
STRIKING THE RIGHT BALANCE: LIMITS ON THE RIGHT TO BRING AN ACTION UNDER ARTICLE 263(4) OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION*

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I. INTRODUCTION

The debate on private applicants' limited *locus standi* to challenge before the European Union ("EU") courts acts adopted by European Institutions has been ongoing for decades among those who study, teach, and practice EU law.¹ Almost twenty years ago, Financial

1. Over the last fifty years, many scholars have deeply criticized the ECJ's strict interpretation of the *locus standi* requirements set forth in the treaties for private applicants. In this regard, see MASSIMO CONDINANZI & ROBERTO MASTROIANNI, IL CONTENZIOSO DELL'UNIONE EUROPEA 110 (2009) (noting that a different approach more favorable to private applicants is required by the principle of respect of the rule of law); Anatole Abaquesne de Parfouru, *Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France?*, 14 MAASTRICHT J. EUR. & COMP. L. 361, 361-402 (2007) (asserting the need of reforming standing rules for non-privileged applicants in consideration of the inadequacy of alternative mechanisms of judicial

Times published a cartoon strip, also reproduced in a famous handbook on EU Procedural Law, where two upset *gendarmes* at the entrance of the EU court reproached an astonished attorney for a potential plaintiff asking very brutally: “HOW DID YOU GET IN?”²

Has the situation changed since then? Are plaintiffs in a better position today? To answer these questions, a short retrospective is necessary.

review and of the principle of effective judicial protection); Anthony Arnall, *Private Applicants and the Action for Annulment Since Codorniu*, 38 COMMON MKT. L. REV. 7, 7-10 (2001) (stating that the requirements which private applicants must satisfy under article 230 TEC are notably strict); Anthony Arnall, *Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty*, 32 COMMON MKT. L. REV. 7, 17 (1995) (analyzing the different factors that brought the Court – at the beginning – to limit as much as possible access of individuals to the ECJ); José Manuel Cortés Martín, *Ubi ius, Ibi Remedium?—Locus Standi of Private Applicants Under Article 230 (4) EC at a European Constitutional Crossroads*, 11 MAASTRICHT J. EUR. & COMP. L. 233, 238 (2004) (asserting that it is time for the ECJ to abandon its restrictive interpretation of the *locus standi* conditions); Adam Cygan, *Protecting the Interests of Civil Society in Community Decision-Making— The Limits of Article 230 EC*, 52 INT’L & COMP. L.Q. 995, 995 (2003) (explaining that the Court’s judgments have been consistently of the view that the granting of *locus standi* under Article 230 EC should be narrowly construed); Mariolina Eliantonio & Betül Kas, *Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?*, 3 J. POL. & L. 121, 121 (2010) (analyzing how the restrictive interpretation of the notion of ‘individual concern’ developed in the case law of the European Court of Justice and discussing possible improvements to the system of judicial protection); Xavier Lewis, *Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should it be Fixed?*, 30 FORDHAM INT’L L.J. 1496, 1498 (2007) (believing that the Court of Justice and the General Court have introduced different correctives to the system of review of EU acts provided in the Treaties); Paul Nihoul, *La recevabilité des recours en annulation introduits par un particulier à l’encontre d’un acte communautaire de portée générale*, 30 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 171, 171-94 (1994) (making an overview of the *locus standi* case law); John A. Usher, *Direct and Individual Concern: An Effective Remedy or a Conventional Solution?* 28 EUR. L. REV. 573, 575-600 (2003) (examining the advantages and disadvantages of challenging the legality of EC legislation through national courts); Angela Ward, *Locus Standi Under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a ‘Wobbly Polity’*, 22 Y.B. EUR. L. 45, 45-77 (2003) (criticizing the standing requirements of individual applicants under Article 230 EC).

2. LIONEL N. BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (5th ed. 2000).

Before the Lisbon Treaty came into force on December 1, 2009, under article 230 of the Treaty Establishing the European Community (“TEC”), private applicants could bring an action for annulment against a decision addressed to them. In the case of a decision addressed to another person or issued in the form of a regulation, or an act of general application, applicants could have access to justice before European courts only if the act in question affected them “directly” and “individually.” Since the early 1960s, the European Court of Justice (“ECJ”) interpreted these requirements in a very strict manner. In particular, individuals should have been able to demonstrate not only that the act in question affected them in their legal situation, leaving no discretion to the authorities responsible for implementing that act (“direct concern”),³ but also that it affected them because of certain attributes that were peculiar to them or circumstances that differentiated them from all other persons (“individual concern”).⁴

The requirement of individual concern, as interpreted by the ECJ, made it “exceedingly difficult” to satisfy the test prescribed by the TEC.⁵ This opened the door to a long list of orders of inadmissibility of actions brought by natural or legal persons against acts of general application. On many occasions, this prevented private parties from having access to justice regardless of the merits of their claims.⁶ This

3. Joined Cases 106 & 107/63, *Toepfer v. Comm’n*, (E.C.R. July 15, 1963), available at <http://curia.europa.eu> (holding that a decision which comes immediately into force is of direct concern to an interested party within the meaning of the second paragraph of article 173 of TEC).

4. Case 25/62, *Plaumann & Co. v. Comm’n*, (E.C.R. July 15, 1963) available at <http://curia.europa.eu> (holding that 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).

5. Brown & Kennedy, *supra* note 2, at 146.

6. For cases in which the ECJ held that the applicants were not individually concerned and dismissed the case, see Case T-329/08, *AJD Tuna Ltd v. Comm’n* (E.C.R. Feb. 14, 2012); Case T-108/03 *von Pezold v. Comm’n*, (E.C.R. Feb. 28, 2005); Case T-376/04, *Polyelectrolyte Producers Grp. v. Council*, (E.C.R. July 22, 2005); Joined Cases T-236/04 & T-241/04, *Eur. Env’tl. Bureau v. Comm’n*, (E.C.R. Nov. 28, 2005); Case T-167/02, *Établissements Toulorge v. Parliament*, (E.C.R. Mar. 21, 2003); Case T-100/94, *Michailidis v. Comm’n*, (E.C.R. Sept. 15, 1998), all available at <http://curia.europa.eu>.

conclusion raised serious questions about compliance with fundamental human rights,⁷ especially when EU acts were of general application, and—irrespective of their *nomen iuris* and the procedure leading to their adoption—did not require any implementing measure by Member States to produce effects in the individuals' legal position. For example, that was the case for acts of general application that prohibit a certain activity. In this particular situation, a person was required to breach the law to challenge the sanction imposed at the national level before a national court, and subsequently ask the latter to raise a question of the act's validity before the ECJ through the preliminary ruling procedure.⁸

In his Opinion delivered in the *UPA* case,⁹ Advocate General Jacobs strongly expressed the need for a more flexible approach, especially in interpreting the individual concern requirement, and the Court of First Instance (now the General Court) essentially came to the same conclusions in the *Jégo-Quéré* judgment.¹⁰ Nevertheless,

7. See Filip Ragolle, *Access to Justice for Private Applicants in the Community Legal Order: Recent (R)evolutions*, 28 EUR. L. REV. 90, 90-91 (2003) (stating that proceedings before national courts do not offer effective judicial protection); Ward, *supra* note 1, at 45-77 (noting that the question of private applicants' *locus standi* risks to represent a violation of article 6(1) of ECHR, which requires schemes of judicial review "sufficiently coherent and clear").

8. See *infra* Section IV.

9. See Case C-50/00 P, *Unión de Pequeños Agricultores v. Council* [hereinafter *UPA*], (E.C.R. Mar. 21, 2002) ¶¶ 59-72 and ¶¶ 82-87 (opinion of Advocate Gen. Jacobs) (proposing to consider a person 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) available at <http://curia.europa.eu>; Takis Tridimas, *The European Court of Justice and the Draft Constitution: A Supreme Court of the Union?*, in EUROPEAN UNION LAW FOR THE TWENTY-FIRST CENTURY: RETHINKING THE NEW LEGAL ORDER 113, 120-24 (2004) (stating that Advocate General Jacobs raised the idea of expanding the reading of individual concern and citing the main criticisms to the *locus standi* liberalization); Rosa Greaves, *Commentary on Selected Opinions of Advocate General Jacobs*, 29 FORDHAM INT'L L.J. 690, 712-14 (2006) (stating that UPA Opinion demonstrates Advocate General Jacobs' commitment to the development of a Community legal order in which individual rights are fully protected at national and Community levels); Constantinos C. Kombos, *The Recent Case Law on Locus Standi of Private Applicants Under Art. 230 (4) EC: A Missed Opportunity or a Velvet Revolution?*, 9 EUR. INTEGRATION ONLINE PAPERS, 1, 3 (2005) (considering the Opinion as a first step in the Velvet Revolution aiming to overturn the legal status quo flowing from the requirement of individual concern dating back to Plaumann).

10. See Case T-177/01, *Jégo-Quéré & Cie SA v. Comm'n*, ¶¶ 41-51 (E.C.R.

the ECJ quashed that judgment,¹¹ confirmed the traditional

May 3, 2002), available at <http://curia.europa.eu> (holding that 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); see also Dominique Grisary et al., *L'arrêt Jégo-Quéré - 3 mai 2002: révolution, évolution ou erreur de parcours? Vers un élargissement du droit de recours en annulation des particuliers*, 48 L'OBSERVATEUR DE BRUXELLES 25, 25-35 (2002) (Belg.) (appreciating the judgment and affirming that a different solution would have impaired the access of individuals to the Court); Dominik Hanf, *Facilitating Private Applicants' Access to the European Courts? On the Possible Impact of the CFI's Ruling in Jégo-Quéré*, 3 GERMAN L.J. ¶¶ 7-8, 12-17 (2002) (affirming that the CFI's ruling in Jégo-Quéré had the merit of having recognized the problems of the traditional case law and of having proposed a way how to abandon it); Florence Malvasio, *L'arrêt Jégo-Quéré - 3 mai 2002: révolution, évolution ou erreur de parcours? L'évolution de la jurisprudence de la Cour et du Tribunal en matière de recevabilité des recours intentés par des particuliers*, 48 L'OBSERVATEUR DE BRUXELLES 36, 36-38 (2002) (Belg.) (appreciating the judgment and recalling that the CFI has been created in order to grant individuals judicial protection).

11. See Case C-50/00 P, *UPA*, (E.C.R. July 25, 2002) ¶¶ 41-45 (holding that it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection) available at <http://curia.europa.eu>. For an analysis of the judgment, see Frédérique Berrod & Flavien Mariatte, *Le pourvoi dans l'affaire Unión de Pequeños Agricultores C/Conseil: Le retour de la procession d'Echternach*, 3 EUR. 7, 7-11 (2002) (noting that the judgments delivered after UPA confirmed the traditional case law on *locus standi*); Johanna Engström, *Turning a Deaf Ear to Effective Judicial Protection? The ECJ's Judgment in C-50/00 P Unión de Pequeños Agricultores*, 10 TILBURG FOREIGN L. REV. 375, 384-85 (2003) (stating that the assertion that the Court turns a deaf ear to the issue of effective judicial protection might be too harsh because it recognizes that the problem exists, but does not take responsibility to resolve it); Femke de Lange, Case Note, *European Court of Justice, Unión de Pequeños Agricultores v. Council*, 12 REV. EUR. COMMISSION & INT'L ENVTL. L. 115, 115-18 (2003) (considering that UPA clarifies the existing case law by excluding that the lack of effective access to justice at the national level alone is sufficient to be granted standing). Many authors considered the judgment as a missed opportunity to liberalize standing requirements for individuals, See Albertina Albors-Llorens, *The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?*, 62 CAMBRIDGE L.J. 72, 92 (2003) (noting that UPA dashed any hopes that the time was ripe for a re-examination of the case law on individual concern); Christopher Brown & John Morijn, Case C-263/02 P, *Commission v. Jégo-Quéré & Cie SA*, Judgment of the Sixth Chamber, 1 April 2004, nyr., 41 COMMON MKT. L. REV. 1639, 1640 (2004) (recognizing that the Jégo-Quéré judgment does little to assuage widely expressed concerns that the Courts' case law does not adequately ensure effective judicial protection for private applicants when wishing to challenge the legality of Community acts); Cornelia Koch, *European Community— Challenge of Community Fisheries*

interpretation as “imposed” by the letter of the Treaty on European Union (“TEU”),¹² and called on the Member States to amend the text of article 230 of TEC, if they wished to broaden private applicants’ access to justice.

Member States apparently were not indifferent to that call. The solution adopted in the Treaty establishing the Constitution for Europe, signed in 2004, was to modify the conditions of admissibility of actions for annulment brought by legal or natural persons. In particular, article III-365(4) of that treaty allowed individuals to bring an action for annulment against acts of general application not only when they were directly and individually concerned by them (as in the previous text), but also in case of “regulatory acts” of direct concern to the applicant that did not entail implementing measures.¹³ The “Constitutional” treaty did not define “regulatory acts”. Nevertheless, the *travaux préparatoires* make clear that the drafters intended the definition to include any non-legislative acts, referring to acts not adopted under a legislative procedure of general application, such as regulations and decisions lacking specific addressee(s).¹⁴

The Treaty establishing the Constitution for Europe never entered into force. Yet, the Treaty on the Functioning of the European Union (“TFEU”)¹⁵, which by virtue of the Treaty of Lisbon replaced the TEC, retained the same wording in article 263(4) of TFEU, including

Regulation— Admissibility of Individual Applicants Under Article 230(4), 98 AM. J. INT’L L. 814, 814-19 (2004) (asserting that the ECJ missed out on an opportunity to broaden access to Community courts for private applicants by adopting a conservative approach).

12. Note that in other circumstances the Court has adopted a more flexible interpretation of the wording of Article 263 TFEU. See case C-70/88, *Parliament v. Council*, (E.C.R. May 22, 1990) available at <http://curia.europa.eu> (recognizing that, despite the fact that in the old version of article 263 of TFEU [then article 173 of EEC], the European Parliament was not mentioned among the potential applicants to bring an action for annulment, it should have had the opportunity to challenge acts which threatened its prerogatives).

13. Treaty establishing a Constitution for Europe, 2004, O.J. (C 310) 1, art. III-365(4).

14. Koen Lenaerts & Ignace Maselis, *Le système juridictionnel de l’Union*, in COMMENTAIRE DE LA CONSTITUTION DE L’UNION EUROPEENNE 231 (2005) (analysing the *travaux préparatoires* of the Constitutional Treaty).

15. Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47 [hereinafter TFEU].

the reference to “regulatory acts.” The current text reads as follows:

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.¹⁶

According to the “*tempus regit actum*” principle, the new rules apply for all applications lodged after December 1, 2009, irrespective of the date the contested act was adopted.¹⁷ For applications lodged before that date, the rules on admissibility are those in force at the time of the application, regardless of the moment when the Court rules on its admissibility.¹⁸

The Lisbon Treaty aimed to remove the main obstacles to an effective judicial protection of natural and legal persons against illegal acts of the EU. As the Court put it, this was achieved by “relaxing”¹⁹ the conditions of admissibility of the action for annulment. In cases where the regulatory act in question does not require implementing measures, it sought to avoid a legal or natural person being obliged to breach the law to have access to a national court to raise a question of validity of that act before the ECJ.

Unfortunately, the text of the new provision is no paragon of clarity. Commentators and the Court itself immediately noticed two problems: first, the notion of “regulatory acts,” a term derived from the Treaty establishing the Constitution for Europe but not contemplated in the treaties in force, may reflect a typo in the text;²⁰

16. *Id.* art. 263.

17. Case T-18/10, *Inuit Tapiriit Kanatami v. Parliament*, (E.C.R. Sept. 6, 2011), ¶ 34 available at <http://curia.europa.eu> (holding that “*tempus regit actum*” requires that the admissibility of an application must be resolved based on the rules in force at the time of submission and further, that the conditions of an action are judged at the time the application is lodged).

18. *AJD Tuna*, ¶ 28, 2012 E.C.R. (citing the case law which recognises that the applicable rules are those in force at the time of the application submission).

19. Case C-132/12 P, *Stichting Woonpunt v. Comm'n*, (E.C.R. Feb. 27, 2014), ¶ 43 available at <http://curia.europa.eu> (holding that the Treaty of Lisbon relaxed the conditions of admissibility requirements by not subjecting the actions against regulatory acts to the condition of individual concern).

20. See Ricardo Alonso García, *Lisbon and the Court of Justice of the European Union*, 1 WP IDEIR, 1, 14 (2010) (stating that the reference to “regulatory acts” was no more than a simple error, and that the real intention of the

second, the meaning of the expression “acts which do not entail implementing measures” was unclear. In a series of judgments recently adopted, the European courts have chosen what they consider the correct interpretation of the new rules, defining both the notion of “regulatory acts” and “acts which do not entail implementing measures.”²¹

This article aims to analyze the practical impact of the new rules on the admissibility of private actions in the light of the interpretative guidance set forth by the ECJ. After a brief review of the ECJ case-law in Section II, Section III uses as a case study the “Bluefin tuna saga,” a series of cases concerning Commission Regulations that restricted the fishing period of tuna, adopted both before and after the Lisbon Treaty entered into force. In comparing these cases, the article seeks to verify whether private applicants now have easier access to the European courts compared to the situation before the Lisbon Treaty’s revision. Section IV analyzes whether article 263(4), as interpreted by the ECJ, is compatible with present and future international obligations of the EU. In this regard, the article refers to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters²² (“Aarhus Convention”) and to the European Convention of Human Rights²³ (“ECHR”), although the accession of the EU to the ECHR is temporarily blocked by a negative opinion delivered by the ECJ on the compatibility of the draft accession agreement with the EU basic texts.²⁴

drafters of Lisbon was not to confer powers on individuals to start proceedings for judicial review of legislative acts).

21. See *infra* Section II.

22. See Council Decision 2005/370/EC, *On the Conclusion, on Behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 2005 O.J. (L 124) 1, 1 (establishing approval by the EU of the Aarhus Convention, emphasizing the its goal of improving the public’s access to information and decision-making on environmental issues).

23. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, [hereinafter ECHR].

24. ECJ, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, (E.C.R. Dec. 18, 2014) available at <http://curia.europa.eu>.

II. BACKGROUND

This section provides guidance on the meaning of “regulatory acts” and “act which does not entail implementing measures” as currently interpreted by the ECJ. First, it seeks to define “regulatory act” which should be interpreted as an act of general application adopted according to a procedure different from the legislative one. Second, it focuses on the notion of “implementing measures”, which—according to a recent judgment delivered by the ECJ—should be interpreted broadly to include any measure that on the European or national level gives effect or only applies a regulatory act, irrespective of whether the “implementing” authority maintains any discretion on the content of that measure. It goes without saying that the outcome of this recent ECJ judgment considerably limits private applicants’ direct access to the European judicature.

A. THE DEFINITION OF “REGULATORY ACT”

In interpreting the new text of article 263, paragraph 4, the Court first sought to clarify the meaning of the term “regulatory act” in the absence of any indication in the basic treaties. On October 2013, in the *Inuit Tapiriit Kanatami v. Parliament and Council of the European Union* judgment,²⁵ the ECJ upheld the conclusion of the General Court²⁶ that a “regulatory act” is a non-legislative act, which is an act of general application adopted according to a procedure different from the legislative one (ordinary or special) as defined in

25. Case C-583/11 P, *Inuit Tapiriit Kanatami v. Parliament and Council of the European Union* (E.C.R. Oct. 3, 2013), available at <http://curia.europa.eu>.

26. Case T-18/10, *Inuit*, 2011 ¶ 56 (holding that a “regulatory act” must be interpreted to cover all acts of general application apart from legislative acts). See Sergio Alonso de Llatio, *Por fin una definición judicial de los “actos reglamentarios” del artículo 263, 4 TFEU*, 44 REVISTA DE DERECHO COMUNITARIO EUROPEO 345, 348-49 (2013) (Spain) (affirming that the *Inuit* ruling clarifies some basic legal concepts in the study of the sources of secondary EU law and sets the limits of the legal standing of private parties before the EU courts); Jan H. Jans, *On Inuit and Judicial Protection in a Shared Legal Order*, 21 EUR. ENERGY & ENVTL. L. REV. 188, 188 (2012) (describing the decision as another example of the “limited options available to NGOs wishing to contest a decision of the European institutions before courts”); Steve Peers & Marios Costa, *Judicial Review of EU Acts Aafter the Treaty of Lisbon*, 8 EUR. CONST. L. REV. 82, 82 (2012) (stating that it would be “preferable that the ECJ overturns the ruling and provide for direct actions against some EU legislative acts”).

article 289 of TFEU.²⁷ This decision was in line with most (but not all) scholarly commentators²⁸ and followed the Opinion of Advocate General Kokott.²⁹ The Court reached this interpretation by using the traditional interpretive tools,³⁰ namely literal, historical, and teleological analyses.

27. *Inuit*, 2013 E.C.R. ¶ 61 (confirming the solution reached by the General Court).

28. See R. Mastroianni, *La tutela dei diritti nell'ordinamento comunitario: alcune osservazioni critiche*, 13 IL DIRITTO DELL'UNIONE EUROPEA, 851, 852-853 (2008) (stating that notwithstanding the ambiguity of the text, the only possible interpretation is to exclude legislative acts); Christoph Werkmeister et al., *Regulatory Acts Within Article 263(4) TFEU—A Dissonant Extension of Locus Standi for Private Applicants*, 13 CAMBRIDGE Y.B. EUR. LEGAL STUD. 311, 311-12 (2011) (stating that a 'regulatory act' must be interpreted narrowly to encompass only non-legislative acts). *Contra* Stephan Balthasar, *Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU*, 35 EUR. L. REV. 542, 546-47 (2010) (asserting that article 263(4) of TFEU should be interpreted broadly and in such a way that the term "regulatory acts" includes Regulations even where they are legislative acts within the meaning of art. 289(3) of TFEU); Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617, 677-79 (2008) (considering that an interpretation of "regulatory act" limited to non-legislative acts of general application would be a minimalist solution).

29. See Case C-583/11 P, *Inuit Tapiriit Kanatami v. Parliament*, (E.C.R. Jan. 17, 2013) ¶¶ 30-61 (opinion of Avocate Gen. Kokott), available at <http://curia.europa.eu> (confirming that the notion of "regulatory act" includes only non-legislative acts of general application).

30. *Inuit*, 2013 E.C.R. ¶ 50 (holding that the interpretation of a provision of EU law must take into account the wording, its objectives, and its context and provisions of EU law as a whole). See also Case C-370/12, *Pringle v. Ireland*, (E.C.R. Nov. 27, 2012) ¶ 135, available at <http://curia.europa.eu> (stating that the preparatory work of treaties may provide relevant information for its interpretation); Case 283/81, *CILFIT v. Ministry of Health*, (E.C.R. Oct. 6, 1982) ¶ 20 available at <http://curia.europa.eu> (holding that the origins of a EU law may provide relevant information to its interpretation); see also Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 656-79 (1996) (enunciating the essential elements of the Court's approach to legal interpretation); Giulio Itzcovich, *The Interpretation of Community Law by the European Court of Justice*, 10 GERMAN L.J. 537, 537-60 (2009) (giving an account of the legal reasoning of the European Court of Justice and focusing on the teleological argument); Miguel Poiars Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEGAL STUD. 1 (2007) (explaining that interpretation is a product of legal reasoning, institutional constraints, and normative preferences in a specific political community).

First, in interpreting the text of the fourth paragraph of article 263 of TFEU, the Court distinguishes between the term “acts” and “regulatory acts.” Provided that “acts” refers to all acts of general application, the scope of “regulatory acts” should be necessarily narrower.³¹ Furthermore, the fact that some language of the treaties reflects a certain degree of similarity between the term “regulation,” within the meaning of the second paragraph of article 288 of TFEU, and the expression “regulatory act,” as used in the fourth paragraph of article 263 of TFEU, does not provide proof that the two terms have similar meanings.³² In fact, as provided by article 55(1) of TEU and article 358 of TFEU, the European treaties are equally authentic in twenty-three different languages; therefore, an interpretation based on a selection of a few language versions of the TFEU is unpersuasive.³³

In reaching its conclusion, the ECJ also analyzes the preparatory works of Treaty establishing the Constitution for Europe and the Lisbon Treaty.³⁴ As to the first text, the preparatory works make

31. *Inuit*, 2013 E.C.R. ¶ 58 (holding that not adopting a difference between “acts” and “regulatory acts,” would nullify the purpose of the distinctions made between them in article 263 of TFEU). For critical remarks, see Denis Waelbroeck & Thomas Bombois, *Des requérants “privilégiés” et des autres. . . À propos de l’arrêt Inuit et de l’exigence de protection juridictionnelle effective des particuliers en droit européen*, 50 CAHIERS DE DROIT EUROPEEN 21, 28 (2014) (Belg.) (considering it possible to interpret the term “regulatory act” to include all acts of general application, as opposed to individual acts); Peers & Costa, *supra* note 26, at 91 (affirming that the wording of article 263(4) does not necessarily provide that a “regulatory act” is only a category of acts of general application because otherwise they would have used a more unambiguous wording).

32. *Contra* Jürgen Bast, *New Categories of Acts After the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, 49 COMMON MKT. L. REV. 885, 904-07 (2012) (noting that the term “regulatory act” is most often used as an antonym of “individual act” rather than of “legislative act”).

33. Consolidated version of the Treaty on European Union, 2012 O.J. (C 326) 13 [hereinafter TEU], art. 55(1) (stating that the TEU is equally authentically and originally written in Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish); *see also* TFEU, art. 358 (stating that the provisions of article 55 of TEU are applicable to the TFEU).

34. *Contra* Balthasar, *supra* note 28, at 544-49 (noting that preparatory works do not bind the ECJ because (i) the Court does not usually consider preparatory works when interpreting primary EU law and (ii) the preparatory works published concern only the European Constitution and therefore one can doubt what

clear that the *Praesidium*³⁵ expressly decided to distinguish between legislative and regulatory acts, allowing complainants under regulatory acts to benefit from a more flexible approach to conditions for the admissibility of the action.³⁶ As to the Lisbon Treaty, the mandate for the 2007 Intergovernmental Conference, which constituted the basic agreement for its negotiations, expressly required to keep the distinction between legislative and non-legislative acts and its consequences.³⁷

The Court also explained that the proposed interpretation was in line with the aim of the provision, namely to enable private applicants “to bring, under less stringent conditions, actions for annulment of acts of general application other than legislative acts.”³⁸ In fact, the new wording of article 263(4) of TFEU intended to avoid situations in which a private applicant would infringe the

authority such documents have for interpreting the Lisbon Treaty). It is possible to consider the preparatory works of the Constitutional Treaty given that the Treaty of Lisbon has kept the same wording and that the European Council had expressly stated in the mandate for the IGC conference to keep the distinction between legislative and non-legislative acts.

35. The term “*Praesidium*” refers to the group of thirteen people led by Giscard d’Estaing that played a key role during the works for elaborating the Constitutional Treaty. In particular, the group had to supervise and to draw up draft agendas for the plenary sessions of the Convention, the body in charge of making proposals for institutional reforms.

36. *Inuit*, 2011 E.C.R. ¶ 49. See also *Praesidium*, Cover note to the Convention on Articles relating to the Court of Justice and the High Court, CONV 734/03, (May 12, 2003) (holding that the wording of article III-365(4) enabled a distinction between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts, for which the “direct and individual concern” condition remains applicable); M. Gil Carlos Rodriguez Iglesias, *Oral Presentation to the Discussion Circle on the Court of Justice*, CONV 572/03 (Feb. 17, 2003) (considering appropriate to continue to take a restrictive approach to actions by individuals against legislative measures and to provide for a more open approach with regard to actions against regulatory measures).

37. *Inuit*, ¶ 45, 2013 E.C.R. (opinion of Avocate Gen. Kokott) (holding that, according to the mandate for the 2007 Intergovernmental Conference, the distinction between what is legislative and what is not and its consequences must be stressed and maintained); see also General Secretariat of Council of European Union, Mandate for 2007 intergovernmental conference (11218/07) 26 June 2007, ¶19 (v) (holding that “the distinction between what is legislative and what is not and its consequences” should be maintained).

38. *Inuit* 2013 E.C.R. ¶ 60 (reading article 263(4) of TFEU in the light of its purpose).

law to have access to the Court.³⁹ This interpretation reflects the one suggested by Advocate General Jacobs in *UPA*, who called for a more flexible interpretation of the standing requirements under article 230 of TEC to fill the gaps in the judicial protection system.⁴⁰

Finally, as stated by Advocate General Kokott in her Opinion, the proposed solution also complies with the principle of institutional separation.⁴¹ According to this principle, there is an “indirect hierarchy of legal norms” depending upon the democratic legitimacy of the adopted measure, in accordance with the situation in many Member States. Therefore, it should be possible for individuals to challenge more easily an act with a lesser degree of democratic legitimacy, such as a regulatory act, than an act with a greater degree of democratic legitimacy, such as a legislative act.⁴²

39. *Inuit*, 2011 E.C.R. ¶ 50 (holding that the purpose of article 263 of TFEU is to allow a person to bring actions against an act of general application which is not a legislative act, which is of direct concern to them, and does not necessitate implementing measures, thereby avoiding having to infringe the law to have access to the court).

