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Judicial review of EU acts after the Treaty of Lisbon

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Introduction

The Treaty on the Functioning of the European Union (TFEU) provides for two different methods of judicial control designed to ensure the legal exercise of power by EU institutions, offices, bodies and agencies. The relevant provisions are now Articles 263, concerning direct actions for annulment, and 267, concerning indirect review via the preliminary reference procedure from the national courts.

The Court of Justice had strictly interpreted the *locus standi* requirements set out in the former Treaties for private plaintiffs to challenge the legality of EU measures directly before the EU courts, despite widespread criticism in the legal literature over the last fifty years.¹ As is well known, under Article 230(4) EC private parties were entitled to bring annulment proceedings before the General Court as long as they were ‘directly and individually concerned’ by the allegedly unlawful EU measure. Article 230(4) EC read as follows:

Any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

Despite the criticism, the Court of Justice refused to amend its established case law and instead placed the burden on the member states for a Treaty amendment, ruling that ‘[...] it is for the Member States, if necessary ... to reform the system currently in force’.² To that end, the Treaty of Lisbon amended Article 230(4) EC (now Article 263(4) TFEU) 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 any implementing measures.

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¹ For instance, see: P. Craig, ‘Standing, Rights, and the Structure of Legal Argument’, 9 *European Public Law* (2003) p. 493; A. Cygan, ‘Protecting the interests of Civil Society in Community decision-making –The limits of Art. 230 EC’, 52 *International and Comparative Law Quarterly* (2003) p. 995; Editorial: ‘What should replace the Constitutional Treaty?’, 44 *Common Market Law Review* (2007) p. 561; Editorial: ‘EU Leaders Strike Deal on Reform Treaty’, *EU Focus* (2007) p. 213; S. Enchelmaier, ‘No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice’s Jurisprudence on Art. 230(4) EC’, 24 *Yearbook of European Law* (2005) p. 173; S. Flogaitis and A. Pottakis, ‘Judicial Protection Under the Constitution’, 1 *European Constitutional Law Review* (2005) p. 108; E. Garcia De Enterria, ‘The Extension of Jurisdiction of National Administrative Courts by Community Law: the Judgment of the Court of Justice in *Borelli* and Art. 5 of the EC Treaty’ 13 *Yearbook of European Law* (1993) p. 19; C. Harding, ‘The Impact of Art 177 of the EEC Treaty on the Review of Community Action’, 1 *Yearbook of European Law* (1981) p. 93; and C. Harlow, ‘Towards a Theory of Access for the European Court of Justice’, 12 *Yearbook of European Law* (1992) p. 213.

² Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677.

The first limb of Article 263(4) TFEU is the same as the first limb of the prior Article 230(4) EC, and so calls for no comment. As for the second limb of Article 263(4) TFEU, it differs from the second limb of the prior Article 230(4) EC, as it has replaced the word ‘decision’ by ‘act’ and deleted the words ‘although in the form of a regulation or a decision addressed to another person’. However, these changes simply take account of the case law of the Court of Justice,³ which had departed from the literal wording of the Treaty provision on this point and interpreted it broadly already before the Treaty of Lisbon came into force, clearly permitting private plaintiffs since the *Codorniu* judgment to challenge legislative regulations as long as they are directly and individually concerned by such measures.

So the most significant change brought about by the Treaty of Lisbon is the new third limb of Article 263(4), which provides for the possibility for natural or legal persons to obtain standing to bring a direct action without having to meet the requirement of ‘individual concern’, provided that: (a) they still meet the requirement of ‘direct concern’ and their challenge is (b) brought against a ‘regulatory act’ which (c) ‘does not entail any implementing measures’. This Treaty amendment has the potential to mitigate the gaps in relation to the *locus standi* of private plaintiffs, subject to acceptable interpretation by the judiciary.

Therefore, the main focus of this analysis is upon the recent order (*Inuit Tapiriit Kanatami*)⁴ and the judgment (*Microban*)⁵ of the General Court, which ruled for the first time on the interpretation of Article 263(4) TFEU. According to the Court, the new provisions do not make it easier for private parties to challenge EU *legislative* measures as defined by Article 289(3) TFEU, since such acts cannot be considered to be regulatory acts; the requirement of individual concern, as traditionally interpreted, continues to apply in full in such cases. On the other hand, the *Microban* judgment confirms that the revisions to the *locus standi* rules do make it easier for private parties to challenge *non-legislative* acts directly in some cases.

Background

Before the entry into force of the Treaty of Lisbon, strict *locus standi* requirements for private litigants constitute one of the very few areas of EU law where the legal literature was united, agreeing almost unanimously that fundamental gaps in judicial protection existed.⁶ According to the cumulative criteria, the measure had to be of direct and individual concern to the legal position of the applicant. Private parties were directly concerned when EU measures directly affected their legal position and left no discretion to the addressee, as they were ‘sufficient in themselves and require no implementing provisions’.⁷

While it was possible for private litigants to challenge regulations directly given that by definition regulations preclude national implementing measures, it was problematic for private litigants to challenge directly the legality of directives since by definition, directives leave discretion to the member states. The applicants in the *Salamander*⁸ case argued that not

³ See Joined Cases 239 and 275/82 *Allied Corporation and others v Commission* [1984] ECR 1005; Case C-358/89 *Extramet v Council* [1991] ECR I-2501; and Case C-308/89 *Codorniu v Council* [1994] ECR I-1853.

⁴ Case T-18/10 *Inuit Tapiriit Kanatami and Others v Commission*, order of September 6, 2011, not yet reported. This order has been appealed to the Court of Justice (Case C-583/11 P, pending).

⁵ Case T-262/10 *Microban v Commission*, judgment of 25 October 2011, not yet reported. This judgment has not been appealed to the Court of Justice.

⁶ A. Arnall, ‘Editorial: April Shower for Jégo-Quéré’, 29 *European Law Review* (2004) p. 287; C. Koch, ‘Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ right to an effective remedy’, 30 *European Law Review* (2005) p. 511.

⁷ Case 294/83 *Parti Ecologiste ‘Les Verts’ v EP* [1986] ECR 1339.

⁸ Joined Cases T-172/98 and T-175-177/98 *Salamander and others v EP and Council* [2000] ECR II-2487.

all directives leave discretion to the member states as to their substantive implementation and that the directive in question was substantially clear, precise and unconditional and was producing legal effects on the applicants even though the time for transposition had not yet expired. The Court indeed ruled that directives can be challenged directly. The difficulty, however, is to meet the requirement of direct concern, since ‘a directive cannot of itself impose obligations on an individual and may therefore not be relied on as such against him’.⁹ Directives can only be challenged directly by private parties where the effects of the directive are automatic or where the member states are expressly authorised to act in a particular manner.¹⁰ The EU courts therefore tended to direct private plaintiffs to their national courts to raise indirectly the legality of directives when they review transposition into the member state’s national legal system.¹¹ The most recent approach is however exactly the same as the approach in *Codorniu*:¹² directives fell within the scope of Article 230(4) EC, even though they were not mentioned in that provision, provided that the applicant could show direct and individual concern.

