



INDIVIDUALS AT THE GATE OF THE EUROPEAN COURT OF JUSTICE

**Accessibility of judicial review for private applicants in the European Union and its
compatibility with standards of access to justice**

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LL.M. Long Thesis

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TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	III
ACKNOWLEDGEMENTS.....	IV
LIST OF ABBREVIATIONS.....	V
INTRODUCTION.....	1
1. LEGAL STANDARDS OF FAIR TRIAL AND ACCESS TO JUSTICE	11
1.1 DEFINITIONS	12
1.2 ACCESS TO JUSTICE IN NATIONAL LAWS	15
1.2.1 <i>France</i>	16
1.2.2 <i>England</i>	17
1.2.3 <i>Germany</i>	18
1.2.4 <i>Interim conclusions</i>	19
1.3 ACCESS TO INTERNATIONAL COURTS	20
1.4 ACCESS TO COURT IN THE ECHR	23
1.5. ACCESS TO JUSTICE IN THE AARHUS CONVENTION	27
1.6 THE STANDARDS OF ACCESS TO JUSTICE AND NATIONAL REMEDIES IN THE EU LAW	30
2. ACCESS OF INDIVIDUALS TO THE ECJ THROUGH THE ANNULMENT PROCEDURE.....	35
2.1 THE CORE FEATURES OF THE ANNULMENT PROCEDURE	35
2.1.1 <i>Reviewable acts</i>	36
2.1.2 <i>Grounds for review and time limit</i>	37
2.1.3 <i>Standing</i>	37
2.2. DIRECT CONCERN.....	38
2.3 INDIVIDUAL CONCERN.....	39
2.4 RATIONALE BEHIND RESTRICTIVE INTERPRETATION OF ‘INDIVIDUAL CONCERN’	42
2.5 ATTEMPTS TO ACCOMMODATE STANDING RULES.....	44
2.6 THE CHANGES BROUGHT ABOUT BY THE LISBON TREATY	50
2.6.1 <i>Reviewable acts</i>	50
2.6.2 <i>The partial relaxation of individual standing</i>	52
2.7 PRACTICAL PROBLEMS WITH IMPLEMENTATION OF ARTICLE 263 (4) TFEU	53
2.7.1 <i>Treatment of cases – transitional period</i>	54
2.7.2 <i>What are regulatory acts?</i>	54
2.7.3 <i>‘(...) which does not entail implementing measures’</i>	57
2.8 CURRENT PRACTICE OF THE EU COURTS IN ANNULMENT PROCEDURE BROUGHT BY INDIVIDUAL APPLICANTS	58
3. PRELIMINARY RULING PROCEDURE AS AN ALTERNATIVE REMEDY	62
3.1 MAIN FEATURES OF THE PRELIMINARY RULING PROCEDURE.....	63
3.2 SUBSTANTIVE DIFFICULTIES	64
3.3 NORMATIVE DIFFICULTIES	65
3.4 PROCEDURAL DIFFICULTIES	67
3.5 DIFFICULTIES AT THE NATIONAL LEVEL	68
3.6 INTERIM CONCLUSIONS	69
4. FINAL EVALUATION AND RECOMMENDATIONS	71
4.1 FINAL EVALUATION	71
4.1.1 <i>Possibilities to challenge legal act of the Commission</i>	71
4.1.2 <i>Possibilities to challenge regulation of the Parliament and the Council</i>	72
4.1.3 <i>Possibilities to challenge directive of the Parliament and the Council</i>	73
4.2 PROPOSALS FOR IMPROVEMENT AND RECOMMENDATIONS	74
4.2.1 <i>A special remedy based on alleged violations of fundamental rights</i>	74
4.2.2 <i>Liberal interpretation of standing rules</i>	76
4.2.3 <i>Broadening the possibilities of indirect challenges</i>	77
CONCLUSION.....	79
LIST OF BIBLIOGRAPHY.....	83

Executive Summary

The objective of this thesis is to analyze the main routes for individuals to enforce their rights against legal measures of the EU institutions and to assess their compatibility with fair trial standards of access to justice. The focus is given to the access of individuals to the judicial review of administrative and legislative acts adopted by the EU institutions. The two main procedures available to individuals to challenge validity of the EU legal measures are the annulment action and the preliminary ruling procedure. Therefore, the standing requirements for individual applicants within the annulment procedure and the shortcomings of the preliminary ruling procedure as an alternative remedy in challenges against validity of the EU legal measures are analyzed closer.

The present thesis addresses the gap in the judicial protection of individuals seeking to challenge the validity of EU legal measures and its possible incompatibility with the national and international standards of access to justice. Since standing requirements in the annulment procedure have been modified by the Lisbon Treaty, the present thesis also contributes to the ongoing discussions about the impact of the Lisbon Treaty on the rules of individual standing.

The analysis revealed that that partial relaxation of standing requirements made by the Lisbon Treaty affects only a limited number of litigants seeking to challenge *regulatory acts* not addressed to them, therefore the level of judicial protection against the measures of the EU institutions depends largely on the form of legal act in question. The problematic wording of the new Article 263 (4) TFEU and unclear developments surrounding the transitional period might not only lead to legal uncertainty but also new inconsistencies within this area. The hurdles from before the adoption of Lisbon Treaty remained basically unchanged for individuals seeking to challenge acts of general application.

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List of Abbreviations

Aarhus Convention	Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters
Aarhus Regulation	Regulation on the application of the provisions of the Aarhus Convention to Community institutions and bodies
ACHR	American Convention on Human Rights
CFI	Court of First Instance
Constitutional Treaty	Treaty establishing a Constitution for Europe
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
EU Courts	Court of Justice of the European Union
EU Charter	Charter of Fundamental Rights of the European Union
GC	General Court
ICCPR	International Covenant on Civil and Political Rights
TFEU	Treaty on the Functioning of the European Union
TEC	Treaty on Establishing the European Community
TEU	Treaty on European Union

Introduction

During the past decades, the European Union has become more political than economic union where the position of individuals has become of greater importance. The strong attachment to principles of democracy and rule of law are now expressly set forth in the new Lisbon Treaty, which puts respect for human rights and fundamental freedoms high on the agenda.¹ The EU has now its own Charter of Fundamental Rights and had explicitly recognized the fundamental rights protected by the European Convention on Human Rights as part of the general principles of EU law.² However, it is one thing to have rights, another to be able to protect them, in particular through accessible judicial remedies. The primary objective of this thesis is to analyze the main routes individuals have to enforce their rights against measures of EU institutions and to assess their compatibility with fair trial standards of access to justice. In other words, the present thesis aims to answer the question whether the system of judicial protection in the EU meets the fair trial standards of access to justice.

The concept of access to justice is a broad one, but the present paper restricts itself to what many call a *narrow* interpretation of access to justice, i.e. access to courts and in particular, *locus standi* requirements. The focus will be given on access of individuals to the judicial review of administrative and legislative acts adopted by the EU institutions.

The first chapter offers multiple perspectives on the ‘access to justice’ standards, ranging from international to national comparative analyses. As the EU does not exist in a vacuum, the Member States’ common constitutional traditions are indeed relevant. Since the

¹ Treaty on European Union of 9.5.2008 [O.J. C 115/13] (Consolidated version) (TEU), Preamble and Articles 2 and 6

² Article 6 (3) TEU

EU intends to accede to the European Convention on Human Rights and recently ratified the Aarhus Convention,³ their access to justice standards must be taken into account too.

There are two major ways an individual can access the EU Courts to challenge EU legal acts: firstly, the annulment procedure which is the main direct action available to individuals seeking to challenge the validity of acts of the EU institutions (Article 263 TFEU);⁴ secondly, the preliminary ruling procedure, which is an alternative way via the national courts for individuals unable to access the EU Courts directly (Article 267 TFEU). The two procedures are analyzed in the second and third chapter respectively.⁵ The final chapter deals with proposals and recommendations intended to improve individual rights enforcement within the EU.

The European Court of Justice as the judicial institution of the EU has often stressed that the EU is “a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.”⁶ At first sight, this formula anticipates a strong mechanism of judicial review. Moreover, the Court dwells on stating that the Treaty established “a complete system of legal remedies and procedures, designed to permit the Court (...) to review the legality of measures adopted by the

³ Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus, 25.6.1998)

⁴ Tridimas, T., Gari, G., *Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)*, E.L. Rev. 2010, 35(2), 131-173, p. 140

⁵ The other procedures are intentionally omitted since they are not suited for individuals to obtain judicial review of the EU measures and their analyses will overstep the scope of this thesis. Briefly, the *infringement procedure* is not considered because it is an enforcement procedure directed against Member States and it is held completely in the hands of the Commission with no formal participation of individuals. The *action for failure to act* is omitted because it simply mirrors the annulment procedure and its usage by individuals is very limited. Between 2001 and 2005 only 13 actions for failure to act were brought before the EU Courts and none of them was successful (Tridimas/Gari, 2010). The *action for damages* is left out because it does not constitute a mechanism of judicial review of Community measures and is suited only to claim financial compensation. Finally, the *plea of illegality* is not analyzed because it does not constitute an independent action.

⁶ Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339, para 23

institutions.”⁷ Within this allegedly strong mechanism of judicial review as depicted above there is, however, a gap in the judicial protection of individuals wanting to challenge illegal and harmful legal acts of the EU institutions.

The action for annulment is the main tool of the EU Courts to review the validity of legislative and other acts adopted by the EU institutions, bodies, offices and agencies when these breach substantive and procedural rules of law exceed their competence or misuse their powers.⁸ Under this procedure the ECJ has the power to annul the act of other EU institutions giving it an extraordinary power to control these institutions and secure the respect of the rule of law. The annulment procedure distinguishes between three types of applicants. Whereas so-called *privileged* and *semi-privileged* applicants, basically the Member States and EU institutions, can attack the contested act without proving any interest or affection of such act to them,⁹ the so called *non-privileged* applicants, i.e. natural and legal persons, are subject to certain standing conditions. The private parties can attack only acts which are addressed to them or in case they are not addressees of the act, they have to prove that the contested act is of *direct and individual concern* to them.¹⁰ This formulation would probably not be problematic if the EU Courts would interpret it liberally. But the EU Courts adopted a strict approach to the interpretation of this provision, especially with regard to the notion of *individual concern*. This approach has been challenged by a number of commentators¹¹ and also by the Courts’ own members.¹²

⁷ Ibid

⁸ Treaty on the Functioning of the European Union of 9.5.2008 [O.J. C 115/47] (Consolidated version) (TFEU), Article 263

⁹ However, the semi-privileged applicants shall prove the purpose of protecting their prerogatives.

¹⁰ Article 263 (4) TFEU as interpreted in Case 26/62 *Plaumann & Co. v Commission of the European Economic Community* [1963] ECR 95. It must be stressed, however, that the requirement of *individual concern* has been recently removed by the Lisbon Treaty with regard to the regulatory acts which do not entail implementation measures.

¹¹ Albors-Llorens, A., *Private parties in European Community law: challenging community measures* (Clarendon Press, Oxford 1996); Arnall, A., *Private applicants and the action for annulment since "Codorniu"*, CMLR 2001, v. 38, n. 1, pp. 7-52; Arnall, A., *The Action for Annulment: a Case of Double Standards?*, in Liber Amicorum in Honour of Lord Slynn of Hadley (Kluwer Law International, Hague 2000); Craig, P., De Búrca, G., *EU law: text, cases and materials* (4th ed., Oxford University Press, Oxford 2008); Granger, M.P., *Towards*

Due to the restrictive interpretation of *individual concern*, it becomes extremely difficult for individuals to challenge decisions of the EU institutions not addressed to them and even harder to challenge the acts of general application. Moreover, most annulment actions brought by individuals against legislative measures end “in refusal to review the merits of the case, no matter how cogent the complaint, on the ground that the applicant lacks *locus standi*.”¹³ Especially, in comparison with the standing of Member States and EU institutions as privileged applicants, individuals were placed in a “disadvantageous *locus standi* position.”¹⁴ The statistical data show a sharp difference between the number of annulment actions dismissed as inadmissible by the ECJ which hears the claims of the privileged applicants (10,7 %) and by the General Court which hears the claims of individuals (58,6 %).¹⁵ “This high percentage indicates how difficult it is for non-privileged applicants to get access to justice.”¹⁶ Craig and de Búrca described this situation metaphorically but concisely when saying that “the ‘possibility’ of *locus standi* is like a mirage in the desert, ever receding and never capable of being grasped.”¹⁷

According to the available statistics there is also an enormous difference between the actions for annulment brought by natural persons (9 %) and those brought by legal persons (87 %).¹⁸ Out of those brought by natural persons (in total 30 actions in five years), a half

a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: Jégo-Quéré et Cie SA v Commission and Unión de Pequeños Agricultores v Council, The Modern Law Review, Vol. 66, No. 1 (Jan. 2003), pp. 124–138; Ward, A., *Judicial review and the rights of private parties in EC law* (2nd ed., Oxford University Press, Oxford/New York 2007); Ward, A., *Amsterdam and Amendment to Article 230: an opportunity lost or simply deferred?*, in Dashwood, A., Johnston, A., *The future of the judicial system of the European Union* (Hart Publishing, London 2001); Ward, A., *Locus standi under Article 230 (4) of the EC Treaty: crafting a coherent test for a ‘wobbly polity*, (2003) 22 YEL 45

¹² Most remarkably Advocate General Jacobs: Opinion in C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* from 21. 3. 2002

¹³ Ward, A., *Amsterdam and Amendment to Article 230: an opportunity lost or simply deferred?* (2001), p. 37

¹⁴ Rasmussen, H., *European Court of Justice* (GadJura, Copenhagen 1998), p. 198

¹⁵ Tridimas, T., Gari, G., *Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)*, (2010), p. 172

¹⁶ Ibid

¹⁷ Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), p. 512

¹⁸ Tridimas, T., Gari, G., *Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)*, (2010), p. 159

were dismissed as inadmissible.¹⁹ As a result “the chances are that one out of two measures lodged by individuals will be dismissed as inadmissible and, even if they make it through the admissibility test, only 1 in 10 actions will succeed in annulling or partially annulling a Community measure.”²⁰ That means that from the overall 30 annulment actions lodged by individuals (natural persons) in a period of five years, only two were successful.²¹ It is worth to note that the two successful cases were lodged by a scholar²² and former MEP²³, respectively, and thus, by persons with „a strong interest or experience with the European Union.”²⁴

The situation described above not only raises concerns about access to justice but also puts into question the basic principles of the rule of law, legitimacy or accountability of the EU institutions. “Any modern polity which purports like the [European Union] to be based on the rule of law must provide a mechanism for subjecting the activities of its legislative and executive bodies to judicial review.”²⁵ A strong system of judicial review safeguarding compliance of EU institutions with basic principles of EU law and fundamental rights is especially “essential to the legitimacy of EC polity.”²⁶ Since the law-making process in the EU is not “entirely driven by democratic principles, it appear[s] to be of the utmost importance to ensure that private parties could obtain a review of legality of [European Union] acts that are harmful to their interest.”²⁷

¹⁹ Ibid, p. 159

²⁰ Ibid, p. 159

²¹ Ibid, p. 159

²² Ibid, fn 72, T-211/00 *Kuijer v Council* [2002] E.C.R. II-485

²³ Ibid, fn 73, T-146/04 *Koldo Gorostiaga Atxalandabaso v Parliament* [2005] E.C.R. II-5889

²⁴ Ibid, p. 159

²⁵ Arnall, A., *The European Union and its Court of Justice* (2nd ed., Oxford University Press, Oxford/New York 2006), p. 91

²⁶ Ward, A., *Amsterdam and Amendment to Article 230: an opportunity lost or simply deferred?* (2001), p. 38

²⁷ Albers-Llorens, A.: *Private parties in European Community law: challenging community measures*, (1996), p. 217; See also Weiler, J.H.H., Lockhart, N.J.S.: *Taking rights seriously: The European Court and its Fundamental Rights Jurisprudence*, (1995) 32 CML Rev. 51, p. 66 (quoted in: Ward, A., *Locus standi under Article 230 (4) of the EC Treaty: crafting a coherent test for a ‘wobbly polity* (2003), p. 48)

Moreover, the strict approach of the EU Courts with regard to individual standing stands in a stark contrast with its liberal approach in other areas, in particular in the doctrines of supremacy, direct effect or States' liability.²⁸ After the liberal development of case law in other areas one would expect that the EU Courts would develop "a robust mechanism for judicial review" on the basis of Article 263 TFEU (ex 230 TEC)²⁹ where individuals would play an important role.³⁰ However, the Court, by adopting restrictive and, at times, inconsistent case law "prevented the article's full capacity for ensuring respect for the rule of law from being realized."³¹ There is also a contradiction between the strict approach of ECJ towards the standing of individuals in annulment action with the very liberal approach towards the standing of the European Parliament.³² As *Rasmussen* argued, "it flies in the face of the simplest notions of procedural fairness and of justice to deny judicial review to plaintiffs who often do not have other means of self-defense while granting the right to litigate to parties who enjoy powerful alternative means of influencing Community law making."³³

It is also argued that the EU Courts with their policy of restrictive individual standing are actually applying double standards. On the one hand, the EU Courts have imposed clear obligations on national judicial bodies to interpret their procedural rules in accordance with the right to effective judicial protection,³⁴ while refusing to do the same in their own procedural rules.³⁵ As one commentator put it, "it seemed perverse for the Court to expect

²⁸ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1; Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585; Case 6 and 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357

²⁹ Treaty Establishing the European Community [2002] O.J. 325 (consolidated version) (TEC)

³⁰ Arnall, A., *The Action for Annulment: a Case of Double Standards?* (2000), p. 179

³¹ *Ibid*

³² Case 70/88 *EP v. Council* (1991) ECR I-4529; See also Arnall, A.: *The Action for Annulment: a Case of Double Standards?* (2000), p. 182; Dehousse, R., *The European Court of Justice: the politics of judicial integration* (St. Martin's Press, New York 1998), p. 97

³³ Rasmussen, H., *European Court of Justice* (1998), p. 175

³⁴ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; Case C-432/05 *Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271

³⁵ Case C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677

national judges to interpret their own rules in the light of the need to ensure effective judicial protection when it refused to do likewise in interpreting [Article 263 TFEU].”³⁶

Although the EU Courts are subjected to harsh critique for this *lacuna* in judicial protection, there are reasonable arguments to explain their approach.³⁷ The test of *locus standi* is not necessarily narrower than that of the European Court of Human Rights, where individual petition is confined to the ‘victim’ of violation (...).”³⁸ Moreover, the principal litigants before the EU Courts are usually corporate and commercial entities; any enlarged possibility of standing would in fact not bring advantage to individuals but to corporate lobbying groups surrounding EU politics.³⁹ The restrictive interpretation of direct and individual concern can also be explained by “the far-reaching consequences of the annulment of a [Union] act”⁴⁰ which means that it is retroactive and has *erga omnes* effect. “To make the action for annulment generally available might mean permanent litigation about [EU] regulations and open the way to *actio popularis*.”⁴¹ Moreover, “abandoning a strict interpretation of the requirements of direct and individual concern (...) is likely to increase the judicial time dealing with applications by non-privileged applicants.”⁴²

Yet, despite these explanations of the current restrictions, there are many suggestions for improvement of the rules governing individual standing before the EU Courts, not only within academia, but also within the EU Courts themselves. However, commentators have different ideas on how the system could be reformed. *Ward* argued that Article 263 TFEU

³⁶ Arnall, A., *The European Union and its Court of Justice* (2006), p. 87

³⁷ Harlow, C., *Access to justice as a human right: the European convention and the EU*, in: Alston, P., *The European Union and human rights*, Oxford University Press, Oxford 1999, pp. 187-214; Lenaerts, K., Arts, D., *Procedural law of the European Union* (2nd ed., Sweet & Maxwell, London, 2006), p. 163 et seq.

