Developments

The Meaning of *Regulatory Act* Explained: Are There Any Significant Improvements for the Standing of Non-Privileged Applicants in Annulment Actions?

By Haakon Roer-Eide[*] *& Dr. Mariolina Eliantonio*[**]

A. Introduction

The right to an effective legal remedy is a generally accepted principle of modern legal systems and is enshrined in national constitutions as well as international treaties, such as the European Convention on Human Rights and Fundamental Freedoms.[1] On the European Union (hereinafter *EU*) level, the right to an effective remedy is laid down in Article 47 of the Charter of Fundamental Rights of the European Union.[2]

A private party's ability to challenge the legality of an EU measure—as was provided for in Article 173 of the Treaty on the European Economic Community (hereinafter *EEC*), later Article 230 of the Treaty of the European Community (hereinafter *EC*) and currently Article 263 of the Treaty on the Functioning of the European Union (hereinafter *TFEU*)—is an essential remedy when challenging EU measures, especially as the ECJ made it clear in *Foto-Frost* that national courts do not have the ability to rule on the validity of EU measures.[3] However, traditionally the action of annulment has only been available for private parties that were able to prove "direct and individual concern," and, as the latter requirement was interpreted rather strictly by the ECJ in *Plaumann,*[4] individuals have only been able to rely on this remedy if they could demonstrate to be differentiated from all other persons and could be distinguished individually in relation to the disputed measure. This strict standing requirement severely limited individuals' ability to challenge legal

[*] LL.B. Candidate, European Law School, Maastricht University.

[**] Assistant Professor in European Administrative Law. Department of Public Law, Faculty of Law, Maastricht University.

[1] *See* European Convention on Human Rights art. 6, 13, Sept. 3, 1953, 14 C.E.T.S. 194.

[2] Charter of Fundamental Rights of the European Union art. 47, Dec. 7, 2000, 2000 O.J. (C364) 1 (stipulating that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal").

[3] Foto-Frost v. Hauptzollamt Lübeck-Ost, CJEU Case 314/85, 1987 E.C.R. 4199.

[4] Plaumann & Co. v. Comm'n, CJEU Case 25/62, 1963 E.C.R. 95.

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measures of the European Union, even in cases where the legality challenge itself could have been well founded.[5] Some attempts to liberalize the requirement of individual concern were not endorsed by the ECJ and, although criticized by members of the Court itself and by doctrine, the *Plaumann* formula has essentially remained unchanged until the present time.[6]

Some changes to the wording requirements were, however, introduced by the Lisbon Treaty. In particular, the requirements of direct and individual concern remained unchanged and still must be fulfilled in order to challenge the legality of an EU measure in general, but the new Article 263(4) TFEU removed the requirement of individual concern for challenges against regulatory acts of direct concern that do not entail implementing measures. The term *regulatory act* is, however, not defined in the Lisbon Treaty.

The focus of this article will be to explore the meaning and the consequences of this new provision, trying to identify concrete situations where the new provision has made it easier to challenge an EU measure. Specifically, the focus will be placed on the position of environmental non-governmental organizations (hereinafter *NGO*) attempting to challenge EU measures taken in the field of environmental law. As the EU has signed the Aarhus Convention on, amongst other things, access to justice,[7] it is important to assess whether the current situation fulfils the conditions provided in the Aarhus Convention. The principal source in this process will be the recent case law on the definition of *regulatory act* in the aftermath of the Lisbon Treaty, but, in order to understand the issues addressed in the cases, the historical background will first have to be studied further.

B. The Situation Before the Lisbon Treaty

Private parties' ability to challenge the legality of an European Community or EU measure was provided for in Article 173 of the EEC Treaty and later in Article 230 of the EC Treaty, but only if the measure was of direct and individual concern to them. The phrase *direct*

[5] *See generally* Stichting Greenpeace Council (Greenpeace Int'l) & Others v. Comm'n, CJEU Case T-585/93, 1995 E.C.R. II-2205; Stichting Greenpeace Council (Greenpeace Int'l) & Others v. Comm'n, CJEU Case C-321/95 P, 1998 E.C.R. I-1651.

[6] *See* Unión de Pequeños Agricultores v. Council, CJEU Case C-50/00 P, 2002 E.C.R. I-6677; Comm'n v. Jégo-Quéré & Cie, CJEU Case C-263/02 P, 2004 E.C.R. I-3425.

