was not relevant, since the regulation applied to all waste shipments in the EC.[41] The laudable hope[42] that *Codorniu* might lead to a test for standing based on adverse impact, judged on the facts of the case, was not therefore realized.[43]

(iii) Plaumann, *Regulations, Directives, and the Lisbon Treaty*

If the applicant cannot take advantage of the exception in Article 263(4) for regulatory acts where individual concern is not required, the difficulties of showing such concern in relation to regulations and directives in the post-Lisbon world may well be greater for the reasons set out above.[44] Legislative acts are those made in accordance with a legislative procedure. This does not preclude an applicant from claiming that a legislative act in the form of a regulation or directive is of direct and individual concern, and the very fact that the test for a legislative act is formalistic may assist the applicant in this respect. The GC and ECJ may however be reluctant to conclude that a provision termed a 'legislative act' will be of individual concern in the sense demanded by the *Plaumann* test. An applicant may well face equal difficulties in convincing the Union Courts that a delegated act in the form of a regulation or directive is of individual concern as judged by the rigorous requirements of the *Plaumann* test, given that delegated acts are defined as non-legislative acts of general application.

(E) INDIVIDUAL CONCERN: ANTI-DUMPING, COMPETITION, AND STATE AIDS

The ECJ has been more liberal in according standing in certain areas, those concerning anti-dumping, competition, and state aids. The relevant Treaty Articles and regulations had a marked impact on judicial decisions, since the procedure in these areas explicitly or implicitly envisaged a role for the individual complainant, who could alert the Commission to the breach of EU law. The EU interest in these areas was moreover relatively clear, and the Union Courts were therefore receptive to arguments that, for example, a state had infringed EU law by illegal state aid.

(i) *Anti-Dumping*

We can begin by considering anti-dumping. The EU passes anti-dumping regulations to prevent those outside the EU from selling goods within the EU at too low a price, to the detriment of Union

Nazionale di Previdenza a Favore degli Avvocati e Procuratori v Council [1995] ECR II-1; Case T-138/98 *Armement Coopératif Artisanal Vendéen (ACAV) v Council* [2000] ECR II-341; Cases T-38-50/99 *Sociedade Agricola dos Arinhos, Lda v Commission* [2001] ECR II-585; Case T-155/02 *VVG International Handelsgesellschaft mbH v Commission* [2003] ECR II-1949; Case T-139/01 *Comafrica SpA and Dole Fresh Fruit Europe Ltd and Co v Commission* [2005] ECR II-409, [100], [107]–[116].

[38] Case C-209/94 P *Buralux* (n 37) [24].

[39] Ibid [25].

[40] Ibid [28].

[41] Ibid [29].

[42] A Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty' (1995) 32 CMLRev 7.

[43] A Arnull, 'Private Applicants and the Action for Annulment since *Codorniu*' (2001) 38 CMLRev 7, 51–52.

[44] 493.

traders. Whether a firm is dumping may be controversial. There was the added complication that anti-dumping duties had to be imposed by regulation, as opposed to decision. If, therefore, the Court held that the regulation was not a regulation at all, then it was arguable that the Commission had no power to impose the measure. Three types of applicant might wish to challenge an anti-dumping duty.

The first type is the firm which initiated the complaint about dumping, as exemplified by the *Timex* case[45] where the company that initiated the complaint was unhappy with the resultant regulation because it felt that the anti-dumping duty was too low. The ECJ held that as the principal complainant and a leading watch maker in the EU it had standing to contest the level of duty imposed.

The second type of applicant is the producer of the product that is subject to the anti-dumping duty. In the *Allied Corporation* case[46] the ECJ confirmed that the producers and exporters who were charged with dumping could also be regarded as individually concerned, at least in so far as they were identified in the measure adopted by the Commission or involved in the preliminary investigation.

