

Protection Against Acts Harmful to Human Health and the Environment Adopted by the EU Institutions

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Abstract

This chapter examines whether the EU has duly implemented its obligations regarding access to justice in environmental matters. On the one hand, EU courts remain hardly accessible to individuals seeking to challenge acts harmful to human health and the environment adopted by the EU institutions. In this regard, the Lisbon amendment of the standing requirements for non-privileged applicants has not radically changed the situation. In the light of recent decisions of the General Court, it appears that the latter has as yet resorted to a restrictive interpretation of the new prerequisites laid down in Article 263(4) TFEU. On the other hand, the internal review mechanism of EU environmental measures as provided for under secondary law does not live up to its objective of enhancing legal protection. In addition to the limited scope thereof, the EU institutions have shown much reluctance to be challenged. Therefore, it may be concluded that EU citizens are not provided with effective remedies. This represents a significant issue given the essential enforcement deficit of environment law. Arguably the EU legal system scarcely complies with the letter and the spirit of the Århus Convention with respect to access to justice.

I. INTRODUCTION

THE ÅRHUS CONVENTION on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters¹ Agreement is deemed to be a mixed agreement.²

¹ Convention on Access to Information, Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

² JHH Jans and HHB Vedder, *European Environmental Law*, 4th edn (Groningen, Europa Law Publishing, 2012) 70.

It was signed by the Commission on 25 June 1998 and approved by the Council in 2005.³ As a result, EU law should be consistent with the Århus Agreement provisions. The underlying premise of the Convention is that procedural rights relating to environmental matters should ‘contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being’.⁴ The objectives of the Convention are threefold. First, by granting citizens the right of access to environmental information, it endeavours to raise public awareness of environmental concerns and improve transparency of the national administrations and EU institutions.⁵ Secondly, it aims to secure a greater public involvement in the decision-making process so as to strengthen public support for decisions affecting the environment.⁶ Lastly, it intends to entitle individuals as well as environmental associations to challenge decisions through effective judicial mechanisms.⁷ In particular, Article 9(3) requires access to judicial or other review procedures for challenging acts and omissions by private persons and public authorities which contravene provisions of environmental law.

In order to discuss access to justice in EU law, this chapter will follow a two-tier structure. First, it will deal with the conditions under which an action for annulment may be brought by non-privileged applicants before EU courts. Article 263(4) of the Treaty on the Functioning of the EU (TFEU) sets out the standing requirements in this regard. Secondly, the so-called ‘Århus regulation’⁸ which has been enacted by the EU in an attempt to ensure compliance with the Århus Convention will be discussed. This regulation establishes inter alia a regime allowing environmental associations to apply for internal review of measures adopted by EU institutions in the field of environmental law.

At the outset, one should stress the importance of the subject at stake: the question of access to justice is nothing short of addressing the crucial issue of effectiveness and enforcement of EU law. Therefore, this article examines a fundamental component of the rule of law. More than any other field of law, environmental law requires mechanisms enabling its effectiveness. Indeed, given that the ‘environment has no voice of its own’,⁹ it is imperative that the measures aimed at its protection are susceptible to effective judicial enforcement. Without such mechanisms environmental protection measures

³ Council Decision 2005/370, OJ 2005 L124/1.

⁴ Art 1 of the Århus Convention.

⁵ Århus Convention, arts 4–5.

⁶ Århus Convention, arts 6–8.

⁷ Århus Convention, art 9.

⁸ Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to community institutions and bodies [2006] OJ L264/13.

⁹ L Krämer, ‘The Environmental Complaint in the EU’ (2009) 6 *Journal of European Environmental and Planning Law* 13, 25.

are highly likely to be left in legal limbo, regardless of their usefulness and appropriateness. Additionally, the significance of the subject-matter of this article lies in its wide scope and its numerous repercussions. Having a horizontal function, the provisions on access to justice transcend the internal boundaries of environmental law by influencing and shaping each of its sub-categories (air, biodiversity, water, installations, waste, etc).

The EU has ratified the Convention and therefore both Member States and the EU institutions are subject to its obligations. This article, however, will be focused on the implementation of the third pillar of the Convention regarding access to justice to the Union judicature. Consequently, the issue of access to justice at the Member States' level will not be examined.

II. ACTION FOR ANNULMENT

A. State of Play Prior to the Lisbon Treaty: Article 230(4) EC

i. Introductory Remarks

The right for any person to challenge the legality of any legal act which applies to him or her is the essential hallmark of a State governed by the rule of law which is proclaimed as a core value of the EU under Article 2 TEU. In providing for a 'complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions',¹⁰ the EU treaties appear to have responded to this requirement.

However, the conditions which had to be met by individual applicants prior to the entry into force of the Lisbon Treaty—under the old Article 230(4) EC—and more specifically according to the *Plaumann* case on the prerequisite of individuality, had a chilling effect on potential applicants seeking to challenge acts of Union law which had an impact on the quality of the environment. In fact, under former Article 230(4) EC, non-privileged claimants had to demonstrate that they were 'directly' and 'individually' concerned with the challenged act, conditions that were never fulfilled in cases related to enforcement of environmental law.¹¹ Consider the example of a fishing company which uses a certain fishing technique within a given

¹⁰ According to the Court of Justice, the Treaty establishes a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Courts of the European Union. See Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 [40].

¹¹ See the leading case: Case C-321/95 P *Greenpeace v Commission* [1998] ECR I-165. Cf. also: Case T-219/95 R *Danielsson et al v Commission* [1995] ECR I-03051; Case T-94/04 *European Environmental Bureau (EEB) et al v Commission* [2005] ECR II-04919; C-362/06 P *Sahlstedt & al v Commission* [2006] ECR I-2903. See on this: L Krämer, 'Environmental Justice in the European Court of Justice' in J Ebesson and P Okowa (eds), *Environmental Law and Justice in Context* (Oxford, Oxford University Press, 2009) 208; N de Sadeleer, *Commentaire Mégret Environnement et marché intérieur* (Brussels, ULB, 2009) 190–96.

area. Because the company is using a technique that any other company can use in the future, the Court would reason that the company is a member of an open category of applicants and hence does not satisfy the *Plaumann* test for individual concern.¹² Additionally, litigants have to prove that they are directly concerned by the contested act. Let us now turn to the analysis of these two standing requirements. Given that the Lisbon Treaty has not radically changed the situation, the case law dealing with Article 230(4) EC continues to be significantly relevant.

ii. Individuality

As mentioned above, the leading case with respect to the condition of individuality is the *Plaumann* ruling. In this decision, the Court held that if the applicant is not the addressee of the decision whose annulment is sought, he must show that he is individually concerned. This will only be the case if the decision 'affects it 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'.¹³

Nevertheless one could note that the *Plaumann* test is shaped according to traditional individual rights and personal interests. By contrast, environmental cases are inherently underpinned by public interest and support the preservation of common goods. It is therefore important to examine whether Union courts have somehow relaxed the interpretation of this requirement when adjudicating environmental cases.

In this regard, the ruling in the *Greenpeace* case is symptomatic of the difficulties faced by non-privileged applicants while directly challenging environmental measures.¹⁴ Greenpeace International and local associations and residents of Gran Canaria (Spain) requested the annulment of a decision adopted by the Commission to provide financial assistance from the European Regional Development Fund for the construction of two power stations on the Canary Islands, without requiring the conduct of an environmental impact assessment. The General Court asserted that the *Plaumann* doctrine should be applicable to environmental matters and refused standing to the applicants.¹⁵ The Court of Justice upheld the decision stating that:

whereas in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the contested decision ... the same

¹² Case T-177/01 *Jégo Quéré* [2002] ECR II-2365 [26].

¹³ Case 25/62 *Plaumann v Commission* [1963] ECR 95, para 107.

¹⁴ *Greenpeace v Commission* (n 11).

¹⁵ Case T-585/93 *Greenpeace e.a. v Commission* [1995] ECR II-2205 [7].

applies to associations which claim to have *locus standi* on the basis of the fact that the persons whom they represent are individually concerned by the contested decision.¹⁶

Subsequently, the General Court attempted to depart from this rigorous reading of the standing rules.¹⁷

Nevertheless, the Court of Justice made clear, in the case *Unión de Pequeños Agricultores* that this could not happen so long as the Treaty was not amended to that end.¹⁸ In particular, the Court did not grant standing to the trade association UPA, representing and acting on behalf of small Spanish agricultural businesses, which sought the annulment of a regulation reforming the common organisation of the olive oil market. Applicants were denied *locus standi* although some of its members would have to cease their economic activity because of the contested act. This decision was based on the ground that Member States were responsible for the establishment of a system of legal remedies and procedures ensuring respect of the right to effective judicial protection.

Yet the Court was exhorted by Advocate General Jacobs to reverse its long-established approach concerning the condition of individuality. The Court largely disregarded his opinion that ‘there are no compelling reasons to read into [the] notion [of individual concern] a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee’.¹⁹ Since then, the Court has maintained this rigid interpretation.²⁰

iii. Direct Causation

In the same vein as the condition of individuality, Union courts have taken a strict view when construing the requirement that applicants must be directly affected by the measure whose annulment is sought.