[7] This international instrument was adopted by the European Community on 17 February 2005 by Decision 2005/370/EC and it provides, in Article 9(2), that the contracting parties should ensure that members of the public concerned having a sufficient interest or, alternatively, maintaining impairment of a right (where the administrative procedural law of a party requires this as a precondition), have access to a review procedure to challenge the substantive and procedural legality of decisions concerning activities subject to the public participation requirements of Article 6 of the Convention itself. Furthermore, Article 9(3) provides for the obligation for the parties to provide for a wide access of the members of the public to review procedures to challenge the legality of decisions affecting the environment.

and individual concern is ambiguous and leaves room for different interpretations. However, the ECJ provided an interpretation for *individual concern* as early as 1962 in *Plaumann,* where the Court quite restrictively stated that "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed."[8] This strict standing requirement severely limited the possibility for individuals to challenge legal acts of the European Union, and has been at the core of a heated academic debate,[9] in which many have argued that the right to an effective remedy against EU actions is not satisfactorily guaranteed in the EU legal order.[10]

The necessity of re-thinking the *Plaumann* test was addressed by Advocate General (hereinafter *AG*) Jacobs in *UPA*,[11] where he argued for a significantly less strict interpretation of the term *individual concern*, replacing the *Plaumann* criteria with a test based on whether the measure has a substantial adverse effect on the interest of the

[8] *Plaumann & Co. v. Comm'n*, CJEU Case 25/62.

[9] For criticism on the standing requirements of individual applicants under Article 230 EC, see Angela Ward, *Locus Standi Under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity*, 22 Y.B. OF EUR. L. 45 (2003); Anthony Arnull, *Private Applicants and the Action for Annulment Since* Codorniu, 38 COMMON MKT. L. REV. 7 (2001); José Manuel Cortés Martín, *Ubi ius, Ibi Remedium?–Locus Standi of Private Applicants Under Article 230(4) EC at a European Constitutional Crossroads*, 11 MAASTRICHT J. EUR. & COMP. L. 233 (2004); Angela Ward, *Amsterdam and Amendment to Article 230: An Opportunity Lost or Simply Deferred?*, *in* THE FUTURE OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION 37 (Alan Dashwood & Angus Johnston eds., 2001); Anatole Abaquesne De Parfouru, *Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France?*, 14 MAASTRICHT J. EUR. & COMP. L. 361 (2007); Adam Cygan, *Protecting the Interests of Civil Society in Community Decision-Making–The Limits of Article 230 EC*, 52 INT'L & COMP. L. Q. 995 (2003); Xavier Lewis, *Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should it be Fixed?*, 30 FORDHAM INT'L L.J. 1496 (2006–2007). Specifically with regard to environmental policy, see for example Birgit Dette, *Access to Justice in Environmental Matters; A Fundamental Democratic Right*, *in* EUROPE AND THE ENVIRONMENT: LEGAL ESSAYS IN HONOUR OF LUDWIG KRÄMER 1 (Marco Onida ed., 2004).

[10] John Usher, *Direct and Individual Concern–An Effective Remedy or a Conventional Solution?*, 28 EUR. L. REV. 575 (2005); Filip Ragolle, *Access to Justice for Private Applicants in the Community Legal Order: Recent (r)evolutions*, 28 EUR. L. REV. 90 (2003); Albertina Albors-Llorens, *The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat*?, 62 CAMBRIDGE L. J. 72 (2003). Specifically with regard to environmental policy, see Nicole Gérard, *Access to Justice on Environmental Matters—A Case of Double Standards*?, 140 J. ENVTL. L. 149 (1996); Frédérique Berrod, *Comment to Greenpeace*, 36 COMMON MKT. L. REV. 635 (1999); Nicole Gérard, *Access to the European Court of Justice: A Lost Opportunity*, 10 J. ENVTL. L. 338 (1998); Diana L. Torrens, *Locus Standi for Environmental Associations Under EC Law—Greenpeace: A Missed Opportunity for the ECJ*, 8 REV. EUR. COMMUNITY & INT'L ENVTL. L. 336 (1999).

[11] Unión de Pequeños Agricultores v. Council, CJEU Case C-50/00 P, 2002 E.C.R. I-6677.

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applicant, in order to provide full and effective judicial protection.[12] A similar approach was taken by the Court of First Instance (hereinafter *CFI*) in *Jégo-Quéré & Cie SA v. Commission*, where the CFI did not dismiss the case even when it established that the requirement of individual concern under the *Plaumann* formula was not fulfilled.[13] Instead the CFI reviewed the *Plaumann* formula from the perspective of effective judicial protection,[14] stating that "in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard."[15]

However, these attempts to alter the *Plaumann* criteria did not succeed; the ECJ decided *UPA* in line with established case law, holding that it was up to the Member States, not the court to initiate any reform of the law on *locus standi.*[16] The court clearly stated that "it should be added that, according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually . . . such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts."[17] The new test applied by the CFI was likewise discarded by the ECJ when it decided *Jégo-Quéré & Cie* on appeal,[18] finding that the requirement cannot be interpreted as setting aside a condition expressly laid down in the Treaty, establishing that the interpretation of the CFI had this effect and as a result overturning the ruling.[19] As has been argued, the validity of this argument could be disputed, since although the requirement of individual concern is laid down in the treaty, its strict interpretation was

[12] *Id*. at para. 60 (giving opinion of Advocate General Jacobs). In this context, the AG also highlighted the perverse effects of the *Plaumann* test, namely that the greater the number of persons affected by a measure, the less likely than an action under Article 230(4) EC would succeed.