The third category of applicant who might wish to contest the legality of an anti-dumping regulation is the importer of the product against which the anti-dumping duty has been imposed. Some such applications were rejected on the ground that the importer could challenge the measure indirectly under what is now Article 267 TFEU in an action against the national agency which collected the duty. The *Extramet* case indicated when an importer would be held to have standing.[47]

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

Extramet (E) imported calcium from outside the EC, which it then processed itself. There was only one Community producer of calcium, P, which refused to supply the raw material to E. P also claimed that E's supplies from outside the EC were being dumped in the EC and a dumping duty was imposed. It was this duty which E then sought to have annulled. The ECJ held that an anti-dumping regulation could still be of individual concern to certain traders who satisfied the *Plaumann* test. E satisfied that test for the following reasons.

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17. The applicant has established the existence of factors constituting such a situation... 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.

[45] Case 264/82 *Timex Corporation v Council and Commission* [1985] ECR 849. It seems however that participation in the procedure leading to the anti-dumping regulation and being named therein will not in itself secure standing: Case T-598/97 *British Shoe Corporation Footwear Supplies Ltd v Council* [2002] ECR II-1155.

[46] Cases 239 and 275/82 *Allied Corporation v Commission* [1984] ECR 1005; Case T-155/94 *Climax Paper Converters Ltd v Council* [1996] ECR II-873; Case T-147/97 *Champion Stationery Mfg Co Ltd v Council* [1998] ECR II-4137.

[47] Case T-161/94 *Sinochem Heilongjiang v Commission* [1996] ECR II-695; Case T-2/95 *Industrie des Poudres Sphériques v Council* [1998] ECR II-3939.

(ii) *Competition*

A second area in which the ECJ has been more liberal in according standing is competition policy, regulated by Articles 101 and 102 TFEU. Under what was Article 3(2) of Regulation 17,[48] a Member State, or any natural or legal person who claimed to have a legitimate interest, could make an application to the Commission, putting forward evidence of a breach of what are now Articles 101 and 102 TFEU.

Case 26/76 Metro-SB-Großmärkte GmbH & Co KG v Commission[49]
[1977] ECR 1875

[Note Lisbon Treaty renumbering: Arts 85, 86, and 173 are now Arts 101, 102, and 263 TFEU]

Metro argued that the distribution system operated by SABA was in breach of Article 85 of the Treaty. It initiated a complaint under Article 3(2) of Regulation 17. The Commission decided that certain aspects of the distribution system were not in breach of Article 85, and it was this decision, addressed to SABA, that Metro sought to annul. The question arose whether Metro could claim to be individually concerned by a decision addressed to another.

THE ECJ

The contested decision was adopted in particular as the result of a complaint submitted by Metro and it relates to the provisions of SABA's distribution system, on which SABA relied and continues to rely as against Metro in order to justify its refusal to sell to the latter or to appoint it as a wholesaler, and which the applicant had for this reason impugned in its complaint.

It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3(2)(b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with wholly or in part, to institute proceedings in order to protect their legitimate interests.

In those circumstances the applicant must be considered to be directly and individually concerned, within the meaning of the second paragraph of Article 173, by the contested decision and the application is accordingly admissible.

(iii) *State Aid*

Similar considerations are apparent in the case law on state aids. The provision of such aid is regulated by Articles 107 to 109 TFEU to prevent competition from being distorted by a firm receiving assistance from its government, thereby giving it an unfair advantage against competitors.[50] The

[48] The regime for the enforcement of competition policy has now changed: see below, 1005–1009.

[49] See also Case T-37/92 *Bureau Européen des Unions des Consommateurs v Commission* [1994] ECR II-285, although the result was different if the applicant had not taken part in the complaints procedure: Case C-70/97 *Kruidvat BVBA v Commission* [1998] ECR I-7183. See also in relation to mergers Case T-12/93 *Vittel* (n 21); Case T-96/92 *Comité Central d'Entreprise de la Société Générale des Grands Sources v Commission* [1995] ECR II-1213; Cases T-528, 542, 543 and 546/93 *Métropole Télévision SA v Commission* [1996] ECR II-649; Case T-158/00 *ARD v Commission* [2003] ECR II-3825.

[50] Ch 29.