40. See *UPA* 2002 E.C.R. (opinion of Avocate Gen. Jacobs), ¶ 50. Note that in *UPA* the applicants were refused standing for a direct action and at the same time did not have the possibility to obtain an indirect review through the national courts. For an analysis of the judgment, see *supra* note 11.

41. *Inuit*, 2013 E.C.R. ¶ 38 (opinion of Advocate Gen. Kokott) (holding that the distinction between legislative and non-legislative acts is not just a formalistic difference, but also a qualitative one). Note that the expression “institutional separation” has been used by Michael Harker et al., *The EU Rules on Standing in Merger Cases: Should Firms Have to Demonstrate “Harm to Competition”?*, 36 EUR. L. REV. 500, 512-13 (2011) (noting that the principle of institutional separation implies an “indirect hierarchy of legal norms” which depends upon the democratic legitimacy of the adopted measure). *Contra* Dougan, *supra* note 28, at 678; Balthasar, *supra* note 28, at 547 (both criticizing the parallel with the national situation because: (i) European institutions do not enjoy the same degree of democratic legitimacy as their domestic counterparts and (ii) legislative acts could always be challenged in the context of a preliminary reference under Article 267 TFEU); Bast, *supra* note 32, at 907 (affirming that there is no valid reason to assume that a high level of parliamentary involvement indicates that an indirect challenge, such as preliminary ruling, best suits the purpose of providing effective judicial protection).

42. *Inuit*, 2013 E.C.R. ¶ 38 (opinion of Advocate Gen. Kokott) (holding that the high democratic legitimization of parliamentary legislation may result in the absence of easier direct legal remedies for individuals challenging legislative acts).

Recent judgments confirm this solution.⁴³ In principle, although the discriminative criterion is more formalistic than substantive, it appears quite convincing. The wording of article 263(4) is ambiguous and could be read in different manners. However, the solution adopted by the Court appears to be the most persuasive one.

B. THE DEFINITION OF “ACT WHICH DOES NOT ENTAIL IMPLEMENTING MEASURES”

While the meaning of the term “regulatory act” was immediately settled, the interpretation of the term “implementing measure” remained unclear and controversial until April 2015, when the Grand Chamber of the ECJ delivered its very controversial judgment in *T&L Sugars*.⁴⁴ The following paragraphs briefly summarize the judgment and provide some critical remarks on the solution reached by the ECJ.

1. *The T&L Sugars Judgment*

The case concerned an appeal lodged by some cane sugar refiners established in the EU against a judgment of the General Court⁴⁵ that considered their action inadmissible on the basis of article 263, para 4 of TFEU. The applicants intended to challenge the measures adopted by the European Commission and designed to increase the supply of sugar on the EU market. Two Commission Regulations (“Quota Regulations”)⁴⁶ allowed producers to market a limited

43. Case T-279/11, *T&L Sugars Ltd v. Comm’n*, ¶ 36 (E.C.R. June 6, 2013), available at <http://curia.europa.eu> (holding that the contested regulations are regulatory acts, since they are acts of general application that have not been adopted according to standard legislative procedure or a special legislative procedure), upheld by Case C-456/13 P, *T&L Sugars and Sidul Açúcares v Comm’n*, (E.C.R. April 28, 2015) available at <http://curia.europa.eu>.

44. *T&L Sugars*, 2015 E.C.R. The Court confirmed its interpretation in case C-84/14 P, *Forgital Italy Spa v. Council and Comm’n*, (E.C.R. July 14, 2015), available at <http://curia.europa.eu>.

45. *T&L Sugars*, 2013 E.C.R.

46. Commission Regulation (EU) No 222/2011 of 3 March 2011 provided exceptional measures as regards to the release of out-of-quota sugar and isoglucose on the Union market at reduced surplus levy during marketing year 2010/2011, 2011 OJ (L 60), 6. Commission Implementing Regulation (EU) No 293/2011 of 23 March 2011 fixed allocation coefficient, rejected further applications, and closed the period for submitting applications for available quantities of out-of-quota sugar to be sold on the Union market at reduced surplus levy 2011 OJ

quantity of sugar and isoglucose in excess of the domestic production quota, while two other Commission Regulations (“Tariff Regulations”)⁴⁷ introduced a tariff quota allowing any economic operator concerned to import a limited quantity of sugar with import duties suspended. To take advantage of the EU measures, both sugar producers in the context of Quota Regulations⁴⁸ and any other economic operator concerned in the context of Tariff Regulations,⁴⁹ had to apply before national authorities, which decided on the admissibility of applications in the light of the criteria set out in the respective regulations.

According to the applicants, the General Court judgment had to be set aside since the contested regulations were regulatory acts that *did not* entail implementing measures; in fact, the European Commission determined every detail, while the Member States authorities acted

(L 79), 8.

47. Commission Implementing Regulation (EU) No 302/2011 of 28 March 2011 opened an exceptional import tariff quota for certain quantities of sugar in the 2010/11 marketing year 2011 OJ (L 81), 8. Commission Implementing Regulation (EU) No 393/2011 of 19 April 2011 fixed the allocation coefficient for the issuing of import licenses applied for from 1 to 7 April 2011 for sugar products under certain tariff quotas and suspending submission of applications for such licences, 2011 OJ (L 104), 39.

48. *T&L Sugars*, 2013 E.C.R. ¶¶ 39-40 (holding that, according to Regulation 222/2001, “in order to benefit from that exceptional quantity [of sugar and isoglucose which may be marketed in excess of the production quotas], producers must apply for certificates to the competent national authorities in the Member State in which they are approved. Under article 4 of that regulation, those authorities are to decide on the admissibility of applications in the light of the criteria set out in the same regulation and then notify the admissible applications to the Commission”); *T&L Sugars*, 2013 E.C.R. ¶ 41 (holding that Regulation 293/2011 instead defined the allocation coefficient “to be applied by the national authorities to applications submitted between 14 and 18 March 2011 and notified to the Commission”).

49. *T&L Sugars*, 2013 E.C.R. ¶¶ 39-40. Regulation 302/2011 provided that the import duties were suspended between 1 April 2011 and 30 September 2011, for a quantity of 300,000 tons of sugar. As for the administration of that quota, Regulation 302/2011 made reference to other Commission Regulations (1301/2006 and 376/2008), according to which national authorities issue the import licenses to applying operators that satisfy the conditions for admissibility set out by the Commission, which is then informed of the quantities allocated. Regulation 393/2011 defines the allocation coefficient for applications for import licenses lodged from 1 to 7 April 2011, for which the available quantity has been exceeded, and suspends the submission of further applications until the end of the marketing year 2010/11.

merely as ‘mail boxes.’ Notwithstanding a different suggestion from its Advocate General,⁵⁰ the Court dismissed the action.⁵¹ First, with regard to the Quota Regulations, it affirmed that to assess whether a regulatory act entails implementing measures, the applicant’s position should be taken into consideration.⁵² In this respect, the ECJ highlighted that the Quota Regulations only concerned sugar producers and consequently the action should have been considered inadmissible because sugar refiners were not “directly concerned” with the above-mentioned regulations.⁵³ Second, with regard to the Tariff Regulations, the ECJ considered that such Regulations produced their legal effects vis-à-vis the appellants only through the intermediary of acts taken by the national authorities, which constituted “implementing measures” within the meaning of the final limb of the fourth paragraph of article 263 of TFEU.⁵⁴ In this regard, the Court clarified that the fact that the Member States did not have any discretion in the measures’ application is a relevant element in assessing the “direct concern” of the applicants, while it is completely irrelevant to qualify a national act as an “implementing measure.”⁵⁵

The ECJ also dismissed the argument brought by the applicants that a restrictive interpretation of article 263(4) of TFEU would be contrary to the right to an effective judicial remedy, as set out by

50. Case C-456/13 P, *T&L Sugars Ltd v. Comm’n*, ¶¶ 29-40 (E.C.R. Oct. 14, 2014) (Opinion of Advocate Gen. Villalón) available at <http://curia.europa.eu> (holding that the notion of implementing measure should not cover situations where the national authority merely “applies” an EU regulatory act).

51. The Court also excluded that the applicants were “individually concerned” by the Tariff regulation. See *T&L Sugars*, 2015 E.C.R. ¶¶ 61-68 (holding that, although Regulation 393/11 concerned all the applicants for import licenses who lodged their application with the EU between April 1 and 7, 2011, as the applicants did, the Regulation was adopted in consideration of an objective situation which did not take into account the individual situation of T & L Sugars and Sidul Açúcares).

52. *T&L Sugars*, 2015 E.C.R. ¶ 32. See also *Forgital*, 2015 E.C.R. ¶ 52 (holding that in order to assess whether a regulatory act entails implementing measures, the applicant’s position should be taken into consideration).

53. *Id.* ¶ 38.

54. *Id.* ¶ 40.

55. *Id.* ¶¶ 41-42. See also *Forgital*, 2015 E.C.R. ¶ 44 (holding that the circumstance that the challenged regulatory act allows discretion to the authorities accountable for its implementation is irrelevant in determining whether it entails implementing measures).

article 47 of the Charter of Fundamental Rights. Thus, the ECJ recognized that a Charter-oriented interpretation could not have the effect of setting aside the admissibility conditions expressly laid down in article 263(4) of TFEU.⁵⁶ In any case, according to the Court, the treaties already ensure an effective judicial protection for individuals through a complete system of remedies that involve both ECJ and courts and tribunals of the Member States.⁵⁷ In the view of the Court, individuals who do not fulfill the requirements of article 263(4) of TFEU can challenge EU acts in the context of national proceedings through the preliminary ruling mechanism, which “constitute, like actions for annulment, [a mean] for reviewing the legality of EU acts.”⁵⁸ Thus, Member States must ensure an effective judicial protection for individuals in the fields covered by EU law in compliance with article 19(1) of TEU.⁵⁹

2. An Interpretation Too Broad to Ensure Individuals an Effective Judicial Protection

As recognized by Advocate General Cruz Villalón in his Opinion, *T&L Sugars* is the first case—since the Lisbon Treaty entered into force—where the Court fully addresses the issue of the correct interpretation of the new conditions for access to the Court to challenge EU acts.⁶⁰

The judgment, confirming the “negative” trend of the previous decisions toward private individuals’ direct access to the European courts,⁶¹ espouses a very broad interpretation of “implementing

56. *Id.* ¶¶ 43-44. *See also Forgital*, 2015 E.C.R. ¶ 48 (holding that the interpretation of the admissibility requirements of article 263 of TFEU in the light of the right to an effective judicial protection could not have the effect of setting aside the conditions expressly laid down in that article)

57. *Id.* ¶ 45.

58. *Id.* ¶ 47.

59. *Id.* ¶¶ 49-50. *See also Forgital*, 2015 E.C.R. ¶ 66 (holding that it is for the national courts to interpret the procedural rules governing actions brought before them in such a way as to ensure—as far as possible—judicial protection of individual’s rights under EU law).

60. *Id.* ¶ 17 (Opinion of Advocate Gen. Villalón).

61. The ECJ has already analyzed the meaning of the term “implementing measure,” although only in negative terms. *See Case C-132/12 P, Stichting Woonpunt*, 2014 E.C.R. ¶ 50, *T-279/11, T&L Sugars*, 2013 E.C.R. ¶ 37 both available at <http://curia.europa.eu> (stating that the challenged acts did not entail implementing measures).

measures.” This expression now seems to include any measure that gives effect or only applies a regulatory act at the European or national level, irrespective of whether the implementing authority enjoys any discretion on the content of that measure. If this appears coherent with the ECJ suggestions considered above (that the Lisbon Treaty revision’s aim was only to give access to justice to individuals that otherwise would not have other alternatives than infringing the law),⁶² this interpretation is still unsatisfactory.

In fact, as it is evident in *T&L Sugars*, the broad interpretation adopted by the ECJ for the term “implementing measure” in most cases prevents individuals from challenging EU acts that are detrimental to their interests.⁶³ The Court affirms that when the contested EU act entails some kind of implementing measure at the national or European level, private applicants’ judicial protection is not an issue, as they can challenge that act before a national or European court, respectively.⁶⁴ When an EU institution, body, office, or agency adopts the implementing measure, private applicants can directly bring an action against it and then, in the course of the proceedings, plead in support of the illegality of the basic act under article 277 of TFEU. When a Member State adopts the implementing measure, the Court’s view is that access to justice is guaranteed since

62. See Case C-274/12 P, *Telefónica SA v. Comm’n*, ¶ 27 (E.C.R. Dec. 19, 2013) available at <http://curia.europa.eu> (agreeing with Advocate General Jacobs that the concept of a ‘regulatory act’ which does not entail ‘implementing measures’ should be interpreted in the light of that provision’s objective, which, as is clear from its origin, consists in preventing an individual from being obliged to infringe the law in order to have access to a court); see also Case C-274/12 P, *Telefónica SA v. Comm’n*, ¶ 40 (E.C.R. Mar. 21, 2013) (opinion of Advocate Gen. Kokott), available at <http://curia.europa.eu>.

63. This is also clearly demonstrated by *Telefónica SA*, 2013 E.C.R., ¶¶ 1, 3, 35. *Telefónica*, a company that had benefited from a special tax scheme in Spain, challenged the Commission decision that considered Spain’s special tax scheme as a state aid incompatible with the single market and ordered the recovery of the aid from the beneficiaries. The Court, however, denied *Telefónica* the *locus standi*, affirming that the Commission only decided that the tax scheme was incompatible with the single market, but it did not define the specific consequences for each taxpayer. The Court thus concluded that the Commission decision entailed an implementing measure, namely the recovery order addressed by the State to the aid beneficiaries. Consequently, the Court dismissed the action as inadmissible.