³⁸ Harlow, C., *Access to justice as a human right: the European convention and the EU*, (1999), p. 193

³⁹ Ibid, p. 195-197; See also Dehousse, R., *The European Court of Justice: the politics of judicial integration* (1998), p. 111

⁴⁰ Lenaerts, K., Arts, D., *Procedural law of the European Union* (2006), p. 163

⁴¹ Ibid

⁴² Tridimas, T., Gari, G., *Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)*, (2010), p. 173

shall be amended in order to give individuals standing “if *prima facie* case of breach is made out by a [EU] institution of either fundamental rights, or a primary principle of law enshrined in the [EU] Treaty.”⁴³ Such a suggestion was, however, strictly refused by *Arnulf*, who claimed that, based on the experience of the German Constitutional Court, “it is often possible to dress a case up in terms of fundamental rights violation.”⁴⁴

Ward further suggested granting individual standing if the applicant “is able to prove either the absence of national implementation measure that might be subject to attack through the courts of Member States, or that judicial review at national level otherwise provides an inadequate remedy.”⁴⁵ This was, however, rejected by Advocate General *Jacobs* when he argued that such an amendment would oblige EU Courts to review national procedural measures on a case-by-case basis which clearly goes beyond their jurisdiction.⁴⁶

Ward also suggested amending the rules of standing in a way which would distinguish between the normative and executive acts. As she proposed, the requirement of direct and individual concern should be removed with regard to the *executive* acts which are usually adopted under the so called comitology procedure, criticized for lack of accountability. However, the judicial review of *normative* acts, which are usually adopted by the co-decision procedure with the active involvement of the European Parliament, should be left unchanged.⁴⁷

The most fertile suggestions were made by Advocate General *Jacobs* in the *UPA* case, who after detailed analysis of the EU system of judicial remedies, recommended the ECJ an alternative interpretation of the notion of individual concern. According to his opinion,

⁴³ Ward, A., *Judicial review and the rights of private parties in EC law* (2007), p. 343; Similar suggestion was made by Albers-Llorens, A., *Private parties in European Community law: challenging community measures* (1996), p. 229

⁴⁴ Arnulf, A., *The European Union and its Court of Justice* (2006), p. 88

⁴⁵ Ward, A., *Judicial review and the rights of private parties in EC law* (2007), p. 343

⁴⁶ Advocate General Jacobs, Opinion in Case C-50/00P *Unión de Pequeños Agricultores v. Council of the European Union* from 21. 3. 2002, paras 50-53

⁴⁷ Ward, A., *Locus standi under Article 230 (4) of the EC Treaty: crafting a coherent test for a ‘wobbly polity* (2003), pp. 47-48

nothing in the wording of the Treaty precludes the ECJ to read the notion of individual concern more liberally and therefore no treaty change is required. His alternative interpretation would provide standing for an individual seeking to challenge a measure not addressed to him “where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.”⁴⁸

Arnull disagreed and argued that “a treaty change will be necessary to remove the blot on the landscape of Community law which the case law on admissibility has become.”⁴⁹ *Jacobs* solution to re-consider the interpretation of individual concern may be more easy to implement than the treaty amendment suggested by *Arnull* which would have to be negotiated by all EU Member States. However, both scholars agreed on the substance of the change, which should “confer standing on any natural or legal person who is adversely affected by a Community act.”⁵⁰ It cannot be disputed that such a change would considerably ease the way of individuals to challenge unlawful acts of the EU institutions before the EU Courts.

It must be stressed, however, that all the suggestions mentioned above were made before the entry into force of the Lisbon Treaty. The Lisbon Treaty partially relaxed the standing conditions for individuals in annulment procedure. The individual applicants seeking to challenge a ‘regulatory act’ which ‘does not entail implementing measures’ are no longer required to show individual concern.⁵¹ Despite this development, the issue of individual access to justice within the EU is still pressing. It is argued that the relaxation of *locus standi* in the Lisbon Treaty failed to fully address the *lacuna* in the judicial protection

⁴⁸ Advocate General Jacobs, Opinion in Case C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* from 21. 3. 2002, para 60

⁴⁹ Arnull, A., *Private applicants and the action for annulment since "Codorniu"* (2001), p. 52

⁵⁰ Ibid, p. 52; Advocate General Jacobs, Opinion in Case C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* from 21. 3. 2002, para 60

⁵¹ Article 263 (4) TFEU

in the EU system.⁵² Although the new wording of the relevant provision was intended to respond to problematic cases, where no indirect challenge was possible due to the lack of (national) implementing measure, the success of this objective is uncertain. The reform of standing failed to include acts of legislative nature (as opposed to regulatory acts) and thus, to challenge certain types of EU measures might still be problematic. Moreover, there is no clear distinction between the legislative and administrative acts within the EU legal system⁵³ and this fact makes the application of reformed standing rules more complex. The Lisbon Treaty has also introduced the obligation for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by the EU law.⁵⁴ But the transfer of judicial review on national courts is also problematic because they lack jurisdiction to invalidate the EU legal measures. Therefore, the present thesis also aims to contribute to the ongoing discussions about the impact of the Lisbon relaxation of individual standing under annulment procedure and evaluate if further reform of legal remedies in the EU law is still necessary.

⁵² Usher, J. A., *Direct and individual concern – an effective remedy or a conventional solution?*, E.L. Rev. 2003, 28(5), 575-600; Koch, C., *Locus standi of private applicants under the EU Constitution: Preserving gaps in the protection of individuals' right to an effective remedy*, E.L. Rev. 2005, 30(4), 511-527; M. Eliantonie, N. Stratieva, *From Plaumann, through UPA and Jégo-Quéré, to the Lisbon Treaty: The Locus Standi of Private Applicants under Article 230 (4) EC through a political lens* (Maastricht: Maastricht Faculty of Law Working Paper, 2009)

⁵³ Granger, M.P., *Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: Jégo-Quéré et Cie SA v Commission and Unión de Pequeños Agricultores v Council*, (2003), p. 124 (ftn 1)

⁵⁴ Article 19 (1) TEU

1. Legal standards of fair trial and access to justice

The present chapter examines national and international standards of fair trial and access to justice, so as to define an appropriate normative framework for the evaluation of access to justice in the EU. The chapter starts with academic definitions of the terms access to justice, fair trial and access to court. It then continues with an examination of access to justice in selected national legal systems, i.e. France, England and Germany. The subsequent subchapter is dedicated to international standards of access to justice and evaluation of access to selected international tribunals. The analysis then continues with the notion of access to justice as it appeared in the jurisprudence of the ECtHR and in the Aarhus Convention. The final part elaborates on access to justice standards developed in the EU law and jurisprudence of ECJ.

The structure of analysis in the present chapter mirrors the ECJ technique of reasoning when it comes to the protection of fundamental rights. Apparently, national constitutional principles and international human rights standards are important sources of inspiration for the ECJ in its fundamental rights jurisprudence. According to well-established case-law of the ECJ, “fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States (...)”⁵⁵ Furthermore the ECJ draws inspiration from the “international treaties for the protection of human rights on which the Member States collaboration or of which they are signatories”⁵⁶ whereas the European Convention of Human Rights enjoys special position within these international

⁵⁵ Case 4/73 *Nold KG v. Commission* [1974] ECR 491, para 13; see also Case 29/69 *Stauder v. Stadt Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 36/75 *Rutili v. Ministre de l'intérieur* [1975] ECR 1219; Case 149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1978] ECR 01365

⁵⁶ Ibid

instruments.⁵⁷ In recent years, the ECJ does not only recognize the special position of the ECHR in the EU legal order but it also relies on the body of the ECtHR case-law.⁵⁸ This is what some commentators call "*de facto* accession"⁵⁹ of the EU to the ECHR because the ECJ in fact incorporated the ECtHR jurisprudence into the EU legal system.

1.1 Definitions

Lawrence Friedman started his chapter about access to justice pragmatically by stating that, "when people talk about 'access to justice' they may mean many different things."⁶⁰ One commentator divided the concept in three categories.⁶¹ According to him, the first category of 'access to legal justice' embraces mainly procedural obstacles in enforcement of rights. The second category of 'access of machinery of justice of the welfare state' covers broader questions of justice in modern states, like the legal aid system or small claim procedures. The third category of 'Justice with capital J' encompasses "broader view of the realization of fairness and equity in society."⁶² The present thesis focuses on the first category, that is "the possibility for the individual to bring a claim before a court and have a court adjudicate it."⁶³

Many authors connect the concept of access to justice to the doctrine of 'rule of law'.

Berry and Boyes state that access to justice is an "essential right in a society based on rule of

⁵⁷ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18

⁵⁸ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351; C-13/94 *P. v S. and Cornwall County Council* [1996] ECR I-2143; and most recently C-229/05 P *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v Council* [2007] ECR I-00439 where the ECJ checked whether the applicant organization would enjoy the victim status under the Convention.

⁵⁹ Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), p. 424

⁶⁰ Friedman, L.M., *Access to Justice: Social and Historical Context*, in: Cappelletti, M., Garth, B., *Access to justice*, Sijthoff & Noordhoff, Alphenaaandenrijn, 1978-1979, p.7

⁶¹ Tunc, A., *The Quest for Justice*, in: Cappelletti, M. [ed.], *Access to Justice and the Welfare State* (European University Institute, Florence 1981), p. 315, (quoted in Storskrubb, E., Ziller, J., *Access to Justice in European Comparative Law*, in: Francioni, F., *Access to justice as a human right* (Oxford University Press, Oxford, 2007), pp. 187-188

⁶² Storskrubb, E., Ziller, J., *Access to Justice in European Comparative Law*, in: Francioni, F., *Access to justice as a human right* (2007), p.188

⁶³ Francioni, F., *The Rights of Access to Justice under Customary International Law*, in: Francioni, F., *Access to justice as a human right* (2007), p.1

law”⁶⁴ and more importantly as an obligation of government to secure that “adequate redress for unlawful state action must be available.”⁶⁵ In this understanding, access to justice means not only access to court, but also the existence of suitable remedies, such as a functioning mechanism of judicial review and state liability for the actions and wrongdoing of its entities.

The concept of access to justice is sometimes understood as one element of the broader right to fair trial. The right to fair trial can be seen from two perspectives. On the one hand, it can be considered as a right essential for the enforcement of other rights. This aspect was described by one commentator as being of ‘parasitic’ character, because it can be invoked only when other substantial rights are in question.⁶⁶ On the other hand, right to fair trial can be understood as a separate substantive right to have disputes decided by an impartial and independent tribunal.

The very precondition of the realization of the right to a fair trial is the right to access to court. It was recognized for the first time by the European Court of Human Rights in the case of *Goldner v. United Kingdom* (1975)⁶⁷ in what was described as “one of the most creative steps taken by the [ECtHR] in its interpretation of any article of the Convention.”⁶⁸ The Court admitted that there is no express guarantee for right to access the courts in the wording of Article 6 ECHR, but such a right can be ‘inferred’ from the text of the first sentence of this Article.⁶⁹ The Court recalled the principle of rule of law guaranteed in the Preamble of the ECHR and it also relied on principles recognized by international law that forbids the denial of justice.⁷⁰

⁶⁴ Berry, E., Boyes, S., *Access to Justice in the Community Courts: A Limited Right?*, C.J.Q. 2005, 24(APR), p. 224

⁶⁵ Ibid

⁶⁶ Harlow, C., *Access to justice as a human right: the European convention and the EU*, in: Alston, P., *The European Union and human rights*, Oxford University Press, Oxford 1999, pp.187-188

⁶⁷ *Goldner v. United Kingdom* [1975] 1 EHRR 524 PC

⁶⁸ Harris D.J. [et al.], *Law of the European Convention on Human Rights* (2nd ed., Oxford University Press, New York 2009), p. 235

⁶⁹ *Goldner v. United Kingdom* [1975] 1 EHRR 524 PC, para 26

⁷⁰ Ibid, paras 34-35

“It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, *access to a court*. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.”

Goldner v. United Kingdom [1975] 1 EHRR 524 PC, para 35 (emphasis added)

In order to access the court, one has to have a standing. The notion of standing is described by legal dictionary as “a party’s right to make a legal claim or seek judicial enforcement of a duty or right.”⁷¹ It is usually a set of conditions set by the legislator or by the case-law which requires plaintiffs to show a certain interest in filing the case. The body of standing rules is usually developed by the judicial interpretation in order to adapt them to particular group of cases and achieve the proper balance of justice. Some legal systems recognize so called *actio popularis*, which allows a person or group of persons to bring an action in the interest of another, in collective interest.

The adoption of standing rules is a political decision with crucial importance to the whole system of judicial review and protection of individual rights. The decision on how standing rules are set up “determines who has access to justice and it therefore has a constitutional significance.”⁷² More importantly, the underlying question is, whether it can be ever principally right for the court to turn away a person, with otherwise valid claim against governmental action, only because his or her rights or interests were not sufficiently affected.⁷³ Of course, there are valid reasons for developing standing rules for the applicants to go to court. One of the purposes of standing rules is to deter unmeritorious and ‘hopeless’ claims and thus prevent the courts from being flooded by speculative litigators and enable

⁷¹ Garner, B.A. [ed.], *Black’s Law Dictionary* (9th ed., St. Paul, MN: West, c2009)

⁷² De Smith, S.A. [et al.], *Judicial review of administrative action* (5th ed., Sweet & Maxwell, London 1995), p. 99 (with application to the whole paragraph)

⁷³ Ibid, p. 99

them to focus on delivery of justice in substantiated claims.⁷⁴ Consequently, standing rules protect government from being disrupted by excessive litigation and keep courts within its judicial powers.⁷⁵ On the other hand, too restrictive setting of standing rules might cause a situation where “because all the public is equally affected no one is in a position to bring proceedings.”⁷⁶ Thus, standing requirements embody the inevitable tension between “the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper invoking the jurisdiction of the courts in matters in which he is not concerned.”⁷⁷

1.2 Access to justice in national laws

Being aware of the limits of comparative method applied to supranational and national legal systems,⁷⁸ the present subchapter is dedicated to illustration of three national systems of *individual access* to the judicial review of legislative and administrative acts, with the aim to define the standards of access to justice in national legal orders. In support of the comparative method is the fact that the standing rules of the EU have been inspired by national systems of judicial review, most notably by France.⁷⁹ Moreover, despite the *sui generis* nature of the ECJ oscillating between the classic international court and constitutional court of Europe, one of its powers is the review of secondary legislation adopted by the EU institutions, comparable to judicial review on national level. The main limit for the present comparison is the fact that there is no clear distinction between the legislative and administrative acts within

⁷⁴ Ibid, p. 99

⁷⁵ Ibid, p. 101

⁷⁶ Ibid, p. 101

⁷⁷ Ibid, p. 100

⁷⁸ Abaquesne de Parfouru, A., *Locus standi of private applicants under the Article 230 EC action for annulment: any lessons to be learnt from France?*, Maastricht Journal of European and Comparative Law 2007, v. 14, n. 4, pp. 361-402

⁷⁹ Berry, E., Boyes, S., *Access to Justice in the Community Courts: A Limited Right?*, (2005), p. 237 (fn 86)

the EU legal order. Therefore, the following analysis dealt with the judicial review of both, legislative and administrative acts at the national level.

1.2.1 France

The review of administrative acts in France is entrusted to administrative courts.⁸⁰ An individual seeking to challenge an administrative act is required to show that she has an *interest* in bringing the action, i.e. that the attacked decision is detrimental to her interest.⁸¹ The interpretation of *interest* is relatively broad, encompassing also purely moral or collective interest in bringing the case to the court.⁸² However, the applicant must be sure to bring an action only against reviewable administrative acts (*la décision préalable*)⁸³ and comply with the two months time limit.⁸⁴ The individual access to the French administrative courts is described by commentators as ‘relatively lax’.⁸⁵ Moreover, de Parfouru’s analysis shows that the standing requirements of the French law, comparable to the ex-Article 230(4) TEC ‘direct and individual concern’ test, were significantly relaxed by the judicial interpretation,⁸⁶ which suggests that liberal interpretation by the ECJ of these requirements remains a possible option.

The review of legislative acts in France can be divided into two parts: *a priori* and *a posteriori* review whereas the latter enabling access to individuals to judicial review of *lois*

⁸⁰ Bell, J. [et al.], *Principles of French law* (2nd ed., Oxford University Press, Oxford/New York 2008), p. 41

⁸¹ Ibid, p. 120; Brown, L.N. [et al.], *French administrative law* (5th ed., Oxford Clarendon Press, Oxford 1998), p. 166: “*pas d’intérêt, pas d’action*”

⁸² Bell, J. [et al.], *Principles of French law* (2008), p. 120; Brown, L.N. [et al.], *French administrative law* (1998), pp. 167-169

⁸³ Bell, J. [et al.], *Principles of French law* (2008), p. 121: “*La décision préalable* is a decision of administration [...which] may consist of the rejection of person’s request, or a refusal to take a decision as requested.”

⁸⁴ Two months *after* the decision has been adopted. Unlike the English courts, the French judiciary does not have discretion to waive time limits. See Bell, J. [et al.], *Principles of French law* (2008), p. 122; Brown, L.N. [et al.], *French administrative law* (1998), p. 170

⁸⁵ Bell, J. [et al.], *Principles of French law* (2008), p. 120

⁸⁶ Abaquesne de Parfouru, A., *Locus standi of private applicants under the Article 230 EC action for annulment: any lessons to be learnt from France?* (2007)

*ordinaires*⁸⁷ has been introduced only very recently.⁸⁸ The *a priori* judicial review which has been until recently the only way of judicial review of legislative acts in France, is limited to the enumerated institutions⁸⁹ within the *ex ante* review powers of the *Conseil Constitutionnel*. The *a posteriori* judicial review introduced in the outset of big constitutional reform enables individuals claiming that a statutory disposition infringes over the rights and liberties safeguarded by the Constitution to have their case decided by the *Conseil Constitutionnel*.⁹⁰ The decision if to refer the case is, however, purely discretionary and moreover, goes through the scrutiny of *Conseil d'Etat* or *Cour de Cassation*.⁹¹

1.2.2 England

Unlike in France, there is no separate administrative judiciary in England; the review of administrative acts is entrusted in the special division of the High Court.⁹² The judicial review of administrative acts is performed through the procedure of *application for judicial review*.⁹³ An individual seeking to challenge administrative act needs to obtain *leave* from the

⁸⁷ *Loi ordinaires* are acts of Parliament adopted under the ordinary legislative procedure. Abaquesne de Parfouru, A., *Locus standi of private applicants under the Article 230 EC action for annulment: any lessons to be learnt from France?* (2007), p. 377

⁸⁸ Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la V^e République of 24 July 2008

⁸⁹ Article 61 (2) of the 1958 French Constitution reserves the power of referral to the President of the Republic, the Prime Minister, the President of either Chamber of Parliament, or sixty members of either Chamber of Parliament.

⁹⁰ Article 61-1 of the 1958 French Constitution

⁹¹ Closer to the new system of *a posteriori* judicial review in France see Fabbrini, F., *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, 9 German L.J. 1297 (2008)

⁹² Bradley, A.W., Ewing, K.D., *Constitutional and administrative law* (14th ed., Pearson Longman, Harlow 2007), p. 765; in 2000 this division was renamed as Administrative Court as part of the reform of administrative procedure.