Commission decides whether the aid is compatible with the Treaty, and addresses a decision to the state, which can challenge it under Article 263 TFEU. The Treaty was less clear whether complainants could also do so. There was nothing directly comparable in state aids to the complaints procedure that operated in competition law. Notwithstanding this, the ECJ in *COFAZ*[51] reasoned by analogy from the *Metro* case in competition law and the *Timex* case in anti-dumping. The applicants in *COFAZ* played a comparable role in the procedure under what is now Article 108 TFEU, more especially because Article 108(2) recognized in general terms that the undertakings concerned were entitled to submit their comments to the Commission. They were therefore granted standing, subject to the further condition that their position on the market was significantly affected by the aid that was the subject of the contested decision.[52]

(c) INDIVIDUAL CONCERN: REFORM AND THE COURTS

Article 263(4) TFEU amended Article 230(4) EC by providing that individual concern is not required in relation to regulatory acts that do not entail implementing measures. The scope of this exception will be considered below. Before doing so, we should consider attempts at more general reform of the test for individual concern through judicial means.

The very fact that the case law on dumping, competition, and state aids was more liberal cast into sharp relief the restrictive approach that dominated the majority of cases on standing. It is therefore not surprising that the generality of the Courts' jurisprudence on standing for non-privileged applicants was criticized as being too restrictive. The ECJ defended its jurisprudence on the ground that the Treaty provided a comprehensive mechanism for legal protection: applicants who did not have standing for a direct action under Article 263 could test the legality of the measure indirectly through Article 267 TFEU. Advocate General Jacobs questioned this reasoning in the *Extramet* case.[53] In the *UPA* case he subjected the hypothesis to more searching scrutiny, found it to be unconvincing, and suggested that standing should be accorded where the contested measure had a substantial adverse effect on the applicant.

Case C-50/00 P *Unión de Pequeños Agricultores v Council*
[2002] ECR I-6677

[Note Lisbon Treaty renumbering: Arts 230 and 234 are now Arts 263 and 267 TFEU]

An association of farmers, UPA, sought the annulment of Regulation 1638/98, which amended the common organization of the olive oil market. The CFI dismissed the application because the members of the association were not individually concerned by the Regulation under Article 230(4). The UPA argued, *inter alia*, that it was denied effective judicial protection because it could not readily attack the measure via Article 234. The following extract contains the Advocate General's summary of his Opinion.

[51] Case 169/84 *Compagnie Française de l'Azote (COFAZ) SA v Commission* [1986] ECR 391; Case T-435/93 *ASPEC v Commission* [1995] ECR II-1281; Case T-380/94 *AIUFFASS v Commission* [1996] ECR II-2169; Case T-88/01 *Sniace, SA v Commission* [2005] ECR II-1165, [56]-[57].

[52] The case law on standing in relation to state aids is complex. For more detail see 1103-1104, and U Soltesz and H Bielesz, 'Judicial Review of State Aid Decisions—Recent Developments' [2004] ECLR 133.

[53] Case C-358/89 *Extramet Industrie SA v Council* [1991] ECR I-2501, AG Jacobs, [70]-[74].

ADVOCATE GENERAL JACOBS

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(1) The Court's fundamental assumption that the possibility for an individual applicant to trigger a reference for a preliminary ruling provides full and effective judicial protection against general measures is open to serious objections:

— under the preliminary ruling procedure the applicant has no right to decide whether a reference is made, which measures are referred for review or what grounds of invalidity are raised and thus no right of access to the Court of Justice; on the other hand, the national court cannot itself grant the desired remedy to declare the general measure in issue invalid;

— there may be a denial of justice in cases where it is difficult or impossible for an applicant to challenge a general measure indirectly (e.g. where there are no challengeable implementing measures or where the applicant would have to break the law in order to be able to challenge ensuing sanctions);

— legal certainty pleads in favour of allowing a general measure to be reviewed as soon as possible and not only after implementing measures have been adopted;

— indirect challenges to general measures through references on validity under Article 234 present a number of procedural disadvantages in comparison to direct challenges under Article 230 before the Court of First Instance as regards for example the participation of the institution(s) which adopted the measure, the delays and costs involved, the award of interim measures or the possibility of third party intervention.