Additionally, the concept of ‘individual concern’ has been extremely narrowly defined since the *Plaumann* case.¹³ In particular, individuals must be affected, ‘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’.¹⁴ Due to this strict interpretation, the requirement of ‘individual concern’ in relation to directives and regulations has only been met in a very limited number of cases.¹⁵ However, in some areas such as competition law, anti-dumping and state aids the Court has treated standing requirements more generously and ruled that the Treaty standing requirements were satisfied.¹⁶

The test of individual concern was criticised for being very restrictive, since it makes it impossible for an applicant to establish individual concern except in exceptional circumstances related to past events.¹⁷ The prospect of reform of the rules was raised when Advocate-General Jacobs in his opinion delivered in the *UPA* case challenged the established interpretation of the ‘individual concern’ requirement, and suggested that the requirement should be considered satisfied when ‘the measure has, or is liable to have, a substantial adverse effect on [the applicant’s] interest’.¹⁸ Shortly after the delivery of that opinion, the Court of First Instance (now the General Court) delivered a judgment highly influenced by it. The Court in *Jégo-Quéré* ruled that individual concern is met ‘[i]f the measure in question affects [an individual’s] legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him’.¹⁹ Nevertheless, the Court of Justice refused to relax the strict standing criteria and in *UPA* reaffirmed its unsatisfactory restrictive case law, leaving the burden on the member states ‘to establish a system of legal remedies and procedures’, and required national courts ‘to interpret and apply national procedural rules governing the exercise of action in a way that enables natural and legal persons to challenge

⁹ *Salamanca* (*ibid.*), at para. 54.

¹⁰ *Salamanca* (*ibid.*).

¹¹ Case T-99/94 *Asocarne v Council* [1994] ECR II-871.

¹² *Supra* n. 3.

¹³ Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95.

¹⁴ *Plaumann* (*ibid.*), at para. 31.

¹⁵ Case T-135/96 *UEAPME v Council* [1998] ECR II-2335; Joined Cases 87/77, 130/77, 22/83 and 9-10/84 *Salerno v Commission and Council* [1985] ECR 2523.

¹⁶ Cases: C-152/88 *Sofrimport Sarl v Commission* [1990] ECR I-2477; 11/82 *Piraiiki - Patraiki v Commission* [1985] ECR-207; and 239 and 275/82 *Allied Corporation and others v Commission* [1984] ECR 1005.

¹⁷ A. Ward, *Judicial Review and the Rights of Private Parties in EU Law*, 2nd edn (OUP, 2007).

¹⁸ Advocate General’s Opinion in *UPA* (*supra* n. 2).

¹⁹ Case T-177/01 *Jégo-Quéré et Cie SA* [2002] ECR II-2365 at para. 51.

the legality of any decision.’²⁰ The same approach was confirmed in the *Jégo-Quéré* appeal.²¹

Facts of the cases and Court rulings

Inuit Tapiriit Kanatami and others and *Microban* are the first cases in which the General Court has interpreted the substance of the revised *locus standi* rules. The issue had not arisen in the case law previously, because the General Court had/s ruled that the revised Treaty provisions could not apply to proceedings which have been brought before the entry into force of the Treaty of Lisbon, since the admissibility of an application for annulment had to be resolved by the rules in force at the day on which the application for annulment was submitted.²² This approach, however, is not consistent with the case law of the Court of Justice regarding the extension of the Court’s jurisdiction over immigration, asylum and civil law cases pursuant to the Treaty of Lisbon, which repealed the prior restriction on the Court’s jurisdiction pursuant to Article 234 EC to references from final courts only.²³ That case law establishes that the Court’s wider jurisdiction must be extended to cases which were referred to it from national courts before the Treaty of Lisbon came into force.²⁴

In *Inuit Tapiriit Kanatami and others* case,²⁵ a group of entities consisting of Inuit seal hunters and trappers and other organisations representing the interests of Inuit, as well as individuals and companies involved in the processing of seal products, sought the annulment of Regulation 1007/2009, adopted pursuant to the former co-decision procedure (now called the ‘ordinary legislative procedure’), on the prohibition of marketing of seal products.²⁶ The applicants have also separately sought the annulment of a Commission Regulation implementing Regulation 1007/2009,²⁷ arguing also in that case against the validity of the parent measure on the basis of the exception of illegality pursuant to Article 277 TFEU.

The General Court dismissed the action as inadmissible. The Court started by noting that the new *locus standi* requirement for private parties set out in Article 263(4) TFEU do not define the concept of ‘regulatory act’. It was therefore necessary for the Court to carry out a ‘literal, historical and teleological interpretation of that provision.’

First of all, it stated that the ‘ordinary meaning’ of the word ‘regulatory’ meant that ‘regulatory acts’ were acts ‘of general application’. Next, in the Court’s view, ‘it is clear that’ the new *locus standi* rule ‘does not relate to all acts of general application, but to a more restricted category, namely regulatory acts.’ In light of Article 263(1) TFEU, Article 263(4) created three types of *locus standi*: challenges against acts addressed to the person concerned; challenges against legislative or/and regulatory acts of general application (subject to the ‘direct and individual concern’ threshold); and challenges against a category of acts of

²⁰ *UPA* (*supra* n. 2) at paras. 41, 42 and 45.

²¹ Case C-263/02 P *Jégo-Quéré v Commission* [2004] ECR I-3425 at paras. 33 and 34.

²² Cases T-539/08 *Etimine SA and Ab Etiproducs Oy v European Commission*, at para. 76 and T-532/08 *Norilsk Nickel Harjavalta and Umicore v Commission*, at para. 70 (orders of September 7, 2010, not yet reported).

²³ Previous Art. 68(1) EC.

²⁴ Case C-283/09 *Weryński*, judgment of February 17, 2011 (not yet reported) at para. 28, followed in Case C-396/09 *Intereidil*, judgment of October 20, 2011 (not yet reported) at para. 20.

²⁵ *Supra* n. 4. The General Court also ruled three times on applications for interim measures in Case T-18/10 (orders of: 30 April 2010, T-18/10 R [2010] ECR II-75*; 19 October 2010, T-18/10 R-II INTP (unreported); and 25 October 2010, T-18/10 R-II, not yet reported). The third interim measures order was appealed to the Court of Justice, which ruled that there was no need to adjudicate in light of the outcome of the main proceedings (Case C-605/10 P (R), order of 27 October 2011, not yet reported).

²⁶ Reg. 1007/2009 on trade in seal products (*OJ* [2009] L 286/36). Note that although the contested Regulation was adopted before the entry into force of the Treaty of Lisbon, the revised *locus standi* rules applied, because the proceedings were brought after that Treaty’s entry into force: paras. 32 to 35 of the order.

²⁷ Case T-526/10, pending, concerning Commission Regulation 737/2010 (*OJ* [2010] L 216/1).

general application, i.e. regulatory acts only (subject to the ‘direct concern’ threshold and the requirement that no implementing measures were entailed). This interpretation was supported by analogy with the reference to the member states’ ‘law, regulation or administrative action’ in Article 114 TFEU. Furthermore, the Court rejected the idea that the new *locus standi* rule was meant to apply to delegated acts (adopted pursuant to Article 290 TFEU) only.

Secondly, applying a historical interpretation, the documentation of the drafting of the Constitutional Treaty, which subsequently became the basis for the text of the Lisbon Treaty, supported the interpretation that the new *locus standi* rule applied to non-legislative acts only. Thirdly, a teleological interpretation supported the idea that the purpose of the new rule was to avoid the situation in which persons ‘have to infringe the law to have access to the court’, as regards non-legislative acts.