⁹³ The application for judicial review was introduced into the English law in 1978 under Order 53 of the *Rules of the Supreme Court*. In 2000 the procedure under Order 53 was replaced by the new Part 54 of the Civil Procedure Rules (CPR) with little adjustments. For the Order 53 procedure see De Smith, S.A. [et al.]: *Judicial review of administrative action* (1995), pp. 109-128 and pp. 660-672. For the changes in Part 54 procedure see Cornford, T., *The New Rules of Procedure for Judicial Review*, (2000), first published in Web Journal of Current Legal Issues in association with Blackstone Press Ltd., available at <http://webjcli.ncl.ac.uk/2000/issue5/cornford5.html> (last access on 28.11.2010 at 17:40)

High Court and in order to obtain it he must prove *sufficient interest* in bringing the action.⁹⁴

The courts have, similarly as in France, interpreted this notion in a broad and flexible way.⁹⁵

The application for judicial review must be lodged with the court ‘promptly and in any event within *three months* from the date when the grievance arose.’⁹⁶

Due to the doctrine of parliamentary sovereignty, the courts cannot invalidate acts adopted by the Parliament.⁹⁷ The judicial review of legislative acts in England is therefore limited to scrutiny of compatibility of acts adopted by the Parliament with the EU law⁹⁸ and with the European Convention on Human Rights.⁹⁹

1.2.3 Germany

Germany has a special system of administrative courts.¹⁰⁰ In order to challenge an administrative act, an individual is first required to file an objection (*Widerspruch*) with the authority within *one month* after the contested act was issued.¹⁰¹ If no redress is achieved through the objection, the applicant can challenge administrative act before the court within another *one month* time limit.¹⁰² The applicant must show that he has been *injured* in his

⁹⁴ Sec. 31 (3) of the Supreme Court Act (1981) c. 54: “No application for judicial review shall be made unless the leave of the court has been obtained in accordance with the Rules of Court; and the court shall not grant leave to make such an application unless it considers that the applicant has a *sufficient interest* in the matter to which the application relates.” (emphasis added)

⁹⁵ Bradley, A.W., Ewing, K.D., *Constitutional and administrative law* (2007), pp. 769-771

⁹⁶ Civil Procedure Rules, Part 54.5 (emphasis added)

⁹⁷ See e.g. *Medzmbamuto v. Lardner-Burke* [1969] 1 AC 645, 723; for doctrine of parliamentary sovereignty see Bradley, A.W., Ewing, K.D., *Constitutional and administrative law* (2007), chapter 3

⁹⁸ European Communities Act (1972) c. 68

⁹⁹ Human Rights Act (1998) c. 42

¹⁰⁰ Three stage system: *Verwaltungsgericht*, *Oberverwaltungsgericht* and *Bundesverwaltungsgericht*, for the system of administrative procedure in Germany see Robbers, G., *An introduction to German law* (3rd ed., Nomos, Baden-Baden 2003), pp. 141-145; Reimann, M., Zekoll, J., *Introduction to German law* (2nd ed., Kluwer Law International, Hague c2005), pp.106-107, Foster, N. G., *German legal system & laws* (2nd ed., Blackstone Press, London 1996), pp. 174-179.

¹⁰¹ Verwaltungsgerichtsordnung (VwGO) adopted on 21.01.1960, published under BGBl. I S. 686, as amended, Sec. 68 et seq.

¹⁰² VwGO, Sec. 74 (1)

subjective rights by the challenged administrative act or at least that such injury is possible.¹⁰³

In other words, the applicant must prove that his legally protected *interest* was violated by the challenged act.¹⁰⁴ The contested act must not necessarily be addressed to the applicant; there are cases where “the third parties derive the right to review as a result of being affected by the decision addressed to others.”¹⁰⁵

Germany is the only from the three reviewed jurisdictions which enables individual access to the judicial review of legislative acts through the mechanism of constitutional complaint (*Verfassungsbeschwerde*). The constitutional complaint can be filed with the German Federal Constitutional Court by any person “alleging that one of his or her basic rights (...) has been infringed by public authority.”¹⁰⁶ This test provides for “significantly lower threshold than that utilized by the Court of Justice.”¹⁰⁷ Legislative acts in Germany can also be challenged by individuals indirectly, through the mechanism of *judicial referral*.¹⁰⁸

1.2.4 Interim conclusions

The standing rules in the reviewed jurisdictions encompass one common feature: an individual must show some kind of *interest* in bringing the action (Fr., Eng.) or must prove violation of protected *interest* (in the sense of subjective right) by the public authority (Ger.). In all three jurisdictions, the courts were keen to interpret standing requirements broadly and

¹⁰³ VwGO, Sec. 42(2): „*in seinen Rechten verletzt zu sein*” and also Article 14 (4) of the German Basic Law: “Should any person’s rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.”

¹⁰⁴ Foster, N. G., *German legal system & laws* (1996), p. 175

¹⁰⁵ Ibid

¹⁰⁶ Art. 93 (1) 4a of the German Basic Law

¹⁰⁷ Berry, E., Boyes, S.: *Access to Justice in the Community Courts: A Limited Right?* (2005), p. 237

¹⁰⁸ Art. 100 (1) of the German Basic Law: „If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.”

it might be concluded that overall, there is a clear trend towards relaxation of standing rules when comes to judicial review of administrative acts.¹⁰⁹

Only one country from the reviewed jurisdictions provides for the judicial review of legislative acts through the mechanism of *constitutional complaint* (Ger.) and two of them enable indirect access to the judicial review of legislative acts through the *judicial referral* (Ger., Fr.) whereby France adopted this model only very recently. Nevertheless, the possibility to challenge *inter alia* legislative acts through the mechanism of constitutional complaints exists in some form in most European countries which were not analyzed in this section.¹¹⁰

1.3 Access to international courts

The main rationale for looking at international standards regarding access to court is based on the observations that the ECJ is still an international court in the sense of public international law since it was set up by the international treaties and is composed of judges coming from the Member States, although many would contest the assumption that ECJ is a traditional international tribunal.¹¹¹ Moreover, the ECJ itself often use international standards as a source of inspiration.

Alter divides international tribunals into two categories.¹¹² The ‘old-style’ international courts, such as, for example International Court of Justice, whose role is primary to settle disputes between international actors. This type of international tribunals lacks

¹⁰⁹ Arnall, A., *Private applicants and the action for annulment under Article 173 of the EC Treaty*, Common Market Law Review 32, 1995, pp. 7-9

¹¹⁰ E. g. in Spain, Italy, Austria, Poland, Slovakia, Czech Republic

¹¹¹ For AG Jacobs, it would not “be appropriate to describe the Court of Justice as an international tribunal.” As he claimed the EU legal order developed in such a way that “it would no longer be accurate to describe it as a system of intergovernmental cooperation.” (AG Jacobs, Opinion in C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* from 21. 3. 2002, para 78)

¹¹² Alter, K.J., *The European Court's political power: selected essays* (Oxford University Press, New York 2009), p. 265

compulsory jurisdiction and in general does not allow standing for individual actors. On the other hand, ‘new-style’ international tribunals usually enjoy compulsory jurisdiction and allow access to individual applicants. It is hard to compare the ECJ to the other international courts since ECJ has developed over time into the unprecedented *sui generis* international court. However, according to *Alter’s* functionalist division there are several international courts which perform similar role of administrative and constitutional review as the ECJ.¹¹³ From the international courts included in *Alter’s* analysis, fourteen allow private access of individuals, from which nine are enabled to enforce international rules against member states.¹¹⁴ Interestingly enough, 96 percent of decisions involving private actors were issued by European international courts which make private enforcement “largely a European phenomenon.”¹¹⁵

The international human rights tribunals provide for another comparative perspective. The individual access to the international tribunals based on human rights treaties such as the European Court of Human Rights (ECtHR), the UN Human Rights Committee (HRC)¹¹⁶ and the Inter-American Court of Human Rights (IACHR), is generally based on two conditions. Firstly, all three human rights mechanism require the applicant to exhaust all available domestic remedies.¹¹⁷ However, this condition was mitigated by jurisprudence of the ECtHR saying that there is “no obligation to have recourse to remedies which are inadequate or

¹¹³ From the international courts reviewed by *Alter*, seven were endowed with power of administrative review and from them four also hear appeals against national administrative decisions (ECJ, ATJ, COMESA, CACJ). The same four international courts have also power of constitutional review, i.e. power to review validity of laws. *Ibid*, p. 275-280

¹¹⁴ *Ibid*, p. 281 (indirect actions included)

¹¹⁵ *Ibid*, p. 284

¹¹⁶ Although the UN HRC is not a judicial body, it is nevertheless used for comparison for it performs similar functions than other human rights tribunals such as ECHR or ACHR; Scheinin, M., *Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights*, in Francioni, F., *Access to justice as a human right*, (2007), pp. 135-136

¹¹⁷ ECHR (Article 35), Optional Protocol to the International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force 23 March 1976) (ICCPR) (Article 2), American Convention on Human Rights (adopted on 22 November 1969) (ACHR) (Article 46)

ineffective.”¹¹⁸ A Similar approach was also taken by the HRC.¹¹⁹ The second requirement of access to international human rights tribunals is that the applicant must be an actual victim of a human rights violation.¹²⁰ According to the ECtHR jurisprudence, the applicant can be considered to be a victim when he or she is “directly/personally affected by the act or omission at issue.”¹²¹ Abstract complaints or complaints on behalf of another are usually not accepted. However, the concept of victim has been broadened by the jurisprudence, recognizing possibility to lodge a complaint to ‘potential’ victims,¹²² ‘future/victims’¹²³ and ‘indirect’ victims.¹²⁴

The concept of victim as interpreted by the ECtHR is in principle stricter than the national standing rules.¹²⁵ For example the ECtHR although allowing applications brought by representatives of victims, would dismiss applications brought in public interest which could be perfectly acceptable for a national administrative court.¹²⁶

Whereas the standing conditions of human rights tribunals are very similar in terms of exhaustion of domestic remedies and victim status, the approaches towards admissibility of

¹¹⁸ *Akdivar and Others v Turkey* [1996] Reports 1996-IV, para 67

¹¹⁹ *KL v Peru* Communication no. 1153/2003, HRC Views of 24.10. 2005; Scheinin, M., *Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights*, (2007), pp. 138-139

¹²⁰ ECHR (Article 34), Optional protocol to the ICCPR (Article 1)

¹²¹ For relevant case law see Dijk, P. van [et al.], *Theory and practice of the European Convention on Human Rights* (4th ed., Intersentia, Antwerp 2006), p. 58 (fn 169); Zwart T., *The admissibility of human rights petitions: the case law of the European Commission of Human Rights and the Human Rights Committee* (Kluwer Academic Publishers, M. Nijhoff, Dordrecht c1994), p. 50 (fn. 55)

¹²² ‘Potential’ victims were defined as “category of persons whom it could not be ascertained with certainty that they had suffered an injury” because it could not have been established “whether challenged legislation had or had not been applied to them” (quoted from Dijk, P. van [et al.], *Theory and practice of the European Convention on Human Rights* (2006), p. 61). Especially in surveillance cases *Klass and Others v. Germany* [1978] A28, para 34; *Malone v. United Kingdom* [1982] B67; but also *Marckx v. Belgium* [1979] A31; *Dudgeon v. United Kingdom* [1981] A45. The Court did not grant ‘potential’ victim status in *Segi and Gestoras Pro-Amnistia and Others v. 15 States of the European Union* [2002] Reports 2002-V

¹²³ The concept of ‘future’ victim is most often used in the extradition cases. See *Soering v. United Kingdom* [1989] A161, *Vilvarajah v. United Kingdom* [1991] A215. For the concept consult Dijk, P. van [et al.], *Theory and practice of the European Convention on Human Rights* (2006), pp. 66-68

¹²⁴ In certain cases the ECtHR allows third persons to pursue a complaint without having directly suffered a violation of human rights. Such applicant must have “so close link with the direct victim of the violation that he himself is also to be considered as a victim” (quoted from Dijk, P. van [et al.], *Theory and practice of the European Convention on Human Rights* (2006), p. 68).

¹²⁵ Gordon, R. J. F., *EC law in judicial review* (Oxford University Press, Oxford c2006), pp. 85-86

¹²⁶ *Ibid*, See the comparison between cases: *Greenpeace Schweiz v. Switzerland* [1997] 23 EHRR CD 116 (test of Article 34 ECHR) and *R v. Secretary of State for the Environment, ex p Greenpeace* [1994] 4 All ER 352 (domestic test of standing).

complaints may differ. In the last few years, the ECtHR has been very strict in the interpretation of admissibility criteria, being a victim of its own success buried under a huge caseload.¹²⁷ The restrictive trend in the access to the ECtHR can be seen also in the Protocol 14 to the Convention which introduced new criterion of *significant disadvantage* to the admissibility procedure.¹²⁸ In contrast, the HRC's approach towards standing is more liberal, presumably because complaints under ICCPR are still not very popular.¹²⁹ It would be, however, too limited to claim that the approach of international tribunals towards standing depends largely on the number of cases pending before them.

1.4 Access to court in the ECHR

The ECtHR recognizes that access to court is part of the right to a fair trial as guaranteed in Article 6 of the ECHR.¹³⁰ The Court developed this concept in its subsequent jurisprudence mainly through the wide interpretation of the notion of 'civil rights and obligations' from the first sentence of Article 6. Thus, the applicability of fair trial guarantees was broadened to encompass not only disputes between private parties but also claims against state, thus involving also administrative law.¹³¹

The ECtHR has often emphasized that the rights guaranteed in the Convention must be 'practical and effective' rather than 'theoretical and illusory'. With regard to access to

¹²⁷ The number of unresolved cases at the ECtHR exceeded 140 000 in October 2010. See European Court of Human Rights, *Pending Applications allocated to a judicial formation*, 31.10.2010, available at http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending_applications_chart.pdf (last access on 28.10.2010 at 18:00)

¹²⁸ Article 35(3)b ECHR as amended by Protocol 14: "the applicant has not suffered a *significant disadvantage*, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal." (emphasis added) For the background of the reform see Lemmens, P., Vandenhole, W., *Protocol No.14 and the reform of the European Court of Human Rights* (Intersentia, Antwerpen 2005), pp. 50-60

¹²⁹ Scheinin, M.: *Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights*, (2007), p. 136

¹³⁰ *Goldner v. United Kingdom* [1975] 1 EHRR 524 PC, para 35

¹³¹ To the judicial review of administrative decisions see Harris, D.J. [et al.]: *Law of the European Convention on Human Rights* (2009), p. 228

court, the Court stressed that “right of access means access in fact, as well as in law.”¹³² That means that access to court must be effective in the sense that “practical impediments must not unduly obstruct the exercise of the right.”¹³³ In *De Geouffre de la Pradelle v. France* (1992) the Court stated that ‘the extreme complexity’ of the law governing the access of the applicant to courts was ‘likely to create legal uncertainty’ and that “the applicant was entitled to expect a coherent system that would achieve a fair balance between the authorities’ interests and his own.”¹³⁴ Therefore, the principle of effectiveness requires that the rules governing access to courts are coherent and consistent in order to give individuals a “reasonable opportunity of exercising the remedies afforded by national law.”¹³⁵

However, the right of access to court is not absolute. States enjoy certain ‘margin of appreciation’ in determining the restrictions of the right to access courts in order to secure the proper administration of justice.¹³⁶ Nevertheless, the ECtHR has put limits to the States’ autonomy in *Osman v. United Kingdom* (1998): “it must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.”¹³⁷ The restrictions must also pursue a legitimate aim and there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.¹³⁸

The EU is, however, not yet a party to the Convention; therefore, its institutions are not formally bound by its provisions, neither do they fall under the jurisdiction of the ECtHR.

¹³² For review of relevant cases see Harris, D.J. [et al.]: *Law of the European Convention on Human Rights* (2009), p. 236

¹³³ This was the rationale which led the Court to recognize the right to legal aid in *Airey v. Ireland* [1979] A32. See Jacobs, F. G., *The Right to a Fair Trial in European Law*, (1999) 2 E.H.R.L.R. 141, p. 143

¹³⁴ *De Geouffre de la Pradelle v. France* [1992] A253-B, paras 33, 34

¹³⁵ Jacobs, F. G., *The Right to a Fair Trial in European Law*, (1999), p. 143

¹³⁶ *Ashingdane v. United Kingdom* [1985] A93, para 57: “The right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals.”

¹³⁷ *Osman v. United Kingdom* [1998] Reports 1998-VIII, para 147

¹³⁸ For review of case-law on restriction to access to courts see Dijk, P. van [et al.]: *Theory and practice of the European Convention on Human Rights* (2006), pp. 569-578

The question is thus to what extent are ECHR standards applicable to proceedings before the EU Courts. First of all, the EU may, in a not so distant future, become a party to the ECHR, since Article 6(2) TEU enables accession of the EU to the ECHR.¹³⁹ On the side of the Council of Europe, Protocol 14 to the ECHR, which allows for EU accession, entered into force on 1 June 2010.¹⁴⁰

Nonetheless, even without formal accession, there are two arguments in favor of applicability of ECHR standards to the actions of the EU institutions. First is the *de facto* accession, i.e. recognition of the ECHR principles by the ECJ itself. Second argument flows from the case-law of the ECtHR, sometimes called as the indirect review of the EU actions.¹⁴¹ The pre-accession situation is governed by the *Bosphorus* judgment where the Strasbourg Court established the doctrine of ‘equivalent protection’.¹⁴² According to this doctrine the State’s action taken in compliance with legal obligations stemming from the membership in the other international organization can be justified “as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can

¹³⁹ For the possibility of accession of the EU to the ECHR see *Opinion 2/94* on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-01759; Report of the Steering Committee for Human Rights (CDDH), *Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights*, June 28, 2002; Report of the experts group set up by the CDHH, *Accession by the European Union to the European Convention on Human Rights. Answers to frequently asked questions*, November 23, 2007; for academic debate see Myjer, E., *Can the EU Join the ECHR – General Conditions and Practical Arrangements*, in: Stöbener P., Mall, J., *The Future Of The European Judicial System in a Comparative Perspective*, Colloquium/IACL Round Table Berlin, 2-4 November 2005 (Nomos Verlag, Baden-Baden 2006); Callewaert, J., *The European Convention on Human Rights and European Union Law: A long way to go to harmony*, E.H.R.L.R. 2009, 6, 768-783

¹⁴⁰ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 1 June 2010

¹⁴¹ *M & Co v. Germany* [1990] Commissions decision of 9.2.1990 (app. no. 38817/97): “a transfer of powers does not necessarily exclude a State’s responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character.” See also *Cantoni v. France* [1996] Reports 1996-V; *Matthews v. United Kingdom* [1999] Reports 1999-I; *Segi and Gestoras Pro-Amnistia and Others v. 15 States of the European Union* [2002] Reports 2002-V; *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* [2004] Reports 2004-IV

¹⁴² *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [2005] Reports 2005-VI

be considered at least equivalent to that for which the Convention provides.”¹⁴³ If the organization provides for such equivalent protection, there will be “presumption that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization.”¹⁴⁴ However, this presumption is rebuttable if the protection of the Convention rights could be considered as ‘manifestly deficient’ to be assessed on a case-by-case basis.¹⁴⁵ The *Bosphorus* doctrine triggered a lively academic discussions focused predominantly on the level of protection the ECtHR will consider for ‘equivalent’ with the Convention system.¹⁴⁶

In the *Bosphorus*¹⁴⁷ case the ECtHR also scrutinized the system of human rights protection guaranteed by the EU in order to find out whether it can be considered as generally equivalent with the one guaranteed under the Convention. With regard to the possibilities of individuals to access courts and to seek remedy, the Strasbourg Court stated:

“It is true that access of individuals to the ECJ under these provisions is limited: they have no *locus standi* under [ex] Articles 169 and 170; their right to initiate actions under [ex] Articles 173 and 175 is restricted as is, consequently, their right under [ex] Article 184; and they have no right to bring an action against another individual.”