(2) Those objections cannot be overcome by granting standing by way of exception in those cases where an applicant has under national law no way of triggering a reference for a preliminary ruling on the validity of the contested measure. Such an approach

— has no basis in the wording of the Treaty;

— would inevitably oblige the Community Courts to interpret and apply rules of national law, a task for which they are neither well prepared nor even competent;

— would lead to inequality between operators from different Member States and to a further loss of legal certainty.

(3) Nor can those objections be overcome by postulating an obligation for the legal orders of the Member States to ensure that references on the validity of general Community measures are available in their legal systems. Such an approach would

— leave unresolved most of the problems of the current situation such as the absence of remedy as a matter of right, unnecessary delays and costs for the applicant or the award of interim measures;

— be difficult to monitor and enforce; and

— require far-reaching interference with national procedural autonomy.

(4) The only satisfactory solution is therefore to recognise that an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests. That solution has the following advantages:

— it resolves all the problems set out above: applicants are granted a true right of direct access to a court which can grant a remedy, cases of possible denial of justice are avoided, and judicial protection is improved in various ways;

— it also removes the anomaly under the current case-law that the greater the number of persons affected the less likely it is that effective judicial review is available;

— the increasingly complex and unpredictable rules on standing are replaced by a much simpler

test which would shift the emphasis in cases before the Community Courts from purely formal questions of admissibility to questions of substance;

— such a re-interpretation is in line with the general tendency of the case-law to extend the scope of judicial protection in response to the growth of powers of the Community institutions (*ERTA*, *Les Verts*, *Chernobyl*);

(5) The objections to enlarging standing are unconvincing. In particular:

— the wording of Article 230 does not preclude it;

— to insulate potentially unlawful measures from judicial scrutiny cannot be justified on grounds of administrative or legislative efficiency: protection of the legislative process must be achieved through appropriate substantive standards of review;

— the fears of over-loading the Court of First Instance seem exaggerated since the time-limit in Article 230(5) and the requirement of direct concern will prevent an insuperable increase of the case-load; there are procedural means to deal with a more limited increase of cases.

(6) The chief objection may be that the case-law has stood for many years. There are however a number of reasons why the time is now ripe for change. In particular:

— the case-law in many borderline cases is not stable, and has been in any event relaxed in recent years, with the result that decisions on admissibility have become increasingly complex and unpredictable;

— the case-law is increasingly out of line with more liberal developments in the laws of the Member States;

— the establishment of the Court of First Instance, and the progressive transfer to that Court of all actions brought by individuals, make it increasingly appropriate to enlarge the standing of individuals to challenge general measures;

— the Court's case-law on the principle of effective judicial protection in the national courts makes it increasingly difficult to justify narrow restrictions on standing before the Community Courts.

The hope that standing rules might be liberalized proved short-lived, since the ECJ declined to follow the lead of Advocate General Jacobs.

Case C–50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I–6677

The ECJ accepted the principle from *Codorniu* that a true regulation could be challenged, provided the applicant could show individual concern in accordance with the *Plaumann* test. It continued as follows:

THE ECJ

37. If that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for the annulment of a regulation.

38. The European Community is, however, a Community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.

39. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States...

> 40. [T]he Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions... Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid..., to make a reference to the Court of Justice for a preliminary ruling on validity.
>
> 41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.
>
> 42. In that context, in accordance with... Article 5 of the Treaty, the 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.
>
> 43. [I]t is not acceptable to adopt an interpretation of the system of remedies... to the effect that a direct action for annulment before the Community courts will be available if it can be shown, following 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. Such an interpretation would require the Community court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.
>
> 44. Finally, it should be added that, according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challeneging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually... 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.
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> 45. While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.