64. *T&L Sugars*, 2015 E.C.R. ¶ 30; *Telefónica SA*, 2013 E.C.R. ¶ 28 (explaining that natural or legal persons, who are unable to bring a proceeding against a regulatory act directly before the EU judicial system, are protected by the opportunity to challenge the implementing measures that the act entails).

individuals can plead the invalidity of the basic act before the national court and *cause the court to request* a preliminary ruling from the ECJ under article 267 of TFEU.⁶⁵

This article further considers private individuals' rights protection is very limited and does not come close to directly challenging the contested act's effectiveness. For the time being, it is sufficient to note that the interpretation of the term "implementing measure" as any measure of application is unconvincing as the Court suggests. It leads to the rather paradoxical conclusion that it would be impossible on many occasions to benefit from the new standing requirements, which were intended to relax the conditions for access to justice. In fact, as Advocate General Wathelet pointed out in his Opinion delivered in the *Stichting Woonpunt v. Commission* case, simple formalities, such as a publication, notification, confirmation, or recall, even if merely optional, might be considered "implementing measures" and therefore obstruct individuals' direct access to the European courts.⁶⁶

Moreover, the approach adopted by the Court prevents actions against European directives from benefiting from the special

65. *T&L Sugars*, 2015 E.C.R. ¶ 31; *Telefónica SA*, 2013 E.C.R. ¶ 29 (holding that when the EU is responsible for implementing such acts, individuals may challenge and plead the illegality of the implementing acts before the EU and national courts).

66. Case C-132/12 P, *Stichting Woonpunt v. Comm'n*, ¶ 45 (E.C.R. May 29, 2013) (opinion of Advocate Gen. Wathelet), available at <http://curia.europa.eu>. See also *Stichting Woonpunt* (2014 E.C.R.), ¶¶ 52-53 (dismissing the Advocate General's opinion with respect to the Commission's decision regarding state aid compatibility, which would have been implemented solely through national measures, such as a ministerial decree and a new housing law). Paradoxically, according to the ECJ judgment, the applicant found an easier method to *locus standi* by using the "old" test of individual concern, instead of the "enlarging" test of the Lisbon Treaty, even though the latter was expressly "less stringent." Another example of the paradoxical outcomes of a broad interpretation of the term "implementing measure" is provided by *Forgital*, 2015 E.C.R., ¶ 62. In this case, the ECJ affirmed that even the custom's authority decision of releasing the goods, which *de facto* represents a mere "stamp of approval" of the economic operator's declaration, constitutes a national implementing measure to be challenged before the national court. More in detail, according to the ECJ, the customs authority, by releasing the goods, implicitly approves the declaration through which the economic operator makes a self-assessment of the duties to be paid. As a consequence, in the Court's view, the release of the goods constitutes a decision of a national authority (i.e. the customs authority) that implements EU acts of general application and directly and individually concerns the economic operator.

standing conditions under article 263(4), since directives, by their nature, require the adoption of implementing measures.⁶⁷ This would create a situation where the form and procedure for the adoption of an EU act determines the possibility of challenging it under article 263 of TFEU, in contradiction with the previous *dicta* of the Court.⁶⁸

For this reason, some scholars have proposed to exclude from the term of “implementing measures,” acts adopted by national authorities without any discretion on their part.⁶⁹ According to this interpretation, to classify an act as an “implementing measure,” it is necessary to verify whether the authority enjoys a margin of discretion in implementing the EU act.⁷⁰ In *T&L Sugars*, the General Court responded to these criticisms, underlining that the lack of discretion given to the authority in implementing the measure is a criterion that must be examined in another context. Namely, the European courts must use it to determine whether the applicant is directly concerned, while the new requirement of absence of

67. TFEU, *supra* note 15, art. 288 (stating that directives are legally binding upon each Member State that they address, but leave the issue of form and implementing measures up to the national authorities).

68. See Albers-Llorens, *Remedies Against the EU Institutions after Lisbon: An Era of Opportunity?*, 71 CAMBRIDGE L.J. 507, 527 (2012) (explaining that a formalistic approach refers to a situation where the form and mechanism of adoption of an act determines the possibilities of challenge under article 263 of TFEU); Camilla Buchanan, *Long Awaited Guidance on the Meaning of “Regulatory Act” for Locus Standi Under the Lisbon Treaty*, 2012 EUR. J. RISK REG. 115, 122 (recalling that, according to the case law of the ECJ, the objective of the direct and individual concern test, was “to prevent the Community institutions from being able, merely by choosing the form of a regulation, to preclude an individual from bringing an action against a decision which concerns him directly and individually”).

69. See Laurence W. Gormley, *Access to Justice: Rays of Sunshine on Judicial Review or Morning Clouds on the Horizon?*, 36 FORDHAM INT’L L.J. 1169, 1187 (2013) (explaining that acts which are merely carrying out the instructions or the logical individual consequences of a regulatory act do not prevent the regulatory act from being open to challenge merely on demonstration of direct concern); Peers & Costa, *supra* note 26, at 95-99 (noting that any applications for annulment would remain inadmissible based on the fact that any measures leaving discretion to Member States would still entail implementing measures).

70. *Stichting Woonpunt*, (2013 E.C.R.) ¶ 68 (opinion of Advocate Gen. Wathelet) (underlining that the margin of discretion cannot be merely formal); Case T-16/04, *Arcelor SA v. Parliament*, ¶ 123 (E.C.R. Mar. 2, 2010), available at <http://curia.europa.eu> (confirming that a directive that leaves a very wide margin of discretion to the Member States in implementing and adopting national measures does not fulfill the requirement of an absence of implementing measures).

implementing measures, laid down in the fourth paragraph of article 263 of TFEU, constitutes a different condition.⁷¹

However, as Advocate General Wathelet underlined, it seems difficult to imagine an individual harmed by a EU act, which needs a real implementing measure. In fact, according to the Court, to be of direct concern to an individual, the EU act must “directly affect the legal situation of those parties . . . [since the] implementation . . . result[s] from [EU] law alone, without the application of other intermediate rules.”⁷² In his opinion, the condition of “absence of implementing measures” simply repeats the “direct concern” requirement.⁷³

In his Opinion on the *T&L Sugars* case, AG Villalon suggested a different and more convincing interpretation. He proposed to interpret the term “implementing measures” as any intervention implying a certain degree of discretion in the exercising state authority. In assessing whether the power exercised by the State is discretionary, attention must be paid to the nature, form, and intensity of the cooperation required from the national authorities.⁷⁴ The proposed solution would have also implied a different interpretation of the direct concern condition, which, according to the settled case law, has always been considered unsatisfied when

71. Case T-400/11, *Altadis, SA v. Comm'n*, ¶ 47 (E.C.R. Sept. 9, 2013), available at <http://curia.europa.eu> (holding that the lack of discretion must be analyzed only in order to determine whether the applicant is directly concerned); Case T-279/11, *T&L Sugars*, 2013 E.C.R., ¶ 53 (holding that whether the challenged regulatory act allows discretion to the authorities accountable for its implementation is irrelevant in determining whether it entails implementing measures); Case T-381/11, *Europäischer Wirtschaftsverband der Eisen- und Stahlindustrie (Eurofer) ASBL v. Comm'n*, ¶ 59 (E.C.R. June 4, 2012), available at <http://curia.europa.eu> (holding that the lack of discretion must be analyzed only in order to determine whether the applicant is directly concerned).

72. *Stichting Woonpunt*, 2013 E.C.R. ¶ 52 (opinion of Advocate Gen. Wathelet).

73. *Id.* ¶ 49. See Peers & Costa, *supra* note 26, at 96 (stating that the direct concern condition was not meant to put an additional hurdle besides the “direct concern” requirement, but only clarify the meaning of “direct concern; similarly, art. 1(1) of the Special Protocol on the Charter of Fundamental Rights simply clarifies art. 51 of the Charter itself).

74. *T&L Sugars*, 2014 E.C.R. ¶ 30 (Opinion of Advocate Gen. Villalon) (noting that the term “measure” means that a certain “power” is exercised, thus implying that a certain degree of discretion has been conferred to the State authority).

implementing intermediate measures required by the act was not purely automatic.⁷⁵ The risk is that the condition of the absence of implementing measures is considered inherent to the condition of direct concern.⁷⁶ In order to avoid this conclusion, AG Villalon elaborated a “functional division” between those conditions. As he explained in his Opinion, the direct concern requirement should refer both to the definition of the rule and the identification of its addressees, while the absence of implementing measures ensures that the rule, whose addressees have been identified, is fully operational.⁷⁷ However, ECJ disagreed with its Advocate General and dismissed the action.⁷⁸

III. A CASE STUDY: THE (SAD) STORY OF BLUEFIN TUNA FISH

This section highlights the Lisbon Treaty’s impact on private individuals’ access to the ECJ. It presents a case study—the “Bluefin tuna saga”—concerning some Commission Regulations that restricted the fishing period of tuna, adopted both before and after the Lisbon Treaty entered into force. The following sections analyze the admissibility of the action for annulment of the mentioned Regulations before Lisbon and after Lisbon.

75. *Id.* ¶ 23 (citing the case law relating to the direct concern requirement).

76. *Id.* ¶ 25 (noting that the direct concern, as interpreted by the Court in relation to the pre-Lisbon version of the Treaty, was already based on the understanding that where implementation was purely automatic and there was no obstacle to the recognition of standing to bring proceedings).

77. *Id.* ¶ 32 (defending the “alternative view” according to which the new wording of Lisbon Treaty should be interpreted in accordance to the “functional division”).

78. The only exception to the Court’s restrictive approach to the conditions to obtain access to the Court is represented by *Microban* (Case T-262/10, *Microban Int’l Ltd v. Comm’n*, ¶¶ 37-39 - E.C.R. Oct. 25, 2011) available at <http://curia.europa.eu> (holding that all the ancillary acts, which refer to measures that are ancillary to the main purpose of the regulatory act, should not be considered as implementing measures). However, it is very difficult for private applicants to invoke the existence of an ancillary act because the Court has strictly interpreted this notion once again. For instance, see *Telefónica SA*, 2013 E.C.R. (rejecting the company’s affirmation that the measures subsequent to a decision declaring an aid scheme incompatible with the common market only concern an ancillary obligation that does not involve the direct effect of the articles regarding that decision).

A. THE ADMISSIBILITY OF THE ACTION FOR ANNULMENT BEFORE
LISBON

The first situation concerns a dispute submitted before the two EU courts before the Treaty of Lisbon came into force.⁷⁹ On June 12, 2008, the Commission adopted Regulation No. 530/2008⁸⁰ establishing emergency measures to restrict fishing before the program expiration period. In particular, the Regulation prohibited Bluefin tuna fishing from June 16, 2008, for the purse seiners flying the flag of all Mediterranean Member States with the exception of Spain, whose vessels were allowed to fish until June 23.⁸¹ Moreover, to reinforce the effectiveness of these measures designed to forestall a serious threat to the conservation of the Bluefin tuna stock, the Regulation also obliged Community operators not to accept, according to the same temporal limitations, landings, placing Bluefin tuna in cages for fattening or farming, and transshipments of Bluefin tuna caught by purse seiners in the Atlantic Ocean, east of longitude 45 degree west, and the Mediterranean.⁸²

Many operators of different Mediterranean countries challenged the Regulation before the European courts.⁸³ Among them, AJD

79. *AJD Tuna Ltd v. Comm'n*, ¶ 1, 2012 E.C.R., (concerning an action for annulment brought against Regulation No 530/2008 of 12 June 2008 establishing emergency measures as regards to purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and in the Mediterranean Sea, and the action was dismissed as inadmissible); Case C-221/09, *AJD Tuna Ltd. v. Direttur tal-Agrikoltura u s-Sajd*, ¶¶ 1-3 (E.C.R. Mar. 17, 2011), available at <http://curia.europa.eu> (concerning a decision in which the Director for fisheries prevented AJD Tuna from buying or importing bluefin tuna for its farming and fattening ventures).

80. Commission Regulation 530/2008, art. 1, 2008 O.J. (EC) (establishing emergency measures concerning “purse seiners fishing for Bluefin tuna in the Atlantic Ocean, east of longitude 45 degrees west, and in the Mediterranean Sea” in light of the serious threat of overfishing to the conservation of the Bluefin tuna stock).

81. *Id.* arts. 1, 3 (indicating that it was prohibited, from June 16, 2008 onwards, to fish for bluefin tuna in the Atlantic Ocean, east of longitude 45 degrees west, and the Mediterranean by purse seiners in Greece, France, Italy, Cyprus, and Malta, but allowed by purse seiners flying the flag of, or registered in Spain until June 23, 2008).

82. *Id.* art. 3.

83. See case T-305/08 *Italian Republic v Commission* (E.C.R. Feb. 14, 2012) available at <http://curia.europa.eu> (concerning an action for annulment brought

Tuna, a company established in Malta, whose main activity is the farming and fattening of Bluefin tunas caught alive in the Mediterranean Sea with a view to reselling them to traders. The applicant's name was included in a list of authorized operators issued by Member States and notified to the Commission and the International Commission for the Conservation of Atlantic Tunas ("ICCAT").⁸⁴

Therefore, considering itself part of a "closed list" for the purpose of admissibility of the claim, AJD Tuna brought an action before the General Court on August 12, 2008,⁸⁵ contesting the validity of the Regulation on different grounds, including insufficient motivation, violation of general principles such as legitimate expectations and fundamental rights protected by the EU. Since its activity concerned the farming of tuna caught by non-Spanish seiners, it also argued that no objective reasons justified a different date for the application of the ban according to the nationality of the seiners.⁸⁶

The defendant immediately raised an objection as to the admissibility of the action, arguing that the applicant was not "individually concerned" by the contested Regulation.⁸⁷ Being aware of the objective difficulty of having the action being considered admissible and the time required by this procedure,⁸⁸ AJD Tuna

against Regulation No 530/2008 of 12 June 2008 establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45° west, and in the Mediterranean Sea, and determining the action was dismissed as there was no need to adjudicate on the action).

84. *See AJD Tuna Ltd.*, 2012 E.C.R. ¶ 13 (stating that ICCAT authorized AJD Tuna to the farming and fattening of Bluefin tunas).

85. *See id.* ¶ 17 (affirming that AJD Tuna brought an action for annulment against Regulation 530/2008).

86. *See AJD Tuna Ltd.* Application (T-329/08), Oct. 25, 2008, 2008 O.J. (C 272) 38 (holding that the Regulation infringed the principle of legitimate expectation because the Community legislation on fishing for bluefin tuna gave rise to a reasonably founded expectation on the part of the applicant that its fish farming and fattening activities were lawful).

87. *See id.* ¶ 18 (indicating that the Commission asked the Court to consider the action as inadmissible).