¹⁶ Ibid [29].

¹⁷ Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365 [50]; see T Tridimas and S Poli, ‘Locus Standi of Individuals under Article 230(4): The Return of Euridice?’ in A Arnall, P Eeckhout, T Tridimas (eds), *Community and Change in EU Law. Essays in Honor of Sir Francis Jacobs* (Oxford, Oxford University Press, 2008) 70.

¹⁸ *Unión de Pequeños Agricultores v Council* (n 10) [44]. See for a critical analysis of this case: P Craig and G de Búrca, *EU Law. Text, Cases and Materials*, 5th edn (Oxford, Oxford University Press, 2011) 504.

¹⁹ Opinion of Advocate General Jacobs delivered on 21 March 2002 prior to C-50/00P *Unión de Pequeños Agricultores* [2002] ECR I-6677, [59].

²⁰ See for another case where regional entities and environmental associations disputed the validity of a regulation on the management of fishing areas and resources in the EU. Case C-444/08P *Região autónoma dos Açores v Council* [2009] ECR I-200. Cf. also: Case T-291/04 *Enviro Tech Europe Ltd & al v Commission* [2011] (n 10) [103]. The General Court’s jurisprudence is consonant with the settled case law of the Court of Justice, see for instance: Case T-83/92 *Zunis Holdings S.A. v Commission* [1993] ECR II-1169.

The Court of Justice has repeatedly stated that the measure contested:

must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.²¹

This condition has also proven to be a major obstacle for applicants in the field of environmental litigation. A good illustration of this is provided by the *Sahlstedt* case where nature conservation law was reviewed by the Court.²²

The Habitats Directive obliges Member States to create the well-known ‘Natura 2000 network’ that is made up of numerous protected areas.²³ The establishment of this EU-wide ecological network requires inter alia the Commission to adopt a decision by which it establishes a draft list of sites considered to be of Community importance.²⁴ In this context, actions were brought by landowners who sought annulment of Commission decisions designating their own lands as being part of this network.²⁵ The General Court dismissed the applications for annulment on the ground that the contested decision did not produce, by itself, effects on the applicants’ legal situation.²⁶ In other words, some discretion was conferred on national authorities, which were responsible for the implementation of the contested decision. The appeal lodged before the Court of Justice was likewise rejected because the applicants did not meet the standing requirements.²⁷

Furthermore, Union courts appear to be reluctant to unlock their doors to non-privileged applicants disputing the validity of Union rules adopted in order to tackle climate change. The cornerstone of the EU strategy in this field lies in the emission trading scheme (ETS).²⁸ The latter allows stationary CO₂-emitting installations to trade the allowances assigned to them in the National Allocation Plans (NAPs) with other installations covered by the

²¹ Case C-386/96P *Société Louis Dreyfus & Cie v Commission* [1998] ECR I-2309 [43].

²² Case C-362/06P *Sahlstedt v Commission* [2009] ECR I-2903.

²³ Directive 92/43/EEC of the Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L7/206. Cf for further developments about this directive: N de Sadeleer ‘Habitats Conservation in EC Law: From Nature Sanctuaries to Ecological Networks’ (2005) *Yearbook of European Environmental Law* 215–52.

²⁴ Art 4(2) Directive 92/43/EEC.

²⁵ *Sahlstedt* (n 22).

²⁶ Case T-150/05 *Sahlstedt and Others v Commission* [2006] ECR II-1853 [54].

²⁷ In spite of the Opinion of AG Bot who felt that the applicants did satisfy the standing requirements: Opinion of AG Bot in Case C-362/06P *Sahlstedt v Commission* [2009] ECR I-2903 [68].

²⁸ The ETS system was created under Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ L275/32. Cf for further developments about this directive: C Poncelet, ‘The Emission Trading Scheme Directive: Analysis of Some Contentious Points’ (2011) 20 *European Energy and Environmental Law Review* 245–55.

scheme. The allocation process of these allowances provided that Member States were responsible for the drafting of their NAP.²⁹ Subsequently, the latter were submitted to the Commission which adopted or rejected it. National authorities had then to decide the total quantity of allowances.

This legal regime gave rise to intense judicial battles before the Union judiciary. Undertakings operating steel mills challenged several Commission decisions approving particular NAPs. In the *US Steel Košice* case,³⁰ the applicant sought annulment of the Slovak NAP which imposed a significant reduction of the allocated allowances. It was claimed that the allocation proposed provided an undue advantage to one operator, thereby breaching the rules on State aid. The Court concluded that Member States were bound by the overall emission ceilings laid down in the Commission decision but could rely on some discretion in making individual allocations of emission allowances. Therefore, the contested act did not constitute the definitive decision affecting the legal situation of the applicants which thus were not regarded as directly affected by the measures at stake.

It is striking to observe that among the numerous cases brought by private parties against NAPs, none of them overcame the hurdle of admissibility due to a lack of standing. The only decision in which Union courts ruled on the merits of such a case was delivered following a preliminary reference.³¹

The analysis of this body of case law highlights the major difficulties encountered by individuals while seeking to challenge acts adopted by the EU institutions which are likely to harm the environment. Non-privileged applicants have been repeatedly denied standing in environmental litigation. In essence, most environmental measures do not create situations that are 'peculiar' to anyone within the meaning of the *Plaumann* doctrine. In fact, the condition of individuality as construed by the Court was virtually impossible to fulfil. In other words, environmental measures were immune from judicial review initiated by individuals. In such a context, there is a strong possibility that these measures taken by the EU authorities were enforced in spite of their potential unlawfulness. This in turn may affect the quality of the environment.

This line of cases should lead to a critical assessment to which it is now turned.

²⁹ Directive 2003/87/EC arts 9–11.

³⁰ Case C-6/08P *US Steel Košice v Commission* [2008] ECR I-96.

³¹ Case C-127/07 *Arcelor Atlantique and Lorraine and Others v Premier Ministre* [2008] ECR I-9895. Cf for an in-depth analysis of the case law: J van Zeben, 'The European Emission Trading Scheme Case' (2009) 18 *Review of European Community and International Environmental Law* 119–28.

iv. Critical Remarks

As a result of the orthodox approach elaborated by the Union judiciary, Article 230(4) EC was very far from offering an *actio popularis* for the protection of the environment but rather constituted the major stumbling block for claimants.

In view of the foregoing, one could question whether such an interpretation of the standing rules is compatible with the letter and the spirit of the Århus Convention. Remarkably the Court of Justice itself has indicated that national courts should try to render Article 9(3) of the Convention³² applicable ‘to the fullest extent possible’.³³ Bearing in mind that the EU institutions are also bound by the Convention, it is evident that Union courts are subject to the same requirement. This view is further buttressed by the Charter of Fundamental Rights of the EU³⁴ which ensures a right to effective judicial review as well as a high level of human health and environmental protection.³⁵ Furthermore, the Implementation Guide of the Århus Convention indicates that the latter ‘encourages a broad interpretation of who has “standing” to bring a challenge’.³⁶

In this regard, it is necessary to examine whether the restrictive approach taken by the Court of Justice is compatible with the position of the Compliance Committee set up under the Århus Convention.

In the Committee’s opinion, contracting parties are not entitled to ‘introduc[e] or [maintain] so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment’.³⁷ Unsurprisingly, it has repeatedly emphasised that a broad interpretation of the Convention should be the rule, not the exception.³⁸ In December 2008, an NGO active

³² Art 9(3) reads as follows:

In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

³³ Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] (nyr) [51].

³⁴ The Charter is part of EU law according to Art 6(1) TEU.

³⁵ Charter of Fundamental Rights of the European Union, arts 52(3), 35 and 37. See N de Sadeleer, ‘Enforcing ECHR Principles and Fundamental Rights in Environmental Cases’ (2012) 81 *Nordic Journal of International Law* 39–74.

³⁶ S Stec, S Casey-Lefkowitz (eds), *The Aarhus Convention: An Implementation Guide* (United Nations. Economic Commission for Europe, 2000) 136 available at: www.unecce.org/env/pp/acig.pdf. Note: This guide, however, does not have any authoritative status. Cf: Case C-182/10 *Solvay & al v Région Wallonne* [2012] (nyr) [28].

³⁷ Compliance Committee, Aarhus Convention, 14 June 2005, Compliance by Belgium, ACCC/C/2005/11.