The ECJ in *Jégo-Quéré* followed its reasoning and decision in *UPA*.[54] It acknowledged the right to effective judicial protection, but held once again that the Treaty established a complete system of legal protection through the combination of Articles 263 and 267. It was for the Member States to ensure that individuals should be able to challenge Union measures at national level, even where no implementing measures were involved. The criteria for standing under Article 230(4) EC would not be relaxed even where it was apparent that the national rules did not allow the individual to contest the validity of the measure without having contravened it. The right to effective judicial protection could not, said the ECJ, have the effect of setting aside a condition expressly laid down by the Treaty. The

[54] Case C-263/02 P *Commission v Jégo-Quéré & Cie SA* [2004] ECR I-3425, [29]-[39]. See also Case C-258/02 *Bactria Industriehygiene-Service Verwaltungs GmbH v Commission* [2003] ECR I-15105; Case T-213/02 *SNF SA v Commission* [2004] ECR II-3047; Case T-231/02 *Gonnelli and AIFO v Commission* [2004] ECR II-1051; Case T-139/01 *Comafrica* (n 37); Cases T-236 and 241/04 *EEB and Stichting Natuur en Milieu v Commission* [2005] ECR II-4945; Case T-16/04 *Arcelor* (n 20) [100]-[123]; Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana v Community Plant Variety Office (CPVO)* [2008] ECR II-31; Case T-309/02 *Acegas-APS SpA v Commission* [2009] ECR II-1809; Case C-550/09 *Criminal proceedings against E and F*, 29 June 2010, [44].

ECJ rejected the alternative test proposed by the CFI,[55] which the latter had given after the Opinion of Advocate General Jacobs in *UPA*, but before the Court's decision.

Although the ECJ regarded reform as a matter for Treaty amendment, there was indirect pressure from the European Court of Human Rights, since there were indications that the restrictive standing rules might be inconsistent with Article 6 ECHR.[56] It was not therefore fortuitous that this issue was raised in a number of EU cases. Thus in the *Ocalan* case[57] the applicant claimed that the EC's restrictive standing rules violated Article 6 ECHR, and the ECJ self-consciously 'checked' whether the applicants would be regarded as victims under the ECHR.

The premise underlying the ECJ's decisions in *UPA* and *Jégo-Quéré* is that the Treaty provided for a complete regime of legal protection in terms of access to court, via Articles 267 and 263 TFEU. There are however real difficulties with this hypothesis.[58]

i. The ECJ largely ignored the Advocate General's analysis of the difficulties faced by individuals who seek to use Article 267. They are in part procedural: proceeding via the national court can have implications for participation of the institutions that adopted the contested measure; delays; costs; the award of interim measures; and the possibility of third party intervention. They are in part inherent in the very nature of Article 267: it is a reference system; the applicant must therefore convince the national court that a reference is required; and may have to fight through more than one national court. The difficulties with Article 267 are also substantive: the national court is precluded from invalidating the measure, and hence the applicant has to proceed to the ECJ; and an individual may not be able to challenge the illegality of the measure in the national court without placing itself in contravention of it.

ii. The ECJ exhorted national courts, in accordance with what is now Article 4(3) TFEU, to interpret national procedural rules so as to enable applicants to challenge EU norms of general application before the national courts. This strategy is however of limited utility. It cannot resolve the procedural difficulties adverted to above. It cannot overcome, although it may alleviate, the difficulties flowing from the discretionary nature of the Article 267 system. It provides no answer to the critique that it is wrong for an applicant to have to place itself in breach of an EU norm in order to challenge its validity.

iii. Indirect challenge via Article 267 has undesirable consequences for the division of competences between the ECJ and the GC. Preliminary rulings are the preserve of the ECJ.[59] Challenges to the validity of EU norms via Article 267 therefore go to the ECJ, while the same issues would be heard by the GC if they were admissible as a direct challenge under Article 263. This increases the ECJ's workload and means that its scarce resources are diverted to answering such preliminary rulings, which will often not involve any point of general importance for EU law.

iv. The ECJ's reasoning in *UPA* concerning Article 263 is equally problematic. It held that the boundaries of legitimate Treaty interpretation constrained any modification to the traditional case law on direct challenge. The right to effective judicial protection could influence the application of individual concern, but could not, said the ECJ, set aside that condition, which could only be done via a Treaty amendment. This is with respect unconvincing. The Treaty has always

[55] Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365, where the CFI held that a person should be regarded as individually concerned by a Community measure of general application if the measure affected his legal position, in a manner which was both definite and immediate, by restricting his rights or by imposing obligations.