[13] Jégo-Quéré & Cie SA v. Comm'n, CJEU Case T-177/01, 2002 E.C.R. II-2365.

[14] Cornelia Koch, *European Community—Challenge of Community Fisheries Regulation—Admissibility of Individual Applications Under Article 230(4)*, 98 AM. J. INT'L L., 814, 815 (2004).

[15] Jégo-Quéré & Cie SA v. Comm'n, CJEU Case T-177/01, 2002 E.C.R. II-2365, para. 51.

[16] DAMIAN CHALMERS, EUROPEAN UNION PUBLIC LAW 424 (2010).

[17] Unión de Pequeños Agricultores v. Council, CJEU Case C-50/00 P, 2002 E.C.R. I-6677, para. 44.

[18] Comm'n v. Jégo-Quéré & Cie, CJEU Case C-263/02 P, 2004 E.C.R. I-3425.

[19] *See* Koch, *supra* note 14, at 818.

conceived by the ECJ itself in *Plaumann.*[20] However, what cannot be doubted is that these two cases did not change the status quo and the *Plaumann* criteria remained the applicable test for establishing individual concern.[21]

C. The Constitutional Convention and the Lisbon Treaty

An initiative to reform the standing requirements for private applicants was taken by the Constitutional Convention when drafting a constitution for Europe. The proposed Article III-365 of the Constitutional Treaty, intended to replace Article 230 EC, did not alter the general requirements of direct and individual concern needed for private parties to challenge EU measures. However, it did introduce a change for one specific group of EU measures: *regulatory acts*. For these acts, only direct concern was required for a private party to have standing, provided that the act in question did not contain implementing measures. The Constitutional Treaty failed and never entered into force, but the wording of Article III-365 survived when the Lisbon Treaty was enacted, and can now be found in Article 263(4) TFEU. As a result the default rule was changed, and it *prima facie* became easier for private parties to challenge at least some EU measures. What was not clear, however, were the actual situations in which these changes were going to matter in practice.

D. The Meaning of the New Article 263(4) TFEU

When the Treaty of Lisbon entered into force, the new provision in Article 263(4) TFEU eliminated the need for individual concern regarding regulatory acts not entailing implementing measures only. Since no definition of *regulatory act* was provided for in the Treaties, there was some uncertainty regarding which EU measures fell within the scope of the new provision. The TFEU uses the term *legislative act* for legal acts adopted by a

[20] *See* Koch, *supra* note 14, at 819. *See also* DAMIAN CHALMERS & GIORGIO MONTI, EUROPEAN UNION LAW 433 (4th ed., 2006); Filip Ragolle, *Access to justice for Private Applicants in the Community Legal Order: Recent (r)evolutions*, 28 EUR. L. REV. 90, 100 (2003); Takis Tridimas & Sara Poli, *Locus Standi of Individuals Under Article 230(4): The Return of Euridice?*, *in* CONTINUITY AND CHANGE IN EU LAW: ESSAYS IN HONOUR OF SIR FRANCIS JACOBS 81 (Anthony Arnull, Piet Eeckhout & Takis Tridimas eds., 2008); Albertina Albors-Llorens, *The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat*?, 62 CAMBRIDGE L. J. 72, 90 (2003); Anatole Abaquesne De Parfouru, *Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France?*, 14 MAASTRICHT J. EUR. & COMP. L. 361, 387 (2007).

[21] Many scholars have considered these rulings by the ECJ as a missed opportunity to broaden the access to the EU courts by private litigants and regarded them as unconvincing. *See, e.g.*, Koch, *supra* note 14, at 819; DAMIAN CHALMERS & GIORGIO MONTI, EUROPEAN UNION LAW 432-33 (4th Ed., 2006); Christopher Brown & John Morijn, *Comment on Jégo-Quéré,* 41 COMMON MKT. L. REV. 1639*,* 1654 (2004); Filip Ragolle, *Access to Justice for Private Applicants in the Community Legal Order: Recent (r)evolutions*, 28 EUR. L. REV. 90, 101 (2003); Albertina Albors-Llorens, *The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat*?, 62 CAMBRIDGE L. J. 72, 92 (2003); José Manuel Cortés Martín, *Ubi ius, Ibi Remedium?–Locus Standi of Private Applicants Under Article 230(4) EC at a European Constitutional Crossroads,* 11 MAASTRICHT J. EUR. & COMP. L. 233, 245 (2004).