³⁸ A Andrussevych, T Alge, C Clemens (eds), *Case Law of the Aarhus Convention Compliance Committee (2004–2008)* (Lviv, RACSE, 2008) 44. This digest provides a review of the Committee case law. See also A Andrussevych, T Alge, C Clemens (eds), *Case Law of the Aarhus Convention Compliance Committee (2008–2011)* (Lviv, RACSE, 2011).

for environmental protection (Client-Earth) submitted a communication to the Committee alleging a failure by the EU to comply with its obligations regarding access to justice under the Convention.³⁹ After that the parties provided comments about the complaint, the Committee declared in its draft findings prepared at its thirty-first meeting, that ‘it is clear [...] that this jurisprudence established by the [CJEU] is too strict to meet the criteria of the [Århus] Convention’.⁴⁰ The Draft Findings then went on to state that the Committee:

is convinced that if the examined jurisprudence of the EU Courts on access to justice were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned *would fail to comply* with Article 9, paragraph 3, of the Convention. (emphasis added)⁴¹

Therefore it becomes clear that the position of the Court is scarcely consistent with the requirements laid down in the Århus Convention with regards to access to justice.

Moreover, it seems somewhat paradoxical that the Union judiciary requires that a person’s individual interest should be affected whereas claims based on public interest are not sufficient to provide *locus standi*. This prompted some authors to describe this line of argumentation as ‘private interest biased’.⁴² In contrast, one could argue that a person is individually concerned by a Union measure for the purpose of standing rules where this measure has, or is likely to have, a significant adverse effect on his interest.⁴³

However, the Court could very well shed a new light on standing rules and revise its restrictive reading thereof while keeping within the parameters of its judicial prerogatives. Indeed, as suggested by the Committee, the provision ‘on which the [Court] has based its strict position on standing, is drafted in a way that could be interpreted so as to provide standing for qualified individuals and civil society organisations in a way that would meet the standard of Article 9, paragraph 3, of the Convention’.⁴⁴ In so doing, the Court would give real substance to the principle of effective judicial remedies, thereby complying with the rule of law which lies at the heart of the EU legal order.

³⁹ See for an analysis of the draft findings: J Jendroska, ‘Recent Case-Law of the Aarhus Convention Compliance Committee’ (2011) 8 *Journal for European Environmental and Planning Law* 4, 375.

⁴⁰ Compliance Committee, Aarhus Convention, ‘Draft findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 concerning compliance by the European Union’, 14 March 2011, para 87. These findings are in draft at present.

⁴¹ *Ibid* [88].

⁴² Jans and Vedder, *European Environmental Law* (n 2) 241.

⁴³ This was suggested in the Opinion of AG Jacobs in *Unión de Pequeños Agricultores* (n 10) [60].

⁴⁴ Compliance Committee, ‘Draft findings’ (n 40) [86].

v. Alternative Avenues to Bring Environmental Cases Before the Union Judicature

Given the difficulties in proving standing in the context of the direct action provided in Article 230(4) EC, it is necessary for individuals and interest groups to challenge EU acts before their national courts. One needs to draw a dividing line between challenges brought by private parties against regulations from the challenges brought against directives.

First, as a matter of principle, it is not possible to challenge a regulation before the national courts; regulations may only be challenged before the Union courts, but litigants must then deal with the difficulties raised by the prerequisites of individuality and direct causation. Nevertheless, it should be noted that some regulations leave room for implementing measures to be taken by Member States. In these cases, individuals may challenge the validity of the national measures before national courts while requesting a preliminary reference.

It remains that in many cases since individuals do not have any standing in Union courts, in order to challenge the regulation, they would have to breach the national criminal law provisions resulting from the regulation in the hope that the national court sent a preliminary reference (Article 267 TFEU). In effect, by subjecting itself to criminal prosecution before the national courts due to violation of the regulation, the applicant could still rely on the illegality of the contested act of EU law and invite the criminal court to send a preliminary reference to the Court of Justice concerning the validity of the act. Admittedly, the case law of the Court of Justice on standing of private parties ends up obliging the interested party to violate the provisions of the contested act of Union law. However, this procedure poses a fundamental problem: is it possible to require individuals to 'breach the law in order to gain access to justice'?⁴⁵ This case law is still more problematic if one bears in mind the findings of the Court of Justice in the *Unibet* case where it was held that if an individual is

forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with [Union] law, that would not be sufficient to secure for it [the principle of effective judicial protection].⁴⁶

The situation is hardly better where Directives are concerned. Given the general nature of this instrument, neither the requirement that an applicant be directly concerned nor that of individuality can easily be met. Given the difficulties met by applicants to challenge such acts before a Union

⁴⁵ Opinion of AG Jacobs in *Unión de Pequeños Agricultores* (n 10) [43].

⁴⁶ Case C-432/05 *Unibet (London) Ltd & Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271 [64].

court, they have to challenge the national laws implementing the contested act of Union law. Accordingly, the national law transposing the contested Directive may be challenged before the national supreme court, which may be obliged to send a reference for a preliminary ruling (Article 267 TFEU) to the Court of Justice if there is any doubt as to the validity of the act of EU law. Here it is necessary for the applicants to convince the supreme court not to reject their request for a preliminary reference on the grounds of the *acte clair* doctrine.⁴⁷ In practice, a considerable number of courts are reluctant to make preliminary references.⁴⁸ What is more, if the directive which infringes the right of the applicants is not followed by implementation measures capable of constituting the basis for an action for annulment before the national courts the situation is particularly unfavourable.

After scrutinising the legal situation under Article 230(4) EC, it is necessary to observe whether Article 263(4) TFEU is more favourable to non-privileged applicants seeking to challenge Union environmental measures. In particular, it will be examined whether the Lisbon Treaty is likely to remedy the deficit of judicial protection highlighted above.

B. State of Play after the Lisbon Treaty: Article 263(4) TFEU

i. Introductory Remarks

As far as the *locus standi* of individuals in relation to actions for annulment are concerned, the Lisbon Treaty seeks to remedy the imperfections under the old Article 230(4) of the EC Treaty. Whereas the old EC Treaty only provided for two situations, the new paragraph 4 of Article 263 TFEU paves the way for a third possibility with the intention of expanding *locus standi*. As far as acts classified as ‘regulatory’ are concerned, the applicant must establish that he has been directly affected by the contested act.⁴⁹

The question arises as to whether the new paragraph 4, that entered into force on 1 December 2009, does radically change the situation with regard to acts that are generally applicable, which constitute the vast majority of the acts adopted in order to protect the environment. Applicants are certainly released from the obligation to establish that the contested act affects them individually, but this exception only applies for acts classified

⁴⁷ Case 283/81 *Cilfit* [1982] ECR 341.

⁴⁸ See M Brobert and N Fenger, *Preliminary References to the European Court of Justice* (Oxford, Oxford University Press, 2010) 47.

⁴⁹ By contrast, EU acts that have to be implemented by national authorities usually leave much discretion to the addressees. As a result, these acts do not directly affect the applicant’s legal position. Interested individuals are entitled to challenge the implementing measures before the national courts. See K Lenaerts et al, *Procedural Law of the EU* (London, Thomson, Sweet & Maxwell, 2006) 251.

as ‘regulatory’, in contrast to acts of a legislative nature regarding which the prerequisite of individuality is still required.

A greater difficulty arises in that this new paragraph 4 copies word for word the text of the defunct constitutional treaty, carrying it over into the Treaty of Lisbon. More specifically, the new text refers to ‘regulatory acts’, a category of act which is not defined elsewhere in the Treaty of Lisbon. This textual reference to the old provision will inevitably raise significant difficulties regarding the scope of the concepts of act, regulatory act, direct link and the absence of implementing measures. Whether these issues have been already settled will be examined below. Was this an intentional omission by the framers of the provision, or an oversight resulting from the difficulties in drafting a new treaty? Whatever the answer, the reference to regulatory acts raises interpretative difficulties, and will continue to do so. If the nature of the cases discussed above is examined, it is not certain that private parties will be more successful.

ii. Conditions for Standing

Following a summary overview of the scope of the two traditional hypotheses, we shall focus on the contributions of the new paragraph 4.

First Possibility Given that a natural or legal person initiates proceedings against an ‘act addressed to that person’, this is the easier case. The decision is addressed to the applicant, who is naturally directly and individually affected. This would be the case for any decision taken by the Commission against a company requiring it to put an end to its operations on the grounds that they breached competition law.

Second Possibility The second hypothesis applies to a natural or legal person who initiates proceedings against an act ‘which is of direct and individual concern to them’, irrespective of whether or not it is addressed to that person.⁵⁰ In other words, it is likely to apply to non-regulatory acts, or in cases in which regulatory acts are followed by implementation measures, precluding the application of the more favourable arrangements governing *locus standi*.

If it is regulatory in nature—eg a legislative act—, the act will not be addressed to the applicant, though it is *de facto* liable to affect it both directly and individually. Therefore, the situation is no different as far as the requirements of individuality and direct causation are concerned, which remain fully applicable. In other words, there is a *status quo* for non-regulatory acts or acts that are followed by implementation measures.⁵¹

⁵⁰ This replaces the former formulation according to which individuals could challenge decisions, which although in the form of a regulation were of direct and individual concern.

⁵¹ K Lenaerts, ‘Le traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l’Union’ (2009) *Cahiers de droit européen* 725–28.