[56] App No 45036/98 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2005).

[57] Case C-229/05 P *Osman Ocalan v Council* [2007] ECR I-439, [75]-[83].

[58] The argument in this section is developed in greater detail in P Craig, *EU Administrative Law* (Oxford University Press, 2006) 340-344.

[59] The Nice Treaty qualified this monopoly, but the power to accord the CFI power over preliminary rulings has not been acted on: see 481-482.

required proof of individual concern. It is the meaning to be given to that phrase that is the question in issue. The crucial issue is not whether the Treaty imposes limits on standing, but whether the interpretation of those limits has been overly restrictive. The *Plaumann* test is open to criticism, even given the language of what was Article 230(4) EC. The ECJ has often interpreted Treaty Articles and EU legislation teleologically. It is moreover not readily apparent why Advocate General Jacobs' interpretation of individual concern would involve any transgression of the bounds of normal Treaty interpretation, let alone that it would be akin to Treaty amendment through judicial fiat. This is more especially so given that the ECJ has literally filled gaps in relation to other parts of Article 263 where it was felt that this was warranted.[60] The ECJ gave no explanation as to why it felt that the Advocate General's test would be incompatible with the wording of Article 263. There is in reality no reason why a test framed in terms of substantial adverse impact could not be a legitimate reading of individual concern.

v. 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 the standing rules are unduly narrow. It is right in normative terms that those who have suffered some substantial adverse impact should have access to judicial review. This test is no more liberal than that which prevails in most domestic legal orders and is fitting for a legal system based on the rule of law. The idea that the more people are affected by a provision the less chance there is for any challenge is contrary to principle.

vi. The ECJ in *UPA* said nothing about the practical consequences of a more liberal test under Article 263, but there is a sense that it was concerned with possible work-load problems. There is however no reason why there should necessarily be any significant net increase in the number of challenges. The very fact that Article 263 has been so restrictive forces applicants to use Article 267. The ECJ has however little control over the range of applicants that can challenge via Article 267 or the type of norm that can be challenged. The consequence of a more liberal interpretation of Article 263 would be to shift some of these cases back to direct challenge, and give the EU Courts scope for control through the determination of whether there was a substantial adverse impact. Moreover, the implicit assumption seems to be that there would be numerous challenges to a regulation by applicants, each of which would claim to have suffered substantial adverse impact. This does not accord with legal or practical reality. Some cases would be joined in a single action. In any event once the ECJ or GC pronounced on the legality of the regulation in relation to one action, that would be the end of the matter. The decision would resolve the issue in relation to any other possible claimant, unless he or she could raise some new legal argument that had not been addressed in the earlier case.

vii. There may well be valid reasons why the EU Courts are wary of intervening too far in the complex discretionary choices made by the EU institutions, and many of the standing cases involve such choices made pursuant to the Common Agricultural Policy.[61] The EU Courts can however influence the number of actions that are brought through the standards of review that are applied.[62] This will impact on the number of actions brought, since applicants will calculate their chances of success before embarking on the expense of litigation. It is of course true that a very strict test for standing may be less demanding on the Court's time. This however comes dangerously close to reductionism, since it says no more than that if a court declines to hear a case it will save more judicial resources than if the case had been heard.

[60] Case C-70/88 *European Parliament v Council* [1990] ECR I-2041; Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339; Case T-411/06 *Sogelma* (n 1).

[61] See 493–499.

[62] Ch 15.