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legislative procedure (Article 289(3) TFEU) and *non-legislative acts* for legal acts adopted by the Commission (Article 290(1) TFEU). Non-legislative acts are defined as either *delegated acts* (Article 290(3) TFEU) or *implementing acts* (Article 291(4) TFEU). The term *regulatory act* is only to be found in Article 263(4) TFEU, and does thus not synonymously correspond with any of these categories. After the entry into force of the Lisbon Treaty, there was little doubt that *regulatory act* at least covered non-legislative acts of general application, such as implementing and delegated acts adopted according to Articles 290 and 291(2) TFEU, but it was uncertain if the term had the potential to cover any acts adopted in accordance with a legislative procedure, defined as legislative acts under Articles 289(3) TFEU**.** Academic debate at the time was divided whether this could be the case or not.[22]

In order to determine what is meant by *regulatory act*, one could turn to the preparatory works of the provision for guidance. One should, however, note that legislative history is not binding upon the ECJ,[23] and that the Court usually does not resort to historical interpretation.[24] Furthermore, for the wording of Article 263(4) TFEU, the available preparatory works relate to the Constitutional Treaty and not the Lisbon Treaty, and their authoritative value can thus be called into question.[25] The preparatory works for the Constitutional Treaty mention that using the term *regulatory act* allows for a distinction between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts (for which the "direct and individual concern" condition remains applicable), while providing for more liberal rules for actions against regulatory acts.

It thus seems like the intention of the Constitutional Convention when drafting the wording of what is now Article 263(4) TFEU was to uphold the requirement of individual concern for legislative acts. It could however be argued that using *regulatory ac*t instead of *non-legislative acts* in the wording of Article 263(4) imply that its intended application was not limited to non-legislative acts such as delegated and implementing regulations only.[26] The validity of this argument could be disputed as it conversely could be argued that *regulatory act* was used instead of *non-legislative acts* in order to restrict the scope of the provision even further. Had *non-legislative acts* been used, the need for individual concern would automatically be eliminated for all measures not adopted through a legislative

[22] *See generally* Stephan Balthasar, *Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Art. 263(4) TFEU*, 35 EUR. L. REV. 542 (2010).

[23] *Id*. at 544.

[24] PAUL CRAIG &GRÁINNE DE BÚRCA, EU LAW 64 (2011).

[25] *See* Balthasar, *supra* note 22, at 545.

[26] *Id.*

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procedure. One could argue that by using the term *regulatory act* instead, the need for individual concern is not eliminated for all kinds of non-legislative acts, but only for those of a regulatory nature. As will be discussed below, recent case law suggests that the correct interpretation lies somewhere in between these two extremes.

E. *Inuit* and *Microban*: *Regulatory Act* Brought Before the Court

The scope of the new provision of Article 263(4) TFEU and the meaning of *regulatory act* were at issue in *Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union*, the first case dealing with the new standing requirements regarding regulatory acts.[27] The contested measure was a regulation adopted pursuant to a legislative procedure and therefore a legislative act, and the applicants claimed that the measure in question could anyhow be defined as a regulatory act, and that they thus did not have to show individual concern. As already mentioned, it seems that the drafters did not intend such an interpretation of the provision, but the outcome of the case was not obvious, as the Court of Justice of the European Union (hereinafter CJEU) is not bound by such preparatory works. In its judgement, the General Court did however refer to the drafting history of the Constitutional Treaty, and concluded that the liberalized requirement for challenging certain measures in Article 263(4) TFEU does not cover all acts of general application, but only a specific category, namely regulatory acts, and that the conditions for challenging a legislative act are therefore still stricter than the conditions for challenging a regulatory act.[28] The court draws a distinction between legislative acts and regulatory acts, excluding the first category from the latter. A legislative act can consequently not be a regulatory act, and the individual concern element still must be fulfilled in order to challenge a legislative act like the disputed regulation. The new wording of Article 263(4) TFEU can thus not be used to challenge a legislative act without the applicant being able to show individual concern. The applicants' claim therefore failed as it contested the legality of a legislative act, and both direct and individual concern was thus needed. The case is important in that it clearly defines regulatory acts for the purposes of Article 263(4) TFEU as "all acts of general application apart from legislative acts."[29] The standing requirements concerning legislative acts are thus unaltered, as the scope of the new provision in Article 263(4) TFEU is limited to non-legislative acts of general application not entailing implementing measures.

[27] Inuit Tapiriit Kanatami & Others v. European Parliament & Council of the European Union, CJEU Case T-18/10, 2011 E.C.R. II-05599.

[28] *Id*. at para. 50.

[29] *Id*. at para. 56.