The Court furthermore rejected the argument that the new *locus standi* provisions should receive a wide interpretation in light of Article 47 of the EU Charter of Rights (which provides for the right to an ‘effective remedy’), because the EU courts cannot alter the jurisdiction set out in the Treaties even in light of the principle of effective judicial protection (relying on pre-Lisbon case law). It also rejected the argument that two specific international treaties might be relevant, since the applicants had not fully explained this argument and international treaties cannot override the provisions of EU primary law. The General Court thus concluded that ‘the meaning of ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering ‘all acts of general application apart from legislative acts’.

Furthermore, the Court ruled that the contested regulation was not a legislative act since ‘its categorisation as a legislative act or a regulatory act according to the [TFEU] is based on the criterion of the procedure, legislative or not, which led to its adoption’.²⁸ In this case, the co-decision procedure had been used to adopt the act, so it was a legislative act.

Since the contested regulation was not a regulatory but a legislative act, the pre-Lisbon requirements for direct and individual concern, which were clearly unchanged, had to be established and the Court therefore examined whether these criteria were satisfied. As regards direct concern, only those applicants which marketed seal products on the EU market met the test,²⁹ since others (such as those trapping seals in Canada) were less directly impacted by the EU rules and those rules furthermore to some extent required the adoption implementing measures to apply. While five of the applicants did meet the test for direct concern, they all failed the test for individual concern, since the law in question ‘applies to objectively determined situations and produces legal effects in regard to categories of persons envisaged generally and in the abstract’, affecting all traders equally.

In *Microban*, the dispute concerned the decision of the Commission implementing EU legislation which concerns plastic materials intended to come into contact with foodstuffs,³⁰ which withdrew from the list of permitted additives a material known as triclosan, with the effect of banning the marketing of triclosan in the Union. The applicants were engaged in the production and marketing of triclosan, and so sought the annulment of the contested decision.

The Court ruled, first of all, that the decision of the Commission to withdraw triclosan from the list was a ‘regulatory act’ for the purposes of Article 263(4) TFEU,³¹ because it was a non-legislative act of general application, as it was adopted pursuant to a comitology

²⁸ *Inuit Tapiriit Kanatami* (*supra* n. 4) at para. 65.

²⁹ *Inuit Tapiriit Kanatami* (*ibid*) at para 75.

³⁰ The decision was taken pursuant to Art. 11(3) of Reg. 1935/2004 (*OJ* [2004] L 338/4), and amended Commission Directive 2002/72 (*OJ* [2002] L 220/18) to remove triclosan from the list of permitted substances.

³¹ *Microban* (*supra* n. 5) at paras. 20 to 25.

procedure and ‘applies to objectively determined situations and...produces legal effects with respect to categories of persons envisaged in general and in the abstract’.

Secondly, the measure was of ‘direct concern’ to the applicants,³² because it met the twofold test, established as regards the requirement of ‘direct concern’ in the prior Article 230 EC, of directly affecting the legal situation of the applicants and also leaving no discretion to its addressees (in this case, member states), who have the task of implementing it, ‘such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules’. The test was met because (a) the applicants purchased triclosan and then used it to manufacture products and (b) the decision left no option to member states but to ban the marketing of products including triclosan as from 1 November 2011. The Court justified the use of this prior definition on the grounds that the revision of Article 263(4) ‘pursues an objective of opening up the conditions for bringing direct actions’, so the concept of ‘direct concern’ in the context of bringing proceedings against regulatory acts ‘cannot, in any event, be subject to a more restrictive interpretation’ than the definition of the same concept in the pre-Lisbon case law.³³

Thirdly, as to whether the decision in question entailed ‘implementing measures’, the General Court ruled that it did not.³⁴ The ban on marketing the substance was complete, and the member states had presumably already transposed the directives which the contested decision implemented. While there was an option to permit the marketing of the substance during a transitional period, this was optional and did not ‘require’ implementing measures as such. Any implementing measures which might be adopted during the transitional period would be ancillary to the pending prohibition of the substance, for which no implementing measures would be ‘necessary’.

The Court then went on to rule, on the substance of the case, that the Commission’s act was illegal, *inter alia* because the parent act did not confer any power upon the Commission to ban any substance at all.³⁵ In practice, then, the application of the new *locus standi* rules enabled the applicant to have annulled an illegal measure just one week before that measure would have banned the marketing of any product including triclosan.

Comments and analysis

The interpretation of the new third limb of Article 263(4) TFEU depends on the interpretation of the three separate elements of that provision. The first key element is the meaning of the term ‘regulatory act’. It is regrettable that such an important term was not defined clearly in the Treaty in the first place,³⁶ but this is not the fault of the General Court. As for the Court’s interpretation, it is clear that the Court has simply followed the distinction made by the Treaty of Lisbon (which it applied retroactively) between legislative and non-legislative acts. According to the Treaty, following the entry into force of the Treaty of Lisbon, Article 289 TFEU specifies that there are two types of legislative procedure: the ordinary legislative procedure and special legislative procedures. Any EU measure adopted by means of a legislative procedure is a legislative act (Article 289(3) TFEU). The obvious implication is that any EU measure *not* adopted by a legislative procedure is *not* a legislative act. Additionally, there are several different types of non-legislative acts, most notably (but not only) delegated acts and implementing acts as defined in Articles 290 and 291 TFEU. There

³² *Microban* (ibid) at paras. 26 to 32.

³³ *Microban* (ibid) at para. 32.

³⁴ *Microban* (ibid) at paras. 33 to 38.

³⁵ *Microban* (ibid) at paras. 40 to 69. The General Court accepted two of Microban’s four pleas, and decided it was unnecessary to rule on the other two.

³⁶ S. Balthasar, ‘Locus standi rules for challenges to regulatory acts by private applicants: the new Article 263(4) TFEU’, 35 *European Law Review* (2010) p. 542.

are also non-legislative acts based directly on the Treaties.³⁷ Since the General Court expressly rejected the idea that a legislative act might ever constitute a ‘disguised’ non-legislative act, it therefore applied a purely formal concept of legislation, rather than a substantive concept. So it seems clear that while the definition of ‘regulatory acts’ includes ‘all acts of general application apart from legislative acts’, it cannot ever include a ‘legislative act’, ie an act adopted pursuant to a legislative procedure.

Applying this rule, the *Microban* judgment states unambiguously that comitology measures in principle fall within the definition of ‘regulatory acts’,³⁸ as long as they are measures of general application, as defined by the Court. This interpretation must apply *a fortiori* to delegated acts adopted pursuant to Article 290 TFEU, since the Treaty expressly specifies that these are ‘non-legislative acts of general application’, and moreover clearly distinguishes them from legislative acts. Furthermore, by analogy with the *Microban* judgment, it should follow that implementing measures adopted by the Council,³⁹ including pursuant to the ‘regulatory procedure with scrutiny’ (RPS),⁴⁰ until it is fully replaced by the delegated acts procedure,⁴¹ must be considered ‘regulatory acts’ also. So must measures adopted pursuant to other forms of *ad hoc* procedures by the Commission. As for acts adopted on the basis of the Treaties, it should be concluded that any form of non-legislative act of general application should also be considered a regulatory act, in light of the definition of ‘regulatory act’ in the *Inuit* judgment and the absence of any suggestion in the Treaty or the *Microban* judgment that some other category of legal act exists.⁴² Of course, in order for the third limb of Article 263(4) TFEU to apply, it will still be necessary in every case to show also that the measure in question is of direct concern to the applicant and does not entail implementing measures.