88. *See Consolidated Version of the Rules of Procedure of the General Court* art. 114, July 2, 2010, 2010 O.J. (C 177) 37 ("[A] party applying to the General Court for a decision on admissibility . . . shall make the application by a separate document"). The provision requires the defendant to take position on the merits within the time limit of two months for lodging a defence. In practice, the interpretation given to this provision is that the defendant may limit itself to

decided to circumvent the problem by filing a liability action before a civil court in Malta and requested damages for adopting an administrative act applying the ban imposed by the Regulation.⁸⁹

On June 4, 2009, the Maltese Court asked the ECJ to rule on the interpretation and validity of the Regulation and practically repeated the same arguments set forth by AJD Tuna in its direct action before the General Court.⁹⁰ Less than two years later, on March 17, 2011, the ECJ declared the Regulation invalid because it violated the principle of equal treatment irrespective of nationality. In fact, unlike those flying the flags of other Member States, Spanish vessels enjoyed a few additional days of fishing and this difference of treatment was not objectively justified.⁹¹ As for the direct action brought by AJD Tuna, on February 2012, the General Court (Fifth Chamber) dismissed it as inadmissible for lack of individual concern.⁹²

B. AFTER LISBON: HOW WOULD THIS CASE BE DECIDED TODAY?

The *Bluefin tuna* saga makes clear the difficulties that private applicants had to face before the entry into force of the Lisbon Treaty in order to have their case decided on the merits by the European courts. The applicants—and this is a very rare situation—were lucky enough to convince the national judge to submit to the ECJ, through a reference for a preliminary ruling under article 267 of TFEU,

contest the admissibility of the action, which appears contrary to both the letter of art. 114 of Rules of Procedure and the principle of equality of arms. The defendant will eventually reply on the merits only after the end of the incidental procedure provoked by the objection.

89. See *AJD Tuna Ltd.*, 2011 E.C.R. ¶ 30 (stating that AJD Tuna brought proceedings before the Maltese Court seeking compensation for damage that it claims to have suffered as a result of Regulation 530/2008).

90. See *AJD Tuna Ltd.* Application (C-221/09), Aug. 29, 2009, 2009 O.J. (C 205) 23 (referencing arguments similar to AJD Tuna's, such as whether the regulation should be interpreted to preclude Community operators from accepting landings, the placing in cages for farming or fattening, or trans-shipments in Community waters or ports of Bluefin tuna caught in the Atlantic Ocean by seiners).

91. *AJD Tuna Ltd.*, 2011 E.C.R. ¶ 113 (holding that Regulation No 530/2008 is invalid in so far as the differences in treatment among operators of different nationalities are not objectively justified).

92. See *AJD Tuna Ltd.*, 2012 E.C.R. ¶ 47 (dismissing the action as inadmissible).

exactly the same grounds of validity previously submitted with a direct challenge under article 263 of TFEU.

The entry into force of Lisbon Treaty gave private applicants the opportunity to bring an action under the conditions specified in article 263(4) of TFEU. In particular, this new chance requires that an act must be adopted under a non-legislative procedure (“regulatory act”), must be a “direct concern” for the applicant, and must not require further implementing measures.⁹³

This raises the question of whether, in practice, the new rules have made it easier for private applicant to access the Court. A recent judgment concerning a Commission Regulation adopted in 2010, which again prohibited fishing activities for purse seiners flying the flag of Greece or France, provides a good example.⁹⁴

In its judgment of February 27, 2013, the General Court qualified the act in question as “regulatory” within the meaning of article 263(4) of TFEU. First, it was adopted by the Commission on the basis of article 36(2) of Regulation No. 1224/2009 and therefore it is not a legislative act; second, it is an act of general application because it is indisputable that the provisions of the contested regulation were addressed in abstract terms to an indeterminate number of persons and apply to objectively determined situations.⁹⁵

As for the other conditions required by the fourth paragraph of article 263 of TFEU, the General Court first considered the applicants directly concerned by the contested regulation because their activity involves fishing for Bluefin tuna using purse seiners. Second, when Member States stopped fishing after the contested regulation, Member States were not required to adopt any implementing measure.⁹⁶

93. TFEU, *supra* note 15, art. 263(4) (providing that any natural or legal person may, under certain express conditions, contest an act that affects or is of direct and individual concern to them, or contest a regulatory act that is of direct concern to them and does not involve implementing measures).

94. T-367/10, *Bloufin Touna Ellas Naftiki Etaireia v. Commission*, (E.C.R. Feb. 27, 2013) ¶ 1 available at <http://curia.europa.eu> (concerning an action for annulment for a Regulation forbidding Bluefin tuna fishing activities for seiners of France or Greece, fishing in the Atlantic Ocean, east of longitude 45° west, and in the Mediterranean Sea).

95. *Bloufin Tuna*, 2013 E.C.R. ¶ 19.

96. *Id.* ¶¶ 20-21

The Court reasoned that the directly concerned requirement was a “subjective” element and concerns the impact of the contested act on the legal situation of the applicant where no subsequent discretionary act is necessary to produce such an impact. On the other hand, the Court construed “requiring implementing measures” as an “objective” element that referred to the act itself, which requires a subsequent intervention at the national or European level to produce legal effects. The Court dismissed the action on the merits, but this case appears to confirm that the entry into force of the new regime, at least to some extent, enhanced private individuals’ access to justice before the European courts.

IV. FILLING THE GAPS OF PRIVATE INDIVIDUALS’ ACCESS TO THE ACTION FOR ANNULMENT: IS RECOURSE TO PRELIMINARY RULING A VALID ALTERNATIVE TO AN ACTION FOR ANNULMENT?

On the assumption that access to the Court for private individuals is still rather limited notwithstanding the Lisbon Treaty amendment to article 263 of TFEU, the article explores whether such a gap can be filled by recourse to other remedies provided by the treaties, in particular the preliminary ruling procedure on the validity of an EU act (article 267 of TFEU). After a brief introduction, the article considers the three main reasons that seem to justify a different position. First, the preliminary ruling is in principle, as recognized by the same ECJ, not a judicial remedy for individuals, rather a means of cooperation between national courts. Second, the preliminary ruling obligation is not enforceable; even if the Commission ascertains that the national court failed to comply with the obligation to make a preliminary reference, the concerned individual will not receive any benefit. Third, the preliminary reference offers individuals less procedural guarantees than the action for annulment.

A. INTRODUCTION

At first sight, the *Bluefin tuna* saga provides a reassuring example. First, the preliminary ruling procedure allowed private applicants to access the Court for assessing the validity of the act. Second, in certain cases, the Lisbon Treaty revision permits direct access to the

Court that the previous regime blocked. At a closer look, however, one cannot generalize the “positive” solution reached in the tuna case because, in shaping the order for reference under article 267 of TFEU, the national court closely followed the same reasoning and adopted the same arguments as the parties in the direct action set forth before the General Court.

In reality, good reasons exist for considering the European court’s interpretation of the new text of article 263, paragraph 4 of TFEU as rendering the Lisbon Treaty revision insufficient for fostering private parties’ access to justice and thereby misinterpreting the spirit of the Lisbon Treaty reform. The starting point of the whole reconstruction, or the assumption that the preliminary ruling procedure on the validity of an EU act provides a comparable legal protection to that afforded by a direct challenge against that act, is unconvincing. The next subsections discuss this further.

B. NATIONAL COURTS ARE THE “MASTERS” OF PRELIMINARY REFERENCES

To justify its strict interpretation of the admissibility conditions under article 263(4) of TFEU, the Court argues that the treaties have established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts either directly under articles 263 and 277 of TFEU or indirectly under article 267 of TFEU.⁹⁷ In other words, such alternative remedies

97. *Inuit* 2013 E.C.R. ¶ 92, (stating that the TFEU has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts); *T&L Sugars*, 2015 E.C.R. 31 (holding that where responsibility for implementing an EU act lies with the EU, natural or legal persons are entitled to bring a direct action before the EU judiciary, while when the implementation is a matter for the Member States, those persons may plead the invalidity of the basic act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the ECJ). The theory of the “complete system of remedies” has always been deeply criticized because it was not able to ensure access to justice to individuals. See Arnall, *supra* note 1, at 43 (highlighting the inadequacies of the national courts as a forum for debating the validity of Community acts); Francis G. Jacobs, *Access to Justice as a Fundamental Right in European Law*, in *MÉLANGES EN HOMMAGE À FERNAND SCHOCKWEILER* (1999) (asserting that community law protects fundamental principles derived from the national laws, such as proportionality, equality, legitimate expectations, legal certainty, and fundamental rights; however, the position of standing is more restrictive than many national legal systems); Jean-

counterbalance private individuals' limited access to direct actions, thus guaranteeing effective protection against illegal acts. In the Court's opinion, article 47 of the Charter of Fundamental Rights, which codifies the right to an effective remedy as a basic human right, would also support this, since it would require individuals to be able to challenge EU acts but does not unconditionally entitle individuals to bring an action for annulment directly before the ECJ.⁹⁸

However, even in the context of "enlarged" system of judicial protection involving both European and national courts following the new text of article 19(1) of TEU,⁹⁹ the ECJ's reasoning is not convincing.

The main reason is that preliminary ruling procedure on validity is not accessible to the parties of a dispute before national courts. Such procedure is, in principle, not a judicial remedy for individuals, rather a means of cooperation between national courts and the ECJ when an action is brought before national courts.¹⁰⁰ In fact, as the

Claude Bonichot, *Le recours des particuliers dans le droit de l'Union: parcours du combattant ou système complet de voies de recours?*, 100 L'OBSERVATEUR DE BRUXELLES 28, 30-31 (2015) (noting that attributing to preliminary ruling, rather than to the action for annulment, the role of judicial remedy at the disposal of individuals is coherent with the "decentralized" system of protection established by the treaties). The Authors, however, respectfully disagree with such approach for two main reasons (that will be better explained in this section): (a) the primary function of the preliminary ruling procedure is to ensure cooperation between ECJ and national courts and not individuals judicial protection; (b) the ECJ—according to the *Fotofrost* case law—is the only court empowered to review the validity of EU acts and therefore it is difficult to understand why it is necessary to oblige interested parties to follow a complicated route via a national court before reaching the ECJ.

98. *Inuit*, 2013 E.C.R. ¶ 105 (rejecting appellants' argument that article 47 of the Charter is incompatible with the concept of "regulatory act" found in the fourth paragraph of article 263 of TFEU); *T&L Sugars*, 2015 E.C.R. ¶ 43 (holding that article 47 of the Charter is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the EU).

99. TEU, *supra* note 33, art. 19(1) ("The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law").

100. Joined Cases C-354 & 355/04 P, *Gestoras Pro Amnistía v. Council*, (E.C.R. Oct. 26, 2006) ¶ 95 (opinion of Advocate Gen. Mengozzi) available at

Court frequently states, only the national court is responsible for deciding if a reference is necessary to resolve a specific case, and the content of the questions to refer, while the parties may only suggest the questions that they consider appropriate.¹⁰¹

It is true that a question of validity requires a decision from the ECJ even if it is raised before a “lower” court, since national courts are not empowered to declare an EU act invalid.¹⁰² Nevertheless, the Court has consistently held that any national court, including those of last resort, cannot be deprived of its competence to decide: (a) the relevance of a preliminary question, including that of validity, for the solution of the dispute¹⁰³ and (b) the very object of the questions to refer, which in principle may be different from what the parties suggested or similar to what one party requested but opposite to what the other party requested.¹⁰⁴

<http://curia.europa.eu> (noting that a reference for a preliminary ruling, including one regarding validity, is not a remedy in the true sense but a means of cooperation between national courts and the Community court in the context of an action that can be brought before national courts).

101. Case C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato*, ¶¶ 28-29, 32 (E.C.R. July 18, 2013), available at <http://curia.europa.eu> (stressing that regardless of suggestions from parties, the Court alone ultimately decides on the question).

102. See Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, (E.C.R. Oct. 22, 1987) available at <http://curia.europa.eu> (finding that the national Court cannot declare decisions of the European Commission invalid, as only the ECJ is competent to do so).

103. See Joined Cases C-297/88 and C-197/89, *Dzodzi v Belgian State* (E.C.R. Oct. 18, 1990) ¶ 34 available at <http://curia.europa.eu> (holding that it is for the national courts to determine both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court). National Court of last resort can decide not to refer a question for preliminary ruling in two different situations: in case of an “*acte éclairé*” and of an “*acte clair*”. See Joined Cases 28, 29, & 30/62, *Da Costa en Schaake N.V. v. Nederlandse Belastingadministratie*, (E.C.R. Mar. 27, 1963) ¶ 38 (noting that according to the theory of the *acte éclairé*, national courts can decide not to refer questions for preliminary ruling in some circumstances, such as when the question has already been raised in a previous ruling), and Case 283-81, *CILFIT v. Ministry of Health*, (E.C.R. Oct. 6, 1982) ¶¶ 13-14 (explaining the theory of the *acte clair*, which states that courts may not refer questions of validity and decide the matter themselves if the answer is obvious and there can be no reasonable doubt).

104. *Consiglio nazionale dei geologi*, 2013 E.C.R. ¶ 29 (affirming that the parties to the main proceedings cannot change the tenor of the questions prepared by the national court).

In light of this, it does not seem possible to concur with the Court's finding in *Inuit* (as in other subsequent rulings) that "requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, means for reviewing the legality of [EU] acts." The Court employed such a finding to justify a strict interpretation of the new treaty provisions on standing of private applicants.¹⁰⁵ The preliminary ruling procedure enables a review of the validity of EU acts; yet, its "masters" are national courts, rather than private applicants. On the contrary, direct challenge allows applicants to fully decide the grounds for annulment (which obviously can or cannot be shared by the European courts, but this concerns the merits of the case, not its admissibility), not to mention the huge difference in terms of time and costs between a direct action before the General Court (to be brought within the two months period provided by the treaty) and a long and complicated proceedings that by its nature involves national courts (often until the last resort) and the ECJ.

C. THE FAILURE OF THE OBLIGATION TO REFER IS NOT ENFORCEABLE

There is another factor capable of further amplifying the great disparity between direct and indirect access to the European courts and that depends on the structural differences existing between the two remedies. In fact, if the General Court dismisses an action as inadmissible or unfounded, individuals concerned can challenge that decision before the ECJ; if a national court of last instance, instead, breaches its obligation to refer to the ECJ under article 267, paragraph 3 of TFEU, very limited remedies are available to unsatisfied private parties.¹⁰⁶

First, failing to comply with the obligation to make a preliminary reference can lead the Commission to open an infringement

105. *Inuit*, 2013 E.C.R., ¶ 95 (owing this to the fact that parties have the right to challenge the legality of an EU act of general application by challenging its implementing measures).