Third Possibility Since the entry into force of the Lisbon Treaty, in addition to the two hypotheses discussed above, a natural or legal person can initiate proceedings ‘against a regulatory act which is of direct concern to them and does not entail implementing measures’. This third hypothesis undeniably has the objective of expanding, but only to a limited extent, the jurisdiction of the Court of Justice over actions for annulment initiated by individuals against regulatory acts which do not require implementation measures.

The expansion is intended to remove the requirement that the applicant must demonstrate that it is ‘individually affected’ by the contested act. Returning to the *Greenpeace* case, here the Court upheld the judgment of the national court which had ruled inadmissible the request for annulment made by an environmental protection NGO against a Commission decision to grant financial assistance to Spain in order to build power stations.⁵² The Court held that the applicant was not individually concerned by the Commission decision.

The addition of this new possibility of standing seeks to remedy situations where an individual would be required to violate a provision of national or EU law as a prerequisite for seizing the Union courts, which had been objected to in the *Jégo Quéré* and *Unibet*⁵³ cases as well as by the European Court of Human Rights in the *Posti* and *Rahko* cases.⁵⁴

However, in requiring that two conditions must be met—actions are limited only to ‘regulatory acts’ not followed by implementation measures—the framers of the Lisbon Treaty sought to strike a compromise between the desire to grant individuals access to the courts, whilst not opening up the floodgates to litigation. It is necessary to examine the scope of these two requirements.

a. The Contested Act is Regulatory

It should be stressed at the outset that the framers of the Treaty of Lisbon did not define the concept of ‘regulatory act’. It therefore falls to the Court of Justice to interpret the scope of this concept, in relation to which opposing views have been adopted.⁵⁵

One view argues that regulatory acts only include ‘non legislative’ acts, and hence only delegated acts or implementing acts by the European Commission (Articles 290 and 291 TFEU) can be challenged. This argument appears to be confirmed by the intentions of the framers of the now

⁵² *Greenpeace* (n 11).

⁵³ Case T-177/01 *Jégo Quéré* [2002] ECR II-2365; *Unibet* (n 46) Cf A Van Waeyenberge and P Pecho, ‘L’arrêt Unibet et le Traité de Lisbonne: un pari sur l’avenir de la protection juridictionnelle effective’ (2008) *Cahiers de droit européen* 123–56.

⁵⁴ ECtHR, *Posti Rahko v Finland*, 24 September 2002 [64].

⁵⁵ Lenaerts, ‘Le traité de Lisbonne’ (n 51) 728.

defunct Constitution. In fact, the covering note from the Praesidium on the ‘Articles on the Court of Justice and the *Tribunal de grande instance*’⁵⁶ defines a regulatory act as a non-legislative act of general scope intended to produce legal effects. This view is supported by some academics who consider that individuals should not challenge acts vested with a certain democratic legitimacy in particular when they are classified as ‘legislative’.⁵⁷ On the contrary, ‘non legislative acts taken by non-majoritarian institutions’, such as the Commission or agencies, should be subject to greater judicial scrutiny than legislative acts.⁵⁸ This view is further supported by the French language version of Article 263(4) as the terms *actes réglementaires* refer in the national legal orders to non-legislative acts. As we shall see, this position has been confirmed in the case law of the General Court. As a result of this minimalist reading, cases such as the aforementioned *Unión de Pequeños Agricultores*⁵⁹ would not lead to another outcome in terms of admissibility given that the regulation at issue was of a legislative nature under Article 289(3) TFEU.

According to a different view which is more favourable to applicants, any act of the Union with a general scope which produces legal effects, irrespective of whether the act concerned is legislative or not should be subsumed under the concept of ‘regulatory act’.⁶⁰ Whether legislative or not, every act of general scope which does not amount to a decision on a specific case may be challenged by an individual if it affects it directly, provided that it does not require any implementing measure.

This second interpretation is based on the fact that in a considerable number of constitutional regimes legislative acts may be challenged before the supreme court without any requirement for the applicants to demonstrate that they are individually affected.⁶¹ It is also based on the fact that the determination of legality of acts adopted under the terms of legislative procedures is not an exact science, because the European Parliament’s role

⁵⁶ CONV 734/03, p 20.

⁵⁷ Cf for a criticism of this view: M Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 *Common Market Law Review* 678.

⁵⁸ D Chalmers, G Davies and G Monti, *European Union Law* (Cambridge, Cambridge University Press, 2010) 415.

⁵⁹ *Unión de Pequeños Agricultores* (n 18).

⁶⁰ Lenaerts, ‘Le traité de Lisbonne’ (n 51) 727; see also S Balthasar ‘Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU’ (2010) 35 *European Law Review* 542; Dougan, ‘The Treaty of Lisbon 2007’ (n 57).

⁶¹ By way of illustration, the Belgian judicial Code (art 17), the Belgian coordinated laws on the Council of State and the law on the Constitutional Court require that the petitioner demonstrates an ‘interest’ that is interpreted more broadly than under the Plaumann case law. By the same token, the French Code of Civil Procedure (art 31) confers locus standi only on those persons allowed to bring or contest a claim or to defend a specific interest. Similarly, claimants’ petitions before the French administrative courts are determined according to their interest, irrespective of the condition of individuality.

is particularly limited with reference to the special legislative procedure (Article 289(2) TFEU).⁶²

Case law developments

The order of the General Court of 6 September 2011 was the first time a Union court adopted a position on the scope of the new standing regime introduced by the Treaty of Lisbon. The case arose from a challenge brought by native Inuit Hunters and Trappers Associations as well as Inuit individuals who were seeking the annulment of Regulation (EC) No 1007/2009 of the European Parliament and the Council on trade in seal products,⁶³ the purpose of which, according to Article 1 thereof, is to establish harmonised rules concerning the placing on the market of seal products. The General Court requested that the parties reply to a question relating to whether the applicants are directly concerned by the contested regulation. In its order of 6 September 2010, the General Court decided the action inadmissible.

Absent an explicit definition of the concept of regulatory act in the Treaty, the General Court based its decision on a literal, historical and teleological interpretation. The General Court concluded that

the fourth paragraph of Article 263 TFEU, read in conjunction with its first paragraph, permits a natural or legal person to institute proceedings against an act addressed to that person and also (i) against a legislative or regulatory act of general application which is of direct and individual concern to them and (ii) against certain acts of general application, namely regulatory acts which are of direct concern to them and do not entail implementing measures.⁶⁴

Indeed, the purpose of Article 263 TFEU

is to allow a natural or legal person to institute proceedings against an act of general application which is not a legislative act, which is of direct concern to them and does not entail implementing measures, thereby avoiding the situation in which such a person would have to infringe the law to have access to the court.⁶⁵

The General Court's interpretation is thus based on a distinction between legislative acts and regulatory acts. Therefore, only 'certain acts of general application' are deemed to be regulatory acts.⁶⁶

The General Court considers that this interpretation cannot be challenged in the name of the general principle of effective judicial protection such as is guaranteed in particular under Article 47 of the Charter,⁶⁷ nor less in

⁶² With respect to the special legislative procedure, see, for instance, art 19(2) TFUE, art 113 TFUE, art 153(2) TFUE, art 192(2), b) TFUE.

⁶³ Council Regulation (EC) No 1007/2009 on trade in seal products OJ [2009] L286, p 36.

⁶⁴ Case T-18/10 *Inuit Tapiriit Kanatami e.a. v Parliament and Council* [2011] (nyr) [45].

⁶⁵ *Inuit* (n 64) [50].

⁶⁶ *Inuit* (n 64) [45].

⁶⁷ *Inuit* (n 64) [51].

accordance with the Århus convention or Rio Convention on Biological Diversity.⁶⁸

It follows from the order of 6 September 2010 that a legislative act can only be subject to an action for annulment by a natural or legal person if the act affects that person directly and individually.

What counts as a legislative act? The General Court based the definition of a legislative act on a procedural criterion on the grounds that it is the procedures governing the adoption of the act which should be taken into account.⁶⁹ This would leave all delegated and implementing acts as non-legislative acts, and, as a result, as regulatory acts. In doing so, the Court rejected both a formal criterion based on the title of the act as well as a substantive criterion based on the general or individual scope of the contested act. The judgment is revolutionary on this point since to date the Union courts have adopted a substantive rather than a formal approach to the acts contested before them. Indeed, it is more the content of the act than its form which must be taken into consideration.⁷⁰ This shows the extent to which the reformulation of the types of Union acts by the framers of the Treaty of Lisbon is liable to affect the *locus standi* of natural or legal persons.⁷¹

However, since the General Court considers that some acts of general application can be challenged, nothing prevents the applicants from challenging directives and decisions under hypothesis three provided that they do not entail implementing measures. That being said, the problem lies in the fact that directives entail the adoption of national measures transposing them into national law.