As for the General Court’s methods of interpreting the concept of ‘regulatory act’, its starting point that regulatory acts are acts of general application is unobjectionable, as it can be justified by comparing the wording of the first and third limbs of Article 263(4) TFEU. However, it does not necessarily follow from the wording of Article 263(4) that a ‘regulatory act’ is only a *category* of acts of general application. With great respect to the Court’s view, the wording of Article 263(1) does not in any way suggest such an interpretation either.

In any event, even if the drafters of the Treaty of Lisbon intended to make a distinction between different categories of acts of general application as regards the third limb of Article 263(4), it does not follow that they specifically intended a distinction between *legislative* acts and non-legislative acts. In fact, the Court does not reach such a conclusion on the basis of a literal interpretation. The most obvious conclusion a purely literal interpretation of Article 263(4) suggests is instead that the Treaty drafters did *not* intend to distinguish between legislative and non-legislative acts. If they had intended such a distinction, why not

³⁷ For instance, Art. 81(3) TFEU provides for the possible adoption of a decision changing the decision-making procedure as regards family law measures.

³⁸ The act challenged in the *Microban* case was adopted prior to the reform of the comitology procedure effected by Reg. 182/2011 (OJ [2011] L 55/13), but there is no reason why the Court would have ruled differently if the act had been adopted pursuant to the revised comitology rules.

³⁹ See Art. 291(2) TFEU.

⁴⁰ For instance, see the Decision supplementing the Schengen Borders Code (OJ [2010] L 111/20), which is however subject to legal challenge by a privileged applicant (Case C-355/10 *EP v Council*, pending).

⁴¹ On the current legal framework for such measures, see S. Peers and M. Costa, ‘The Accountability of Delegated and Implementing Acts after the Treaty of Lisbon’, *European Law Journal* (forthcoming). Of course, once the RPS procedure is fully replaced by the delegated acts procedure, any delegated acts then adopted by the Commission will be ‘regulatory acts’ for the purpose of Art. 263(4) also.

⁴² For a different view on this point, see C. Werkmeister, S. Pötters and J. Traut, ‘Regulatory Acts within Article 263(4) TFEU—A Dissonant Extension of *Locus Standi* for Private Applicants’, 13 *Cambridge Yearbook of European Legal Studies* (2010-11) p. 311.

use more express and unambiguous wording?⁴³ After all, they chose to make a clear distinction between legislative acts and non-legislative acts in several other provisions of the Treaties.⁴⁴ Most significantly, since the Treaty drafters inserted an express reference to ‘legislative acts’ in Article 263(1), but *not* in the third limb of Article 263(4), this obviously suggests that they intended a *different* scope of the relevant provisions.⁴⁵

Perhaps this is why the Court’s analysis moves hastily on to other methods of interpretation. But it should be noted in passing that the Court’s limitation of the second limb of Article 263(4) TFEU to acts of general application is highly questionable. Indeed, the General Court’s reasoning that the phrase ‘regulatory act’ in the third limb of Art. 263(4) necessarily refers only to acts of general application should obviously mean, *a contrario*, that the absence of this phrase in the second limb of Art. 263(4) means that this limb applies to acts of general *or* individual application⁴⁶ Surely it is still possible that an act of *individual* application might be of ‘direct and individual concern’ to a person other than the addressee.⁴⁷ More generally, one might question whether a literal interpretation should play a significant role as regards the interpretation of Article 263, whereas it did not always play such a role in the past.⁴⁸ The pattern has been that private litigants can satisfy the standing requirements independently of the type of the contested measure.⁴⁹

As for the historical interpretation, the analysis of the General Court is clearly correct.⁵⁰ However, again it might be questioned whether a historical interpretation is in principle suitable for the interpretation of the Treaties.⁵¹ Furthermore, the EU Courts have hardly been consistent in applying this principle.

⁴³ For instance, ‘...and against a *non-legislative act [of general application]* which is of...’

⁴⁴ See, for instance: Arts. 15, 203, 290, 296, 297, 349 and 352 TFEU; Arts. 12(a), 16(8), 17(2), 24(1), 31(1) and 48(7), revised TEU; Arts. 2-5 of the protocol on national parliaments; and Arts. 2-8 of the protocol on subsidiarity. All of these references were inserted by the Lisbon Treaty drafters, whereas the distinctions between ‘law’ and ‘administrative action’ referred to by the General Court (in fact, the Court only explicitly refers to Art. 114 TFEU) were inserted as part of earlier Treaty amendments, and are therefore surely less relevant as regards the interpretation of the Treaty of Lisbon. The comparison between Art. 290 TFEU (which the Treaty drafters expressly limited in scope to ‘legislative acts’ only) and Art. 291 TFEU (where the Treaty drafters decided to refer to all ‘legally binding Union acts’) is surely particularly relevant to the interpretation of Art. 263(4). The General Court clearly followed the analysis by Koch (*supra* n. 6), p. 520, but her analysis did not consider this counter-argument either.

⁴⁵ The General Court refers to the wording of Art. 263(1) to demonstrate the existence of a distinction between regulatory acts and other measures of general application, but fails to explain why the Treaty drafters used different words in the same paragraphs of the same Article when it discusses the definition of ‘regulatory acts’.

⁴⁶ As long as the ‘direct and individual concern’ requirement is met, of course.

⁴⁷ See, for instance, Case C-188/92 TWD [1994] ECR I-833. Indeed, the General Court has confirmed this position as regards an action brought after the entry into force of the Treaty of Lisbon: Case T-224/10, *Association belge des consommateurs test-achats ASBL*, judgment of 12 October 2011 (not yet reported), para. 27.

⁴⁸ See the case-law discussed at paras. 67-71 of the UPA opinion (*supra* n. 2), and also the case law ignoring the express reference to decisions in the second limb of the prior Art. 230(4) EC (*supra* n. 3).

⁴⁹ Case T-45/02 *Dow v EP and Council* [2003] ECR II-1973.

⁵⁰ In addition to the document referred to by the General Court, namely the Convention Presidium’s proposed Articles on the Court of Justice and the ‘High Court’ (Conv 734/03, 12 May 2003: see the commentary on the proposed amendments to Art. 230), see also, for instance: the final report of the discussion circle on the Court of Justice (Conv 636/03, 25 March 2003), at para. 22; the comments of the President of the Court of Justice (Conv 572/03, 10 March 2003), at p. 4; and the comments of the President of the Court of First Instance (Conv 575/03, 10 March 2003), at p. 4. See also M. Varju, ‘The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention’, 10 *European Public Law* (2004) p. 43 at pp. 54 and 56 and Koch (*supra* n. 6), p. 520.

⁵¹ F. Jacobs, ‘The Lisbon Treaty and the Court of Justice’ in A. Biondi, P. Eeckhout and S. Ripley (eds), *EU Law after Lisbon* (OUP, 2012), p. 197 at p. 201.