(G) INDIVIDUAL CONCERN: REFORM AND THE LISBON TREATY

The framers of the Lisbon Treaty amended the rules on standing: individual concern is not required in relation to a regulatory act that is of direct concern and does not entail implementing measures. The significance of this reform depends on the meaning of 'regulatory act' and 'implementing measure'.[63]

(i) *Regulatory Act*

The same term was used in the analogous provision in the Constitutional Treaty.[64] Its meaning was uncertain, but the better view was that it applied only in relation to secondary norms and not to primary legislative acts.[65] There is also uncertainty in relation to the meaning of regulatory act under the Lisbon Treaty. The types of legal act specified by the Lisbon Treaty were considered above.[66] Legislative acts are those enacted by a legislative procedure, and can take the form of a regulation, decision, or directive.[67] A legislative act can delegate power to the Commission to adopt a non-legislative act, which may once again take the form of a regulation, decision, or directive, although it will normally be a regulation.[68] These are termed delegated acts.[69] There is also a separate category of implementing acts.[70]

The term 'regulatory act' does not fit easily with the Lisbon classification of legal acts. It could be construed broadly to cover any legally binding act, whether legislative, delegated, or implementing, provided that it does not entail implementing measures. It could be interpreted more narrowly to cover any legislative, delegated, or implementing act, provided that it takes the form of a regulation or decision that does not entail implementing measures. It could cover only delegated and implementing acts in the form of regulations or decisions, which do not entail implementing measures, or only delegated acts subject to the same condition.

The construction that best fits the intent of those who devised the Constitutional Treaty would be the last, which is the narrowest: it would only apply to delegated acts in the form of regulations or decisions that are of direct concern and do not entail implementing measures. If this interpretation were adopted it would have only a limited impact on the pre-existing problems of standing for non-privileged applicants. It would not apply to legislative acts that are of direct concern and do not entail implementing measures. This constraint on the ambit of the reformed provision would be all the more marked, given the formalistic nature of the definition of legislative act in the Lisbon Treaty, which covers any act passed by a legislative procedure. It is therefore perfectly possible for there to be a 'legislative act' that applies to a very narrow group of applicants, which is *de facto* a closed group, where no one could challenge the measure because they would not come within the scope of the reformed standing provision; they would hence have to show individual concern and would be unable to do so under existing case law.

If Article 263(4) is to alleviate the pre-existing difficulties for non-privileged applicants it will have to be interpreted to cover any legislative, delegated, or implementing act that does not entail implementing measures. This would in practice exclude directives in the form of legislative, delegated, or

[63] S Balthasar, 'Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: the New Article 263(4) TFEU' (2010) 35 ELRev 542.

[64] Art III–365(4) CT.

[65] Craig (n 19) ch 4.

[66] Ch 4.

[67] Art 289 TFEU.

[68] Art 290 TFEU.

[69] Art 290(3) TFEU.

[70] Art 291 TFEU.

implementing acts, since directives do require implementing measures. It remains to be seen whether the ECJ is willing to interpret the new provision in this manner.

It is important to recognize that where the exception in Article 263(4) TFEU does not apply an applicant will still need to show individual concern as that term has been interpreted in *Plaumann* and subsequent cases. This means that direct challenge in such cases will continue to be extremely difficult. Applicants will have to proceed indirectly via Article 267 TFEU and the Lisbon reforms have done nothing to address the difficulties with this method of challenge identified by Advocate General Jacobs in the *UPA* case.

(ii) *Implementing Measure*

The novel aspect of Article 263(4) whereby individual concern is not required only applies to a regulatory act that is of direct concern and does not entail implementing measures.

The most natural meaning of 'implementing measures' would be as follows. Regulations are directly applicable: once they are made by the EU they apply within the Member States without the need for transformation or adoption into national law. In that sense regulations do not 'entail' any measure to implement them into the national legal order. The same is true for the great majority of decisions, whether they are classic individualized decisions addressed to a particular person, or whether they are decisions of a more generic nature that are concerned with inter-institutional relations. Directives, by way of contrast, specify the ends to be achieved but leave the Member States with the choice of form and methods of implementation. Directives in that sense entail implementing measures.

It might be argued that even regulations or some decisions will lead to the modification of national rules in order that the demands of the regulation/decision are met within the particular Member State, and that where this is so such national measures should be regarded as implementing measures, with the consequence that an applicant could not take advantage of the liberalized standing rules in Article 263(4). The premise is correct, but the conclusion must be wrong.