Given that the contested Regulation could not be classified as regulatory, applicants were required to establish the existence of a direct and individual link. The General Court held that most applicants had not been directly affected, with the exception of those operating in the transformation and marketing of seal-derived products originating from hunting.⁷² As far as the requirement of individuality is concerned, the Court applied the classical criteria laid down in the *Plaumann* case. The Court held that their situation was no more individualised than that of other operators marketing seal-derived products.⁷³ The applications were therefore rejected as inadmissible. It will undoubtedly be necessary to await a judgment by the Court of Justice on appeal in order for the case law to be settled definitively on the range of questions raised in relation to the scope of regulatory acts.

⁶⁸ *Inuit* (n 64) [52].

⁶⁹ D Simon, 'Case note under case T-18/10' (2011) 11 *Europe* 14.

⁷⁰ Case T-213/02 *SNF v Commission* [2004] ECR II-3047.

⁷¹ Simon, 'Case note' (n 69) 14.

⁷² *Inuit* (n 64) [68]–[87].

⁷³ *Inuit* (n 64) [93].

With respect to the concept of ‘regulatory act’, the findings of this decision have been confirmed by the judgment delivered by the General Court in October 2011 in the *Microban* case. The Court was called upon to rule on the legality of a decision taken by the Commission in the field of food law, a branch of law that shares similar regulatory techniques with environmental law (authorisation, positive lists, restrictions to the use of products, etc.). The decision at issue was adopted in the exercise of the Commission’s implementing powers. As in any event this type of act falls within the category of non-regulatory act, it did not come as a surprise that this action for annulment was held as admissible. The Court mainly referred to the reasoning followed in the *Inuit* case according to which the term ‘regulatory act’ within the meaning of Article 263(4) has to be construed ‘as covering all acts of general application apart from legislative acts’.⁷⁴ That said it is noteworthy that the applicant in this case would most likely not have been admissible under the former Article 230 (4) EC.⁷⁵ In some ways, the judgment in *Microban* reflects the value added by the reform of the standing rules in spite of the restrictive reading of Article 263(4) resorted to by the General Court.

b. The Contested Regulatory Act Must Not Entail Implementing Measures

Moreover, regulatory acts can only be contested by individuals who are directly affected by them where they do ‘not entail implementing measures’. Accordingly, NGOs which challenge the legality of decisions adopted by the Commission authorising the placing on the market of GMOS or of regulations authorising the marketing of hazardous substances will have to establish that these acts do not entail implementing measures.

This requirement also raises numerous questions. A distinction may be drawn between several hypotheses.

1. The regulatory act entails a national implementing measure

Applicants challenging a regulatory act cannot rely on the new more favourable standing regime where the act entails a national implementing measure.

At the outset, it must be noted that, as a matter of principle, regulations as well as decisions do not entail implementing measures at national level. However, the situation is apposite as far as directives are concerned (Article 288(2) TFEU).

⁷⁴ Case T-262/10 *Microban International Ltd, Microban (Europe) Ltd v Commission* [2011] (nyr) [21]. Cf also: Case T-381/11 *Europäischer Wirtschaftsverband der Eisen und Stahlindustrie ASBL v Commission* [2012] (nyr) [42].

⁷⁵ Indeed, the applicant was neither the addressee of the decision nor individually concerned within the meaning of the Plaumann test.

Therefore, one could take the view that, given the absence of implementing national measures, decisions and regulations are subject to the liberalised standing rules. Nonetheless, such an interpretation is likely to be dogged by controversy. In fact, it is possible that some regulations or decisions lead to amendments of national rules by national authorities with a view to complying with the requirements laid down under this Union act. Would such rules be regarded as implementing measures entailed by the act?

In this connection, a few illustrations will suffice. The European Regional Development Fund⁷⁶ supports national programmes addressing regional development, economic change, enhanced competitiveness and territorial co-operation throughout the EU. In particular, Member States are called upon to adopt National Strategic Reference Framework (NSRF) establishing the main priorities for spending. Moreover, Operational Programmes (OP) are setting out a region's priorities for delivering the funds. The Commission negotiates and approves the NSRFs and OPs proposed by the Member States, and uses these as a basis for allocating resources. The question arises as to whether these different programmes are implementing measures. Are the applications brought against the Commission decisions likely to be rejected on the grounds that the relevant Commission acts require implementing measures at national level? To name another example, regulation on fisheries setting specific quotas do not have to be transposed by Member States. Nonetheless, such regulations are likely to oblige some Member States to adopt further implementing measures regarding monitoring and enforcement. Are these national measures likely to be qualified as implementing measures within the meaning of paragraph 4? An affirmative answer would seriously jeopardise the principle of equal treatment given that the possibility of a direct challenge would vary throughout the EU depending on the consistency of pre-existing national law with the regulation/decision at hand.⁷⁷ Given that the implementation of EU law varies considerably across Member States, it would be unacceptable that the admissibility of an application depends upon the peculiarities of the intern legal orders. Moreover, it might be argued that amendments in such a context result primarily from national law rather than from the Union act itself.

Admittedly, Article 263(4) TFEU raises more questions than it answers.

If a broad interpretation of an implementing measure were endorsed, the applicant would have to establish that it meets the conditions specified under hypothesis two: individuality and direct causation. The other possibility available to it is similar to that at issue in the *Unión de Pequeños*

⁷⁶ Council Regulation (EC) No 1783/1999 of the European Parliament and of the Council of 12 June 1999 on the European Regional Development Fund [1999] OJ L213/1.

⁷⁷ This is suggested in: Craig and de Búrca, *EU Law* (n 18) 509.

Agricultores case commented upon above.⁷⁸ The applicant will have to challenge the national implementing measure before a national court so as to obtain a preliminary reference, if appropriate in that case. The applicant will thus have to contest the act before a national court, assuming of course that this is possible under its legal system. It will do so in order to obtain, where appropriate, a preliminary reference to the Court of Justice with the intention of challenging the validity of the EU act which it is not able to challenge directly before the Union courts. However, we have seen the difficulties which such action may involve: the national criminal law must be breached in order to be able to challenge the legality of the act of EU law.

2. The regulatory act expressly entails Union implementing measures

Where the framework act—eg a framework regulation of the Council or the Council and the European Parliament—has to be followed by an EU implementing measure (Article 291 TFEU), the applicant may not rely on the new standing regime to challenge this act. If he would like to take advantage of the new standing conditions, he will then have to initiate an action seeking the annulment of the implementing act of the framework act that cannot be challenged as such. Indeed, as regards the prerequisites for the admissibility of its action to annul the implementing act, it is limited to the requirement that it be ‘directly’ affected, since the requirement of individuality no longer applies. During this action, the applicant may also claim before the Union courts that the framework act is unlawful (Article 277 TFEU).

On the other hand, should the applicant wish to challenge the framework act, it will have to meet the condition of individuality and the requirement that it is directly affected. In such cases, there has not been any progress in terms of the expansion of judicial protection.

It is also possible that an additional difficulty may arise. In practice, it may be the case that implementing measures are never adopted by the Union, or are adopted several years later. The main difficulty lies in the fact that the applicant is only granted a period of two months in order to initiate an action for annulment (Article 263(6) TFEU).

If the applicant does not challenge the framework act, preferring to challenge subsequent implementing acts, it will risk running into a blind alley if no implementing measures are then adopted.

The only grounds for challenge available to it are first failure to act proceedings under Article 265 TFEU if the Commission was required to adopt the implementing act, and secondly an action seeking damages against the State which should have adopted the implementing measures.⁷⁹ However,

⁷⁸ *Unión de Pequeños Agricultores* (n 10).

⁷⁹ J Van Meerbeek and A Van Waeyenberge, ‘Les conditions de recevabilité des recours introduits par les particuliers: au cœur du dédale européen’ in N de Sadeleer et al (eds), *Les innovations du traité de Lisbonne. Incidences pour le praticien* (Brussels, Bruylant, 2011) 184.

the admissibility of such applications is naturally highly uncertain. When confronted with these hazards, there will then be an incentive for applicants to initiate actions for annulment against all regulatory acts which affect them without waiting for any implementing measures.

3. The regulatory act does not entail any implementing measure

This would be the most favourable hypothesis for the applicant. An applicant which is directly affected (eg an importer or a manufacturer) has an interest to challenge the contested act because first the act is regulatory in nature and secondly because this act does not entail implementing measures. In fact, the act will be automatically applied where neither the European Commission nor the national authorities are required to intervene. In such cases, the new more favourable standing regime will then apply.

This can be illustrated by the recent judgment in *Microban* commented on above.

That being said, another difficulty must be raised. Whilst they do not require the adoption of implementing measures, certain acts which allow for the possibility of their adoption leave a certain margin for appreciation to the Commission or the national authorities. Accordingly, it is possible that the contested regulatory act may potentially entail the adoption of implementing measures but that these have not yet been issued at the time the contested act is challenged. In fact, the term 'entail' does grant this possibility, since this word embraces the concept of 'require',⁸⁰ 'admit', 'contain', etc. Must we therefore conclude that an action against such acts which are not followed by implementing measures would be admissible provided that the litigant is directly affected? This last case raises interpretative difficulties which it will then fall to the Court of Justice to resolve.