As for teleological interpretation, the General Court's reasoning on this point in effect repeats its historical analysis, since the Court's sole argument for interpreting the third limb of Article 263(4) to mean that its purpose is to avoid applicants infringing the law in order to gain access to court is another reference to the same document forming part of the *travaux* of the negotiations on the Constitutional Treaty. So in this case, teleological interpretation does not in fact form a separate strand of the General Court's reasoning, and does not call for further comment.

Finally, the General Court's line of reasoning regarding the EU Charter of Fundamental Rights is, with great respect, not convincing. Most significantly, the Court fails to take into account that since the entry into force of the Treaty of Lisbon, the Charter has the 'same legal value' as the Treaties.⁵² So reliance on the pre-Lisbon case law as regards the effect of the Charter on the system of judicial review of EU measures is now otiose. On the other hand, the Treaty requires that the Charter must be interpreted with 'due regard' to the explanations of the Charter referred to in it,⁵³ and these explanations specify that Article 47 of the Charter 'has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union.' Furthermore, according to these explanations, the 'Convention' which drew up the Constitutional Treaty (which had included the Charter as part of its text) 'has considered the Union's system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected...in particular in the fourth paragraph of Article 263 [TFEU].' The first part of this explanation does suggest that the Charter did not as such aim to amend the rules on judicial review, but then the explanations are not legally binding.

There are five arguments in favour of the General Court's interpretation of 'regulatory act' that it did not invoke. First, its interpretation is the easiest to apply in practice, given that it is instantly obvious whether an EU measure was adopted by means of a legislative procedure or not. However, that approach would wrongly give precedence to legal certainty and transparency over a more fundamental aspect of the rule of law – judicial accountability for the legality of acts of the public authorities, which can only be guaranteed by effective access to judicial review.⁵⁴

Secondly, the General Court's interpretation of 'regulatory act' matches the hierarchy of norms of EU law as developed by the drafters of the Lisbon Treaty.⁵⁵ This is an obvious teleological argument which the Court surprisingly overlooked. Similarly, it might also be noted that the Court's approach to the definition of 'regulatory act' means that the system for the control of challenges to the legality of EU acts brought by non-privileged applicants will more closely match the system for the control of the legality of EU acts brought by *privileged* applicants as regards the allocation of cases between the General Court and the Court of Justice.⁵⁶ However, this approach should be rejected because it means that the form which an

⁵² Art. 6(1) TEU. The Court of Justice has referred frequently to this development: see the case law beginning with Case C-555/07 *Küçükdeveci* [2010] ECR I-365.

⁵³ See Art. 6(1) TEU, third sub-paragraph, and Art. 52(7) of the Charter. The Court of Justice took these explanations into account, as regards a different aspect of Art. 47 of the Charter, in Case C-279/09 *DEB*, judgment of 22 December 2010, not yet reported.

⁵⁴ F. Mancini and D. Keeling, 'Democracy and the European Court of Justice', 57 *Modern Law Review* (1994) p. 175 at p. 181.

⁵⁵ Balthasar (*supra* n. 36).

⁵⁶ See Art. 51 of the Statute of the Court of Justice. It would even be possible to align the allocation of jurisdiction between the two EU Courts as regards the two categories of applicants precisely, by giving the General Court jurisdiction pursuant to Art. 256(3) TFEU over all references from national courts on the validity of non-legislative acts. However, this would also mean giving the General Court jurisdiction over any questions of the interpretation of those acts which were referred along with the questions on validity; and there would

EU measure takes is less important than its substance, as regards the system for judicial control.⁵⁷

Thirdly, it can be argued that the General Court's approach is comparable to distinctions made as regards judicial review of legislative and non-legislative acts found in the national law of many member states.⁵⁸ But a comparison with the national law of the member states is not usually a factor in interpreting EU law.

Fourthly, the fundamental argument underlying the second and third arguments is that judicial review of legislative acts should be limited as compared to non-legislative acts, given the greater democratic legitimacy of acts of elected parliaments as compared to acts of the executive.⁵⁹ However, while this might be a valid argument within the context of the legal and political systems of member states, the more convincing counter-argument is that the EU legal and political system lacks the same legitimacy as those national systems, and so EU legislative acts should not benefit from the same degree of special protection.⁶⁰ Furthermore, as Dougan has rightly observed, the definition of 'legislative procedures' in the Treaties is in many respects peculiar.⁶¹ It suffices to point out that the European Parliament (EP) has more control over delegated acts than it has over most acts adopted pursuant to a special legislative procedure,⁶² undercutting any argument based on democratic legitimacy.

Finally, it has been argued that leaving national courts with the major role as regards judicial review of EU acts respects the principle of 'judicial subsidiarity'.⁶³ However, in this case, the application of the principle of subsidiarity points in the opposite direction: further centralization of the control of the validity of EU acts would clearly 'be better achieved at Union level',⁶⁴ since it would establish a more effective system of judicial review than member states could achieve acting separately. In any event, since national courts already lack the key power to declare Union acts invalid,⁶⁵ this train has already left the station.

The second key element of the third limb of Article 263(4) is the meaning of 'direct concern'. On this point, it should be noted that in the *Microban* judgment, while the General Court made clear that the interpretation of this concept could not be *less* generous to plaintiffs as compared to the pre-Lisbon interpretation in the context of bringing proceedings against regulatory acts, the Court did not rule out the possibility that the interpretation of this concept might be *more* generous than the pre-Lisbon interpretation in the same context. The Court did not need to rule on this issue in the *Microban* case, because the applicant in any event met the pre-Lisbon threshold. So this point should be considered open. In any event, as noted already,

have to be a 'tie-break' rule if a national court referred questions on the validity of both types of measures. See, for instance, Joined Cases C-92 and 93/09, *Volker und Markus Schecke and Eifert*, judgment of 9 November 2010, not yet reported.

⁵⁷ R. Barents, 'The Court of Justice after the Treaty of Lisbon', 47 *Common Market Law Review* (2010) p. 709 at pp. 724-6 and J. Usher, 'Direct and individual concern – an effective remedy or a conventional solution?', 28 *European Law Review* (2003) p. 575 at 599.

⁵⁸ See J. Schwarze, 'The Legal Protection of the Individual Against Regulations in European Union Law', 10 *European Public Law* (2004) p. 285 and Werkmeister et al (*supra* n. 42).

⁵⁹ See Werkmeister et al, *ibid*.

⁶⁰ See particularly M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts', 47 *Common Market Law Review* (2008) p. 617 at p. 678 and Usher (*supra* n. 57).

⁶¹ *Ibid*.

⁶² Art. 290(2) TFEU provides that the EP can block the adoption of a delegated act by a component majority of its members, while most special legislative procedures provide for consultation of the EP only.

⁶³ See Werkmeister et al (*supra* n. 42).

⁶⁴ See Art. 5(3) TEU.

⁶⁵ See Case 314/85 *Foto-Frost* [1987] ECR 4199 and further J. M. Cortes Martin, 'Ubi ius, Ibi Remedium? – Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads', 11 *Maastricht Journal* (2004) p. 233 at pp. 251-3.

the pre-Lisbon interpretation of ‘direct concern’ clearly continues to apply unchanged to the second limb of Article 263(4).⁶⁶

Regarding the third key element of 263(4): the General Court’s interpretation of the phrase ‘does not entail implementing measures’ in the *Microban* judgment clearly assumes that an act can only ‘entail’ implementing measures for the purpose of Article 263(4) if it *requires* them to be adopted. Moreover, the analysis of the third part of the new *locus standi* test in effect followed the same reasoning as the analysis of the second part (the ‘direct concern’ test), although the Court did not explicitly state that these two parts of the test were identical.