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [2005] Reports 2005-VI, para 162

Nonetheless, the system of judicial protection offered by the national courts in connection with the possibility of preliminary ruling procedure seemed to be sufficient for the ECtHR to conclude that “the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, ‘equivalent’.”¹⁴⁸ However, as was emphasized by Judge *Ress* in his concurring opinion, “one should not infer from paragraph 162 of the

¹⁴³ Ibid, para 155

¹⁴⁴ Ibid, para 156

¹⁴⁵ Ibid, para 156

¹⁴⁶ For the academic discussion see Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), pp.422-424; Costello, C., *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, HRLR 6:1, 2006, pp. 87-130; Kuhnert, K., *Bosphorus – Double Standards in European Human Rights Protection?*, Utrecht Law Review. V. 2, I. 2. Dec. 2006, pp. 177-189

¹⁴⁷ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [2005] Reports 2005-VI

¹⁴⁸ Ibid, para 165

judgment in the present case that the Court accepts that Article 6 § 1 does not call for a more extensive interpretation.”¹⁴⁹ As he pointed out the ECtHR did not address the question, whether the limited access of individuals to the ECJ is compatible with the standards set up in Article 6 paragraph 1 ECHR. Once the ECtHR will have to address this question, the conclusion about ‘equivalent’ protection could be changed.

There is also limited case-law of the Strasbourg Court regarding procedures before the ECJ, such as *Lutz John v. Germany* (2007)¹⁵⁰ where the Court considered the complaint under Article 6 § 1 ECHR about the failure of German courts to seek a preliminary ruling from the ECJ or *Emesa Sugar N.V. v. Netherlands* (2005)¹⁵¹ concerning the complaints under Article 6 § 1 ECHR about no possibility to react on the opinion of Advocates General or in *Matthews v. United Kingdom* (1999) where the ECtHR *inter alia* considered the right of individuals to lodge application against one or all of the Member States.¹⁵²

1.5. Access to justice in the Aarhus Convention

The European Community ratified the Aarhus Convention¹⁵³ in 2005 and in order to implement it, the Aarhus Regulation was adopted.¹⁵⁴ By ratification of the Aarhus Convention, the EU “took upon itself the obligation to ensure that members of the public

¹⁴⁹ Concurring opinion of Judge Ress in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [2005] Reports 2005-VI, para 2

¹⁵⁰ *Lutz John v. Germany* [2007] Chamber decision of 13.2.2007 (app. no. 15073/03)

¹⁵¹ *Emesa Sugar N.V. v. Netherlands* [2005] Chamber decision of 13.1.2005 (app. no. 62023/00) and most recently *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A v. Netherlands* [2009] Chamber decision of 20.1.2009 (app. no. 13645/05)

¹⁵² *Matthews v. United Kingdom* [1999] Reports 1999-I

¹⁵³ Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus, 25.6.1998)

¹⁵⁴ Regulation 1367/2006/EC of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters to Community Institutions and Bodies, [2006] O.J. L264/13

have access to administrative or judicial procedures to challenge acts and omissions by EU institutions which contravene provisions of EU law relating to the environment.”¹⁵⁵

The Aarhus Convention within its third pillar - access to justice establishes an obligation for its contracting parties to “ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have *access to administrative or judicial procedures* to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”¹⁵⁶ The same provision also requires that these procedures provide for adequate and effective remedies which are fair, equitable, timely and not prohibitively expensive.¹⁵⁷

In order to comply with this requirement the EU established a *review procedure* under which “any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.”¹⁵⁸ The time limit for this request is six weeks after the adoption of the administrative act and the requested body shall respond to the request in no later than twelve weeks.¹⁵⁹ Consequently, the non-governmental organization which had previously requested the above mentioned review procedure, may *under the condition laid down in the EU Treaties* institute proceedings before the ECJ.¹⁶⁰

The scope of the Aarhus Regulation when compared to Article 9 (3) of the Aarhus Convention is in certain aspects narrower.¹⁶¹ The internal review procedure is accessible only to the *non-governmental organizations* meeting the entitlement criteria of Article 11 of the

¹⁵⁵ Institute for European Environmental Policy, *Compliance by the European Community with its obligations on Access to Justice as a party to the Aarhus Convention*, June 2009, p. 6

¹⁵⁶ Aarhus Convention, Article 9 (3), (emphasis added)

¹⁵⁷ Aarhus Convention, Article 9

¹⁵⁸ Aarhus Regulation, Article 10 (1)

¹⁵⁹ Aarhus Regulation, Article 10 (2) and (3)

¹⁶⁰ Aarhus Regulation, Article 12, (emphasis added)

¹⁶¹ Crossen, T., Niessen, V., *NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?*, RECIEL 16 (3) 2007 (with application to the whole paragraph)

Aarhus Regulation.¹⁶² From the internal review are excluded *Community institutions and bodies* “when acting in a judicial or legislative capacity”¹⁶³ which is wording taken out from the Aarhus Convention.¹⁶⁴ Although there is no clear distinction between the legislative and administrative acts within the EU, according to the established case-law, in particular regulations and directives are considered to be of legislative nature, and are thus excluded from the internal review under the Aarhus Regulation.¹⁶⁵ Moreover, only administrative acts *under environmental law* are reviewable under the internal procedure which differs from the wording in the Aarhus Convention and this distinction is “not entirely clear.”¹⁶⁶ Further, the Aarhus Regulation limits the internal review only to *administrative acts and omissions* whereas the Aarhus Convention refers only acts and omissions.¹⁶⁷ *Crossen* and *Niessen* draw attention to the definition of *administrative acts* under the Aarhus Regulation which reads: „any measure of *individual scope* under environmental law, taken by a Community institution or body, and having legally binding and external effects.“¹⁶⁸ In particular they point to the term *individual scope* meaning of which is unclear.¹⁶⁹

It might be questioned whether the standard of access to justice as set up by the ECJ is compatible with the requirements of the Aarhus Convention. *Crossen* and *Niessen* argue that the Aarhus Regulation provide the non-governmental organisations with access to justice, including the access to the ECJ. They argue that the *written reply* which is the consequence of the internal review procedure secures the standing of NGO under the first limb of the ex-

¹⁶² Aarhus Regulation, Article 11: “(a) it is an independent non-profit-making legal person in accordance with a Member State’s national law or practice; (b) it has the primary stated objective of promoting environmental protection in the context of environmental law; (c) it has existed for more than two years and is actively pursuing the objective referred to under (b); (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.”

¹⁶³ Aarhus Regulation, Article 2 (1) c)

¹⁶⁴ Aarhus Convention, Article 2 (2)

¹⁶⁵ Crossen, T., Niessen, V., *NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?* (2007), p. 335

¹⁶⁶ Ibid, p. 335

¹⁶⁷ Ibid, p. 336

¹⁶⁸ Aarhus Regulation, Article 2 (1) g)

¹⁶⁹ Crossen, T., Niessen, V., *NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?* (2007), p. 336

Article 230 (4) TEC because this act is addressed to them.¹⁷⁰ On the other hand, as pointed out by *Mathiesen*, the ECJ criteria for establishing judicial review, e.g. in case of challenging a regulation when no preliminary ruling procedure is practically possible, are “inappropriate for the fact that the greater the potential environmental impact of a EC measure, the greater the range of affected persons, and therefore, the less the likelihood that applicants will be able to establish *individual* concern, even if the facts of the a given case would seem to warrant judicial review.”¹⁷¹ There might also be concern about the lengthiness of the procedure before the ECJ and compliance with the Aarhus standard of timely and effective remedies. According to statistical data the majority of annulment actions as well as the majority of preliminary rulings on validity brought before the ECJ last between 18 and 36 months.¹⁷²

1.6 The standards of access to justice and national remedies in the EU law

The human rights standards guaranteed in the ECHR as recognized in the jurisprudence of the ECJ were incorporated into the primary law of the EU by the Maastricht Treaty.¹⁷³ The principle of fundamental rights protection was reaffirmed by the Lisbon Treaty where the ECHR constitutes one of the sources of general principles of EU law.¹⁷⁴ The prominent position of protection of fundamental rights within the EU was confirmed by the incorporation of the EU Charter of Fundamental Rights into the Lisbon Treaty. Thus, after almost one decade of uncertain status, the EU Charter finally became binding part of EU law.

¹⁷⁰ Ibid, p. 337; and even if not they argue that given the written reply the NGOs would meet requirements of direct and individual concern.

¹⁷¹ Mathiesen, A.S., *Public participation in decision-making and access to justice in EC environmental law: the case of certain plans and programs*, European Environmental Law Review 2003, v. 12, n. 2, February, pp. 36-52

¹⁷² Tridimas, T., Gari, G., *Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)*, (2010), p. 140

¹⁷³ Treaty on European Union [1992] O.J. C 191 of 29 July 1992, Article 6 (2)

¹⁷⁴ Ibid, Article 6 (3)

The EU Charter “as the most recent emanation of access to justice”¹⁷⁵ guarantees in Article 47 the *right to an effective remedy* and to a *fair trial*. Article 47 is composed of three parts and guarantees firstly, the right to an effective remedy, secondly, the right to fair and public hearing within reasonable time by independent and impartial tribunal and right to defense, and finally, provision on legal aid. Thus, “the Article is de facto a formulation of the right to access to justice.”¹⁷⁶

However, the EU Charter must be read in light of its Explanatory memorandum which serves as a “tool of interpretation intended to clarify the provisions of the Charter.”¹⁷⁷ According to the explanations, Article 47 “has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union.”¹⁷⁸ This means that the new Article 47 of the Charter does not replace wording of the Treaty. But it is not excluded that in light of this provision the standing rules might be interpreted by the ECJ in amore liberal way in the future.

When looking for standards of access to justice within the legal order of the EU, one cannot forget the extensive jurisprudence of the EU Courts on the application of EU law on national level. In order to secure proper enforcement of directly applicable EU rights on the domestic level, the ECJ developed the *doctrine of effective judicial protection*. In *Johnston*, the Court emphasized that “it is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which a directive provides.”¹⁷⁹ Therefore,

¹⁷⁵ Storskrubb, E., Ziller, J.: *Access to Justice in European Comparative Law* (2007), p. 184

¹⁷⁶ Ibid

¹⁷⁷ Explanations relating to the Charter of Fundamental Rights, O.J. C 303 , 14/12/2007 P. 0017 - 0035

¹⁷⁸ Ibid

¹⁷⁹ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 19

the Member States became obliged to ensure that individuals enjoy effective and adequate judicial protection of their rights stemming from the EU law.

Moreover, this principle requires that an adequate and effective judicial remedy is always available to individuals seeking to invoke their directly applicable EU rights.¹⁸⁰ In case that national legal order does not grant the possibility of such remedy, as was the case in *Factortame I* where the courts were precluded to grant interim relief against the Acts of the Parliament, the ECJ nonetheless stated that:

“(...) that the *full effectiveness* of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law . It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to *set aside* that rule.”

Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433 (emphasis added)

The most specific remedy developed by the Luxembourg court was the “right to reparation”¹⁸¹ developed in *Francovich* where the ECJ obliged national courts to provide individuals with compensation for the loss suffered from the breach of EU law by the Member State.¹⁸² Thus, as *Jacobs* pointed out, “Community law goes further [than ECHR system], and may require national courts to grant a remedy where none is available under national law.”¹⁸³ The ECJ went further in recent *Unibet* case where it *in fact* confirmed that the principle of effective judicial protection requires from Member States to provide for free-standing action to examine whether national provisions are compatible with the EU law.¹⁸⁴

¹⁸⁰ Ibid

¹⁸¹ Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), p. 306

¹⁸² Case C-6 and 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357; for more about the doctrine of State liability see Craig, P., De Búrca, G.: *EU law: text, cases and materials* (2008), p. 328

¹⁸³ Jacobs, F. G., *The Right to a Fair Trial in European Law*, (1999), p. 148

¹⁸⁴ Case C-432/05 *Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271, paras 37 et seq. ; For comments on the judgment see Van Waeyenberge, A., Pecho, P., *L’arret Unibet e tle Traité de Lisbonne – un pari sur l’avenir de la protection juridictionnelle effective*, Cahiers de droit europeen, Vol. 44, N° 1-2, 2008 , pp. 123-156

It may be concluded that access to justice as formulated by the ECJ in the *doctrine of effective judicial protection* and as recognized recently in the EU Charter forms an important part of the EU legal order. The level of protection is in some aspects even broader than the one guaranteed by the Convention.¹⁸⁵ However, the emphasis of judicial protection is moved from the EU level to the national sphere where domestic courts play an important role in the enforcement of directly applicable rights stemming from EU law. Thus, the requirements put on national courts may differ from those placed on the EU Courts.¹⁸⁶ This development is confirmed not by the new provision in the Lisbon Treaty which provides that the “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”¹⁸⁷

On the other hand, it is interesting to follow recent developments in EU Courts jurisprudence regarding the restrictive measures taken by the EU against some organizations and entities in the context of fight against terrorism. In the landmark case of *Kadi and Al Barakaat International Foundation*, the ECJ overruled the ex-CFI decision and stated that the rights to defense and right to an effective judicial remedy of the applicants have been infringed by the contested regulation¹⁸⁸ mainly because they were not properly informed about the grounds of restrictive measures taken against them and thus prevented from exercising the review of lawfulness of this measures.¹⁸⁹ Similarly, in the recent case of *People’s Mojahedin Organization of Iran*, the ex-CFI annulled the decision of the Council¹⁹⁰ to freeze the accounts of the applicants on the ground that there were insufficient allegations

¹⁸⁵ Explanations relating to the Charter of Fundamental Rights, O.J. C 303 , 14/12/2007 P. 0017 - 0035

¹⁸⁶ See the critique of double standards in Ward, A., *Judicial review and the rights of private parties in EC law* (2007), p. 324; Arnall, A., *The European Union and its Court of Justice* (2006), p. 87

¹⁸⁷ TEU, Article 19 (1) (2)

¹⁸⁸ Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (O.J. L 139, 29.5.2002, p. 9–22v)

¹⁸⁹ Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351

¹⁹⁰ Council Decision 2008/583 implementing Article 2(3) of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism

against the applicant and that “the very circumstances of its adoption (Council decision) infringe the applicant’s right to effective judicial protection.”¹⁹¹ This line of case law suggests the tendency of strengthening the principle of effective judicial protection at EU level. Thus, the EU Courts are willing to put stricter obligations on the EU institutions and are prepared to exercise strict judicial review over EU legal acts restricting fundamental rights of individuals.¹⁹² This could suggest a new mindset in the Court in cases involving anti-terrorist measures against individuals or in general more liberal approach of the Court towards standing of individuals in annulment procedure of measures adopted under the former second and third pillar.¹⁹³

¹⁹¹ T-284/08 *People’s Mojahedin Organization of Iran v. Council* [2008] ECR II-03487, para 78; the judgment is subject to appeal to the ECJ: C-27/09 P (OJ C 82 of 04.04.2009, p.14)

¹⁹² Ibid, para. 75

¹⁹³ Rossi, L.S., *How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon*, Yearbook of European Law 2008 27, pp. 84-85

2. Access of individuals to the ECJ through the annulment procedure

The purpose of this chapter is to review the possibility of individuals to challenge legal acts of EU institutions which are harmful to them for any reason before the ECJ or the GC. The EU Treaties provide several actions for individual access to the ECJ with the view to challenge EU action or inaction, from direct actions, i.e. the action for annulment (Article 263 TFEU), the action for failure to act (Article 266 TFEU), and the action for damages (Article 340 TFEU), to indirect actions, through the preliminary ruling procedure (Article 267 TFEU) and the plea of illegality (Article 277 TFEU). From all these remedies available under the EU Treaties, the annulment procedure is considered to be the most appropriate remedy for an individual.¹⁹⁴ The reasons are pragmatic: the action for failure to act simply mirrors the annulment procedure, the action for damages is suited to claim financial compensation, but not necessarily illegality, the plea of illegality does not constitute an independent action, and the preliminary reference procedure is determined by domestic factors (see next chapter). Consequently, the action for annulment is the only direct and potentially the most effective way for individuals to reach the ECJ with their claims against legal acts of the EU institutions. The following chapter constitutes a detailed analysis of the mechanism of the annulment procedure, with a focus on the admissibility stage. It then analyzes the changes brought about by the Lisbon Treaty and the most recent practice of the ECJ when considering individual claims.

2.1 The core features of the annulment procedure

The main purpose of the annulment procedure is to review the legality of different acts and measures adopted by the EU institutions. If successful, the applicant can achieve that

¹⁹⁴ Tridimas, T., Gari, G., *Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)*, (2010), p. 140: The action for annulment constitutes more than half of the total number of actions for judicial review of Community measures which makes it to be the “most important type of action for judicial review.”

the unlawful act is declared void by the ECJ.¹⁹⁵ The institution whose act was declared void has an obligation to “take the necessary measures to comply with the judgment (...).”¹⁹⁶ Thus, the annulment procedure provides the ECJ with an important power to invalidate, under certain conditions, a legal act of another EU institution. The annulment procedure also constitutes an important tool of judicial review helping to keep legislative and executive power under control. The doctrine of judicial review as developed in modern democratic states is considered to be one of the cornerstones of democracy and the rule of law because it gives individuals a possibility to have legal acts which are harmful to them reviewed by an independent tribunal.

The legal basis for the annulment procedure before the entry into force of the Lisbon Treaty was Article 230 et seq. TEC, now Article 263 TFEU. Although the Lisbon Treaty has brought some changes of annulment procedure, in order to outline the development of the jurisprudence regarding the individual standing in the annulment procedure, the present chapter will work with an the provision of the old Article 230 (4) TEC.

The procedure is formally divided into two stages: the admissibility stage and the merits. For the purposes of this thesis the admissibility stage is crucial because many of individual claims end here without making it to the stage when merits of their claims are reviewed. A brief summary of the admissibility conditions is provided below.

2.1.1 Reviewable acts

Not all legal acts adopted by the EU institutions are open to judicial review. The range of reviewable acts covers all legislative acts, acts of the Council, the Commission and the European Central Bank, act of the Parliament and the European Council intended to produce legal effects vis-à-vis third parties, and also acts of bodies, offices and agencies intended to

¹⁹⁵ Article 231 (1) TEC, Article 264 (1) TFEU; however, under para 2 of the same provision : „(...) the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.”