106. *But see* Draft Treaty Establishing the European Union art. 43, Feb. 14, 1984, 1984 O.J. (C 77) 33 (proposing a right of appeal to the ECJ against the decisions of national courts of last instance where reference to the Court for a preliminary ruling was refused or where a preliminary ruling of the Court was disregarded).

procedure against the Member State in question under article 258 of TFEU.¹⁰⁷ However, according to the Court's case law,¹⁰⁸ the Commission enjoys full discretion in deciding whether or not to commence infringement proceedings and to refer a case to the Court. Moreover, such a remedy risks being ineffective for the interested person because, when the Commission potentially opens an infringement procedure or a ECJ judgment under article 258 of TFEU, it has no consequences on the national judicial decision taken in breach of the obligation to refer, which will become *res iudicata* when all national judicial remedies have been exhausted. In fact, once a national judicial decision reaches the final stage, it can be no longer called into question, even if doing so would enable the Member State to remedy an infringement of EU law.¹⁰⁹ This principle, affirmed by the ECJ, can be set-aside only in very specific situations,¹¹⁰ which must be assessed on a case-by-case basis.

107. Case C-129/00, *Comm'n v. Italy*, (E.C.R. Dec. 9, 2003) ¶ 29 available at <http://curia.europa.eu> (“[A] Member State's failure to fulfill obligations may, in principle, be established . . . whatever the agency of that State whose action or inaction is the cause of the failure to fulfill its obligations, even in the case of a constitutionally independent institution”).

108. Case 247/87, *Star Fruit Co. SA v. Comm'n*, (E.C.R. Feb. 14, 1989) ¶ 11 available at <http://curia.europa.eu> (claiming that because of this discretion, individuals cannot requires the Commission to adopt any specific position); see also Roberto Mastroianni, *The Enforcement Procedure Under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?*, 1 EUR. PUB. L. 535, 536-37 (1995) (contesting the Commission's wide discretion and requiring at least a statement of reasons in case the Commission does not follow the complainant's request).

109. See Case C-234/04, *Kapferer v. Schlank & Schick GmbH*, (E.C.R. Mar. 16, 2006) ¶ 21 available at <http://curia.europa.eu> (noting that Community law does not “require” national courts to remove finality of a decision in these circumstances).

110. See Alexander Kornezov, *Res Judicata of National Judgments Incompatible with EU Law: Time for a Major Rethink?*, 51 COMMON MKT. L. REV. 809, 819-24 (2014) (indicating that “there have so far been three judgments in which the Court has had to deal with the question of the objective limits of authority of *res iudicata* of national judgments incompatible with EU law”); Case C-224/01, *Köbler v. Austria*, (E.C.R. Sept. 30, 2003) ¶ 39 (holding that the applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res iudicata* of the judicial decision which was responsible for the damage); Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, (E.C.R. July 18, 2007) ¶ 63 (finding that Community law precludes the application of a provision of national law which seeks to lay down the principle of *res iudicata* in so far as the application of that provision prevents the recovery of state aid granted in breach of

Second, another potential form of redress in case of a breach of the duty to refer is filing a domestic action for damages against the Member State concerned. In *Francovich v. Italy*,¹¹¹ *Brasserie du Pêcheur SA v. Germany*,¹¹² and in a numerous other judgments,¹¹³ the Court held that parties must fulfill three conditions to establish state liability: (1) the rule of law infringed must be intended to confer rights on individuals; (2) the breach must be sufficiently serious; and

Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final); Case C-2/08, *Amministrazione dell'Economia e delle Finanze and Agenzia delle Entrate v. Fallimento Olimpiclub Srl*, (E.C.R. Sept. 3, 2009) ¶ 29 available at <http://curia.europa.eu> (reasoning in the interest of legal certainty and principle of effectiveness that “not only does the interpretation in question prevent a judicial decision that has acquired the force of *res judicata* from being called into question, . . . it also prevents any finding on a fundamental issue common to other cases . . . from being called into question”); see also Case C-213/13, *Impresa Pizzarotti & C. SpA v. Comune di Bari*, ¶ 64 (E.C.R. July 10, 2014), available at <http://curia.europa.eu> (holding that to the extent that it is authorized to do so by the applicable domestic rules of procedure, a national court which has given a ruling at last instance, without a reference having first been made to the Court of Justice under Article 267 of TFEU, that has led to a situation which is incompatible with the EU legislation must either supplement or go back on that definitive ruling so as to take into account any interpretation of that legislation provided by the Court subsequently).

111. Joined Cases C-6 & 9/90, *Francovich v. Italy*, (E.C.R. Nov. 19, 1991) available at <http://curia.europa.eu> (recognizing the principle of state liability as a direct consequence of the duty of sincere cooperation, as set out in article 4(3) of TEU).

112. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany*, (E.C.R. Mar. 5, 1996) available at <http://curia.europa.eu> (holding that the principle of state liability applies to any breach of EU law, “whatever be the organ of the State whose act or omission was responsible for the breach”).

113. See Case C-118/08, *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado*, ¶¶ 29-48 (E.C.R. Jan. 26, 2010), available at <http://curia.europa.eu> (making clear, along with the cases cited therein, that if these conditions are satisfied, the Member State must make the reparation on the basis of national law, provided that these rules are not less favorable than those relating to similar domestic claims, as well as not framed as to make gaining reparation “impossible or excessively difficult”); Case C-445/06, *Danske Slagterier v. Bundesrepublik Deutschland*, ¶¶ 37-39 (E.C.R. Mar. 24, 2009) available at <http://curia.europa.eu> (concerning the compatibility of a limitation period for the action for reparation of loss or damage with the principles of equivalence and effectiveness); Case C-470/03, *A.G.M.-COS.MET Srl v. Suomen valtio*, (E.C.R. Apr. 17, 2007) ¶¶ 75-99 available at <http://curia.europa.eu> (mentioning that EU law does not preclude individual civil servants being personally liable in addition to the State).

(3) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. However, according to the Court,¹¹⁴ the breach of the obligation to refer is not a sufficiently serious violation per se, which makes obtaining reparation very difficult.

Remarkably enough, individuals have a greater opportunity to obtain reparation by bringing an action against the State before the European Court of Human Rights (“*Eur.Ct.H.R.*”), which is a completely different context from EU legal order. In fact, recent *Eur.Ct.H.R.* judgments¹¹⁵ confirm that a national jurisdictional procedure is not “fair” and therefore violates article 6(1) of ECHR if the national court of last resort does not respect the obligation to refer notwithstanding the applicant’s request. In any event, the actions against the State brought by private applicants before the *Eur.Ct.H.R.* aimed to obtain, *in casu*, just satisfaction. However, in many cases this was insufficient to undo the injustice to the individual caused by the contested EU measure.¹¹⁶

114. See *Köbler*, 2003 E.C.R. (finding that the decision of the Verwaltungsgerichtshof dismissing Mr Köbler’s action did not constitute a manifest infringement of Community law and thus does not render the Austrian State liable); see also FABIO FERRARO, *LA RESPONSABILITÀ RISARCITORIA DEGLI STATI PER VIOLAZIONE DEL DIRITTO DELL’UNIONE* (2012).

115. See *Dhahbi v. Italy*, App. No. 17120/09, ¶¶ 33-34 (Eur. Ct. H.R. Apr. 8, 2014), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-142504> (holding that Italy violated article 6 of the Convention because the national court of last instance did not explain why it decided not to make the preliminary reference to the ECJ); *Ullens de Schooten & Rezabek v. Belgium*, App. Nos. 3989/03 & 38353/07, ¶¶ 59-60 (Eur. Ct. H.R. Sept. 20, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108382> (affirming that article 6(1) “imposes . . . in this context, an obligation on domestic courts to give reasons, in the light of the applicable law, for any decisions in which they refuse to refer a preliminary question, especially where the applicable law allows for such a refusal only on an exceptional basis”). See generally Luc Donnay, *L’obligation incombant au juge de poser une question préjudicielle à la Cour de justice, élément vaporeux du procès équitable*, 96 REVUE TRIMESTRIELLE DES DROITS DE L’HOMME 887, 902 (2013) (noting that the Strasbourg Court is frequently called upon to intercede and provide commentary on the application of the EU law but attempts to do so in a delicate manner).

116. See *Kornezov*, *supra* note 110, at 810 (providing the example of persons still subject to discrimination or who cannot effectively exercise their right to free movement and damages cannot undo these injustices).

D. THE LIMITED PROCEDURAL GUARANTEES OFFERED IN A
PRELIMINARY RULING PROCEEDING

In addition, the preliminary ruling procedure offers fewer procedural guarantees than a direct action. This is particularly true for the author of the contested European act.

First, the Institution adopting the contested measure is not a party to the procedure from the beginning to the end. The preliminary ruling procedure allows EU institutions to intervene before the ECJ.¹¹⁷ However, the same institution also cannot file an intervention before the national court. The latter would then take its decision without having the opportunity to hear the views of the act's author. On the contrary, in a direct action, the institution that adopted the contested measure is a party to the procedure from the beginning to the end.¹¹⁸

Second, rules governing preliminary ruling procedure can determine a breach of the *audi alteram partem* principle. According to the Court's procedural rules, in a preliminary ruling proceeding, the parties have to send their written pleadings simultaneously, without having the opportunity to read the counterparty's pleading and to answer to the observations provided therein, if not at the hearing (if one takes place).¹¹⁹ On the contrary, a direct action allows

117. Rules of Procedure of the Court of Justice art. 96, 2012 O.J. (L 265) 1, 29 (allowing the Institution that adopted the act to submit observations to the ECJ). *See also* UPA, 2002 E.C.R., ¶ 46 (opinion of Advocate Gen. Jacobs) (preferring proceedings before the General Court under article 230 of EC over reference proceedings under article 234 of EC, in part because in the latter only Institutions can submit observations, not individual third parties); Waelbroeck & Bombois, *supra* note 31, at 20 (noting that the preliminary ruling offers less procedural guarantees than a direct action).

118. *See* Protocol (No. 3) on the Statute of the Court of Justice of the European Union art. 40, 2010 O.J. (C 83) 210 (stating that, according to article 40(1) of the Statute of the Court, institutions and Member States may intervene before the ECJ).

119. *See id.* art. 23(2) (affirming that the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court within two months of this notification); *see also* UPA, 2002 E.C.R. ¶ 46 (opinion of Advocate Gen. Jacobs) (finding direct action's preferable because they are unlike reference proceedings, which involve only a "single round of observations followed by oral observations before the Court"); *see also* Waelbroeck & Bombois, *supra* note 31,

for a full exchange of pleadings; in fact, the application and the defense are normally followed by a reply and a rejoinder.¹²⁰

Third, the preliminary ruling procedure makes it difficult for other individuals to intervene before the ECJ. In a preliminary ruling proceeding, interested individuals cannot submit their observations to the ECJ, unless they have already taken part in the proceedings before the national court.¹²¹ In contrast, a direct action allows parties that are able to establish a sufficient interest to intervene before the ECJ.¹²²

Fourth, the interim measures adopted by a national court have a limited effectiveness. If a national court considers it appropriate to adopt interim measures, the effects of those measures only concern the relevant Member State. Therefore, applicants may need to bring proceedings in more than one Member State to obtain interim protection of their legitimate interests. On the contrary, interim measures adopted by ECJ in the course of a direct action are immediately applicable in all EU countries.¹²³

Fifth, some national jurisdictions may not refer questions to the ECJ.¹²⁴ According to the ECJ, national courts must comply with a few requirements in order to be considered as a “court” authorized to

at 21 (noting that the preliminary ruling offers less procedural guarantees than a direct action).

120. Rules of Procedure of the Court of Justice, *supra* note 117, art. 126 (stating that the application initiating proceedings and the defense may be supplemented by a reply from the applicant and by a rejoinder from the defendant).

121. *See id.* art. 96 (excluding interested individuals that are not parties to the main proceedings from a list of parties authorized to submit observations in preliminary ruling proceedings); *see also* UPA, 2002 E.C.R. ¶ 47 (opinion of Advocate Gen. Jacobs) (stressing that meeting the prerequisite of taking part in the proceedings before the national court can be difficult because most individuals are likely not aware of actions in the national courts at sufficiently early stages).

122. *See* Rules of Procedure of the Court of Justice, *supra* note 117, art. 130 (providing that the application to intervene should also explain the circumstances establishing the right to intervene).

123. *See* TFEU, *supra* note 15, arts. 278-79 (holding that actions brought before the Court of Justice “shall not have suspensory effect” and prescribing the Court with the power to prescribe necessary interim measures in any case); *see also* UPA, 2002 E.C.R. ¶ 44 (opinion of Advocate Gen. Jacobs) (explaining that bringing proceedings in different Member States opens the possibility of conflicted decisions in each State, subverting uniform application of Community law).

124. *See* Waelbroeck & Bombois, *supra* note 31, at 20 (noting that the preliminary ruling offers less procedural guarantees than a direct action).

refer. Therefore, not all national courts meet these requirements. For example, this is the case for arbitration tribunals.¹²⁵

To conclude, the different rationale underlying the preliminary ruling and the action for annulment also influences the structure of the two remedies. Consequently, the preliminary ruling, which is in principle a means of cooperation between courts, does not offer the same procedural guarantees of a direct action. The structural and procedural differences between the two remedies cast serious doubts on the ECJ's finding that the two procedures are equivalent in terms of effectiveness of judicial protection. In addition, it is doubtful that the Court's interpretation of article 263(4) is compatible with present and future international obligations of the EU.

V. INTERPRETING THE ADMISSIBILITY REQUIREMENTS OF ARTICLE 263 TFEU IN THE LIGHT OF INTERNATIONAL AGREEMENTS

The EU is a contracting party to a number of international agreements, granting rights or imposing obligations vis-à-vis third-states or other international organizations. Often these agreements aim to improve private individuals' rights in their relations with public power, including European institutions. This article argues that a more generous approach by the Court towards "non-privileged" applicants, in particular a stricter interpretation of "implementing measures," would be more in line not only with the "internal" requirements of the rule of law but also with international obligations of the EU. The next subsections analyze the compatibility of the restrictive interpretation on the admissibility requirements adopted by the ECJ with the present obligations under article 6.1 of the Aarhus Convention and with the future (but, at the moment, very uncertain) obligations arising from accession to the ECHR.

125. See Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co.*, (E.C.R. Mar. 23, 1982) available at <http://curia.europa.eu> ¶ 13 (finding that arbitration procedure is not sufficient enough to the organization of legal remedies of the Member State's courts to be a national court under article 177 of the Treaty).