Table 7.1 summarises, in the light of our previous analysis, the different possibilities offered by Article 263(4) TFEU.

III. ACTION FOR INTERNAL REVIEW

In order to avoid the obstacles created by the *Greenpeace* and *Unión de Pequeños Agricultores* case law, which preclude collective redress against acts of an individual or regulatory nature, the Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (Århus Regulation) establishes a two-stage right of access to justice: first, an

⁸⁰ *Microban International Ltd, Microban (Europe) Ltd* (n 74) [34].

Table 7.1: Summary analysis of Article 263(4) TFEU

Hypothesis	Terms of paragraph 4	Conditions	Examples
Hypothesis one	A natural or legal person initiates proceedings against an ‘act addressed to that person’.	This will apply to decisions where the act is specifically addressed to the applicant. No need for justification in terms of the direct and individual effect due to the personalised nature of the decision.	A decision taken by the Commission against a commercial company requiring it to put an end to that activity on the grounds that it breaches competition law.
Hypothesis two	A natural or legal person initiates proceedings against an act ‘ <i>which is of direct and individual concern to them</i> ’, irrespective of whether it is addressed to that person.	For non-regulatory acts or acts which entail implementing measures despite their regulatory status, the applicant must demonstrate that it has been directly and individually affected. The <i>Plaumann</i> case law will continue to apply as regards the condition of individuality.	This second hypothesis applies to non-regulatory acts, or regulatory acts followed by implementing measures (where the prerequisites for hypothesis three are not met). The act is adopted in the form of a regulation or decision addressed to another person.
Hypothesis three	A natural or legal person initiates proceedings ‘ <i>against a regulatory act which is of direct concern to them and does not entail implementing measures</i> ’.	A natural or legal person will henceforth be able to initiate an action for annulment against regulatory acts which concern it directly and which do not entail any implementing act. The applicant need only prove that it has been directly affected by the contested act. Accordingly, the prerequisite of individuality does not apply.	Delegated or implementing acts adopted by the Commission which do not entail implementing measures either on EU or national level. An undertaking seeking the nullification of a substance listed on a positive list of a Commission regulation.

application for an internal review of administrative acts by the NGO, and second the possibility for the latter to apply to the Court of Justice.⁸¹ The rationale for the internal review is that the EU authority which has issued the act to be challenged should be given the opportunity to reconsider its former decisions, or, in the case of an omission, to act.⁸² It is the aim of this section to explore some of the key issues arising with respect to this new procedure.

A. Personal Scope

i. Applicants: Who Brings an Action for Internal Review?

The internal review mechanism enables certain members of the public to be regarded as the addressees of a decision or an omission by the EU institutions, and accordingly to satisfy the prerequisites for instituting proceedings. Whilst at first sight this internal review mechanism appears to be well conceived, it should be noted that its scope is relatively limited and raises difficulties regarding its compatibility with the Århus Convention. Whereas Article 9(3) of the Århus Convention grants the right of access to ‘members of the public’ which meet certain criteria, the EU Århus Regulation reserves this right exclusively to environmental NGOs which meet a certain number of criteria (not-for-profit, specialist object defined in its articles, duration, ...), which has the effect of excluding individuals. This limitation therefore departs from the provisions of the international agreement.⁸³ On the other hand, it buttresses the role of NGOs in the implementation of this right.⁸⁴

⁸¹ Århus Regulation (n 8). See P Wenneras, *The Enforcement of EC Environmental Law* (Oxford, Oxford University Press, 2007) 216–50; JH Jans, ‘Did Baron von Munchhausen Ever Visit Århus?’ in R Macrory (ed), *Reflections on 30 Years of EU Environmental Law* (Groningen, Europa Law Publishing, 2006) 477–84; M Pallemerts, *Compliance by the EC with its Obligations on Access to Justice as a Party to the Århus Convention IEEP Report* (London, Institute for European Environmental Policy, 2009) 45; A Garcia Ureta, ‘Aspectos sobre el acceso a la justicia en el Convenio de Aarhus y su incidencia sobre el Derecho comunitario’ in *IeZ, IVAP* (Oñati, Europar Ikerten Taldea, 2005) 63–88.

⁸² See 19th recital of the preamble.

⁸³ Wenneras, *The Enforcement of EC Environmental Law* (n 81) 228.

⁸⁴ Cf also Arts 12 and 13 of the Council and Parliament Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56. The Court of Justice has stressed on numerous occasions the important role played by NGOs: Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009] ECR I-9967, para 45; Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland v Bezirksregierung Arnsberg* [2011] (n/r). See also the position of the European Court of Human Rights: ECtHR 24 February 2009, *ASBL Erablère v Belgium*.

ii. Defendants: Against Which Public Body a Request for Internal Review can be Brought?

As far as the authorities subject to the application are concerned, it may be noted that the procedure is not limited to the EU institutions. NGOs are entitled to make a request for an internal review to any ‘body, office or agency established by, or on the basis of, the Treaty’.⁸⁵ Subject to the condition that they are an individual and have legally binding and external effects, the decisions taken by the European Chemicals Agency (ECHA) may therefore be the object of an application for internal review. On the other hand, it should be noted that opinions given by the agencies are not covered by this procedure. A case-by-case analysis is required given the wide-ranging nature of the agencies’ activities. For instance, the European Food Safety Authority may take an administrative act such as the decision relating to its public procurement activity.⁸⁶

Moreover, the procedure does not apply where the EU institutions and bodies are ‘acting in a judicial or legislative capacity’.⁸⁷ Once again, it is difficult to distinguish between acts carried out under EU law which are of an executive nature and those which are legislative.

Finally, pursuant to Article 2(2), the Commission is not subject to the internal review procedure when acting ‘in its capacity as an administrative review body such as under’:

- Articles 101, 102, 106 and 107 TFEU (competition rules),
- Articles 258 and 260 TFEU (infringement proceedings),
- Article 228 TFEU (Ombudsman proceedings),
- Article 325 TFEU (OLAF proceedings).

Thus, an application concerning a decision by the Commission to bring infringement proceedings to an end will be inadmissible.⁸⁸

Besides, the use of the term ‘such as’ in the provision is problematic as it indicates the non-exhaustive character of this list. This raises the contentious question of what should be meant by ‘capacity as an administrative review body’. For this reason, this provision has been highly criticised.⁸⁹ It triggers significant legal uncertainty and leaves many questions unanswered.⁹⁰

⁸⁵ Art 2(1) c).

⁸⁶ A Alemanno and S Mahieu, ‘The European Food Safety Authority before European Courts’ (2008) 5 *European Food & Feed Law Review* 330.

⁸⁷ Art 2(1) c).

⁸⁸ See the Commission Decision of 23 October 2008 where the Commission rejected a request concerning an infringement procedure following a possible violation of Union legislation with respect to a dam project in Portugal. (COD/2008/0013(COD) of 17 December 2008 (not published in the OJ).

⁸⁹ Jans, ‘Did Baron von Munchhausen Ever Visit Århus?’ (n 81) 480.

⁹⁰ See for a description of the wide-range of acts taken by the Commission which are excluded of the scope: Pallemarts, *Compliance by the EC* (n 81) 22.

B. Temporal Scope

The application must be made within six weeks after the date when the administrative act was adopted or published or, in the case of an alleged omission, six weeks after the date when the administrative act was supposed to have been adopted.

C. Material Scope: Acts and Omissions Subject to Review

The manner in which the material scope has been limited calls for several comments.

i. The Requirement for there to be a Contested Act

In the first place, the contested administrative act must have an ‘individual scope’, which appears to preclude acts with legislative scope or of a regulatory nature.⁹¹ Although the concept of ‘administrative act’ is not defined under Treaty law, it is important to distinguish it from general measures.⁹² There is no doubt that the framers of the regulation inserted the terms ‘of individual scope’ in order to exclude general measures from the review procedure. In this way, an application seeking the internal review of a regulation establishing the maximum level of pesticide residues will be inadmissible on the grounds that the act applies to all economic operators.⁹³ Accordingly, the Århus regulation has a scope that is decidedly more limited than that of Article 9(3) of the Århus Convention, which covers the ‘acts’ and ‘omissions’ of public authorities which contravene national law provisions relating to the environment, without referring to the individual scope of the contested act.

However, some have argued that only ‘true legislative acts, such as basic or framework regulations and directives’ should be excluded from the scope of the regulation.⁹⁴ The Council does not seem to share this view. Through a request for review of a Regulation concerning the quota of certain fish species,⁹⁵ the environmental association Greenpeace requested the Council to amend the quotas for bluefin tuna as this species is endangered. The

⁹¹ Case T-117/94 *Rovigo* [1994] ECR II-455, para 24.

⁹² Case C-16/88 *Commission v Council* [1989] ECR I-3457 [16].

⁹³ Pallemerts, *Compliance by the EC* (n 81) 23.