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The case is currently on appeal with the ECJ,[30] but the judgement has not been delivered at the time of writing. Advocate General Kokott did however deliver her opinion in January 2013,[31] which follows the same line of reasoning as the order of the General Court, and advises the ECJ to dismiss the appeal. The AG defends the higher threshold for challenging legislative acts by, *inter alia*, pointing to the democratic legitimacy of this category of acts.[32] She further argues that the requirements do not prejudice effective judicial protection, as individuals also have the possibility to challenge legislative acts indirectly, by challenging implementing measures before European or national courts.[33]

The applicants in *Inuit* did indeed also try to challenge the Commission Regulation, a regulatory act according to the definition set out above, that implemented the legislative act in question.[34] However, the case was dismissed on the merits as unfounded without the Court addressing the question of admissibility.[35] It is, however, worth noting that the plea of inadmissibility raised by the Council (which was acting as intervener in support of the Commission) only concerned the criterion of direct concern, thereby implicitly admitting that individual concern did not, in that case, have to be proven by the applicants.[36]

A second case where the disputed measure was claimed to be a regulatory act under Article 263(4) TFEU was decided by the General Court shortly after the first *Inuit* case, in *Microban v. Commission*.[37] The applicant sought to challenge a Commission Decision addressed to the Member States. The court assessed whether that measure could be defined as a regulatory act, thus eliminating the need to show individual concern. In its judgement, the General Court applied the same test as in *Inuit*,[38] and restated that the

[30] Inuit Tapiriit Kanatami & Others v. European Parliament & Council of the European Union, CJEU Case C-583/11P, *available at* http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=132541.

[31] *Id.*

[32] *Id.* at para. 38.

[33] *Id.* at paras. 115–24.

[34] Inuit Tapiriit Kanatami and Others v. Commission, CJEU Case T-526/10, (Apr. 25, 2013) *available at http://curia.europa.eu/juris/documents.jsf?num=T-526/10*.

[35] *Id.* at para. 21.

[36] *Id.* at para 18.

[37] Microban v. Comm'n, CJEU Case T-262/10, 2011 E.C.R. II-07697 [hereinafter Microban].

[38] Steve Peers & Mario Costa, *Court of Justice of the European Union (General Chamber), Judicial Review of EU Acts After the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission*, 8 EUR. CONST. L. REV. 82, 90 (2012).

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"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."[39] As the disputed Decision was adopted by the Commission according to implementing powers conferred on them, the Decision could not be regarded as a legislative act and could consequently be defined as a regulatory act. The Court also concluded that the Decision was of general application even if it was addressed to the Member States, as it produces legal effects vis-à-vis certain categories of persons.[40] The measure was also held to have no implementing measures even if the Member States had some discretion in a transitional period.[41] Consequently, the applicant was granted standing and was also successful in his claim. The case further strengthens the definition of regulatory act as provided for in *Inuit* and provides a concrete example of a situation where the new provision in Article 263(4) TFEU now allows applicants to have standing without showing individual concern.

F. Practical Consequences of the New Article 263(4)

With two cases relating to the new provision in Article 263(4) TFEU having been decided, it is now possible to establish that the scope of *regulatory act* as used in this provision covers all acts of general application apart from legislative acts as long as they do not entail implementing measures. The latter requirement means that the possibility to challenge Directives has not changed; as the regulatory act must not entail any implementing measures, Directives can still not be directly challenged as they per se must be implemented, also making it very difficult to prove direct concern.[42]

As was made clear by the General Court in *Inuit*, individual concern still has to be shown in order for a private person to challenge legislative acts, so it has not become easier to challenge regulations enacted by the Parliament and/or the Council according to a legislative procedure. Implementing and delegated acts adopted by the Commission according to Articles 290 and 291 TFEU are not legislative acts and could thus be defined as regulatory acts if they are of general application. The standing requirements for challenging a delegated regulation adopted by the Commission are therefore more easily fulfilled after the Lisbon Treaty entered into force. It has also become easier for natural and legal persons to challenge other non-legislative acts, such as implementing and delegated decisions taken by the Commission as long as they are of general application. *Microban* clearly illustrates this; the applicant was directly concerned and had standing since the disputed measure was a non-legislative decision of general application. The

[39] Microban at para. 21.

[40] *Id*. at para. 23.

[41] *Id*. at para. 38.

[42] *See* Balthasar, *supra* note 22, at 543.

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requirement that the act needs to be of general application is not clearly stated in the provision itself but can be derived from case law.[43] The applicable test for establishing whether an act is of general application is if it "applies to objectively determined situations and it produces legal effects with respect to categories of persons envisaged in general and in the abstract."[44] Commission Decisions can thus be of general application even if they formally are directed towards specific addressees, as was the case with the Commission Decision in *Microban*, which was addressed to the Member States.