A. THE ADMISSIBILITY REQUIREMENTS AND CURRENT
INTERNATIONAL OBLIGATIONS: THE CASE OF THE AARHUS
CONVENTION

The Aarhus Convention¹²⁶ is a multilateral agreement about government accountability, transparency, and responsiveness on environmental matters.¹²⁷ It was adopted at the Fourth “Environment for Europe” Ministerial Conference in Aarhus, Denmark on June 25, 1998 and entered into force on October 30, 2001. Currently, it counts forty-seven parties, which include all EU Member States, with the exception of Ireland, and the EU since May 2005.¹²⁸

The prescriptive part of the Aarhus Convention is structured around three pillars, namely: (1) access to environmental information to allow the public to know and understand what is happening in the environment around them;¹²⁹ (2) public participation in decision-making to improve the ability of authorities to carry out their responsibilities and to provide the necessary conditions for the public to enjoy their rights and meet their own obligations;¹³⁰ and (3) access to justice to provide procedures and remedies to members of the public to enjoy the rights enshrined in the Aarhus Convention.¹³¹

126. See U.N. Econ. Comm’n for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”), June 25, 1998, available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>. See generally Elisa Morgera, *An Update on the Aarhus Convention and its Continued Global Relevance*, 14 REV. EUR. COMMUNITY & INT’L ENVTL. L. 138, 138–47 (2005) (detailing the groundbreaking features of some of the initiatives enacted within the Convention’s framework); Vera Rodenhoff, *The Aarhus Convention and its Implications for the “Institutions” of the European Community*, 11 REV. EUR. COMMUNITY & INT’L ENVTL. L. 343, 343–57 (2002) (laying out the Convention’s pillars of public participation and access to justice and the difficulties of their implementation); Jeremy Wates, *The Aarhus Convention: A Driving Force for Environmental Democracy*, 1 J. FOR EUR. ENVTL. & PLAN. L. 2, 2–11 (2005) (providing an overview of the origin and evolution of the Convention up to 2005, as well as the role played by NGOs in the Convention).

127. See *supra* note 22.

128. U.N. Econ. Comm’n for Europe, *The Aarhus Convention: An Implementation Guide*, U.N. Doc. ECE/CEP/72/Rev.1 (2014) at 15 [hereinafter Aarhus Implementation Guide] (introducing the purpose and reasons behind the Convention).

129. *Id.* at 75.

130. *Id.* at 119.

131. *Id.* at 187.

To review contracting parties' compliance with the Aarhus Convention provisions, it is possible to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature" under article 15.¹³² Following this obligation, the Parties have elected a Compliance Committee, which members of the public can also trigger.¹³³

For the purpose of the article's analysis, it is worth focusing on article 9 of the Aarhus Convention, which requires Parties to put in place adequate (administrative or judicial) review procedures to safeguard the rights provided in the other pillars of the Aarhus Convention.¹³⁴

According to the complaint filed in 2008 before the Compliance Committee by Client Heart, a British NGO, the EU violated article 9 "by applying the 'individual concern' standing criterion for private individuals and NGOs that challenge decisions of EU institutions."¹³⁵ In a report issued in 2011, the Committee considered that the conditions under article 230 of TEC, as interpreted by the ECJ, were too restrictive for natural and legal persons to challenge an act before the ECJ. Moreover, according to the Committee's opinion, the preliminary ruling procedure neither met the requirements of access to justice under article 9 nor compensated for the strict conditions imposed by the EU Courts.¹³⁶

132. Aarhus Convention, *supra* note 126, art. 15, (requiring that these arrangements allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention).

133. See Aarhus Implementation Guide, *supra* note 128, at 224 (listing four ways that reviews by the Compliance Committee can be triggered: (i) a Party can make a submission about compliance by another Party; (ii) a Party may make a submission concerning its own compliance; (iii) the secretariat may make a referral to the Committee; (iv) members of the public may make communications concerning a Party's compliance with the Convention).

134. Aarhus Convention, *supra* note 126, art. 2(2)(d), 9(3) (stating that each Party should ensure that, where they meet the criteria, if any, set forth 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).

135. U.N. Econ. Comm'n for Europe, Report of the Compliance Committee, Findings and Recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, Apr. 14, 2011 ¶ 2.

136. *Id.* ¶¶ 76-88 (examining the case law of the EU Courts on access to

More in detail, the report adopted by the Compliance Committee referred to the conditions that private parties had to fulfill to have access to justice according to article 230 of TEC, as interpreted by the ECJ. The Committee first focused on the ECJ case law on the requirements of direct and individual concern, finding that “no member of the public is ever able to challenge a decision or a regulation before the ECJ”¹³⁷ and thus concluding that the ECJ interpretation was too strict to meet the criteria of the Aarhus Convention. Then, the Committee verified whether the strict interpretation could have been “compensated for by the possibility of requesting national courts to ask for preliminary rulings by the ECJ.”¹³⁸ It concluded that the latter “cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies.”¹³⁹ On the basis of these arguments, the Committee stated that the EU fails to comply with article 9 because it neither ensures access to justice nor an alternative adequate and effective remedy.¹⁴⁰

However, the entry into force of the Lisbon Treaty and the later change in the admissibility conditions to bring an action for annulment before the ECJ convinced the Committee not to adopt a non-compliance decision. Nevertheless, the Committee specified in the report that “if the jurisprudence of the EU Courts . . . were to continue, . . . the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Aarhus Convention.”¹⁴¹ For this reason and to ensure compliance with the Aarhus Convention, the Committee suggested the ECJ to interpret the admissibility conditions of the action for annulment differently.¹⁴²

justice).

137. *Id.* ¶ 86 (explaining that because “individual concern” requires a completely individual factual situation, it can never apply to environmental and health issues).

138. *Id.* ¶ 81.

139. *Id.* ¶ 90 (continuing to find that the preliminary review system does not amount to an appellate system).

140. *Id.* ¶¶ 87, 92 (providing that “*unless fully compensated for by adequate administrative review procedures, the Party concerned would also fail to comply with article 9, paragraph 4*”).

141. *Id.* ¶ 94 (allowing for possible exception in the case of full compensation by adequate administrative review procedures).

142. *See id.* ¶ 97 (recommending a “new direction” for these admissibility conditions).

After the Lisbon Treaty entered into force, the question arises whether article 263, para 4 of TFEU complies with the Aarhus Convention requirements and, if not, what are the consequences.

A broad interpretation of “implementing measure,” as it appears in the European courts judgments considered above, confirm the doubts raised by the Compliance Committee. In fact, if a EU regulatory act intervenes in the scope of the Aarhus Convention, an interested person would not be allowed to directly challenge such act before the EU Courts: he or she would be obliged to challenge a national implementing act before a domestic court and ask for a preliminary ruling. However, according to the Compliance Committee’s opinion, the preliminary ruling is an insufficient remedy.¹⁴³ Therefore, it appears that only a narrow interpretation of the term of “implementing measure” could ensure compliance with the Aarhus Convention.

If this is true, this raises the question of whether treaty provisions require the ECJ to interpret primary law as permitting the EU to respect its international obligations. According to article 216, paragraph 2 of TFEU, “[a]greements concluded by the [EU] are binding upon the institutions of the Union and on its Member States.”¹⁴⁴ This provision appears to require the ECJ to adopt an interpretation of EU law, including primary law as provided in article 263 of TFEU, that permits the EU to fulfill its international obligations.¹⁴⁵

143. See *id.* ¶ 90 (noting that “with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice”).

144. TFEU, *supra* note 15, art. 216(2).

145. See Antonino Alì, *Some Reflections on the Principle of Consistent Interpretation Through the Case Law of the European Court of Justice*, in INTERNATIONAL COURTS AND THE DEVELOPMENTS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES 881, 892 (2013) (“resorting to an interpretation which is consistent with international law would be an opportunistic choice aimed at avoiding the deterioration of a non-compliance scenario with the Aarhus Convention”). In some cases, the ECJ has effectively recognized the possibility to interpret EU primary law in the light of International Agreements. See Case C-43/75, *Defrenne*, ¶¶ 156/58 (E.C.R. Apr. 8, 1976) available at <http://curia.europa.eu> (interpreting the treaty in the light of the ILO Convention). However, in general terms, according to the consolidated case law of the ECJ, while there is no doubt that EU secondary legislation should be interpreted as long as possible in the light of international agreements binding the EU, primary law is

The General Court examined the issue in the *Inuit* case, rejecting the applicants' argument that the Aarhus Convention obligation requires a more generous interpretation of article 263, paragraph 4 of TFEU. The General Court justified its decision by stating that international conventions cannot depart from the TFEU, which has established a complete system of legal remedies capable of ensuring judicial review of the legality of acts of the Institutions and has entrusted such review to the EU Courts.¹⁴⁶

The General Court's position is unsatisfactory. It assumes that article 263, paragraph 4 has only one possible interpretation, the narrow one, and that this interpretation cannot be challenged in the light of international agreements to which the EU is a party since such agreements are in a lower position with respect to EU primary law. In our view, the question is different. Given that the treaty provision has different possible interpretations, the General Court should select the broadest one to avoid differences with the international obligations under the Aarhus Convention. Therefore, the issue remains open.

It is true, though, that the marginal role assumed by international treaties to which the EU is a contracting party in the review of legality of EU law has been recently confirmed with specific regard to the Aarhus Convention. Overturning the General Court's ruling,¹⁴⁷ for a number of reasons that cannot be explained in detail in this article, the ECJ has affirmed that the Aarhus Convention cannot even

still seen as an autonomous legal system which is not to be prejudiced by an international agreement. Compare Case C-61/94 *Commission v. Germany*, ¶ 52 (E.C.R. Sept. 10, 1996) available at <http://curia.europa.eu> (holding that primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements) with Joined Cases C-402 and 415/05 P, *Kadi and Al Barakaat v. Council*, ¶ 316 (E.C.R. Sept. 3, 2008), available at <http://curia.europa.eu> (holding that the EC Treaty cannot be prejudiced by an international agreement).

146. *Inuit*, 2011 E.C.R., ¶ 52-55 (rejecting the argument based on the interpretation of article 263(4) of TFEU in the light of the Aarhus convention)

147. Cases T-338/08, *Stichting Natuur en Milieu and PAN Europe v Commission* and T-396/09 *Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht v Commission*, (E.C.R. June 14, 2012) available at <http://curia.europa.eu> (holding that an EU Regulation which limits the concept of 'acts' which can be challengeable under Aarhus Convention cannot be compatible with article 9(3) of the Aarhus Convention).

be considered a benchmark for the review of EU legislation.¹⁴⁸

The position taken by the ECJ is not only disappointing as to respecting international obligations of the EU, but also difficult to reconcile with the text of the treaties. In fact, international agreements represent a benchmark for the review of legality of secondary legislation. Article 216 of TFEU recognizes the binding force of international agreements upon the Union institutions and, according to article 3(5) of TEU, “the strict observance and the development of international law” is firmly among the list of the main EU objectives and values. It is evident that the interpretation given by the ECJ, which is not willing to grant judicial review of EU acts in the light of international obligations, is not in line with the above-mentioned provisions.¹⁴⁹

B. THE ADMISSIBILITY REQUIREMENTS AND FUTURE INTERNATIONAL OBLIGATIONS: THE CASE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

The ECHR¹⁵⁰ is an international treaty that aims to protect human rights and fundamental freedoms in Europe. It was adopted under the auspices of the Council of Europe in 1950 and signed by forty-seven Member States (including all the EU Member States). The ECHR lists the rights and freedoms that the contracting parties have to ensure to everyone within their jurisdiction.¹⁵¹ All matters concerning the interpretation and application of the ECHR fall under the jurisdiction of the Eur.Ct.H.R.,¹⁵² subject to the exhaustion of any available domestic remedies.¹⁵³ The Eur.Ct.H.R. judgments are binding on the contracting parties¹⁵⁴ and the Committee of Ministers,

148. Joined Cases C-401/12P to C-403/12P *Council v Vereniging Milieudefensie*; Joined Cases C-404/12P and C-405/12P *Council v Stichting Natuur en Milieu*, (E.C.R. Jan. 13, 2015) available at <http://curia.europa.eu> (holding that article 9(3) of the Aarhus Convention cannot be relied on to assess the legality of article 10(1) of Regulation No 1367/2006).

149. See Jeremy Wates, Secretary General of the European Environmental Bureau, <http://www.eeb.org/index.cfm/news-events/news/ecj-rulings-a-setback-for-environmental-democracy> (“Today’s ECJ judgments raise serious questions about what it means for the EU to be a party to an international treaty”).

150. See *supra* note 23.

151. *Id.* art. 1-18.

152. *Id.* 32(1).

153. *Id.* art. 35(1).

154. *Id.* art. 46(1).

a body composed of the Foreign Affairs Ministers of all the Member States, is responsible for supervising their execution.¹⁵⁵

The EU is not party to the Convention, although EU treaties already recognize the rights guaranteed by the ECHR as general principles of EU law.¹⁵⁶ Nonetheless, article 6(2) of TEU, as amended by the Lisbon Treaty, expressly provides that the EU “shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the treaties.”¹⁵⁷ After long negotiations, the parties reached consensus on a draft agreement of accession, but the ECJ, in its Opinion 2/13, considered that text incompatible with the EU treaties.¹⁵⁸ The parties should now enter into new negotiations, although the critical remarks contained in the ECJ Opinion and concerning the relationship between the Strasbourg Court and the ECJ make a re-negotiation of the agreement hardly realistic.

155. *Id.* art. 46(2).

156. *See* TEU, art. 6(3). As for the level of protection ensured by the ECJ, article 52(3) of the Charter of Fundamental Rights provides that EU should ensure that the rights mentioned in the Charter have at least the same level of protection granted by the ECHR.

157. For an explanation of the accession process, see Paul Craig, *EU Accession to the ECHR: Competence, Procedure and Substance*, 36 *FORDHAM INT’L L.J.* 1114, 1117-18 (2013) (providing an overview of the accession process); Francis G. Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 291, 294 (2006) (analyzing potential advantages and disadvantages of the accession); Tobias Lock, *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, 35 *EUR. L. REV.* 777, 784 (2010) (weighing the costs and benefits of having joint or joint and several liability among the Union and the Member States).

158. For a critical analysis of the Opinion: Editorial comment, *The EU’s Accession to ECHR - a “NO” from ECJ!*, 52 *COMMON MKT. L. REV.* 1-15 (2015) (affirming that the accession of EU to the ECHR may now have turned into a mission impossible); Benedikt Pirker and Stefan Reitemeyer, *Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR— One Step Ahead and Two Steps Back*, available at <http://europeanlawblog.eu> (providing a concise summary of the Court’s findings, but also some early assessment and criticism of the reactions on particular points of the Opinion). In opposing term, see Daniel Halberstam, *‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, 16 *GERMAN L.J.*, 105, 105-146 (2015) (providing a comprehensive legal analysis and constitutional reconstruction of the Opinion’s many objections to show why the Court’s concerns are mostly warranted).