This means that if future case law does relax the interpretation of ‘direct concern’ in the context of the third limb of Article 263(4), this would be of no avail if such relaxation concerns the part of the ‘direct concern’ test concerning the extent of discretion left to member states or EU bodies – since any applications for annulment would still be inadmissible on the grounds that any measures leaving a sufficient degree of discretion to member states or EU bodies would still ‘entail implementing measures’. However, if future jurisprudence relaxed the interpretation of the ‘direct concern’ requirement as regards the extent of the measure’s impact on the applicants for annulment, this would be a genuine change.

The alternative, more stringent, approach to the interpretation of the ‘implementing measures’ criterion would have been to insist that this criterion required plaintiffs to cross an *additional* hurdle besides the ‘direct concern’ requirement.⁶⁷ For instance, this could mean that the new third limb of Article 263(4) could not apply even if the measure concerned required automatic implementing measures. It might be argued that this interpretation is suggested by the structure of the Treaty Article: why refer to both ‘direct concern’ and the absence of implementing measures unless these two criteria had independent meanings? However, the drafters of the Treaty of Lisbon were apparently content to repeat themselves in other parts of the Treaties,⁶⁸ and such an interpretation would also disrespect the drafters’ intentions by eviscerating even the modest extension of *locus standi* for direct actions set out in that Treaty. The requirement that an act not ‘entail implementing measures’ may have been inserted simply to clarify the meaning of ‘direct concern’.⁶⁹ Moreover, for the sake of consistency it would have to follow that the Court should place greater weight upon the Treaty drafters’ choice to refer to ‘regulatory acts’ instead of ‘non-legislative acts’ in the new third limb of Article 263(4).⁷⁰

More generally, in its analysis of the third limb of Article 263(4) TFEU, the General Court did not consider the distinction between directives and regulations. In our view, directives fall outside the scope of the third limb of Article 263(4) for two reasons. Firstly, directives normally entail implementing measures since they require member states to achieve the directives’ objectives through their national laws.⁷¹ Secondly, the direct concern requirement would normally rule out the admissibility of annulment actions in relation to directives since it is unlikely that a private party could prove that a directive includes ‘a complete set of rules which are sufficient in themselves and which require no implementing

⁶⁶ See *Inuit Tapiriit Kanatami* (*supra* n. 4).

⁶⁷ See *Werkmeister et. al.* (*supra* n. 42).

⁶⁸ See most obviously the wording of Art. 4(1) TEU and the second sentence of Art. 5(2) TEU.

⁶⁹ Similarly, the Court of Justice has ruled that Art. 1(1) of the special Protocol on the Charter of Fundamental Rights simply clarifies Art. 51 of the Charter itself: Case C-411/10 *NS*, judgment of 21 December 2011, not yet reported.

⁷⁰ See *Werkmeister et. al.* (*supra* n. 42), who apply different canons of interpretation to these two aspects of Art. 263(4).

⁷¹ Art. 288 TFEU; see S. Balthasar (*supra* n. 36).

provisions', aside from the exceptions set out in the *Salamander* judgment.⁷² However, even though there will not normally be *locus standi* to challenge directives pursuant to the third limb of Article 263(4) TFEU, the *Microban* judgment makes clear that a regulation which is adopted to implement a directive is not 'tainted' for that reason alone, as far as the 'implementing measures' criterion (and implicitly the 'direct concern' criterion) is concerned.

The contribution of *Microban* as regards the *locus standi* of non-privileged parties is ultimately quite significant. As noted already, the General Court made it clear that the revised Article 263(4) TFEU 'pursues an objective of opening up the conditions for bringing direct actions',⁷³ and the judgment confirms that Article 263(4) now grants more access to justice directly before the EU courts. This approach is fully compatible with the vast majority of legal literature in this area⁷⁴ and also with the opinion of the former Advocate General Jacobs in *UPA* and the Court of First Instance judgment in *Jégo-Quéré*. Arguably, therefore, the General Court implicitly accepted that indirect challenges through Article 267 TFEU offer a lesser quality of justice.

The post-Lisbon framework for judicial review

The revised system for judicial review of EU acts can now be evaluated in light of both the initial judgments of the General Court clarifying the operation of that system, and the opportunity that the Court of Justice in the *Inuit* appeal will soon have of (re-)considering the essential aspects of that system. Essentially, there are two separate (but connected) key issues raised by the system: the fundamental question of access to a court and the consequential question of an effective remedy.⁷⁵ Due to the primordial importance of these issues, the Court of Justice should take the opportunity to address the issue whether or not it agrees with the General Court that the concept of a 'regulatory act' cannot ever include legislative acts. If it agrees with the General Court's interpretation,⁷⁶ the Court of Justice will need to justify its position in light of broad concerns about the legitimacy of the EU system for judicial review, including possible rebellions by national courts and the future supervision of the European Court of Human Rights, which may lead to conflicts between those courts and the Court of Justice. If the Court of Justice disagrees with the interpretation of the General Court, it would still be necessary for the former Court to address the concerns about the EU system, given that on any likely interpretation of Article 263(4) TFEU there will always be some potential challenges to the validity of EU acts which fall outside its scope. It would surely not be a serious option for the Court to 'pass the buck' again to the member states, given the highly implausible prospect of further major Treaty amendment for the foreseeable future.

In considering the overall framework for the judicial review of EU acts, the starting point is the case law of the Court of Justice, which has acknowledged that the principle of effective judicial protection ranks among the general principles of EU law, 'stemming from the constitutional traditions common to the Member States',⁷⁷ and asserted that the Treaties

⁷² *Salamander* (*supra* n. 9); *UEAPME v Council* (*supra* n. 15); Case T-223/01 *Japan Tobacco Inc* [2002] ECR II-3259; A. Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court missed the boat?', 62 *Cambridge Law Journal* (2003) p. 72; *Les Verts* (*supra* n. 7) at para. 31.

⁷³ *Microban* (*supra* n. 5) at para. 32.

⁷⁴ *Supra* n. 1.

⁷⁵ See Koch (*supra* n. 6) at p. 515 and Enchelmaier (*supra* n. 1), p. 196.

⁷⁶ Much of the literature interprets (in some cases reluctantly) a 'regulatory act' as a non-legislative act. See: Koch (*supra* n. 6), p. 520; Varju (*supra* n. 50); Jacobs (*supra* n. 51); Barents (*supra* n. 57); Dougan (*supra* n. 60), at p. 677; K. Lenaerts and T. Corthaut, 'Judicial Review as a Contribution to the Development of European Constitutionalism', 22 *Yearbook of European Law* (2004) p. 1 at p. 24; and P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, 2010), at p. 131. For the opposite view, see Balthasar (*supra* n. 36).