It can thus be concluded that the new standing requirements as interpreted in recent case law have made it easier to challenge some EU measures, but for all kinds of directives as well as regulations and decisions adopted by the Council and the European Parliament the standing requirements remain the same. The difficult requirement of individual concern as interpreted in *Plaumann* still has to be fulfilled before private parties can challenge such measures. It has been suggested that the European courts should interpret the new provision in Article 263(4) TFEU in a broad manner in order to promote the right to judicial review, implying that all legislative acts should not be categorically excluded from the scope of the new provision.[45] A comparable argument was made by the applicants in *Inuit,* putting forward the right to effective judicial protection in support of their claim of admissibility. These arguments are comparable to the ones the CFI used in support of discarding the *Plaumann* criteria in *Jégo-Quéré*,[46] but just as the ECJ rejected these arguments in *Jégo-Quéré* on appeal,[47] the General Court in *Inuit* referred to *Jégo-Quéré* and stated that "the Courts of the European Union may not, without exceeding their jurisdiction, interpret the conditions under which an individual may institute proceedings against a regulation in a way which has the effect of setting aside those conditions, expressly laid down in the Treaty, even in the light of the principle of effective judicial protection."[48] However, taking into account the fact that non-legislative acts constitute a large proportion of EU measures, the practical possibility for private parties to request judicial review of the legality of EU measures has overall increased notably.

In order to get an impression of the practical implications of the new provision in Article 263(4) TFEU, an interesting exercise could be to look at old cases decided before the Lisbon

[43] Inuit Tapiriit Kanatami & Others v. European Parliament & Council of the European Union, CJEU Case T-18/10, 2011 E.C.R. II-05599, para. 63.

[44] Microban at para. 23.

[45] *See* Balthasar, *supra* note 22, at 548.

[46] Jégo-Quéré & Cie SA v. Comm'n, CJEU Case T-177/01, 2002 E.C.R. II-2365.

[47] Comm'n v. Jégo-Quéré & Cie, CJEU Case C-263/02 P, 2004 E.C.R. I-3425.

[48] Inuit Tapiriit Kanatami & Others v. European Parliament & Council of the European Union, CJEU Case T-18/10, 2011 E.C.R. II-05599, para. 51.

Treaty entered into force, and see if the need for individual concern *prima facie* would not have had to be fulfilled in order for the applicants to have standing had the case been decided under the current legal framework.[49] In the landmark case of *Plaumann*,[50] the disputed measure was a Decision taken by the Commission in relation to customs duties. Decisions taken by the Commission are not made through a legislative procedure, and are thus non-legislative acts. Such a decision could thus fall within the definition of *regulatory act*, and had the case been brought before the courts today Plaumann's case could very well have been admissible, as he would no longer have to show individual concern.

In *UPA*,[51] where the Advocate General argued in favour of a broader interpretation of individual concern,[52] the contested measure was Regulation (EC) No 1638/98, a regulation adopted by the Council and thus clearly a legislative act. That measure would thus fall outside the scope of "regulatory act" in Article 263(4) TFEU, and the applicant would still have had to show individual concern for the claim to be admissible, had the case been decided today.

In *Commission v. Jégo-Quéré & Cie* the dispute also concerned a Regulation, but the measure was a Commission Regulation, and thus not adopted by the Council and/or the European Parliament through a legislative procedure.[53] Under the current legal framework, such a measure adopted by the Commission would either be a delegated act or an implementing act, both non-legislative acts (Articles 290-291 TFEU). A regulation is an act of general application, and the disputed Commission Regulation is clearly within the scope of *regulatory act* as defined in *Inuit.* Had the case been decided today, the case would most likely have been admissible, as there would be no need for the applicant to show individual concern in order to acquire standing.

Having shown the improvements brought by the Lisbon Treaty to standing requirements, the following section will examine whether—specifically for the environmental policy field—the changes brought by the Lisbon Treaty do constitute an improvement also for environmental NGOs and whether the changes are enough to comply with the access to justice requirements provided by the Aarhus Convention.

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[49] The requirements of direct concern, general application, and no implementing measures would still have to be fulfilled, but will not be assessed as what is of interest is the scope of *regulatory acts*.

[50] *Plaumann & Co. v. Comm'n*, CJEU Case 25/62, at 107.

[51] Unión de Pequeños Agricultores v. Council, CJEU Case C-50/00 P, 2002 E.C.R. I-6677.

[52] *Id.*

[53] Comm'n v. Jégo-Quéré & Cie, CJEU Case C-263/02 P, 2004 E.C.R. I-3425.