¹⁹⁶ Article 233 (1) TEC, Article 266 (1) TFEU

produce legal effects vis-à-vis third parties.¹⁹⁷ In other words, from the most commonly used legal acts within the EU, regulations, directives and decisions are certainly susceptible for judicial review. The ECJ is, however, keen to broaden the scope of reviewable acts under annulment procedure.¹⁹⁸ Legal acts of the Parliament, European Council and the bodies, offices and agencies are reviewable by the ECJ only when they are intended to produce legal effect vis-à-vis third parties.¹⁹⁹ The acts producing no binding effects such as preparatory acts, opinions or recommendations are excluded from annulment procedure.²⁰⁰

2.1.2 Grounds for review and time limit

Judicial review of legal acts under the annulment procedure is based on four extensive grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers.²⁰¹ The annulment procedure must be initiated within a time limit of *two months* after the publication of the challenged legal act.²⁰²

2.1.3 Standing

Who can initiate annulment procedure and under what conditions, i.e. *locus standi*, is one of the most complex issues of the EU law. Ex-Article 230 TEC distinguished between three types of applicants: Member States, the Parliament, the Council or the Commission as *privileged* applicants could initiate annulment procedure without any restrictions except the time-limit condition of two months. The Court of Auditors and the European Central Bank as

¹⁹⁷ Article 263 (1) TFEU

¹⁹⁸ Case 22/70 *Commission v. Council* [1971] ECR 263; Case C-57/95 *France v. Commission (Re pension Funds Communication)* [1997] ECR I-1627; Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339

¹⁹⁹ For the enumeration of case-law interpreting this condition see Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), p. 505 (n. 5 and 6)

²⁰⁰ Article 263 (1) TFEU expressly excludes recommendation and opinions from the scope of reviewable acts.

²⁰¹ Article 230(2) TEC, Article 263(2) TFEU

²⁰² Exceptions to the *two months* rule are very limited; see e.g. Case C-195/91 *Bayer v. Commission* [1994] ECR I-5619, para 26

semi-privileged applicants were entitled to challenge any legal act in the annulment procedure but only for the purpose of protecting their prerogatives. Individuals, or in the words of the Treaty, the natural and legal persons, as *non-privileged* applicants, could institute proceedings only against (i) decision addressed to them, or against (ii) decision addressed to another person which is of *direct and individual concern* to the them, or against (iii) decision *in the form of a regulation* which is of *direct and individual concern* to them. Thus, the access to the ECJ for individual applicants is on the first sight tougher than for the Member States and EU institutions. Moreover, the notion of *direct and individual concern* as interpreted by the ECJ restricted the possibility for individuals to challenge legal acts of the EU institutions. Although the Lisbon Treaty reformed to certain extent the standing requirements for non-privileged applicants, it failed to remove completely the notion of individual concern. The judicial interpretation of the *direct and individual concern* is the subject of following subchapter.

2.2. Direct concern

As a consequence of the wording of ex-Article 230 (4) TEC individual applicants seeking to challenge decision or other legal act *not addressed to them* were required to pass a two-fold test of direct and individual concern. The *direct concern* would be established when the measure in question affected the legal situation of the applicant directly and did not require implementing measures.²⁰³ The situation is more complex when the act in question requires implementing measures. Then the test of *direct concern* read as follows:

“(...) for an individual to be *directly* affected, the Community measure challenged must directly *produce effects on his legal position* and leave *no discretion* to the addressees of that measure who are entrusted with its implementation, that being a purely automatic matter flowing solely from the Community legislation without the application of other intermediate rules (...)”

²⁰³ Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339, para 31

If the applicant is affected by the measure only because the addressee of it had exercised certain discretion when implementing the measure, the direct concern could not be established.²⁰⁴

The direct concern is, however, not the biggest hurdle for individual applicants to obtain standing in the annulment procedure, except for challenges to directives, where the direct concern requirement would, if not in principle, at least in practice, foreclose almost any possibility for individuals to contest the validity of a directive.²⁰⁵ In any case, the practice of the ECJ in assessing admissibility of individual claims for annulment is, first, to check conditions for *individual concern*.

2.3 Individual concern

The restrictive approach of the ECJ towards the condition of individual concern comes from the early decision in *Plaumann* (1963). In this case the individual applicant has challenged the decision of the Commission addressed to the German government. The Court stated:

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

Case 25/62 *Plaumann & Co. v. Commission* [1963] ECR 95 (emphasis added)

²⁰⁴ Case 69/69 *SA Alcan Aluminium Raeren and others v Commission of the European Communities* [1970] ECR 385

²⁰⁵ Joined cases T-172/98 and T-175/98 to T-177/98 *Salamander AG and others v European Parliament and Council of the European Union* [2000] ECR I-03999

The *Plaumann* test, formulated in the first sentence, has prevented the individual applicant in the particular case from bringing the annulment action simply because he failed to prove that the challenged decision although not addressed to him, affects him more than others. From reasons stated below the *Plaumann* test has “effectively prevented virtually all direct actions brought by private parties to challenge decision addressed to others”²⁰⁶ with a very narrow range of exceptions.²⁰⁷

The individual concern test as interpreted in *Plaumann* was subjected to wide academic critique. According to *Craig* and *de Búrca*, the concept of individual concern as formulated by the Court in *Plaumann* is both, economically unrealistic and conceptually wrong.²⁰⁸ The argument that certain activity might be exercised at any time by some other persons is unconvincing from pragmatic point of view and makes it “literally impossible for an applicant *ever* to succeed, except in a very limited category of retrospective chases.”²⁰⁹ The result of such an approach is that almost all actions brought by individual applicants are stopped by the Court in the admissibility stage on grounds of failing to satisfy standing requirements with no possibility to look into merits of the case.²¹⁰

The Court continued with the *Plaumann* approach in subsequent cases. In the *Greenpeace* case, the Court refused to render admissible the action for annulment of the Commission’s decision granting financial aid for the construction of power stations in the Canary Islands brought by various individual applicants such as fisherman, residents and environmental interest associations. The Court has strictly applied *Plaumann* test and ruled that:

²⁰⁶ Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), p. 513

²⁰⁷ Main exceptions developed in the ECJ case-law are: competition cases, anti-dumping cases and state-aid cases; Arnall, A.: *Private applicants and the action for annulment under Article 173 of the EC Treaty*, (1995), pp. 30 -33

²⁰⁸ Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), p. 512

²⁰⁹ Ibid

²¹⁰ Ward, A., *Amsterdam and Amendment to Article 230: an opportunity lost or simply deferred?* (2001), p. 37

“(...) the criterion which the applicants seek to have applied, restricted merely to the existence of harm suffered or to be suffered, cannot alone suffice to confer *locus standi* on an applicant, since such a harm may affect, generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually in the same way as the addressee of a decision (...)”

T-585/93 *Stichting Greenpeace Council (Greenpeace International) v. Commission* [1995] ECR II-2205, para 51

However, in the case of *Codorniu*, the Court accepted that in fact a true regulation might be of individual concern. In this case the applicant, a Spanish producer of sparkling wine, challenged the legality of the Council regulation laying down general rules for the description of sparkling wines. The Court acknowledged that:

“Although it is true that according to the criteria in the second paragraph of Article 173 of the Treaty [now Article 263 TFEU] 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.”

Case C-309/89 *Codorníu SA v Council of the European Union* [1994] ECR I – 1853, para 19

The Court applied the *Plaumann* test and concluded that the contested regulation, by reserving the right to use the term *crémant* to French and Luxembourg producers prevented the applicant from using its graphic trade mark.²¹¹ Thus, the applicant managed to establish the existence of a situation where it was differentiated from all other traders in the sense of *Plaumann* test. Consequently, the Court dismissed the objection of inadmissibility raised by the Council.²¹²

The *Codorniu* case was celebrated as a great success and many hoped that the Court had finally overcome the rigidity set forth in *Plaumann*. Nevertheless, the post-*Codorniu* development of the Court’s case-law showed that *Codorniu* was rather exceptional case where the successful applicant was in an unusually exceptional position. A majority of cases where individuals challenged decisions or other legal acts not addressed to them were

²¹¹ Case C-309/89 *Codorníu SA v Council of the European Union* [1994] ECR I – 1853, para 21
²¹² *Ibid*, paras 22 and 23

rejected by the Court under *Plaumann* test of individual concern as inadmissible.²¹³ However, as many authors pointed out, the Court has been more liberal when assessing standing of individual applicants in certain areas, such as anti-dumping measures, competition and state aid.²¹⁴

2.4 Rationale behind restrictive interpretation of ‘individual concern’

Many academics attempted to find the rationale behind the restrictive approach of the ECJ in interpreting the notion of *individual concern*. According to *Stein* and *Vining* the liberal economy philosophy of the founding treaties considered the ECJ as a purely international tribunal with competence to decide disputes between the Member States and was not intended to give ECJ the competence to decide upon individual claims.²¹⁵ According to the *Rasmussen*’s theory, the unwillingness to accept the claims of individual litigants is part of Court’s hidden agenda to transform itself into some kind of appellate court of the entire Community system.²¹⁶

Most authors, however, saw the rationale in the *pro-integrationem* position of the Court: a liberal approach towards individual standing could result in too many challenges against the already adopted Community measures which are usually a result of hard-achieved compromises and years-long negotiations. Under this rationale the individual claims could easily disrupt the functioning EU legal system not only by challenging the EU measures but also by burdening the ECJ with too much litigation. *Rasmussen* had demonstrated this approach in the comparison between the very restrictive approach of the ECJ towards

²¹³ For summary of the case-law see: Rasmussen, H., *European Court of Justice* (1998), notes 349-352

²¹⁴ For summary of the case-law see: Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), pp. 518-520

²¹⁵ Stein, E., Vining, G.J., *Citizens Access to Judicial Review of Administrative Action in a Transnational and Federal Context*, 70 Am. Jour. Int. L. 219 (1976), quoted in: Arnall, A.: *The European Union and its Court of Justice* (2006), pp. 92-93

²¹⁶ Rasmussen, H., *Why is Article 173 Interpreted Against Private Plaintiffs?* (1980) 5 E.L.R. 112, quoted in: Kombos, C., *A paradox in the making: detecting something positive in "UPA" under the "Ten Kate" effect*, European Law Journal 2009, v. 15, n. 4, July, p. 518

standing of individual applicants and the liberal approach towards standing for the European Parliament (EP).²¹⁷ Whereas the EP was not listed among privileged applicants, the Court did not hesitate to acknowledge its right to challenge legality of EU acts and thus going completely against the wording of the Treaty but has radically refused to do so in the case of individual applicants.²¹⁸ As Rasmussen pointed out, the wording of the Treaty did not preclude the Court from a liberal interpretation of the notion of individual concern.²¹⁹ The Court however followed the ‘intent of the Treaty drafters’ which was to grant more standing to the EP and less or almost no standing to individuals.²²⁰ Some authors, however, attribute this paradox in case-law to the rationale choice of the ECJ for judicial restraint in cases which might intervene with interests of Member States.²²¹

There are also other explanations of restrictive approach towards individual standing. According to the *Hartley*’s subject matter argument, the ECJ adapts its interpretation of individual concern with regard to the subject matter of the litigation, as for example in anti-dumping or state aid cases where the Court was willing to open the route to the individual more than in areas like environmental or public interest litigation.²²² According to *Eliantonie* and *Stratieva* the restricting position of ECJ towards individual standing can be explained from the viewpoint of historical institutionalism, i.e. that “the ECJ is resisting reforms on the grounds of its own self-interest,”²²³ which is not only pragmatic - avoiding overload of the

²¹⁷

Ibid

²¹⁸ Case C-70/88 *European Parliament v Council of the European Communities* [1991] ECR I-4529

²¹⁹ Rasmussen, H., *European Court of Justice* (1998)

²²⁰ Ibid

²²¹ Eliantonie, M., Stratieva, N., *From Plaumann, through UPA and Jégo-Quéré, to the Lisbon Treaty: The Locus Standi of Private Applicants under Article 230 (4) EC through a political lens*, Maastricht Faculty of Law Working Paper, Maastricht 2009, p. 9 (The authors use *inter alia* approach of rationale choice to explain restrictive position of ECJ towards individual standing.)

²²² Hartley, T.C., *The Foundations of EC Law* (4th ed., Oxford University Press, 1998), pp. 333-341, quoted in: Costas Kombos: *A paradox in the making: detecting something positive in "UPA" under the "Ten Kate" effect*, (2009), p. 516

²²³ Eliantonie, M., Stratieva, N., *From Plaumann, through UPA and Jégo-Quéré, to the Lisbon Treaty: The Locus Standi of Private Applicants under Article 230 (4) EC through a political lens*, (2009), p. 10

Court, but also political - such as to promote supranational nature of the EU.²²⁴ They also argue that the Court's restrictive approach can be explained by the concept of path dependency, i.e. "the long-standing case law which cannot be easily discarded."²²⁵ According to this opinion, the Court decided the path in *Plaumann* and the cost of changing the long-standing case-law are still higher (legal certainty) than the costs of keeping *status quo* (wide critique).²²⁶

2.5 Attempts to accommodate standing rules

Almost four decades after the *Plaumann* decision, the EU Courts registered the first real attempt to re-consider the case-law regarding standing of individuals under the annulment procedure. Interestingly enough, this attempt was initiated from inside of the EU Courts - by Advocate General Jacobs. The story started in November 1999 when the association of farmers *Unión de Pequeños Agricultores (UPA)* challenged the legality of the Council regulation which reformed the common organization of market with olive oils. The CFI, applying *Plaumann* test, held the action for annulment inadmissible due to lack of individual concern.²²⁷

The applicant association appealed against the order of the CFI to the ECJ. The applicant had *inter alia* argued that the nature of legal act in question, i.e. the Council regulation, which is directly applicable in Member States and does not require implementing measures, deprived it of the possibility to reach the ECJ through the preliminary ruling procedure. If the EU Courts would have held the annulment action inadmissible due to lack

²²⁴ Ibid, p. 10

²²⁵ Ibid, p. 10

²²⁶ Ibid, p. 11

²²⁷ Case T-173/98 *Unión de Pequeños Agricultores v Council of the European Union* [1999] ECR II-3357

of individual concern, the applicant would have been left without legal remedy which means that it would have been denied effective judicial protection.²²⁸

At this stage, AG Jacobs stepped in with his revolutionary opinion.²²⁹ In his opinion AG Jacobs questioned the core premise of the EU Courts understanding of *a complete system of legal remedies*, in particular the assumption that the individual applicants seeking to challenge decisions not addressed to them or acts of general application like regulations and directives and who fail to meet standing requirements within the annulment procedure, can access the ECJ indirectly, via the national court through the preliminary ruling procedure. As many academics before him, he submitted that the jurisprudence on individual standing under ex-Article 230 (4) TEC was problematic.²³⁰ The line of his argumentation reads as follows:

“[...] the fact that an individual cannot (in most cases) challenge directly a measure which adversely affects him, if it is a measure of general application, seems *unacceptable* for, essentially, two reasons. First, the fourth paragraph of [ex] Article 230 EC must be interpreted in such a way that it complies with the *principle of effective judicial protection*. Proceedings before national courts do not, however, always provide effective judicial protection of individual applicants and may, in some cases, provide no legal protection whatsoever. Second, the Court's case-law on the interpretation of the fourth paragraph of [ex] Article 230 EC encourages individual applicants to bring issues of validity of Community measures indirectly before the Court of Justice via the national courts. Proceedings brought directly before the Court of First Instance are however *more appropriate* for determining issues of validity than proceedings before the Court of Justice pursuant to [ex] Article 234 EC, and less liable to cause legal uncertainty for individuals and the Community institutions. In addition to those points, it may be argued that the Court's restrictive attitude towards individual applicants is *anomalous* in the light of its case-law on other aspects of judicial review and recent developments in the administrative laws of the Member States.”

Opinion of Advocate General Jacobs delivered on 21.3.2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, para 37 (emphasis added)

AG Jacobs refused the solutions proposed by both parties to the dispute. The proposal suggested by UPA to grant standing to applicants who would otherwise be denied effective

²²⁸ Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677, para 18

²²⁹ Opinion of Advocate General Jacobs delivered on 21.3.2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*

²³⁰ Ibid, para 37

judicial protection had, according to AG Jacobs, no support in the wording of the Treaty and would also require examining by the Court, on a case-by-case basis, the existence of remedies in national laws which could lead to inconsistencies.²³¹ The solution proposed by the Council and the Commission to change rules of national laws so as to enable challenge of Community law before national courts was, according to him, unacceptable because individuals cannot influence decision of national court to make reference to the ECJ.²³² As a solution, AG Jacobs suggested a new interpretation of the notion of individual concern. There was “no compelling reason”²³³, he said, to read the notion of individual concern in the sense as to require from the applicant to be differentiated from all other persons affected by the measure in the same way as the person addressed (*Plaumann* test). According to *Plaumann* logic, the more people affected by the measure in question, the less likely the possibility to succeed with the annulment action.²³⁴ According to AG Jacobs, the logic goes differently: the more individuals adversely affected by the measure, the easier it should be for them to directly challenge such a measure. Therefore, the new interpretation of individual concern should read:

“(...) a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, *a substantial adverse effect on his interests.*”

Opinion of Advocate General Jacobs delivered on 21.3.2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, para 60 (emphasis added)

The advantages of such an interpretation would be, according to AG Jacobs, far-reaching. The new interpretation would not only avoid total denial of justice but also help to improve of judicial protection by ensuring that individuals are never left without a remedy and bringing the issues of validity of general measures before an appropriate judicial forum

²³¹ Ibid, paras 50-53

²³² Ibid, paras 54-58

²³³ Ibid, para 59

²³⁴ Ibid, para 59

and provide more clarity into inconsistent case-law on standing.²³⁵ The encouragement of direct actions would also limit the number of challenges via preliminary ruling mechanism which would be beneficial for legal certainty and uniformity of the application of EU law.²³⁶ The new interpretation of individual concern would also shift the emphasis of judicial review from admissibility stage to the substance and remove the anomalies caused by liberal interpretation of standing in other parts of ex-Article 230 TEC and extremely strict interpretation of individual concern.²³⁷

Very interestingly, the CFI followed the suggestions made by AG Jacobs in *UPA* opinion when deciding another case: in its decision in *Jégo Quéré*²³⁸ from May 2002 (i.e. three months after delivery of AG Jacobs opinion in *UPA*). The case concerned a fisherman seeking to challenge some provisions of Commission's regulation regarding certain rules for fishing. The First Chamber of CFI composed of five judges²³⁹ had followed the reasoning of AG Jacobs and decided to re-consider case-law on individual standing under ex-Article 230 (4) TEC "in the light of Articles 6 and 13 of the [ECHR] and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation."²⁴⁰ The test applied by CFI was slightly different than the one applied by AG Jacobs:

"(...) a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, *by restricting his rights or by imposing obligations on him.*"

Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-02365, para 51 (emphasis added)

²³⁵ Ibid, paras 61-72

²³⁶ Ibid, paras 61-72

²³⁷ Ibid, paras 61-72

²³⁸ Case T-177/01 *Jégo-Quéré & Cie SA v Commission* (3.5.2002) ECR 2002 Page II-02365

²³⁹ B. Vesterdorf (President), K. Lenaerts, J. Azizi, N.J. Forwood and H. Legal (Judges)

²⁴⁰ Case T-177/01 *Jégo-Quéré & Cie SA v Commission* (3.5.2002) ECR 2002 Page II-02365, para 47

As a consequence of this re-interpretation of individual concern, the applicant was regarded as individually concerned by the challenged measure and the case was moved to the merits.