⁹⁴ GJ Harryvan and JH Jans, ‘Internal Review of EU Environmental Measures’ (2010) 3 *Review of European and Administrative Law* 63.

⁹⁵ Council Regulation 43/2009/EC fixing for 2009 fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, and for interim measures [2009] OJ L22/1.

Council took the view that the measures restricting fishing opportunities could not be regarded as an act of individual scope. The contested act ‘concern[s] an unspecified number of fishermen as it is for the Member States to allocate quotas to individual fishing vessel operators’.⁹⁶ However, one should bear in mind the comments made above regarding Article 263(4) TFEU which allows applicants to challenge regulatory acts without proving that they are individually concerned. Given that the regulation at issue was adopted by the Council through a non-legislative procedure and was of general application, it may be subject to an action for annulment by non-privileged applicants. In that connection, it should be pointed out that an action for annulment in front of Union courts might be more successful in some cases. Where an environmental measure does not have an individual scope within the meaning of the Århus regulation, litigants may rely on Article 263(4) TFEU so as to request Union courts to quash this measure. Provided that the other conditions are respected (eg the act was adopted in the exercise of implementing powers), the Union judiciary will be competent to adjudicate on the legality thereof. If a claimant does not meet the requirements laid down in Article 263(4) TFEU (eg the act lacks of a general application), he might be admissible in proceedings under the Århus regulation. As will be seen, these two challenge mechanisms may have a complementary function.

As regards the Commission, following a request for internal review, it has taken the view that a decision allowing the Netherlands to postpone the deadline for attaining the limit values for NO₂ (standards related to ambient air quality) should be regarded as an act of general scope.⁹⁷ Strikingly, the Commission took the view that ‘a decision addressed to a specific Member State may [...] be of general scope by reason of the fact that it is designed to approve a scheme which applies to one or several categories of persons defined in a general and abstract manner’.⁹⁸ In view of this, one could fear that the concept of ‘individual scope’ will be interpreted in the same stringent manner as that of ‘individual concern’ under Article 263(4) TFEU. This, however, would be severely inconsistent with the objective governing the Århus regulation that is, *inter alia*, addressing the issue of standing restrictions.

In that connection, the General Court has handed down two important judgments on the condition of individual scope as early as June 2012 following an application for annulment of the above-mentioned decision

⁹⁶ Council 9507/09 of 07 May 2005 ‘Reply to the request for an internal review of Council Regulation (EC) No. 43/2009’ 4 (not published in the OJ).

⁹⁷ Commission Decision COM (2009) 2560 of 7 April 2009, by which the Commission had authorised the Netherlands to defer to a later date for compliance with its obligations under Directive 2008/50/EC in respect of improvements to air quality (not published in the OJ).

⁹⁸ Commission C(2009) 6121 of 29 July 2009 ‘Reply to the request for internal review of Commission Decision C(2009) 2560’ (not published in the OJ).

of the Commission rejecting the request for review of the decision granting the Netherlands a temporary exemption from its obligations regarding ambient air quality.⁹⁹ The Court concurred with the Commission that such a derogation constitutes a measure of a general nature because it ‘partakes of the general nature of the directive since it is addressed in abstract terms to undefined classes of persons and applies to objectively defined situations’.¹⁰⁰

Most importantly, the applicants claimed, by a plea of illegality (Article 277 TFEU), that the condition of individual scope should be regarded as unlawful since it does not comply with the Århus Convention. Following a purposive interpretation, the Court held that:

an internal review procedure which covered only measures of individual scope would be severely limited, since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and the purposes of the Aarhus Convention, such limitation is not justified.¹⁰¹

Although the Court acknowledges that the Convention offers a certain measure of discretion to its Parties, it considered that Article 9 (3) does not leave a broad discretion with respect to the definition of the ‘acts’ which are open to challenge. Accordingly, ‘there is no reason to construe the concept of ‘acts’ in Article 9 (3) of the Aarhus Convention as covering only acts of individual scope’.¹⁰² The Court thus set aside the application of a condition laid down in a regulation adopted by the Parliament and the Council.

In view of these findings, it seems that the Union judiciary has duly paid heed of the criticism put forward by the Compliance Committee under the Convention in its 2011 draft findings discussed above. The EU institutions thus will have to take these rulings into consideration while appraising the future requests for internal review submitted by NGOs. It remains to be seen whether the Court of Justice will uphold this view.¹⁰³

ii. The Requirement for there to be an Act Having Legally Binding and External Effects

Secondly, administrative acts that are covered by the review procedure are defined as those which ‘have legally binding and external effects’, a condition which is not provided under Article 9(3) of the Århus Convention. Since

⁹⁹ Case T-396/09 *Vereniging Milieudéfensie & al v Commission* [2012] (nyr). See also the following decision delivered on the same day (similar reasoning and findings): Case T-338/08 *Stichting Natuur en Milieu & al v Commission* [2012] (nyr).

¹⁰⁰ *Vereniging Milieudéfensie* (n 99) [32].

¹⁰¹ *Vereniging Milieudéfensie* (n 99) [65].

¹⁰² *Vereniging Milieudéfensie* (n 99) [66].

¹⁰³ At the time of writing this article, the authors were not aware of an appeal lodged against these judgments.

they do not have any effects, they are not subject to the procedures applicable to decisions taken by the Commission pursuant to Article 258 TFEU,¹⁰⁴ as well as preparatory acts and environmental action programmes.¹⁰⁵ By way of example, political statements made by the Commission concerning proposals for amendment of a directive lack legally binding effects.¹⁰⁶

Similarly, the reference to the ‘external effects’ of the act is intended to exempt from the procedure the decisions taken by the Commission concerning the award to the Member States of regional development funds and cohesion funds,¹⁰⁷ documents internal to the EU institutions¹⁰⁸ and inter-institutional agreements.¹⁰⁹ By way of illustration, request for review of the decision adopting a list of candidates for the appointment of executive director of the European Chemicals Agency has been held as inadmissible for lack of external effect.¹¹⁰

iii. The Requirement for the Act to be Adopted under Environmental Law

Thirdly, the administrative act must have been adopted ‘under environmental law’, a concept which is defined in broad terms in relation to the objectives specified under Treaty law.¹¹¹ This means that it is the objective pursued by the author of the act and not the legal basis used which is decisive. However, there is no getting away from the fact that numerous acts adopted in the area of fishing, agriculture or the internal market do not have the goal of protecting the environment within the meaning of Article 191 TFEU, even though they are liable to contribute to the deterioration of ecosystems. There is no doubt that the Union courts will have to interpret the notion of environmental law in broad terms in light of the Århus Convention.

Since the prerequisites commented upon are cumulative, a significant number of the decisions taken by the Commission and the Council under

¹⁰⁴ Case C-48/65 *Leuticke* [1966] ECR I-27 [27]; Case C-247/87 *Star Fruit* [1989] ECR I-291, [12]; Case T-126/95 *Dumez v Commission* [1995] ECR II-2863 [44].

¹⁰⁵ Case C-142/95 *Rovigo* [1996] ECR I-6669 [32–34].

¹⁰⁶ Cf Commission C(2009)3337 of 27 April 2009 Reply to the request for internal review of the Commission statement ad to Article 10 paragraph 3 of the EU ETS Directive (2008/0013(COD)) adopted by the European Parliament on 17 December 2008 (not published in the OJ).

¹⁰⁷ *Pallemaerts, Compliance by the EC* (n 81) 23.

¹⁰⁸ Case C-314/91 *Weber v Parliament* [1993] ECR I-1093 [10]; Case C-69/89 *Nakajima v Council* [1989] ECR I-2069 [49].

¹⁰⁹ Art 295 TFEU.

¹¹⁰ Commission D (2007)23239 of 12 December 2009 Reply to request for internal review concerning the Commission’s decision of 12 September 2007 adopting the list of candidates for the appointment of the Executive Director of the European Chemicals Agency by the Management Board thereof (not published in the OJ).

¹¹¹ de Sadeleer, *Commentaire Mégret* (n 11) 38–41.

the different environmental directives or the regulation on hazardous substances cannot be challenged on the basis of the Århus regulation. What is more, hitherto Union institutions have shown little willingness to open themselves up to challenge. It seems that they rather resort to tortuous reasoning in order to escape review procedure as requested by environmental associations.

However, the following acts should fulfil the requirements mentioned above:

- Marketing authorisation of GMO products (eg new food);
- Authorisation concerning the production, import and use of chemicals on the basis of the REACH regulation (Title VII);
- Decisions taken on the basis of Directive 98/34/CE;¹¹²
- Commission Decisions taken on the basis of Article 114(6) TFEU¹¹³

D. Standard of Review and Process

The regulation does not specify the nature of the measures that are to be taken as part of the internal review of the contested act. The review must embrace both the legality and the appropriateness of the act. Since most environmental regimes include both procedural and substantive conditions, it may be possible for applicant NGOs to challenge decisions with individual scope and external effects on these two levels.