G. Standing of Environmental NGOs Between Old and New Requirements

In the *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission* case, both the CFI and the ECJ held that the *Plaumann* test "remains applicable whatever the nature, economic or otherwise, of those of the applicants' interests which are affected" and did not set up an exception for environmental matters.[54] This means that, in order to challenge an EU measure, environmental NGOs would have to show that the measure affects them "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually."[55]

As mentioned in the introduction, the EU is a Contracting Party to the Aarhus Convention and has, therefore, undertaken to ensure wide access to justice for natural and legal persons wishing to challenge measures allegedly in breach of EU environmental law. To apply the provisions of the Aarhus Convention to EU institutions and bodies, the European Community adopted Regulation No. 1367/2006, which allows environmental NGOs, under certain conditions, to initiate proceedings before the European courts against acts of EU institutions and bodies.[56] One of the conditions is that environmental NGOs can only instigate proceedings "in accordance with the relevant provisions of the Treaty," namely, as of today, Article 263(4) TFEU.[57] The European courts have interpreted this phrase to encompass not just the provisions of Article 263(4) TFEU and the requirement of *individual concern*, but also the interpretation that has traditionally been given to this phrase in the case law. After the approval of the Aarhus Convention and even after the entering into force of Regulation No. 1367/2006, the European courts have—in every case brought before them—refused to change the interpretation of *individual concern* established in *Plaumann*, with the result that environmental NGOs have consistently been refused access to the European courts.[58] The changes brought by the Lisbon Treaty, however, are not

[54] Stichting Greenpeace Council (Greenpeace Int'l) & Others v. Comm'n, CJEU Case T-585/93, 1995 E.C.R. II-2205, at para. 50.

[55] *Plaumann & Co. v. Comm'n*, CJEU Case 25/62, 1963 E.C.R. 95.

[56] Commission Regulation 1367/2006, 2006 O.J. (L264) 13.

[57] *Id.* at art. 12(1). On this point and specifically with regard to the compliance by the EU with its obligations stemming from the Aarhus Convention, see Marc Pallemaerts, *Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention* 41 (Institute for European Environmental Policy, 2009). For a discussion of the drafting history of this Article, see Marc Pallemaerts, *Access to Environmental Justice at EU Level Has the 'Aarhus Regulation' Improved the Situation?*, in THE AARHUS CONVENTION AT TEN—INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND EU ENVIRONMENTAL LAW 287 (Marc Pallemaerts ed., 2011).

[58] European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission, CJEU Case T-236/04 & T-241/04, 2005 E.C.R. II-04945; WWF-UK Ltd. V. Council, CJEU Case T-91/07, 2008 E.C.R. II-81 (confirmed in appeal in case WWF-UK v. Council, CJEU C-355/08 P, 2009 E.C.R. I-73); Regiao autónoma dos Acores v. Council, CJEU Case T-37/04, 2008 E.C.R. II-103 (confirmed in appeal in case Regiao autónoma dos Acores v. Council, CJEU C-444/08,

likely to change the position of environmental NGOs, since many environmental measures fall outside the scope of the concept of "regulatory act not entailing implementing measures" as required by the Article 263(4) TFEU.

First of all, a great part of EU environmental measures are adopted in the form of directives. These are acts which, as discussed above, regardless of their legislative or non-legislative nature, by definition entail implementing measures and thus will not be included in the measures for which individual concern does not need to be proven according to Article 263(4) TFEU.

Secondly, even where the environmental measure is adopted by way of a decision—which was the case in the *Greenpeace*[59] and *EEB*[60] cases—the situation is not significantly improved for environmental NGOs. This is because, as examined above, the new wording of Article 263 TFEU read in conjunction with Article 289(3) TFEU precludes application to the Court against all decisions which were adopted by way of a legislative procedure: All decisions which are adopted by legislative procedure constitute *legislative acts* and therefore cannot be challenged under the new wording in Article 263 TFEU. Furthermore, in case of adoption by way of a non-legislative procedure, many decisions could still not be challenged in court under Article 263 TFEU because they would either not be qualified as regulatory acts because of the lack of general application, or because they need implementing measures at the EU or member states' level.

Finally, where a regulation is used to issue a measure that has an effect on the environment—which was the case in the *WWF-UK Ltd. v. Council*[61] and *Autonomous Region of the Azores*[62] cases—the loosening of the standing requirements will only take place where the regulation is not adopted with a legislative procedure and does not entail implementing measures. However, where regulations and decisions are used in the

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2009 E.C.R. I-200). For a closer examination of this case law, see Mariolina Eliantonio, *Towards an Ever Dirtier Europe?: The Restrictive Standing of Environmental NGOs Before the European Courts and the Aarhus Convention*, 7 CROATIAN Y.B. OF EUR. L. & POL'Y 69 (2011); Marc Pallemaerts, *Access to Environmental Justice at EU Level–Has the 'Aarhus Regulation' Improved the Situation?*, *in* THE AARHUS CONVENTION AT TEN—INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND EU ENVIRONMENTAL LAW 287, 297 (Marc Pallemaerts ed., 2011).