Only about three months after the CFI decision in *Jégo-Quéré*, the ruling of ECJ in *UPA* was issued. To the surprise of many, the judges of Grand Chamber refused suggestions of AG Jacobs to re-interpret the notion of individual concern. The ECJ based the judgment on the old *Plaumann* test and clearly stressed that “if that condition [was] not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation.”²⁴¹ The ECJ repeated that the Treaty established *a complete system of legal remedies* and procedures where individuals who are not able to challenge Community measure of general application directly through the action of annulment are still able to challenge the measure indirectly through the preliminary ruling procedure or through the plea of illegality.²⁴²

“In that context, in accordance with the principle of sincere cooperation laid down in [ex] Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.”

Case C-50/00 *Unión de de Pequeños Agricultores v Council of the European Union* [2002] ECR I – 6677, para 42

The new interpretation of individual concern suggested by AG Jacobs would, according to the judges sitting in the Grand Chamber, go beyond the jurisdiction of the Court and therefore, it was for the Member States to reform the current system of juridical remedies, if necessary, via the Treaty amendment.²⁴³ Consequently, the action brought by *UPA* was dismissed as lacking individual concern. The same happened to the appeal in *Jégo-Quéré*.²⁴⁴

²⁴¹ Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* (2002) ECR I-06677, para 37

²⁴² Ibid, para 40

²⁴³ Ibid, paras 44 and 45

²⁴⁴ Case C-263/02 P *Commission v. Jégo-Quéré & Cie SA* [2004] ECR I-03425

The call to the Member States to change the rules was made whilst the discussions on Treaty reform were discussed in the Convention; there was therefore scope for Treaty change to open up standing requirements.

The *UPA* and *Jégo-Quéré* story was another big disappointment for those hoping for more liberal individual standing before the ECJ. Many academics saw the argument that any re-consideration of standing case-law would require Treaty reform ‘unconvincing’,²⁴⁵ since the ECJ had not hesitated in the past to use teleological interpretation in other cases and since the Treaty itself did not preclude more liberal interpretation of individual concern at all.²⁴⁶ Moreover, the reasoning in *UPA* was unfortunate because it failed to explain why the test of substantial adverse impact proposed by AG Jacobs or the test as framed by the CFI in *Jégo-Quéré* “[could] not be a legitimate reading of the requirements of individual concern.”²⁴⁷

On the other hand, as *Kombos* pointed out, the context behind both cases could have largely contributed to the ECJ reasoning. First of all, the ECJ was asked by the AG Jacobs and the CFI ruling in *Jégo-Quéré* to reconsider the case-law on individual standing which was valid since 1963 and thus basically to accept that the right to an effective judicial protection has not been protected properly since *Plaumann*.²⁴⁸ Secondly, the timing of the cases was a bit unlucky. The Court could have been influenced not only by drafting the EU Charter but also by calling up the European Convention for drafting the Constitutional Treaty.²⁴⁹ Therefore, the Court was probably unwilling to interfere into the policy decision-making and the time was probably not ripe for changing the standing case-law.²⁵⁰

²⁴⁵ Craig, P., *EU Administrative Law*, (2006), p. 342

²⁴⁶ Ibid, p. 343

²⁴⁷ Ibid, p. 344

²⁴⁸ Kombos, C., *A paradox in the making: detecting something positive in "UPA" under the "Ten Kate" effect*, (2009), p. 520

²⁴⁹ Treaty establishing a Constitution for Europe [2004] O.J. C 310 Volume 47 (Constitutional Treaty)

²⁵⁰ Ibid

As a result of the judgment in *UPA* the test of ‘individual concern’ remained the same as in *Plaumann* with all the negative consequences pointed to by AG Jacobs and by academia.

2.6 The changes brought about by the Lisbon Treaty

As suggested by judges in *UPA* the re-consideration of standing rules were in the hands of Member States which decided to amend the provisions on annulment procedure in the Constitutional Treaty.²⁵¹ The same wording of the amendment was preserved in the Lisbon Treaty in Article 263 TFEU. The annulment procedure has been modified by the Lisbon Treaty in two ways. Firstly, the spectrum of reviewable acts has been broadened and secondly, the standing of individuals was partially relaxed. Whereas the extension of range of reviewable acts only reflects the case-law and practice of ECJ, the relaxation of individual standing constitutes a real innovation, which has the potential to redirect the ECJ case law on individual standing in annulment actions, and thus deserves greater attention.

2.6.1 Reviewable acts

The new version of Article 263(1) TFEU provides:

“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.” (emphasis added)

When comparing this wording with the one pre-dating the Lisbon amendments, two additional types of legal acts have been brought under the review of EU Courts. Firstly, the acts of the European Council indented to produce legal effects towards third parties. The European Council is now considered to be one of the institutions of the EU²⁵² which only

²⁵¹ Constitutional Treaty, Article III-365
²⁵² Article 13 and 15 TEU

confirmed previous practice. Its recognition as an institution the acts of which are amenable to the judicial review reflects the accountability considerations behind this incorporation. Nonetheless, it is hard to imagine the practical impact of this extension of judicial review on individuals which are rarely directly affected by the acts of the European Council. One can expect more inter-institutional disputes based on this new Court's power rather than individual applicants litigation.

A much more significant change as far as individuals are concerned is the extension of judicial review to acts of EU agencies, bodies and offices intended to produce legal effects towards third parties. The delegation of powers to various agencies and bodies became extensively used in the EU in the last several decades²⁵³ giving little justification to the impossibility of judicial review of their legal acts. Yet, to a large extent, this amendment codifies the ECJ practice, since in its *Sogelma* decision the ECJ had already stated that “an act emanating from a Community body intended to produce legal effects vis-à-vis third parties cannot escape judicial review by the Community judicature.”²⁵⁴ Thus the action for annulment of the decisions of the European Agency for Reconstruction relating to cancellation of the tender procedure for the public works was declared admissible, although after all dismissed on merits. Nevertheless, it is a great step towards the formal recognition of stronger judicial protection of individual rights against the legal acts produced by various EU agencies, bodies and offices.

Thirdly, the EU Courts were given jurisdiction to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council under the Common Foreign and Security Policy (CFSP), which was formerly the second

²⁵³ Busuioc, M., *Accountability, control and independence: the case of European agencies*, European Law Journal, 15 (5), 2009, pp. 599-615

²⁵⁴ Case T-411/06 *Sogelma v. EAR* [2008] ECR II-2771, para 48; Saurer, J., *Der Rechtsschutz gegen Entscheidungen und Fachgutachten der Europäischen Agentur nach dem Sogelma-Urteil des EuG*, Deutsches Verwaltungsblatt 2009, n. 16, 15. August, p. 1021-1027

pillar of the EU.²⁵⁵ Although the EU Courts were almost completely excluded from the affairs of CFSP, this explicit jurisdiction in reviewing restrictive measures affecting individuals can be considered as a step towards a more comprehensive judicial protection of individuals in the EU.

2.6.2 *The partial relaxation of individual standing*

The result of the discussions of the European Convention regarding the relaxation of individual standing within the annulment procedure was Article III-365 (4) of the Constitutional Treaty, later transferred without any changes into the Reform Treaty as Article 263 (4) TFEU:

“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.*”
(emphasis added)

The present wording of Article 263 (4) TFEU thus provides for three types of situations. Firstly, the individuals may attack acts addressed to them. Secondly, individuals may attack acts not addressed to them but which are of direct and individual concern to them. Thirdly and a big novelty, individuals may attack *regulatory acts* which are of direct concern to them and do not entail implementing measures. Thus, under certain conditions, individuals are relieved from the obligation of proving *individual concern* when seeking an annulment of the regulatory act. Besides this, the other novelty lies in the extension of reviewable acts (acts instead decisions) which, however, only reflect the developments in case-law not regarding the title of legal act but its actual implications.

²⁵⁵ Art. 275 (2) TFEU; Corthaut, T., *An effective remedy for all? Paradoxes and controversies in respect of judicial protection in the field of the CFSP under the European Constitution*, Tilburg Foreign Law Review, v. 12, n. 2, p. 110-144; Leczykiewicz, D., “Effective judicial protection” of human rights after Lisbon: should national courts be empowered to review EU secondary law?, E.L.Rev.2010, 35(3), 326-348

It is worth stating that the reform of individual standing went beyond what AG Jacobs and the CFI were calling for in, *UPA* and *Jégo-Quéré* respectively. They were calling for a re-interpretation of the notion of *individual concern* in problematic cases whereas the Treaty reform has lead to the actual removal of *individual concern* requirement in certain cases.

However, the final wording of Article 263 (4) TFEU is a result of compromises. One cannot forget the overall nature of negotiations surrounding the reform of the Treaties and one has to admit that liberalization of standing was a rather marginal problem for Member States. Neither the EU Courts nor other EU institutions have called for any substantial change in this area. Furthermore, as *Kombos* pointed out, the reform of individual standing must be seen in the “context of constitutional crises”²⁵⁶ expressed by the ECJ in *UPA* seeing the annulment action not as a major way for individuals to reach the EU Courts. Nonetheless, new Article 263 (4) TFEU constitutes a certain relaxation of individual standing and the doors to the EU Courts are now a bit more open than before. However, in the words of *Koch*, recent reform was just “a small step in the right direction and a long way to go.”²⁵⁷

2.7 Practical problems with implementation of Article 263 (4) TFEU

The Lisbon Treaty successfully entered into force on 1 December 2009 after a long-drawn process of ratification by the Member States. The implementation work started practically immediately. With regard to the changes in the annulment procedure initiated by individuals, there are two particular sources of confusion: firstly, the treatment of cases which were lodged before the 1 December 2009 and secondly, the definition of *regulatory acts*.

²⁵⁶ Kombos, C., *A paradox in the making: detecting something positive in "UPA" under the "Ten Kate" effect*, (2009), p. 522

²⁵⁷ Koch, C., *Locus standi of private applicants under the EU Constitution: Preserving gaps in the protection of individuals' right to an effective remedy*, (2005), p. 527

2.7.1 *Treatment of cases – transitional period*

The reform of Article 263 (4) TFEU has brought practical problem, namely, how to treat the cases which were lodged before the 1 December 2009 but are to be decided after this date (hereinafter referred as ‘transitional cases’). This is a significant matter, for the delay in hearing cases is between one and two years and therefore concerns hundreds of cases. The issue is problematic because the Lisbon Treaty does not contain any guidance regarding transitional periods. There are several ways to solve this problem. The GC can treat these cases under the ex-Article 230 (4) TEC regime which means the conditions of *individual concern* test would apply also to challenges against regulatory acts. However, the GC can also interpret the admissibility criteria of these transitional cases in the light of the new provision of Article 263 (4) TFEU and omit the requirement of *individual concern* when it comes to regulatory acts. Possibly, the GC could also chose to treat all cases decided after the 1 December 2009 according to the new regime.

A few months after the adoption of the Lisbon Treaty, the treatment of transitional cases was a hot issue at the EU Courts. According to the interview undertaken at the GC in the beginning of March 2010²⁵⁸, there was intensive internal communication at the GC on the treatment of transitional cases. According to this debate it was not clear how the transitional cases will be treated.

2.7.2 *What are regulatory acts?*

The second problematic aspect concerns the definition of the term *regulatory acts*. Except for Article 263 (4) TFEU, the term of *regulatory act* is mentioned nowhere in the

²⁵⁸ Personal interview with the *referendaire* at the General Court Mr. Peter Pecho (Luxembourg, 8 March 2010)

amended Treaties. Understandably, such a unique term is causing confusion not only in academic discussions but also among judges.²⁵⁹

Based on the preparatory documents from the European Convention, the majority of the members of the discussion circle on the Court of Justice were in favor of using the term *acts of general application*, rather than regulatory acts.²⁶⁰ But the former President of the ECJ, Mr. Rodríguez Iglesias, favored the term *regulatory acts*, which he believed would better reflect the distinction between the legislative and non-legislative acts.²⁶¹ His proposal was later followed by the Member States and the final wording of Article 263 (4) TFEU contains the term *regulatory acts*. However, it is questionable if using such a term was a good decision seeing that this term is not used elsewhere in the Treaties. This inconsistency provoked a wave of criticism even before the actual adoption of the Constitutional Treaty, later transformed into Lisbon Treaty.²⁶²

In order to clarify the term regulatory acts, it is useful to look for sources of distinction between the legislative and non-legislative acts in the Lisbon Treaty. Unlike the Constitutional Treaty, which had renamed EU acts, and provided for a new typology, the reform Treaty maintains existing types of legal acts, namely regulations, directives, decisions, recommendations and opinions.²⁶³ It has nonetheless introduced a new distinction between legislative, delegated and implementing acts.²⁶⁴ Yet, no mention of regulatory acts can be

²⁵⁹ Ibid

²⁶⁰ Access to the Court of Justice for individuals – possible amendments to Article 230, paragraph 4, of the EC Treaty [CERCLE I – WD 01] Brussels, 26.02.2003

²⁶¹ Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the “discussion circle” on the Court of Justice on 17 February 2004 [CONV 572/03] Brussels, 10.03.2003

²⁶² Memorandum by Professor Anthony Arnall, University of Birmingham of 2.10.2003 and Memorandum by Professor A G Toth, University of Strathclyde of 27.8.2003 both available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/47/47we01.htm> (last access on 28.10.2010 at 21:50); See also Lenaerts K., Desomer, M., *Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedure*, 11 European Law Journal 744, 2005; Arnall, A., *The EU and its Court of Justice* (2006), pp. 98-90; Hofmann, H., *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality*, European Law Journal, Vol. 15, No. 4, July 2009, pp. 482–505

²⁶³ Article 288 TFEU

²⁶⁴ Hofmann, H., *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality*, (2009)

found. According to Article 289 (3) TFEU legal acts adopted by legislative procedure shall constitute legislative acts. Therefore, using an argument *a contrario*, non-legislative/regulatory acts could be defined as all other acts which were not adopted by ordinary legislative procedure. Such interpretation is underpinned by *Arnall* who stated that “the term regulatory act means any act other than a legislative act.”²⁶⁵ Similarly *Toth* argued that in the wording of Article 263 (4) TFEU “the term act refers to legislative acts, while the term regulatory act refers to non-legislative acts.”²⁶⁶ However, as he continued such interpretation “is contradicted by Article 263 (1) [TFEU] which uses the term act in widest possible sense”²⁶⁷, including the acts EU institutions other than non-binding acts as well as the acts of EU bodies, offices and agencies. As he further suggested, “if this interpretation is correct, then to set stricter requirements for challenging acts in general than for challenging regulatory acts simply does not make sense.”²⁶⁸ Clearly, such manifest inconsistency of terminology within one article can be described as “internal discrepancy”²⁶⁹ or more severely as “a confusing, not well thought out (or at least not a clearly drafted) provision.”²⁷⁰ Nonetheless, more alarming is that academics had warned about this inconsistency during the drafting process of the Constitutional Treaty and clearly called for re-drafting this Article in order to bring it into line with the terminology used in other provisions of the Treaty and provide for legal certainty.²⁷¹

Despite different possible interpretation of the term *regulatory acts* commentators are united in the opinion that this term will be interpreted as an *act of general application* other

²⁶⁵ Memorandum by Professor Anthony Arnall, University of Birmingham (2003), para 17

²⁶⁶ Memorandum by Professor A.G. Toth, University of Strathclyde (2003), para 9

²⁶⁷ Ibid, para 10

²⁶⁸ Ibid, para 10

²⁶⁹ Kombos, C., *A paradox in the making: detecting something positive in "UPA" under the "Ten Kate" effect* (2009)

²⁷⁰ Memorandum by Professor A G Toth, University of Strathclyde (2003), para 12

²⁷¹ Ibid, para 12

than a legislative act, and which does not entail implementing measures.²⁷² It follows that it would probably include some regulations not requiring implementing measures, and in principle exclude directives which always require implementing measures. It is clear at first sight that the direct challenge against directives brought by individuals will remain (as it was before) almost impossible.

Moreover, it might still be difficult to distinguish between legislative and regulatory acts. Arnall offered an interesting example when comparing acts challenged in *UPA* and *Jégo-Quéré* cases. As he claims, the Council regulation challenged in *UPA* would probably be considered as a *legislative act* under the Lisbon Treaty and would fall into the stricter test of *individual concern*. On the other hand, the regulation adopted by the Commission challenged in *Jégo-Quéré* would be probably considered a *regulatory act* and therefore the standing requirements would be relaxed in this case. As Arnall rightly pointed out, “it is doubtful whether so fine a distinction should produce such a radical effect on the availability of judicial remedies.”²⁷³

2.7.3 ‘(...) which does not entail implementing measures’

According to some commentators, the second part of the last sentence of Article 263 (4) TFEU could also be, under certain circumstances, problematic. Arnall argued that there is a possible discrepancy with the Court’s case-law regarding the interpretation of *direct concern*.²⁷⁴ According to the EU Courts’ jurisprudence, there is direct concern even where the challenged act *does* entail implementing measures, if the implementing authority is given

²⁷² Memorandum by Professor A G Toth, University of Strathclyde (2003); Memorandum by Professor Anthony Arnall, University of Birmingham (2003); Lenaerts, K., Desomer, M., *Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures*, (2005); Kombos, C., *A paradox in the making: detecting something positive in "UPA" under the "Ten Kate" effect* (2009)

²⁷³ Arnall, A., *The European Union and its Court of Justice* (2006)

²⁷⁴ Ibid, p. 90

no discretion in how the act shall be implemented.²⁷⁵ *Arnulf* raised a question whether this would be valid also with regard to regulatory acts. It might not be, because the last sentence of Article 263 (4) TFEU expressly states *which does not entail implementing measures*. *Arnulf*, however, also pointed out that the drafters actually focused on *problematic* cases where the act entails no implementing measures on national level and individuals not fulfilling the individual concern test were left without remedy. Yet, even if the intentions of drafters were clear, the final wording of the provisions should cater for all possible situations, and the inconsistencies not only in terminology but also with existing case law continue to endanger legal certainty.

2.8 Current practice of the EU Courts in annulment procedure brought by individual applicants

It was only a matter of time when the issue of treatment of transitional cases would arise before the EU Courts. The issue was resolved by the Grand Chamber of the GC in the case of *Norilsk Nickel Harjavalta Oy* decided on 7 September 2010.²⁷⁶ The case concerned the action of annulment brought by a private applicant against a Commission directive. Because the challenged measure would probably fall under the ambit of regulatory acts, the core of the dispute was if the case should be treated under the old Article 230 (4) TEC requiring direct *and individual concern* or it should be decided under the new Article 263 (4) TFEU with its relaxed standing not requiring proving individual concern. The GC decided in favor of the Commission, i.e. that “the question of the admissibility of an application must be resolved on the basis of the rules in force at the date on which it was submitted”²⁷⁷ and that

²⁷⁵ Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339; Case 113/77 *NTN Toyo Bearing Company v. Council* [1979] ECR 1185; Case 11/82 *Piraiki-Patraiki v. Commission* [1985] ECR 207

²⁷⁶ Case T-532/08 *Norilsk Nickel Harjavalta Oy and Umicore SA/NV v European Commission*, Order of the General Court (Grand Chamber) of 7 September 2010; ECR 2010 p. 00000 (See also parallel case T-539/08 *Etimine SA and AB Etiproduits Oy v European Commission*, Order of the General Court (Grand Chamber) of 7 September 2010. ECR 2010 p. 00000)

²⁷⁷ *Ibid*, para 70

“the conditions of admissibility of an action are judged at the time of bringing the action, that is, the lodging of the application.”²⁷⁸ The reasons were not only the settled case law²⁷⁹ but also the “danger arbitrariness in the administration of justice, since the admissibility of an application would then depend on the – uncertain – date of delivery of the decision of the Court putting an end to the proceedings.”²⁸⁰ The case was dismissed as inadmissible for failing to meet the requirement of individual concern.