It is certainly true that even though regulations are directly applicable and hence apply without the need for transformation or adoption, a Member State might still need to modify its prior laws to comply with or fulfil the demands of the regulation. It would nonetheless be regrettable if this were to preclude recourse to the liberalized standing rules under Article 263(4). The possibility of direct challenge of the same regulation would vary from state to state, since whether any particular state needed to modify its national rules, and if so how, would depend on the fit between the demands of the EU regulation and its pre-existing law, which will necessarily differ from state to state.

Such a result would moreover not fit well with the wording of Article 263(4), since it could not be said that the regulatory act itself 'entailed' implementing measures. The possibility of such national measures would, by way of contrast, be dependent on whether the particular Member State needed to modify its pre-existing rules in order to comply with the demands of the regulation, and that would depend on the national law, not the EU regulatory act itself.

(H) INDIVIDUAL CONCERN: REFORM AND THE CHARTER

It is doubtful whether the EU Charter of Fundamental Rights[71] will have much impact on the preceding analysis. Article 41 enshrines a right to good administration. Article 41(2) sets out certain more specific rights that are included in this right. Article 47 provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that Article. Standing rules are not explicitly mentioned in either Article.

[71] [2000] OJ C364/01; [2010] OJ C83/389.

It would be open to the EU Courts, if they wished to do so, to regard these provisions as the basis for expanding the existing standing rules. They are however unlikely to do so, given their approach to standing hitherto. This is especially so given that the explanatory memorandum stated in relation to Article 47 that there was no intention for this provision to make any change to the rules on standing other than those embodied in what is now Article 263(4) TFEU.[72]

There is nonetheless an uneasy tension between the Charter rights and the standing rules for direct actions. The Charter accords individual rights, yet the application of the standing rules means that a person who claims that his rights have been infringed by EU law will normally not be able to meet the requirements of individual concern.[73] There is something decidedly odd about the infringement of an individual right not counting as a matter of individual concern.

(i) SUMMARY

i. *Plaumann* remains the test for individual concern. The applicant must show that it has attributes or characteristics which distinguish it from all other persons and mark it out in the same manner as the addressee. The fact that the applicant operates a trade which could be engaged in by any other person will normally serve to deny individual concern, and it is this which makes it almost impossible for most applicants to succeed. The existence of particular factual injury to the applicant will not usually be relevant. Interest groups will not, in general, be in any better position than a private individual.

ii. *Plaumann* can, exceptionally, be interpreted more favourably to the applicant. This may be so where it can be shown that the challenged measure either infringed a right specific to the applicant or was in breach of a duty owed to the applicant. It will be rare for the GC or ECJ to allow a claim merely because of the factual injury suffered by the applicant.

iii. It was clear from *UPA*, *Jégo-Quéré*, and subsequent cases that the EU Courts were not willing to shift to the more liberal test for standing proposed by Advocate General Jacobs. The rationale for adherence to the status quo was that the Treaty provided a complete system of legal protection for individuals through Articles 263 and 267. There are however, as seen above, real difficulties with this view.

iv. The Lisbon Treaty reformed the standing rules by providing an exception for cases where individual concern is not required. This is to be welcomed, but how far it really alleviates previous problems depends on the interpretation of 'regulatory act'. The normal *Plaumann* test will have to be satisfied in cases where the exception does not apply.

6 ARTICLE 267: INDIRECT CHALLENGE TO THE LEGALITY OF EU ACTS

(a) THE RATIONALE FOR USING ARTICLE 267

Article 267 TFEU allows national courts to refer to the ECJ questions concerning the 'validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'. This provision

[72] Charte 4473/00, Convent 49, 11 Oct 2000, 41; CONV 828/03, Updated Explanations Relating to the Text of the Charter of Fundamental Rights, 9 July 2003, 41; Explanations Relating to the Charter of Fundamental Rights, 14 Dec 2007, [2007] OJ C303/17.

[73] Case C-258/02 P *Bactria* (n 54) [48]–[51].