[59] Stichting Greenpeace Council (Greenpeace Int'l) & Others v. Comm'n, CJEU Case T-585/93, 1995 E.C.R. II-2205 (confirmed in appeal in Stichting Greenpeace Council (Greenpeace Int'l) & Others v. Commission, CJEU Case C-321/95 P, 1998 E.C.R. I-1651).

[60] European Environmental Bureau (EEB) & Stichting Natuur en Milieu v. Comm'n, CJEU Case T-236/04 & T-241/04, 2005 E.C.R. II-04945.

[61] WWF-UK Ltd. v. Council, CJEU Case T-91/07, 2008 E.C.R. II-81 (confirmed in appeal in WWF-UK v. Council, CJEU Case C-355/08 P, 2009 E.C.R. I-73).

[62] Regiao autónoma dos Acores v. Council, CJEU Case T-37/04, 2008 E.C.R. II-103 (confirmed in appeal in Regiao autónoma dos Acores v. Council, CJEU Case C-444/08, 2009 E.C.R. I-200).

environmental field, they tend to entail a considerable number of implementing measures such as the designation of national competent authorities, the issuing of permits by national authorities, and the monitoring of the respect of the provisions by the national authorities.[63] They are therefore normally not directly applicable, but require implementing provisions to be adopted by the EU institutions or by the EU Member States.

In conclusion, one could argue that the new wording of Article 263 TFEU will only affect a small number of measures and actions taken by EU institutions or bodies. As the new text only refers to provisions of regulatory acts which do not need implementation measures, it is not likely that a significant number of EU measures that affect the environment could be challenged under the new provision. The limited improvements brought by the Lisbon Treaty, coupled with the interpretation given by the European courts of the requirement of individual concern provided for in Article 263(4) TFEU, do not seem to comply with the requirement of access to justice mandated by the Aarhus Convention, since the consequence of applying the *Plaumann* test to environmental issues is that, in effect, no NGO is ever able to challenge an environmental measure before the European courts. This conclusion has been confirmed by the conclusions of the Compliance Committee of the Aarhus Convention, which established in April 2011 that the standing requirements provided by Article 263(4) TFEU, as interpreted by the European courts, are indeed "too strict to meet the criteria of the Convention."[64]

H. Conclusion

The analysis above shows that the amendments introduced by Article 263(4) TFEU did modify the standing requirements applicable to legal and natural persons for reviewing the legality of EU measures. How extensive the practical consequences were was not clear when the Lisbon Treaty came into force. *Inuit* and *Microban* clarified the standard: The extent of practical change brought about by the amendment is limited to a liberalization of the standing requirements for legal and natural persons concerning non-legislative acts of general application. As a result, it is now easier for legal and natural persons to challenge the legality of Commission Decisions based on implementing powers granted to the Commission, like the one at stake in *Microban*. Other measures based on implementing or delegated powers, such as delegated regulations adopted by the Commission, would also now be easier to challenge if they are of general application and of direct concern to the

[63] Jan H. Jans, *Did Baron von Munchhausen Ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies*, *in* REFLECTIONS ON 30 YEARS OF EU ENVIRONMENTAL LAW; A HIGH LEVEL OF PROTECTION? 474, 485 (Richard Macrory ed., 2006).

[64] Report of the Compliance Committee of the Aarhus Convention, *Findings and Recommendations with Regard to Communication ACCC/C/2008/32 (Part I) Concerning Compliance by the European Union* 11–14, April 2011, Geneva, *available at* http://www.unece.org/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1.edited.adv%20copy.pdf, at para. 87.

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applicant. Nothing, however, has changed concerning implementing and delegated Directives adopted by the Commission, as Directives necessarily contain implementing measures, and direct concern still has to be shown, thus falling outside the scope of the amendment. The reference to past cases has shown that, although the situation has improved, there will still be situations where an applicant is severely affected by a measure, and has valid grounds to question the legality of the measure, but is anyhow unable to challenge the legality of the measure, as he would not be regarded as being individually concerned. Importantly, the new Article 263(4) TFEU has made judicial review easier concerning non-legislative measures adopted by the Commission alone, strengthening judicial protection in cases where the European Parliament does not exercise direct democratic scrutiny. The increased possibility to review the legality of such measures is at least an important step towards more effective judicial protection.

However, the new Article 263(4) TFEU and the interpretation provided by the courts do not solve almost any of the problems which were faced before the reform by environmental NGOs. Since the new, more liberal standing requirements will rarely apply to measures taken in the environmental sphere, new solutions will have to found if the EU is to comply with its obligations arising from the Aarhus Convention.