There are also some interesting developments with regard to interpretation of the term *regulatory act*. Although this new term in Article 263 (4) TFEU has not yet been interpreted by the Court due to the treatment of transitional cases under the old regime, in *Arcelor v. the Parliament and the Council*²⁸¹ case concerning the annulment action against the directive, decided on 2 March 2010 by the Third Chamber of the General Court as inadmissible due to the lack of individual concern, the Court towards the end of the judgment held that:

“This solution is, moreover, not brought into question by the fourth paragraph of Article 263 TFEU. As has been pointed out in paragraph 114 above, the Member States have a broad discretion with regard to implementation of the contested directive. For that reason, contrary to what the applicant contends, that *directive cannot, in any event, be regarded as being a regulatory act which does not entail implementing measures* within the terms of the fourth paragraph of Article 263 TFEU.”

Case T-16/04 *Arcelor v Parliament and Council* [2010] ECR 00000, para 123 (emphasis added)

The remark at the end of the judgment confirms what was already anticipated above, that directives which leave to the Member States discretion of form or methods of implementations are excluded from the relaxation of standing.

²⁷⁸ Ibid, para 70

²⁷⁹ Ibid, para 70 (cited cases: Case 12/71 *Henck* [1971] ECR 743, para 5; Case 60/72 *Campogrande v Commission* [1973] ECR 489, para 4; Joined Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01 *Spain v Council* [2002] ECR I-3439, para 23 and others)

²⁸⁰ Ibid, para 71

²⁸¹ Case T-16/04 *Arcelor v Parliament and Council*, Judgment of the General Court of 2 March 2010, ECR 2010 p. 00000

Another interesting development can be seen in *Inuit Tapiriit Kanatami v. the Parliament and the Council* lodged with the General Court on 11 January 2010, i.e. after the adoption of the Lisbon Treaty.²⁸² The case concerns the action for annulment of the Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products by the associations representing the indigenous groups of Arctic regions. They *inter alia* applied for interim measures which is why the admissibility was *prima facie* considered by the President of the General Court. He suggested several interesting developments: firstly, that it is not clear whether the case could be treated under the new Article 263 (4) TFEU because the challenged act was adopted *before* the entry into force of the Lisbon Treaty,²⁸³ and secondly assuming applicability of the Lisbon Treaty would be given, the interpretation of the term *regulatory act* would be needed and that the act in question (Regulation of the Parliament and the Council) would probably fall under the ambit of *legislative act* as suggested by the Commission.²⁸⁴ Nevertheless, the President of the General Court concluded that he cannot exclude admissibility of the main action and proceed with the *prima facie* case.²⁸⁵

The recent practice of the EU Courts confirmed several anticipated developments. Firstly, that the actions for annulment lodged before the GC before the entry into force of the Lisbon Treaty would be treated under the old regime, i.e. Article 230 (4) TEC requiring direct *and individual concern*. Secondly, that the Court will take time to interpret notion of *regulatory act*. Thirdly, that the relaxation of standing in the new Article 263 (4) TFEU will exclude directives which do always require implementing measures. Fourthly and finally, that even the situation of individual annulment claims arriving at the Court *after* the adoption of

²⁸² Case T-18/10 R *Inuit Tapiriit Kanatami and Others v Parliament and Council*, Order of the President of the General Court of 30 April 2010, OJ C 161, 19.6.2010, p. 41–41

²⁸³ Ibid, para 43 (Suggestions not only considered or raised by any of the parties of the particular case.)

²⁸⁴ Ibid, para 44

²⁸⁵ Ibid, para 48

the Lisbon Treaty is uncertain because it is not clear under which regime will be subjected challenges to acts adopted before entry into force of the Lisbon Treaty.

3. Preliminary ruling procedure as an alternative remedy

The purpose of the following chapter is to analyze the preliminary ruling procedure as an alternative remedy to the annulment action from the viewpoint of an individual seeking to challenge validity of an legal act (legislative or administrative) of an EU institution. The grounds for such analysis are rooted in the *doctrine of complete system of legal remedies* developed by the EU Courts in their jurisprudence on admissibility of individual actions. According to this doctrine the Treaties “have established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions and has entrusted such review to the [EU] Courts (...).”²⁸⁶ Under this system, if individual applicants cannot by reason of the admissibility conditions challenge the act of general application directly through the annulment action, they may challenge such an act indirectly before a national court and request national courts to make reference for a preliminary ruling to the ECJ.²⁸⁷ The sustainability of this doctrine was already challenged by AG Jacobs in his *UPA* opinion²⁸⁸ as well as by several academics²⁸⁹ mainly claiming that the preliminary ruling procedure is not the best or most appropriate way for individuals to challenge validity of EU legal acts. The idea of the following chapter is to show the advantages and disadvantages the preliminary ruling procedure might have for individual applicants.

²⁸⁶ Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677, para 40

²⁸⁷ *Ibid*, para 40

²⁸⁸ Opinion of Advocate General Jacobs delivered on 21.3.2002 in C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*

²⁸⁹ Craig, P., *EU Administrative Law*, (2006), pp. 340 – 342, Ward, A., *Locus standi under Article 230 (4) of the EC Treaty: crafting a coherent test for a ‘wobbly polity* (2003); Berry, E., Boyes, S., *Access to Justice in the Community Courts: A Limited Right?*, (2005); Albors-Llorens, A., *Private parties in European Community law: challenging community measures* (1996)

3.1 Main features of the preliminary ruling procedure

The mechanism of the preliminary ruling procedure remained essentially unchanged by the new Lisbon Treaty and is now regulated in Article 267 TFEU. Under this Article the ECJ is empowered to give preliminary rulings concerning interpretation of the Treaties and the *validity* and interpretation of acts of the EU institutions, bodies, offices or agencies.²⁹⁰ This mechanism is based on *referrals* from national courts which *may* (and in some cases *shall*) make reference to the ECJ when such question arises before them and a decision on the question is necessary for them to deliver judgment.²⁹¹ The national court or tribunal formulates a question of referral and by principle suspends the national proceeding when preliminary ruling procedure is pending. The decision of national court to suspend proceedings and refer the question to the ECJ is then communicated not only to the parties of the case, but also to the Member States and the Commission, as well as the institution, body, office or agency of the EU which adopted the act the validity or interpretation of which is in dispute.²⁹² All notified entities (including parties to the dispute) are entitled to submit statements or written observation within two months of notification of the decision of national court to refer the case to the ECJ.²⁹³ This is to enable the governments and institutions to intervene in the proceeding as well as to follow the development of the EU law. Although, a preliminary ruling has effect only *inter pares*, the interpretation of the Treaty and legislation enjoys considerable legal importance.

For the purposes of this thesis, the focus will be given only to the referrals regarding the *validity* of legal acts of the EU institutions. First of all, it is important to stress that the ECJ is the only EU institution and also the only court empowered to rule on the *validity* of the legal acts of the EU institutions. That means that national courts are never allowed to

²⁹⁰ Article 267 (1) TFEU

²⁹¹ Article 267 (2) and (3) TFEU

²⁹² Protocol (No 3) on the Statute of the Court of Justice of the European Union [2008] OJ C 115/210 (ECJ Statute), Article 23 (1)

²⁹³ Article 23 (2) ECJ Statute

invalidate piece of EU legislation.²⁹⁴ This is justified by the uniformity and consistency of the EU legal order. Secondly, the decision whether to refer or not to refer the question to the ECJ for preliminary ruling is completely in the hands of national judge.²⁹⁵ The parties of the dispute before the national court have no right to have their cases referred to the ECJ. They may only indirectly influence national courts by submitting requests for preliminary questions but national courts are not bound by such requests. However, the tribunals against whose decisions there is no judicial remedy under national law are obliged to make a reference to the ECJ.²⁹⁶ However, it is still up to national judge to consider to what extent is the question of EU law important for deciding a particular case and accordingly if the referral to the ECJ is necessary.²⁹⁷ All these features of preliminary ruling procedure as well as the nature of this procedure as reference procedure itself cause certain difficulties for individuals to obtain effective remedy, i.e. to achieve judicial review of an EU legal act harmful to them. These difficulties are elaborated below.

3.2 Substantive difficulties

The substantive difficulty lies in the very essence of this procedure. Although it might be true that national courts are more accessible for individuals as a matter of distance and local procedural rules, it can be argued that they are not the right forum for validity challenges against EU legal measures. As already stated above, the ECJ is the only court with the competence to invalidate EU legislation. The ECJ was very clear on the issue in its *Foto-*

²⁹⁴ Case 314/85 *Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199, para 15

²⁹⁵ See case-law summarized in Case C-344/04 *International Air Transport Association, European Low Fares Airline Association v Department for Transport* [2006] ECR I- 403, paras 27 et seq.

²⁹⁶ Article 267 (3) TFEU; see also exceptions in Case 283/81 *Cilfit and Others* [1982] ECR 3415, para 21. But note recent developments in Case C-461/03 *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I-10513 where exceptions were interpreted stricter when comes to preliminary references concerning *validity* of EU legal acts. In summary, the ECJ decided that a court against whose decisions there is no judicial remedy under national law is *required to refer* the question relating to the validity of the provisions of a regulation to the ECJ even where the Court has already declared invalid analogous provisions of another comparable regulation.

²⁹⁷ Case 314/85 *Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199, para 14; Case 283/81 *Cilfit and Others* [1982] ECR 3415, para 9

Frost judgment.²⁹⁸ The real competence of national courts in the preliminary ruling procedure concerning validity (as opposed to the interpretation) of EU legal acts is therefore very limited. Their role in such actions is basically to decide if the case before them raises sufficiently serious questions of validity of invoked legal act so as to refer the case to the ECJ. National courts, however, are not entitled to invalidate EU legal measure in question and therefore do not offer a real remedy to individuals seeking invalidation of unlawful EU legal act.²⁹⁹ As AG Jacobs has put it: “it seems to me, therefore, artificial to argue that the national courts are the correct forum for such cases.”³⁰⁰ The only result an individual might achieve by bringing a validity claim before the national court is to have the case referred to the ECJ.

3.3 Normative difficulties

There are basically two scenarios for an individual to invoke national proceedings with the view to invalidate EU legal act via the preliminary ruling procedure. The first is the case where a national entity applies EU piece of legislation and the individual is able to challenge such an action before the national court. The second scenario is when the challenged legal measure does not require implementation in national law and the only possibility for an individual to get to any judicial forum is to violate such measure and be sued by national authorities for non-compliance with legal obligations.³⁰¹ Here arises the normative difficulty of the preliminary ruling procedure as an effective remedy: when the EU legal measure does not require implementation in national laws, there is basically no measure

²⁹⁸ Case 314/85 *Foto-Frost v Hauptzollamt Lubeck-Ost* [1987] ECR 4199

²⁹⁹ As explained by the Court in Case C-344/04 *International Air Transport Association, European Low Fares Airline Association v Department for Transport* [2006] ECR I- 403, para 28: “Article 234 EC does not constitute a means of redress available to the parties to a case pending before a national court and therefore the mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a question has been raised within the meaning of Article 234 EC.”

³⁰⁰ Advocate General Jacobs, Opinion in Case C-50/00P *Unión de Pequeños Agricultores v. Council of the European Union* from 21. 3. 2002, para 41

³⁰¹ Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), p. 529 (with reference to the whole paragraph)

to challenge before the national court. In such cases, as pointed out by AG Jacobs and commentators, the preliminary ruling procedure does not constitute a remedy at all because no national proceedings might be initiated without violating law. And as AG Jacobs put it: “Individuals clearly cannot be required to breach the law in order to gain access to justice.”³⁰² This was the situation in *Jego-Quere* as well as in *UPA* where both applicants were arguing that because of this particular situation they were basically denied access to justice.

The ECJ tried to overcome this difficulty by imposing an obligation on Member States under Article 10 of ex-TEU (obligation of sincere cooperation) to interpret national procedural law broadly enough to allow individuals to challenge validity of EU before national courts.³⁰³ This approach, however, fails to solve the problem of complete lack of remedy nor does it respond to the fact that reference for preliminary ruling depends on discretion of national courts.³⁰⁴

Another normative difficulty is connected with the case-law of the ECJ set up in the *TWD* case. In this judgment the ECJ refused the request for preliminary ruling from a German court because the party to a case before national court was informed of the possibility to bring annulment action and it would certainly have standing to do so.³⁰⁵ According to this line of case-law the indirect challenge would not be possible if there is a possibility of bringing the case through annulment action and the party had knowledge of it.³⁰⁶

³⁰² Advocate General Jacobs, Opinion in Case C-50/00P *Unión de Pequeños Agricultores v. Council of the European Union* from 21. 3. 2002, para 43

³⁰³ Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677, para 62; and also Article 19(1) TEU

³⁰⁴ Craig, P., *EU Administrative Law*, (2006), p. 341

³⁰⁵ Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ERC I-00833

³⁰⁶ Craig, P., De Búrca, G., *EU law: text, cases and materials* (2008), p. 530

3.4 Procedural difficulties

Finally, it is argued that preliminary ruling procedure has considerable procedural shortcomings for individuals wanting to challenge validity of the EU legal act. First of all, the reference for preliminary ruling is not available for individuals as a matter of right.³⁰⁷ As already stated above, the decision whether to make or not to make reference to the ECJ is in a complete discretion of national courts. Moreover, parties to a national proceeding have formally no impact on formulation of questions referred to the ECJ.³⁰⁸ As a consequence their otherwise valid arguments might be mitigated, misunderstood or even omitted by the referring national court, although they have right to submit statements during the procedure of preliminary ruling. The questions referred to are of considerable importance within the preliminary ruling procedure since the ECJ would by principle answer only those issues referred to it by the national court without considering arguments of the parties unrelated to referred questions. Moreover, in order to persuade national judges to refer the case to the ECJ, an individual would most probably have to go through more than one court instance at the domestic level which could not only be time consuming but also costly.

As *Craig* pointed out, shifting the burden of judicial review to national courts has in the end a negative effect on the institutional balance between the ECJ and the GC.³⁰⁹ The reasons are pragmatic: when most of the challenges reach the EU Courts in the form of preliminary ruling procedure, which is still under the monopoly of the ECJ, then the workload of ECJ will be increased. On the other hand, if the challenges would reach the EU Courts directly through the annulment procedure, the GC would deal with the issues first and only a part of the claims would reach ECJ via appeal. After all, one of the ideas of setting up the GC was to ease the workload of the ECJ. Nevertheless, under the present stance of

³⁰⁷ Advocate General Jacobs, Opinion in Case C-50/00P *Unión de Pequeños Agricultores v. Council of the European Union* from 21. 3. 2002, para 42. However, compare argumentation in Case C-432/05 *Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271.

³⁰⁸ Ibid

³⁰⁹ Craig, P., *EU Administrative Law*, (2006), p. 341 (with reference to the whole paragraph)

judicial review, it is the ECJ which deals with reviewing validity of the EU acts, often with very technical issues having no substantial impact on the EU legal system.³¹⁰ This line of critique could be, however, eased by the possible partial transfer of jurisdiction to hear references for preliminary rulings from ECJ to GC as envisaged already in the Nice Treaty but not yet put in practice.³¹¹

3.5 Difficulties at the national level

The ECJ doctrine of the complete system of legal remedies shifts the burden of responsibility for judicial review of EU measures as implemented in the domestic law on the national courts. The following subchapter outlines several practical problems domestic courts might have in performing this role entrusted to them. The difference between liberal standing rules of national courts and very strict standing level of the EU Courts causes several difficulties.

Two scenarios should be distinguished. Firstly, the situation when an individual knows that he has no standing before the EU Courts under Article 263 TFEU and brings the case before a national court hoping for preliminary ruling reference. In such a case, the domestic court is required according to the ECJ case-law to interpret national standing rules so as to admit the claim of an individual (and avoid denial of justice).³¹² However, the situation is different if an applicant would have had standing under Article 263 (4) TFEU but failed to bring a claim within the two months period. A liberal interpretation of national standing rules resulting in admitting the claim which could possibly reach ECJ through preliminary reference could in such case mean circumventing of the EU standing rules.³¹³ The ECJ in the *TWD* case excluded accepting such a reference for preliminary ruling when the party to a dispute at national level had knowledge about the possibility to bring annulment

³¹⁰ Ibid, p. 341

³¹¹ Article 225 (3) TEC, Article 256 (3) TFEU

³¹² Case C-432/05 *Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271

³¹³ Gordon, R. J. F., *EC law in judicial review* (2006), p. 89

action and would have had standing under Article 263 TFEU.³¹⁴ Consequently, it seems that national courts should distinguish between those two situations, *i.e.* between applicants meeting requirements of standing before the ECJ and thus not be able to challenge a measure before the national court and those whose challenge under annulment action would most probably be dismissed by the ECJ and thus accept their claims in order to avoid denial of justice. In order to do so, national courts would have to consider (and at the end even apply) ECJ standing rules.

Or alternatively, a national judge could distinguish between these two cases by not referring the case to the ECJ when an applicant had a chance to claim under annulment procedure. “However, (...) whether a claimant possesses standing under [ex] Article 230 is a complex question and (national courts) should be slow to dismiss preliminary ruling unless the position as to [ex] Article 230 is plain.”³¹⁵

The other option for national judges would be to accept all claims without distinction outlined in the previous paragraph, make reference to the ECJ and wait to see if the case would be accepted or not. This, on the other hand, poses the question of considerable delays and thus again endangers legal certainty.³¹⁶

3.6 Interim conclusions

To bring a case to the national court instead of to the ECJ might have certain advantages to individuals as they might know and thrust their own national system. On the other hand, the nationals of one Member State challenging implementation measures in other Member States might find it difficult to litigate before the national courts given the lack of language knowledge and complexity of foreign system of legal remedies and court procedure. Moreover, given the difficulties outlined above, it must be concluded that the preliminary

³¹⁴ Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ERC I-00833

³¹⁵ Gordon, R. J. F., *EC law in judicial review* (2006), p. 118 (para 4.38)

³¹⁶ *Ibid.*, pp. 88-89

ruling procedure as the reference procedure is not the most effective and appropriate way for individuals to challenge validity of the EU legal acts. This conclusion is also supported by statistical numbers. There is a high contrast between the number of preliminary rulings on *interpretation* and preliminary rulings on *validity*. Whereas the first category forms around a quarter of all the decisions of the ECJ, preliminary rulings on validity form not even 2 % of the overall litigation.³¹⁷ These numbers mean that in five years only 44 cases were brought before the ECJ concerning validity of Community measures and only 6 cases were successful.³¹⁸ The rate of success in preliminary rulings on validity (around 13 %) sharply contrasts with those in annulment actions which is around 30 % regardless of the type of applicant (privileged or non-privileged).³¹⁹ This contrast is however partially explained by the type of challenged measure because measures challenged via preliminary ruling procedure are mostly the acts of general applications which are in general harder to invalidate than individual legal acts. Nevertheless, “the data appear to suggest that, even where individuals do not face the high hurdle of admissibility imposed by ex Article 230(4) [T]EC, their chances of success remain in fact low”³²⁰ and in fact lower than to succeed with a claim via annulment procedure.