⁷⁷ *UPA* (*ibid*), at para. 39.

have established ‘a complete system of legal remedies’ to ensure judicial review of EU acts.⁷⁸ The application of this system in practice should now be reassessed by the Court of Justice, in light not only of the revision of Article 263(4) TFEU, but also of the enhanced status of Article 47 of the Charter and the new Article 19(1) TEU, which provides *inter alia* that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’ Already, in *Opinion 1/2009*, the Court of Justice has interpreted this Article to mean that ‘the guardians of [the EU] legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States’,⁷⁹ and that this ‘judicial system’ includes the ‘complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions’.⁸⁰ It is notable that the Court of Justice has stressed the role of national courts pursuant to Article 19(1), even though they are not expressly mentioned in that Treaty provision.

Access to a court

The main problem in the *UPA* and *Jégo-Quéré* cases was that indirect review via the national courts was not possible because there was nothing in the national legal system to review since the impugned measure was a regulation which did not require any domestic implementing measure. This significant gap in judicial protection cannot be tolerated in a democratic society based on the rule of law.⁸¹ Although the Court of Justice has been willing to accept references from national courts concerning challenges to the validity of an EU measure even where national implementing measures have not been adopted,⁸² this is only possible where the relevant national law provides for such a remedy.⁸³

Assessing the key pre-Lisbon judgments in light of the revised system for judicial review,⁸⁴ the impugned Regulation in *Jégo-Quéré* was adopted by the Commission, under the powers granted to it by Article 15 of Council Regulation 3760/92, which established a system for fisheries and aquaculture. This Regulation gave powers to the Commission to adopt emergency measures when the conservation of fish stock was threatened.⁸⁵ Post Lisbon, the Commission has proposed new parent legislation which would continue to give it the power to adopt emergency measures by means of an *ad hoc* procedure.⁸⁶ In any event, the Commission’s acts do not require any implementing measures, so *Jégo-Quéré* would not have had to show individual concern to challenge this measure and it would therefore have been entitled to bring a direct action for annulment.⁸⁷

⁷⁸ *UPA (ibid)*; *Jégo-Quéré (supra n. 23)*.

⁷⁹ Opinion of 8 March 2011, not yet reported, para. 66.

⁸⁰ *Ibid*, paras. 70 and 71.

⁸¹ *Jégo-Quéré (supra n. 21)*. In reaching this conclusion the CFI expressly made a reference to the opinion of AG Jacobs in *UPA (supra n. 2)*, who suggested the relaxation of the test of individual concern as the only possible solution guaranteeing to private parties effective judicial protection.

⁸² See Case C-491/01 *BAT* [2002] ECR I-11453. Furthermore, a similar measure to that in *Jégo-Quéré* was challenged easily enough via the national courts in Case C-221/09 *AJD Tuna*, judgment of 17 March 2011, not yet reported. See generally J. Temple Lang, ‘Actions for declarations that Community regulations are invalid: the duties of national courts under Article 10 EC’, 28 *European Law Review* (2003) 102.

⁸³ See Cortes Martín (*supra n. 65*), at 258-9.

⁸⁴ See also: Koch (*supra n. 6*), pp. 525-6; Balthasar (*supra n. 36*), p. 544; Usher (*supra n. 57*); Werkmeister et al (*supra n. 42*); and Cortes Martín (*ibid*), at pp. 250-1.

⁸⁵ *OJ* [1992] L 389/1. This parent legislation was replaced by Reg. 2371/2002 (*OJ* [2002] L 358/59), Art. 7 of which still provides for the Commission to adopt such emergency measures.

⁸⁶ COM (2011) 245, 13 July 2011; see Art. 13 of the proposal.

⁸⁷ On this point see *Microban (supra n. 5)* at paras. 28-38. Two pre-Lisbon direct challenges to similar measures are still pending (Cases T-329/08 *AJD Tuna* and T-330/08 *Ligny Pesca di Guaiana Francesco*), while another challenge was dismissed as inadmissible (Joined Cases T-313/08 to T-318/08 and T-320/08 to T-328/08,

On the other hand, in cases where the contested act is a legislative act, the applicant still has to overcome strict requirements of direct and individual concern.⁸⁸ In *UPA*, the impugned Regulation on the common organisation of the markets in oils and fats was adopted pursuant to a legislative process.⁸⁹ So a challenge to such an act can still not be brought directly before the EU courts, in light of the General Court's ruling in *Inuit* that a 'regulatory act' can only refer to a non-legislative act, ie an act not adopted by means of a legislative procedure.

Although, as the *Microban* judgment makes clear, the Treaty of Lisbon has relaxed the *locus standi* for private litigants seeking to challenge regulatory acts directly, it has not changed the legal position as regards legislative acts. Moreover, even regulatory acts cannot be challenged directly if a private litigant cannot show direct concern or if the measure does entail any implementing measures. So while the revisions to Article 263 TFEU have rectified at least some of the cases where individuals may be left without a remedy, it is possible that some such gaps still exist, in particular because no implementing measures were taken, and there is no national act to challenge before domestic courts.

In order to ensure that, as the Court of Justice claims, the EU legal order contains a *complete* system for the review of acts of the EU institutions, Article 19(1) TEU must therefore be interpreted to provide for a general right to challenge EU measures before national courts, even in the absence of direct concern or national implementing measures, subject to the general principles of equality and effectiveness, interpreted by analogy with the case law on national remedies for enforcement of EU law. The criteria for admissibility of direct actions set out in the new third limb of Article 263(4) TFEU, particularly the reference to 'implementing measures', should be understood in light of the objective of ensuring effective judicial protection, in which (a) access to some court must be guaranteed, and (b) the interpretation of Article 263(4) TFEU and Article 19(1) TEU in conjunction allocates jurisdiction to that end between national and EU courts. The extent of national courts' obligations must go beyond the requirement to interpret national law 'as far as possible' in order to permit challenges to EU measures (as set out in the *UPA* judgment), to include an obligation to set aside any national rules which prevent or unduly hinder access to the national courts in this context.⁹⁰ While it might be objected that such a rule would require too many changes in national legal systems, the Court has already required far-reaching changes in such systems in order to ensure the effectiveness of EU law.

Access to an effective remedy

This brings us to the question of whether the system for challenges to the validity of EU measures via actions brought before national courts pursuant to Article 267 TFEU can be considered effective. The Court of Justice's traditional assumption that this form of challenge is sufficiently effective is problematic, in particular for the reasons pointed out by Advocate General Jacobs in his *UPA* opinion.⁹¹ First and foremost, national judges have no power to rule that EU measures are invalid,⁹² but only the power to issue provisional measures,⁹³ if

Veromar di Tudisco Alfio & Salvatore and Others [2009] ECR II-228*). A post-Lisbon direct challenge to a similar measure is now pending also: Case T-367/10 *Bloufin Touna Ellas Naftiki Etaireia*.

⁸⁸ See *supra* n. 13.

⁸⁹ Reg. 1638/98 (OJ [1998] L 210/32). The relevant rules now form part of the single Common Market Organisation Regulation (Reg. 1234/2007, OJ [2007] L 299/1), which was also adopted pursuant to a legislative process.

⁹⁰ See by analogy *Küçükdeveci* (*supra* n. 52), and furthermore Usher (*supra* n. 57) at p. 598, who argues that the new provision is 'more than a simple consolidation of prior case law'.

⁹¹ Opinion in *UPA* (*supra* n. 2).