However, it must be kept in mind that EU environmental directives and regulations are laying down procedural as well as material standards that are directed to the Member States and not the EU institutions.¹¹⁴ As a result, EU institutions are bound by general principles encapsulated in Article 192(1) TFEU or the obligation to integrate environmental concerns pursuant to Article 11 TFEU. Needless to say that it is extremely difficult for applicants to challenge secondary acts in light of these principles.

Where an application is considered to be well founded, the institution or body which receives the application must review its decision, or take

¹¹² Council and Parliament Directive 98/34/EC laying down laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L 204/37.

¹¹³ Eg Commission Decision 2012/160/EU concerning the national provisions notified by the German Federal Government maintaining the limit values for lead, barium, arsenic, antimony, mercury and nitrosamines and nitrosatable substances in toys beyond the entry into application of Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys [2012] OJ L80/19.

¹¹⁴ Eg Council Directive (EEC) 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40; Council Directive (EEC) 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L7/206; Parliament and Council Directive (EC) 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.

action in the event of an omission. However, since it does not amount to an application for annulment, the contested act will not be declared null and void, even if the application appears to be well founded.

E. Proceeding before the Court of Justice

Pursuant to Article 12 the NGO which made the request for internal review may institute proceedings before the Court of Justice pursuant to the relevant provisions of the Treaty. Court actions will concern not the contested administrative act but rather the written reply given by the institution or body in response to the application.

By definition, an act or omission liable to amount to a violation of environmental law is not automatically called into question by the annulment of the written response. In the event that the error is of a procedural nature—for example, where insufficient reasons are provided in the written response to the NGO—the addressee authority may however provide the applicant with a new written response. However, if the Court of Justice considers that the written response contains an error of law due to the illegality of the contested administrative act, the institution or body will have to re-examine its original decision, and where appropriate withdraw or amend it.

F. Concluding Remarks

From this analysis of the internal review procedure under the Aarhus Regulation, a few conclusions can be drawn.

First and foremost, the scope of the review appears particularly narrow. One could therefore infer that many applications for internal review are likely to be dismissed by the authorities in question. These fears seem to be confirmed by a recent study according to which one single case out of the eight commenced has overcome the hurdle of admissibility. Though the single request was admissible, it was declared unfounded on the merits.¹¹⁵ As far as the seven other cases are concerned, none of them has been held admissible due to restrictive interpretation of the above-mentioned conditions. These seven cases concerned acts taken by the Commission except for one request which implied the review of a Council regulation.¹¹⁶ In most cases, the applicants were unsuccessful because the measures under review were regarded as having a general scope.

¹¹⁵ Harryvan and Jans, 'Internal Review' (n 94) 55.

¹¹⁶ Ibid 55. The requests lodged before the Commission can be found at: http://ec.europa.eu/environment/aarhus/internal_review.htm.

Whether the Århus Regulation would be able to achieve the objectives of the Århus Convention remains somewhat doubtful. Our view is that the restricted access to internal review constitutes a major obstacle to the achievement of the ultimate objective of strengthening environmental law enforcement. Moreover, practice has thus far shown the reluctance of EU institutions to be challenged by environmental organisations.¹¹⁷ Such a trend is in stark contrast to the intentions expressed in the Regulation which promotes ‘more effective implementation and application of [EU] legislation on environmental protection, including the enforcement of [EU] rules and the taking of action against breaches of [EU] environmental legislation’.¹¹⁸ There is arguably little hope of significant change given the lack of independence of EU authorities in such a context. Indeed, in the eight cases commented above, both the Commission and the Council were called on to review their own contested measures. Admittedly, changing long-established administrative practice requires time. Drawing firmer conclusions would therefore be premature. Furthermore, the recent judgments handed down by the General Court commented upon above should undoubtedly lead the EU authorities to revise their strict position. It is remarkable that the Court has expressly considered the scope of the review mechanism as being too narrow to comply with the objectives governing the Århus Convention.

Secondly, the Regulation does not bring meaningful innovation such as regards access to Union Courts following an internal review. The 2009 Lisbon amendment of Article 263(4) TFEU could however make the difference.

In view of the above discussion, it seems that the Regulation does not add significant value to the implementation of the Århus Convention third pillar into the EU legal system. That said the viewpoint of the EU institutions is not immutable. It would be a positive development should the EU administration also grasp the paramount importance of access to justice and thus relax its interpretation of the internal review conditions. Admittedly it might have been too optimistic to expect a secondary law instrument to modify the standing requirements as established by the drafters of the Treaty.

IV. CONCLUSIONS

The Århus Convention represents a major step forward regarding the crucial issue of effective enforcement of environmental law. As a party to this international agreement, the EU has been committed to implementing

¹¹⁷ For further details, see Harryvan and Jans, ‘Internal Review’ (n 94) 55–59.

¹¹⁸ Århus Regulation (n 8) preamble, second recital.

obligations on access to justice by subjecting inter alia the EU authorities to the relevant provisions of the Convention.

The decentralised model of access to justice in the Union based on the principle of subsidiarity, according to which the national courts play a key role to defend the rights of individuals, will continue to prevail. In virtue of the third hypothesis foreseen by Article 263(4) TFEU as interpreted to date by the General Court, individuals may now seek annulment of non-legislative acts having a general scope provided that these acts concern them directly without entailing implementing measures. In the event that one of these prerequisites is not fulfilled, the non-privileged applicants must show that they are individually and directly concerned by the contested measures in accordance with the second hypothesis under Article 263 (4) TFEU. As regards the condition of individuality, the applicants will have to withstand the *Plaumann* test, which has proven to be a major barrier, if not insurmountable, in environmental litigation. In that respect, no progress has been made through the Lisbon Treaty.

The Århus Regulation which was adopted in an attempt to address the enforcement deficit of environmental law appears to be far from achieving this objective. In addition to the limited scope thereof, the EU institutions have as yet shown little willingness in practice to open themselves up to challenge. Nevertheless, these institutions will have to revisit their position and handle requests for internal review in the light of two decisions recently delivered by the General Court where the latter has declared that one of the conditions for the admissibility of the request provided for under the Århus regulation is invalid.

Furthermore, one could observe that action for annulment under Article 263(4) TFEU and request for internal review under the Århus Regulation are somehow complementary. Indeed, it is possible that claimants do not meet the requirements necessary to unlock the doors of EU fora but satisfy the standards concerning internal review and vice versa. Therefore, it might be appropriate for litigants to initiate both proceedings concurrently.

Overall, the situation seems unsatisfactory. As a result, the most promising way in which citizens may challenge EU acts which cause harm to the environment, under the current state of EU law, consists in challenging transposition and implementation measures by way of a preliminary reference. This procedural device poses problems since Article 9(3) of the Århus Convention establishes the right for members of the public who satisfy certain prerequisites provided for under national law to challenge acts or emissions which contravene environmental law.

In view of the foregoing, it may be concluded that, as far as the EU institutions and bodies are concerned, both primary and secondary law under their current state are not fully compatible with Article 9(3) of the Århus Convention. Although, as a Party to the Convention, the EU enjoys some leeway, it seems that the latter has been exercised in such a way that

EU citizens are not granted effective access to EU courts. This represents a threat to the environment and human health which may hardly be protected by judicial means initiated by individuals where a possible unlawful act having adverse effects is adopted by the EU authorities.

In any event, the new conditions set out under Article 263(4) TFEU will have to be interpreted by the Court of Justice, as far as environmental cases are concerned, in the light of the obligations laid down by the Århus Convention. In that connection, the position recently articulated by the Compliance Committee set up under the Århus Convention in a case brought against the EU is of a particular relevance. The Committee seems to have warned that in case the current system were to be maintained, the EU would be held in breach of its obligations under the Århus Convention. It should convince the Court to remedy the current inadequate system with respect to the *locus standi* requirements. It is one of the very premises of Union law which lies at the heart of this debate, ie the rule of law.

The current situation is even more questionable if one draws a comparison with the teleological approach elaborated by the Court of Justice as regards access to justice obligations deriving from Union secondary law. In stark contrast, the Court has subscribed to an extensive and progressive reading of the cluster of rules intended to ensure wide access to justice within the Member States' legal orders. Indeed, the Court appears to be keen on providing EU citizens with effective remedies before national courts regarding inter alia the Environment Impact Assessment (Directive 85/337).¹¹⁹ This paradox brings the discussion to another debate which is assuredly worth examining as well.¹²⁰

¹¹⁹ Eg Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009] ECR I-9967 para. 45; Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland v Bezirksregierung Arnsberg* [2011], nyr; Case C-240/09 *Lesoochrannárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011], nyr.

¹²⁰ This discussion would fall outside the scope of this article. For further developments, the reader is referred to: Jans and Vedder, *European Environmental Law* (n 2) 228–37; de Sadeleer, *Commentaire Mégret* (n 11); C Poncelet 'Access to Justice in Environmental Matters: Does the European Union Comply with its Obligations?' (2012) 24(2) *Journal of Environmental Law* 287–309.