³¹⁷ Tridimas, T., Gari, G., *Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)*, (2010), p. 166

³¹⁸ Ibid, p. 166

³¹⁹ Ibid, p. 166

³²⁰ Ibid, p. 166

4. Final evaluation and recommendations

4.1 Final evaluation

After reviewing development of access of individuals to the judicial review of EU legal acts through annulment procedure as well as through preliminary ruling procedure, the purpose of chapter is to evaluate current situation and outline possible solutions. So, what are the real possibilities of private parties to challenge legal act of the EU institutions not addressed to them? The new Article 263 (4) TFEU introduces distinction of admissibility criteria depending on the type of act in question. To demonstrate the problems of such distinction let us go through several scenarios depending on the legal act in question:³²¹

4.1.1 Possibilities to challenge legal act of the Commission

Legal acts of the Commission (e.g. decisions, regulations) are in principle non-legislative acts which do not require implementing measures; accordingly they would most probably fall under the ambit of *regulatory acts*.³²² As was seen in the recent case-law of the EU Courts the annulment actions lodged with the EU Courts before the entry into force of the Lisbon Treaty (1 December 2009) are, however, treated under the old regime of Article 230 (4) TEC where individual concern is required in order to meet admissibility test. Would the annulment action be lodged after this date, there is still a possibility that the judges will treat the case according to the date when contested act was adopted.³²³ Would the EU Courts decide to proceed under the new Article 263 (4) TFEU, an individual applicant will need to prove that the challenged legal act is a *regulatory act* which is not yet defined and that this

³²¹ Although there are many types of acts of the EU institutions, the choice of scenarios has been made deliberately in order to demonstrate the major problems of the current stance of law on standing.

³²² Koch, C., *Locus standi of private applicants under the EU Constitution: Preserving gaps in the protection of individuals' right to an effective remedy*, (2005), p. 525

³²³ Case T-18/10 R *Inuit Tapiriit Kanatami and Others v Parliament and Council*, Order of the President of the General Court of 30 April 2010, OJ C 161, 19.6.2010, p. 41–41

act is of *direct concern* to him. How would the EU Courts interpret the term regulatory act and how will it proceed with the direct concern is not yet clear. According to the current case-law on direct concern applicants are required to show that the measure in question *affects their legal situation directly* and does not require implementing measures. This can result in sufficiently lower threshold for individuals wanting to challenge legal acts of the Commission and thus considerable improving of the legal protection against such measures. (e.g. the applicant in *Jégo-Quéré* would most probably obtain standing under the new rules).³²⁴

4.1.2 Possibilities to challenge regulation of the Parliament and the Council

A regulation is legal act of general application which is binding in its entirety and is directly applicable in all Member States.³²⁵ The direct applicability of regulation excludes implementing measures, therefore the possibility of challenge such regulation via national courts is excluded because there is no implementing act to challenge. The only way is to file annulment action within the two months after the adoption of such regulation with the General Court. The main question before the General Court would be again if such regulation can be considered as a *regulatory act*. Would this be answer in affirmative, an individual will need to show only *direct concern*. In other (and more likely) case, an individual will have to prove that the challenged regulation is of *direct and individual concern* in sense of *Plaumann* test. Thus, the possibility of improvement of legal protection against regulations depends on the interpretation of the notion of *regulatory act*. According to majority of commentators, the term *regulatory acts* will exclude the acts adopted by legislative procedure. The regulations adopted by the Parliament and the Council via the co-decision procedure will, therefore, clearly fall outside the scope of regulatory acts. It follows that the standing reform in the Lisbon Treaty failed to solve complete lack of judicial remedy against the EU legislative acts

³²⁴ Eliantonio, M., Kas, B., *Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?*, Journal of Politics and Law, Vol. 3, No.2, September 2010, p. 128

³²⁵ Article 288 TFEU (Article 249 TEC)

which do not entail implementing measures (situation in *UPA*) where it is almost impossible for individual to establish individual concern within annulment action and there is no possibility to bring the case before national courts due to lack of implementation measures.³²⁶

4.1.3 Possibilities to challenge directive of the Parliament and the Council

A directive is a legal act addressed to the Member States which is binding as to the result whereas the way of its implementation as to the choice of form and methods is up to the national authorities.³²⁷ Because of the nature of directives, it was always very problematic to challenge them via annulment procedure. Firstly, the time limit for lodging of annulment action is two months after the adoption of contested act whereas the implementation period of directive is usually counted in years. Therefore, the effect of directive at the time of lodging the annulment action cannot be felt. Because directives always require implementing measures, they would certainly not fall under the ambit of *regulatory act*.³²⁸ The applicants wanting to challenge the directive via annulment action will therefore prove that the directive is of *direct and individual concern* to them in the sense of *Plaumann*.

Because directive always entail implementing measures, it would be therefore logical to challenge these before the national court and hope for the preliminary reference to the ECJ. It seems that this would remain the only reasonable way for individuals to challenge directives with all the difficulties and shortcomings the preliminary ruling procedure as a legal remedy might have. As pointed out by commentators, the relaxation of standing introduced by the Lisbon Treaty do not apply to legislative or non-legislative acts which do entail implementing measures.³²⁹

³²⁶ Eliantonio, M., Kas, B., *Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?*, (2010), p. 128

³²⁷ Article 288 TFEU (Article 249 TEC)

³²⁸ As already anticipated in *T-16/04 Arcelor v Parliament and Council*, Judgment of the General Court of 2 March 2010, ECR 2010 p. 00000

³²⁹ Eliantonio, M., Kas, B., *Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?*, (2010), p. 128

It can be concluded that the level of judicial protection against the measures of the EU institutions depends largely on the legal act in question.³³⁰ Such distinction in principle exists in many Member States where usually judicial review of administrative measures is more accessible for individuals than the judicial review of legislative acts. But because there is no clear distinction between the legislative and administrative acts in the EU law, the choice of the Treaty makers to incorporate such distinction into the EU system of legal remedies is unfortunate. “The deliberate use of undefined term (...) leaves broad margins of discretion to the Court to actually construe its meaning.”³³¹

4.2 Proposals for improvement and recommendations

The incomplete system of legal remedies within the EU triggered wide academic discussion, so there are many suggestions for its improvement. The spectrum of ideas has been broadened from academic perspective to the political one due to the discussions during the European Convention when drafting the Constitutional Treaty. Given the unsuccessful reform of individual standing made by the Lisbon Treaty, it can be argued, that suggestions for further reform are still valid.

4.2.1 A special remedy based on alleged violations of fundamental rights

Proposals to introduce a special remedy into the EU system of judicial remedies envisage a possibility of individuals to challenge legal acts of the EU institutions allegedly in breach with their fundamental rights directly before the EU Courts.³³² These proposals draw inspiration of similar procedural tools in Germany (*Verfassungsbeschwerde*) and Spain

³³⁰ Ibid, p. 128

³³¹ Bast, J., *Principles of the European Constitutional Law* (rev. 2nd ed., Hart Publishing und Verlag CH Beck, Oxford/München, 2010), p. 396

³³² Reich, N., *Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde*, ZRP 2000 Heft 09, pp. 375 - 378

(*recurso de amparo*) where individuals are given the possibility to challenge legal acts directly before the constitutional courts under alleged violation of their fundamental rights.

The official proposal for introduction of a special remedy was made under the auspices of the European Convention for the Future of Europe by *Meyer* who proposed the introduction of the ‘fundamental rights complaint’ as follows:

„Any natural or legal person may contest a legal act of the Union due to a violation of any of the rights granted to it by the Charter of Fundamental Rights of the Union if no other judicial recourse is available for seeking review of the violation of the fundamental right in question. Specific requirements for the acceptance of a Fundamental Rights Complaint may be provided for.”

Meyer, J., *Fundamental rights Complaint*, Brussels, 26 February 2003, CIRCLE I – WD03

The proponents of this provision have argued that introduction of a special remedy will not disturb existing system of legal remedies and would be of a truly constitutional character of such remedy.³³³ In contrast, the opponents question the possibility of distinguishing the violation of fundamental rights from other violations of law, pointing to the possible abuse of such remedy. Critics also challenge the unclear relationship between the ‘fundamental rights complaint’ and other remedies existing in the EU law.³³⁴ Strong opposition against the introduction of a constitutional complaint-like action was clearly expressed by the then-President of the ECJ, Mr. Rodríguez Iglesias and then-judge (and the current President) Mr. Skouris. The former diplomatically stated that there was no need for creation of such remedy and that “it would be preferable to protect fundamental rights in the framework of existing remedies”.³³⁵ The latter explained further that if such action was to be created “it would be impossible to restrict the initiation of actions solely to cases where there

³³³ The question of effective judicial remedies and access of individuals to the European Court of Justice [WG II – WD 21] Brussels, 01.10.2002, para. 6

³³⁴ The question of effective judicial remedies and access of individuals to the European Court of Justice [WG II – WD 21] Brussels, 01.10.2002; para 6; Arnall, A., *EU and its Court of Justice* (2006), p. 88

³³⁵ Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the “discussion circle” on the Court of Justice on 17 February 2004 [CONV 572/03] Brussels, 10.03.2003, p. 4-5

has been an infringement of a fundamental right.”³³⁶ Given the strong opposition of the Court members and the majority of representatives having reservations, the proposal of establishing a constitutional complaint-like remedy in the system of EU law remedies was not adopted.³³⁷

However, as pointed out by commentators, the remedy based on the model of fundamental rights complaint “could be generally of value to the EU.”³³⁸ Fundamental rights complaint as introduced in national legal system has usually two common features: a subsidiary character which means that it only can be invoked after exhaustion of all other remedies, and requirement to prove direct and individual concern of contested measure by the applicant.³³⁹ Under the current subsidiary character of the EU system of remedies, an individual after exhaustion of all domestic remedies, have no right to appeal to the EU Courts because of discretionary nature of preliminary reference as explained above. The second requirement of individual concern has been interpreted by the EU Courts in ‘much stricter’ sense than by national constitutional courts.³⁴⁰ Fundamental rights complain might, therefore, theoretically provide a remedy for those individuals unable to establish individual concern in annulment procedure and unable to challenge EU legal act before national courts.

4.2.2 Liberal interpretation of standing rules

It was stressed by academics and also by AG Jacobs in *UPA* that the wording of the Treaty does in any way bind the Court to interpret the notion of individual concern restrictively. Although the Court was unwilling to reconsider its jurisprudence on individual concern in *UPA*, it could be time to try it again. The main argument for this possibility is that

³³⁶ Hearing of Judge Mr. Vassilios Skouris, 17.09.2002 [WG II– WD 019] Brussels, 27 September 2002, p. 4-5; Arnall, A., *EU and its Court of Justice* (2006), p. 88

³³⁷ Access to the Court of Justice for individuals – possible amendments to Article 230, paragraph 4, of the EC Treaty [CERCLE I – WD 01] Brussels, 26.02.2003, para 7

³³⁸ Eliantonio, M., Kas, B., *Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?*, (2010), p. 126

³³⁹ Ibid, p. 125

³⁴⁰ Ibid, p. 126

the relaxation of standing brought by the Lisbon Treaty failed to solve all the problems and that challenges against the act of general application such as regulation and directives will most probably still need to meet the requirement of *individual concern*. One cannot forget that the jurisdiction of the EU Courts has been broadened on the review of acts of the former third pillar and some acts of the second pillar where the impact on individual rights requires higher judicial protection. The EU Courts can also be inspired by the overall trend of standing relaxation in the Member States. After all, the interpretation of individual concern in some areas of the EU law, such as competition law or state aid, has been relaxed by the EU Courts; so theoretically, similar move could be expanded on all areas of the EU law. The different standards of individual standing depending on the area of law in question are not desirable from the viewpoint of the legal certainty and equality.

The current situation where the level of judicial protection depends on the form of legal act in question can be partially be remedied by the broad interpretation of the term *regulatory act*. The more acts will be encompassed under the notion of regulatory acts, the smaller will be the above mentioned gap in the judicial protection. It is, however, questionable, if the EU Courts will be willing to open this route for individuals wanting to challenge acts of general application. Moreover, acts entailing implementing measures such as directives are explicitly excluded from the scope of the term.

4.2.3 Broadening the possibilities of indirect challenges

The concept of complete system of legal remedies favored by the EU Courts puts the emphasis of litigation on the national courts with the possibility to refer the case to the ECJ via the preliminary reference.³⁴¹ It seems that recent, post-*UPA* developments of the case-law anticipate the broadening of indirect ways for individuals to challenge validity of legal

³⁴¹ Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677

acts.³⁴² The preliminary reference in *Ten Kate* concerned the question whether a Member State could be held responsible for not lodging an action for failure to act in favor of an individual. The ECJ *inter alia* answered that:

„Community law does not impose any obligation on a Member State to bring an action for annulment, pursuant to [ex] Article 230 EC, or for failure to act, pursuant to Article [ex] 232 EC, for the benefit of one of its citizens. Community law *does not*, however, *in principle preclude* national law from containing such an obligation or providing for liability to be imposed on the Member State for not having acted in such a way.”

Case C-511/03 *Ten Kate Holding Musselkanaal BV and Others* [2006] ECR I- 8979 (emphasis added)

As pointed out by *Kombos*, the decision in *Ten Kate* can be interpreted as establishing an obligation for Member States to challenge the validity of Community legislation and be part of new mindset of the EU Courts to broaden the scope of indirect challenges and thus partially remedy the problems of individual standing in the annulment procedure.³⁴³

There are suggestions which go even further with proposals to fill the gap in the EU judicial protection by strengthening the role of national courts. *Leczykiewicz* argues that in order to provide with adequate protection of individual rights, including human rights, the national courts should be given the power to review the EU secondary legislation.³⁴⁴ It is hard to imagine, however, such development because the ECJ has always insisted heavily on consistency and uniformity of the EU law.

³⁴² Kombos, C., *A paradox in the making: detecting something positive in "UPA" under the "Ten Kate" effect*, (2009)

³⁴³ Case C-511/03 *Ten Kate Holding Musselkanaal BV and Others* [2006] 1 CMLR 50, quoted in: Kombos, C., *A paradox in the making: detecting something positive in "UPA" under the "Ten Kate" effect*, (2009)

³⁴⁴ Leczykiewicz, D., *"Effective judicial protection" of human rights after Lisbon: should national courts be empowered to review EU secondary law?*, (2010)

Conclusion

The objective of this thesis was to analyze the main routes of individuals in order to enforce their rights against measures of EU institutions and to assess their compatibility with fair trial standards of access to justice. The thesis revealed that partial relaxation of standing requirements made by the Lisbon Treaty affects only limited number of litigants seeking to challenge *regulatory acts* not addressed to them. Problematic wording of the new Article 263 (4) TFEU and unclear developments surrounding the transitional period might not only lead to legal uncertainty but also new inconsistencies within this area. The hurdles from before the adoption of Lisbon Treaty remained basically unchanged for individuals seeking to challenge acts of general application. In particular, it is still almost impossible to challenge directives adopted by the Parliament and the Council through the annulment procedure and individuals are therefore left with national courts which, as demonstrated in the third chapter of this thesis, are not the best forum to decide on validity of the EU legal measures. Moreover, there is a complete lack of legal remedy for individuals against regulations adopted by the legislative procedure as legislative acts with no need of implantation measures, unless establishing individual concern in the sense of *Plaumann*. The complex set of standing rules which has not been much clarified by the reform adopted in the Lisbon Treaty are not favorable for individuals seeking the judicial review of EU legal acts.

The present thesis also aimed to answer the question whether the system of judicial protection in the EU meets the fair trial standards of access to justice. With all the shortcomings of the comparison of supranational legal system either with national legal orders or with international standards, some conclusions can still be drawn. Firstly, there is an overall trend in national legal systems towards relaxing of standing rules in favor of individuals, as for example the reform of standing in England or the very recent constitutional

reform in France. It can also be concluded that the access of individuals to the judicial review of administrative acts was easier in the reviewed national systems than in the EU legal order thanks to liberal interpretation of standing rules by national judiciary. It is, however, early to assess the impact of reform of standing rules brought about by the Lisbon Treaty, which affects primarily the accessibility of judicial review of the EU administrative (regulatory) acts. When comes to the judicial review of legislative acts, the rules of standing are in general stricter in national legal systems. However, in national jurisdiction the distinction between legislative and administrative acts is always clearly defined. Lack of such distinction in the EU legal order causes confusion and uncertainty, *inter alia* in the admissibility rules for individuals in annulment actions.

Article 47 (1) of the EU Charter provides that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the *right to an effective remedy* before a tribunal in compliance with the conditions laid down in this Article.”³⁴⁵ However, in the situations outlined above it is questionable whether the current system of remedies as it is set forth by the Treaties can be considered for *effective*. The provisions of the EU Charter “are addressed to institutions and bodies of the Union”³⁴⁶ which “shall respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”³⁴⁷ It is, however, questionable if the right to an effective remedy as set forth in the EU Charter could serve as a legal basis for reform of individual standing before the EU Courts. More likely, Article 47 (1) of the EU Charter can serve as a general principle when interpreting rules of standing or for EU legislator when reforming rules of standing.

It is only matter of time when the EU will accede to the ECHR. After this accession the actions of all EU institutions will fall under supervision of the Strasbourg human rights

³⁴⁵ EU Charter, Article 47 (1) (emphasis added)

³⁴⁶ EU Charter, Article 51 (1)

³⁴⁷ Ibid

machinery, the ECJ being no exception.³⁴⁸ Article 6 ECHR as interpreted by the ECtHR guarantees the right of *access to a court*. Although the Member States enjoy certain margin of appreciation when setting up the admissibility rules these cannot “restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.”³⁴⁹ As suggested by judge *Ress* in his concurring opinion in the *Bosphorus* judgment, it cannot be excluded that the restricted access to the EU Courts would be considered by the ECtHR as falling under the threshold of Article 6 ECHR.³⁵⁰ The accession to the ECHR might therefore be a strong incentive for the EU Courts, as well as for the EU legislator, to reform rules on standing in order to enhance accessibility of judicial review of EU measures by individuals within the EU legal order.

Finally, there are suggestions that the current setting of access to the EU Courts might not comply with the standards of access to justice as set forth in the Aarhus Convention. The Aarhus Regulation is framed in a narrower manner when it comes to implementing Article 9 (3) of the Aarhus Convention. It is also not clear whether the current standing rules of the EU Courts would be compatible with the requirements of *adequate and effective remedies* which are *fair, equitable, timely and not prohibitively expensive*.³⁵¹ With regard to the Aarhus Convention, it must be stressed, however, that it applies only to certain non-governmental organizations and it does not concern legislative measures. The relaxed access to the juridical review of *regulatory acts* when interpreted in a liberal way might therefore meet the standards of the Aarhus Convention. This statement is, however, not valid for litigants seeking the challenge acts not addressed to them which are of other than regulatory nature.

³⁴⁸ Groussot, X., Laurent, P., *Fundamental Rights Protection in the European Union post Lisbon Treaty*, (Foundation Robert Schuman, European Issue N°173 / 14th June 2010)

³⁴⁹ *Osman v. United Kingdom* [1998] Reports 1998-VIII, para 147

³⁵⁰ Concurring opinion of Judge Ress in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [2005] Reports 2005-VI, para 2

³⁵¹ Article 9 of the Aarhus Convention

This thesis also aimed to contribute to the discussions about the impact of the Lisbon Treaty on individual standing under annulment procedure and evaluate if further reform of legal remedies in the EU law is still necessary. From pragmatic point of view, it is unlikely that after years-long discussions surrounding the adoption of the Lisbon Treaty, any big reform of the EU legal order can be expected in the near future. Moreover, the individual standing is rather marginal problem from political point of view. Therefore, it is up to the EU Courts to reconsider its approach towards admissibility criteria and move from considering the standing requirements to reviewing the merits of cases.

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