In any case, if the EU accedes to the ECHR, the former will be held directly liable for breaches of ECHR. In the light of the above, doubts arise as to whether the system of remedies established by the treaties is compatible with the right of access to the courts as guaranteed and protected by article 6 of ECHR.¹⁵⁹

According to article 6 of ECHR, everyone has the right to access to national courts¹⁶⁰ to “challenge an act interfering with his rights.”¹⁶¹ However, as explained by the Strasbourg Court, such right may be subject to limitations that (1) do not impair the very essence of the right and (2) pursue a legitimate aim in a proportionate manner.¹⁶²

The Eur.Ct.H.R. considers that the first condition is not met if one is obliged to breach the law in order to have access to a Court¹⁶³ or when it is required to fulfil conditions that are not under his or her control.¹⁶⁴ As explained above,¹⁶⁵ the new wording of article 263 of TFEU, as interpreted by the ECJ, limits the right to access to the

159. See Hildur Briem, *The Preliminary Ruling Procedure as Part of a ‘Complete System of Remedies’: Does the Obligation Seek a Preliminary Ruling Ensure Effective Judicial Protection of Individuals?* 1 (Spring 2005) (unpublished Masters thesis, University of Lund) (affirming that the indirect access of individuals to justice by means of the preliminary ruling procedure does not comply with articles 6 and 13 of the ECHR).

160. *Golder v. United Kingdom*, App. No. 4451/70, ¶ 36 (Eur. Ct. H.R. Feb. 21, 1975) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496> (stressing that article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal).

161. *Cordova v. Italy*, App. No. 40877/98, ¶ 52 (Eur. Ct. H.R. Jan. 30, 2003) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60913> (declaring that a right to ask a preliminary question is not a sufficient way to provide for this right).

162. *Petko Petkov v. Bulgaria*, App. No. 2834/06, ¶ 27 (Eur. Ct. H.R. Feb. 19, 2013) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116594> (explaining that these limitations are allowed because “the right of access by its very nature calls for regulation by the State, which enjoys a certain margin of appreciation in this regard”).

163. *Posti and Rahko v Finland*, App. No. 27824/95, ¶ 64 (Eur. Ct. H.R. Sept. 24, 2002) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60644> (holding that no one can be required to breach the law so as to be able to have a “civil right” determined in accordance with article 6 § 1).

164. *Melis v Greece*, App. No. 30604/07, ¶ 28 (Eur. Ct. H.R. July 22, 2010) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100054> (holding that requiring individuals to fulfil conditions that are not under their control constitutes a breach of article 6 ECHR).

165. See *supra* Section IV.

European courts in such a way that the very essence of the right appears to be impaired. In particular, the ECJ's approach, which considers preliminary ruling procedure and direct challenge as comparable mechanisms of judicial protection, could be problematic. In fact, as explained above, the preliminary ruling is an incidental procedure "*de jure à jure*"¹⁶⁶ and not a judicial remedy for private applicants.

Concerning the second condition, the Eur.Ct.H.R. considers a system of limited access to justice as legitimate, if the aim is to ensure that the courts are not overburdened with excessive and manifestly ill-founded applications.¹⁶⁷ Therefore, in principle, the strict interpretation given by the ECJ on article 263(4) of TFEU could be justified on this ground. However, the test first requires proof that a different solution would bring about an unbearable "charge de travail" on the shoulders of the European courts; second, that no other "less restrictive means"¹⁶⁸ may suffice to achieve the above objective. In both cases, we believe that it would be a very hard task.

Therefore, it could be reasonably argued that the interpretation of article 263(4) of TFEU provided by the ECJ would be different from the obligations that the EU will contract when it finalizes its accession to the ECHR. However, given that re-negotiating the accession agreement seems difficult at this stage, the article analyses whether the Eur.Ct.H.R. could exercise its power of control over the EU before the formal accession.

166. *Sejdovic v Italy* App. No. 56581/00, ¶ 45 (Eur. Ct. H.R. March 1, 2006) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72629> (pointing out that when it comes to judging on the exhaustion of domestic remedies, the procedures that are not accessible to parties do not have to be considered as remedies to be exhausted).

167. *Stanev v. Bulgaria*, App. No. 36760/06, ¶ 242 (Eur. Ct. H.R. Jan. 17, 2012) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108690> (holding that Member States can limit access to the courts with the sole aim of ensuring that the courts are not overburdened with excessive and manifestly ill-founded applications).

168. *Id.* (suggesting instead to limit the frequency with which applications may be made, or a system for prior examination of admissibility on the basis of the file).

1. The Possible Way Out: Setting Aside Bosphorus Doctrine?

According to some scholars,¹⁶⁹ the Eur.Ct.H.R. already enjoys jurisdiction over EU respect of fundamental rights as enshrined in the ECHR.

In fact, while Eur.Ct.H.R. does not hold jurisdiction to “directly” examine EU acts,¹⁷⁰ it could be competent, at least *in abstracto*, to exercise an “indirect” control over measures adopted by EU Member States that implement EU acts. In fact, EU Member States, which are also ECHR Members, are in principle responsible for actions and omissions of their bodies under their domestic law or under their international legal obligations.¹⁷¹ Therefore, they could be held responsible for breaching fundamental rights guaranteed by the ECHR when giving execution to EU primary¹⁷² or secondary law.¹⁷³

Until now, however, this has never happened. The Strasbourg Court has considered that the EU, to which Member States transferred part of their powers, was able to ensure a level of protection equivalent to that provided by the ECHR, as to both substantive guarantees offered and mechanisms controlling the observance of Convention obligations (“Bosphorus doctrine”).¹⁷⁴

169. See Waelbroeck & Bombois, *supra*, note 31, at 25-37.

170. *Connolly v. 15 EU Member States*, App. No. 73274/01, (Eur. Ct. H.R. Dec. 9, 2008) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90864> (holding that EU is not party to the Convention and thus it cannot be held responsible for any violation of the latter).

171. *Bosphorus v. Irlande*, App. 45036/98, ¶ 153 (Eur. Ct. H.R. June 30, 2005) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564> (holding that a contracting party is responsible under article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations). See also ECHR, *supra* note 23, art. 1 (stating that the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention).

172. *Matthews v. United Kingdom*, App. 24833/94, ¶¶ 26-35 (Eur. Ct. H.R. Feb. 18, 1999) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58910> (holding UK responsibility when giving execution to EU primary law).

173. *M.S.S. v. Belgium and Greece* App. 30696/09, ¶¶ 335 (Eur. Ct. H.R. Jan. 21, 2011) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050> (holding Belgium responsibility when giving execution to EU secondary law).

174. *Bosphorus v. Irlande*, App. 45036/98, ¶ 155, 165 (holding that the protection of fundamental rights by Community law can be considered to be “equivalent” to that of the Convention system).

Therefore, both state actions taken in compliance with EU rules¹⁷⁵ and the guarantees ensured in the procedures before the ECJ¹⁷⁶ are presumed to be compatible with ECHR.

Applying the Bosphorus doctrine, the Eur.Ct.H.R. has recently considered that the EU is capable of ensuring the right of individuals to have access to the Court. In particular, the Strasbourg Court having recognized that “individual access to the [ECJ] is far more limited than the access private individuals have to the Court under article 34 of the Convention” and concluded that “the supervisory mechanism provided for in [EU] law affords protection comparable to that provided by the Convention.”¹⁷⁷

Although the ruling recognizes that the judicial protection offered by the EU can be equivalent to that granted under the ECHR in applying the Bosphorus doctrine, such conclusion is not definitive. In fact, the presumption of equivalence between the EU and ECHR is not absolute, but it can be rebutted if the protection of ECHR rights in a specific situation has been “manifestly deficient.”¹⁷⁸

In that case, the Eur.Ct.H.R. would be called to examine the compatibility of EU provisions with the ECHR before a formal accession by judging the breaches of the Convention caused by Member States when giving execution to EU Law.¹⁷⁹ In particular,

175. *Id.* ¶ 155 (holding that a state action taken in compliance with EU legal obligations is justified as long as the relevant organization is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides protection).

176. *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. The Netherlands*, App. 13645/05, ¶ B.3 (Eur. Ct. H.R. Jan. 20, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91278> (holding that procedures before the ECJ offered guarantees which ensured equivalent protection of the applicant).

177. *Michaud v. France* App. 12323/11, ¶ 111 (Eur. Ct. H.R. Dec. 6, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115377> (holding that the EU affords protection comparable to that provided by the Convention because (i) private individuals are protected under Community law by the actions brought before the ECJ by the Member States and the institutions of the EU and (ii) individuals may possibly apply to the domestic courts to determine whether a Member State has breached Community law, in which case the control exercised by the ECJ takes the form of the preliminary referral procedure open to the domestic courts).

178. *Bosphorus v. Irlande*, App. 45036/98, ¶ 155.

179. See Waelbroeck & Bombois, *supra* note 31, at 27 (considering the ECHR applicable *ratione personae* and *ratione materiae* to Member States when

the Eur.Ct.H.R. would hold jurisdiction to ascertain whether EU acts (*rectius* EU measures implemented by the State) are capable to affect the right of individuals to have access to the Court, as set out in article 6(1).¹⁸⁰

These brief considerations have shown that, *in abstracto*, after the negative opinion of the ECJ on the accession of the EU to the ECHR, the Strasbourg Court is already competent to examine the compatibility of EU legislation with the ECHR and to ascertain whether EU acts impair the right to access to the Court.

The Eur.Ct.H.R. President, D. Spielmann set the first signal in this direction when he affirmed that the Opinion 2/13 “deprives [citizens] of the right to have acts of the European Union subjected to the . . . external scrutiny as regards to respect for human rights” and therefore it will be for the “Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation”.¹⁸¹ We will see in the next months if the President’s position will be reflected in Eur.Ct.H.R. future judgments.

VI. CONCLUSION

This article aimed to underline the limits of the new wording of article 263(4), as interpreted by the ECJ, in terms of ensuring private applicants’ access to justice before the EU Courts. If the interpretation of the term “regulatory act,” limited only to the non-legislative acts of general application, is supported by valid arguments,¹⁸² problems arise with the interpretation of the term “implementing measure.” The solution recently adopted by the ECJ

implementing EU law).

180. *Boulois v. Luxembourg*, App. 37575/04, ¶ 90 (Eur. Ct. H.R. Apr. 3, 2012) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110164> (holding that for article 6 § 1 in its “civil” limb to be applicable, three cumulative conditions should be fulfilled: (i) there should be a dispute over a “right” recognized under domestic law, even if it is not protected by the ECHR; (ii) the dispute should be “genuine and serious”, and (iii) the result of the proceedings should be “directly decisive for the right in question”. See also Waelbroeck & Bombois, *supra* note 31, at 28 (affirming that Article 6 ECHR could also be applicable to the rules governing the action for annulment, if the latter is directly decisive for the outcome of the judgement on the contested right).

181. Eur Ct.H.R., Annual Report (2014), at 6, available at http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf.

182. See Section II A

appears quite unsatisfactory. In fact, including in the scope of this notion any measure, adopted at the national or European level, that puts the original act into operation, makes it practically impossible for private applicants, in a very high percentage of cases, to bring an action before the EU Courts.

Despite the *Bluefin tuna* saga's "happy ending," which is limited to a very specific situation, the new wording of article 263(4) of TFEU does not seem to have effectively enhanced private individuals' access to justice before the European courts.¹⁸³ While the Lisbon Treaty revisions have partly relaxed the conditions for individuals to bring an action for annulment, the strict interpretation of "implementing measures" has *de facto* confirmed largely the traditional limited access to justice for individuals.

According to the ECJ, the declaration of inadmissibility of applications made by individuals would not leave them deprived of judicial protection because they could always argue the invalidity of the contested act before the ECJ via the preliminary ruling procedure.¹⁸⁴ However, the two remedies are by no means equivalent; as repeatedly held by the same Court, the preliminary ruling is in principle a means of cooperation between courts and is not mainly intended to ensure judicial protection to individuals.

The question is now settled by the Grand Chamber and therefore it is difficult to expect a change in the Court's position. In any event, for a more convincing interpretation of article 263, para 4 of TFEU, a simple and linear legal reasoning could be followed. First, the Court should interpret the contested regulatory act to establish whether it produces immediate legal effects, thus being immediately challengeable before the ECJ, or rather requires "implementing measures" to be contested before the national or European courts (the "objective" element). Only in the first case, the Court should also establish whether the same act directly affects the applicant in its legal position by imposing an obligation or denying a right (the "subjective" element of "direct concern"). This implies that in a situation where (as in the *T&L Sugars* case) a regulatory act is complete in its legal elements, there is no need to require an

183. See Section IV.

184. *Id.*

additional “act of application” before a national or European authority to give access to immediate judicial protection.

Such a different interpretation appears more in line with the general principle of effective judicial protection as a fundamental principle of European law, referred to in article 47 of the EU Charter of Fundamental Rights. According to this principle, “everyone whose rights and freedoms guaranteed by [EU law] are violated has the right to an effective remedy before a tribunal.”¹⁸⁵ As the Charter is fully binding upon the Institutions,¹⁸⁶ an interpretation more respectful of this principle should be preferred. If such interpretation is accepted and consequently the conditions of article 263(4) of TFEU are relaxed, then it would be possible to fully appreciate the innovative strength of the Lisbon Treaty, objectively limited by the narrow interpretation of the new text provided by the ECJ. Since the Court followed a different path, one should not exclude another episode of this long story before the Strasbourg Court.

Moreover, a less strict approach would also reaffirm the preliminary ruling procedure’s proper role as an instrument of judicial cooperation that can guide national courts in applying EU law, rather than an unsatisfactory alternative to the action for annulment.

185. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391, 453, art. 47 [hereinafter Charter of Fundamental Rights] (stating that individuals whose guaranteed rights and freedoms are violated have the right to an effective remedy before a court); *see also T&L Sugars*, 2013 E.C.R. ¶¶ 58-59 (holding that the new wording of article 263(4) of TFEU, which prevents situations where a person would have to breach the law to have access to justice, allows the right to a direct remedy guaranteed by the Charter to be implemented).

186. Charter of Fundamental Rights, *supra* note 185, art. 6(1) (stating that the rights and freedoms delineated in the Charter have the same legal effect as the treaties).