⁹² *Foto-Frost* (*supra* n. 65). The Court of Justice based its reasoning on the need to safeguard the uniformity of EU law.

they refer the question of the validity of the EU act to the Court of Justice – which they are obliged to do, if they have serious doubts about the validity of that measure. Private litigants at this stage can only argue for the invalidity of the measure, but the decision on whether or not to refer the case is taken by the national judge. Therefore, it is clear that private parties cannot initiate proceedings concerning the invalidity of EU law via Article 267 TFEU as a matter of legal right. Furthermore, as Advocate-General Jacobs pointed out, proceedings via Article 234, now Article 267, do not comply fully with the principle of effective judicial protection because interim measures are limited in application to the territory of the member state concerned.

Interpreting Article 19(1) TEU in light of Article 47 of the Charter, the first objection to the effectiveness of Article 267 could be addressed by extending the *CILFIT* test fully to all challenges to the validity of EU measures brought via national courts.⁹⁴ This would mean that any national court would have to refer any challenge to the validity of an EU act to the Court of Justice not just where it had serious doubts about the validity of that act, but in all cases where the validity of an EU act is challenged, unless there is no reasonable doubt that the argument is (partly or wholly) unfounded, the Court of Justice had already ruled on an identical challenge or (taking account of the particular context of questions on validity) the plaintiff failed to bring a direct action against that measure pursuant to Article 263(4) within the two-month time limit, if there was no doubt that the plaintiff would have standing to bring such a direct action.⁹⁵ Such a change would entail *Köbler* liability if national courts failed to comply with their obligations;⁹⁶ and arguably, given the obligation on all national courts to refer questions, in this context *Köbler* liability should apply no matter which level of court failed to refer.

This reform of the system would simultaneously address the concerns about the delays and costs in the Article 267 procedure, since it should mean that most references on validity would come from national courts of first instance. In any event, the costs and delays stemming from the Article 267 procedure have to be compared to the lengthy delays inherent in proceedings before the EU General Court, the possible further delays of an appeal to the Court of Justice,⁹⁷ and the extra costs entailed by lawyers' travel to Luxembourg if a hearing is held.

A number of objections to this suggestion might be anticipated. First of all, it might be objected that it would amount to an amendment to the wording of the Treaty by judicial fiat. But the Court already ignored the wording of the Treaty when it banned national courts from ruling that EU acts were invalid⁹⁸ – so it may as well be hung for a sheep as a lamb.

Secondly, it might be argued that such a change would breach the principle of 'judicial subsidiarity'. But, as already argued above, the principle of subsidiarity points towards greater centralization of the control of the validity of EU acts, since this can more

⁹³ See Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415 and Case C-465/93 *Atlanta Fruchthandelsgesellschaft* [1995] ECR I-3761.

⁹⁴ Case 283/81 *CILFIT* [1983] ECR 3415.

⁹⁵ See *TWD* (*supra* n. 47).

⁹⁶ Case C-224/01 [2003] ECR I-10239. The same would apply to a breach of the obligation to ensure access to a court in order to challenge EU measures in the first place. See Enchelmaier (*supra* n. 1), p. 199.

⁹⁷ In *AJD Tuna* (*supra* n. 82), the Commission act was adopted in June 2008, the national court sent a reference in June 2009, and the Court of Justice ruled in March 2011. In comparison, in 2010 the General Court took an average of 24 months to give rulings in 'other direct actions', and the Court of Justice took an average of 14 months to give rulings on appeals (*Annual Report of the Court of Justice (2010)*, p. 183 and p. 96). So the reference took 32 months to resolve, whereas a direct action and appeal would have taken 38 months on average (if appealed).

⁹⁸ *Foto-Frost* (*supra* n. 65). Since Art. 267 TFEU only requires final courts to refer questions on the validity or interpretation of EU law to the Court of Justice, it should follow from a literal interpretation of Art. 267 that lower courts can rule on the validity or interpretation of EU acts without sending a reference.

easily be achieved at EU level than by the member states acting alone. This is true *a fortiori* as regards the effectiveness of remedies.

Thirdly, a similar but subtler argument is that such a system would upset the nature of the relationship between the Court of Justice and national courts, transforming it (as far as questions of validity of EU law are concerned) into a hierarchical and appellate relationship. Yet the system would not really be transformed in this way, for national courts would not be giving a ruling on the validity of EU law which the Court of Justice would be quashing – although it would still be open to national courts, if they wished, to express their opinions on the well-foundedness of the arguments against the validity of the EU measures concerned.

Fourthly, an entirely different line of argument is that such a system would leave so little for national courts to do as regards disputes concerning the validity of EU measures that they might as well be deprived of any role in such cases altogether. However, such an argument should be rejected, because sometimes the questions concerning the validity of EU acts will only arise in the context of national implementation and application of EU acts, and a continued role for the national courts reflects the decentralized application of EU law.⁹⁹ It is often also useful to combine questions on the validity of EU law with questions on its interpretation, but Article 263 TFEU does not provide as such for questions on the interpretation of EU law to be raised. Indeed, in some member states, national courts are already familiar with the role of acting as a filter for challenges to the validity of national legislation, which they then refer to a national constitutional court.¹⁰⁰

Finally, it could be argued that a change in the rules of this sort, coupled with greater access to national courts to challenge EU measures in the first place, would lead to judicial overload for the Court of Justice. The answer to this objection is that ensuring the legitimacy of EU law cannot be subordinated to purely administrative or economic concerns, and that in any event the workload of national courts might be alleviated by such a reform, since more cases would be referred from courts of first instance. Also, a ruling on the validity of an EU act by the Court of Justice would usually forestall any need for the General Court to rule on the same act.¹⁰¹

Addressing the remaining objections to the use of Article 267 raised by Advocate-General Jacobs, the Court of Justice should accept that it has jurisdiction to provide for EU-wide interim measures in cases where a national court has referred the validity of a contested EU measure to the Court of Justice, if there is a good reason, at least in cases where an applicant with activities in multiple member states would otherwise have to bring proceedings in all of those states in order to obtain interim protection or where the party challenging the validity of the EU measure has a cogent reason to ask the Court of Justice for interim measures even though the national court has refused such a request. National courts would still retain the primary role in deciding on interim relief. Such a change would hardly violate the wording of the Treaties; rather it would respect the plain language of the Treaty far more than the Court's current jurisprudence on this issue.¹⁰² Finally, the current rules on exchanges of pleadings and interventions applying to challenges to the validity of EU measures pursuant to Article 267 can be improved simply by changing the Court of Justice's Statute and/or rules of procedure.

Conclusions

⁹⁹ See Art. 291(1) TFEU.

¹⁰⁰ See, for instance, the German courts, as discussed in Schwarze (*supra* n. 58) at p. 288.

¹⁰¹ Cf the reference and direct action in the *AJD Tuna* case (*supra* n. 82 and n. 87).

¹⁰² Art. 279 TFEU provides that '[t]he Court of Justice of the European Union may in *any* cases before it prescribe any necessary interim measures.' (emphasis added).

The Court of Justice now faces a choice whether to reaffirm the General Court's order in *Inuit Tapiriit Kanatami* on appeal. For the reasons set out in this paper, it would be preferable to overturn this order and provide for direct actions against some EU legislative acts. But in any event, the Court of Justice should take this opportunity to recast the EU's system for the judicial review of EU acts, to ensure both access to a court in order to challenge all EU acts and an effective system for challenging those acts when actions are brought via national courts.