

Jur. kand. Cecilia Sjöstrand, Lund/Stud. jur. Kathrin Polley, Freiburg i. Br.*

Standing of Private Parties to Challenge European Union Law

Private applicants challenging European Union Law was and will always be a key issue when it comes to the relationship between the Union and its citizens. Thus the protection of the individual's rights to judicial review of European acts holds a prominent position to ensure that the EU works sufficiently and effectively for every European citizen. The main way to achieve this goal is the authorisation of direct access to the European Court of Justice for the individual. Therefore, this paper aims to examine the ways of access to the Court of Justice for individuals and the general principles justifying the rights of the individual. Furthermore, it will analyse the handling of cases regarding legal certainty and how legal certainty is one of the most important rights for a private applicant.

I. Access to the Court of Justice for Individuals

1. Actions for Annulment, Article 263 TFEU

Subject of an action for annulment is a review of the legality of legislative acts of the EU institutions. The applicants able to bring an action to the Court are divided into two groups: privileged and non-privileged applicants. The former group is formed by the Member States, the European Parliament, the Council and the Commission having an unconditional right to bring an action to the Court.¹ This means they are able to bring an action even if the decision is addressed to some other person or body.² Non-privileged applicants, however, must fulfil certain criteria to be able to initiate an action. Firstly, the Court of Auditors, the ECB and the Committee of Regions are only allowed access to the Court for the purpose of protecting their prerogatives.³ Secondly, the right for individuals to bring an action before the General Court of the European Union is determined in the following way in Article 263 (4) TFEU:

'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act *addressed to that person* or which is of *direct and individual concern* to them, and against a

regulatory act which is of direct concern to them and does not entail implementing measures.' (Italics added)

The meaning of the criteria laid down in the Article above will be discussed further below.

The possibilities for individuals to use the action for annulment procedure have been limited through the Court's very strict interpretation of the conditions for standing of individuals as instigators of these processes. This is creating a significant obstacle in their access to the Court which, moreover, could constitute an infringement of their effective judicial protection or, even worse, to a complete denial of justice.⁴

Non-privileged applicants have been able to initiate proceedings for annulment in three types of cases. Firstly, in cases where the applicant was addressed by the decision and, secondly, when a decision or a regulation was addressed to someone else, however, considered to be of direct and individual concern to him or her.⁵ A regulation may also be challenged by an individual if it, in reality, is to be considered a decision. In determining whether a regulation should be viewed as a decision the Court applied the 'abstract terminology test'⁶, meaning that irrespective of the regulation's form it could still be challenged if it does not apply to 'objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner'.⁷ The mere fact that it is possible to determine the number or even identity of the persons affected would not render a different conclusion. Even if a regulation is determined to constitute a decision, the applicants still need to show individual and direct concern. This last type of situation has been changed through the Lisbon Treaty as will be discussed below. The definitions of direct and individual concern, respectively, have been developed by the case law of the Court of Justice. Both need to be fulfilled for the application to be considered admissible.⁸

The requirement of direct concern is fulfilled if the legal situation of the applicant is directly affected and there is no discretion left for the addressees of the measure who are entrusted with its implementation. This implementa-

* Cecilia Sjöstrand, after graduating from Lund University, Sweden, in June 2011 with a specialization in European Law, is now working within her legal clerkship program at the Förvaltningsrätten in Linköping, Sweden.

Kathrin Polley studies law at Freiburg University (formally at Greifswald University) and is specialized in European, International and Foreign Law. She studied one year at Lund University, Sweden, as an exchange student.

1 Art. 263 (2) TFEU.

2 Paul Craig/Gráinne de Búrca, EU Law: Text, Cases and Materials, 4th edition, 2008, p. 508.

3 Art. 263 (3) TFEU.

4 Opinion of Advocate General Jacobs delivered on 21 March 2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 43; Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365, para. 45.

5 *Craigde Búrca* (fn. 2), p. 509.

6 Defined in Joined Cases 789/79 and 790/79 *Calpak SpA et Società Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 1949, para. 9.

7 *Craigde Búrca* (fn. 2), p. 516.

8 Article 263 (4) TFEU, with the exception of the challenge of regulatory acts, see below; Henry G. Schermers/Denis F. Waelbroeck, *Judicial Protection in the European Union*, 6th edition, 2001, p. 449.

tion must be automatic and result from Community rules without the application of other intermediate rules.⁹

The way to determine whether an applicant was individually concerned by a decision was set out by the Court in the *Plaumann* case¹⁰ and has become known as the *Plaumann* test. Accordingly, applicants are considered to have individual concern if the decision 'affects them by reason of certain attributes which are peculiar to them or by reason of circumstance in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually'.¹¹ The question is whether an action may be brought by any person at any time, and if so the regulation cannot be of individual concern to the applicant.¹² It is possible that more than one applicant is individually concerned.¹³ The test has been applied in a very strict manner and has been very difficult to meet.¹⁴ The situation of the applicant is compared to the hypothetical situation of any other operator in the same area – i. e. any other individual actually or potentially in the same situation.¹⁵ The strict approach of the court has been discussed quite thoroughly in the doctrine.¹⁶

Regulations are, however, usually formulated in a generalised and abstract manner and may not be considered

decisions under the abstract terminology test, therefore, the Court has acknowledged in the *Codorniu* case¹⁷ that even if a provision is of general legislative nature concerning traders in a general way it is not precluded from having individual concern for some of them.¹⁸ However, the way of determining this is still by means of the *Plaumann* test.

In some areas, such as anti-dumping, competition and state aids, the Court has been more lenient when applying the rules for standing.¹⁹

2. Recent Development

There have been some tendencies towards a more relaxed or allowing approach towards the interpretation of the standing rules also in the general application of the standing rules.

The first step was taken by Advocate General *Jacobs* in his opinion in the *UPA* case where he scrutinised the *Plaumann* test and its problems. He concluded that the procedure prescribed in Article 263 TFEU was manifestly more appropriate for examining the validity of all EC measures of general application than the preliminary ruling procedure in Article 267 TFEU.²⁰ He then tested different approaches such as granting standing on exceptional basis when no other remedy would be possible, or to obligate Member States to ensure availability of reference on validity of general Community rules. These were, however, considered unsatisfactory and AG *Jacobs* arrived at the following solution: a private applicant should be individually concerned 'where by reasons of his particular circumstances, the measure has, or is liable to have, substantial adverse effect on his interests'.²¹ This seems to include any kind of potential effects, not only legal ones.²²

In the case of *Jégo-Quéré* the applicant was considered not to be individually concerned and, consequently, the company would have no alternative remedy. It thus argued that this would constitute a breach of the right to a fair trial in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The CFI agreed and with reference to Article 6 and 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights concluded that the procedures available to applicants under EU law were not enough to guarantee individuals' right to an effective remedy.²³ Therefore, it declared with reference to AG *Jacobs'* opinion in

9 *Craig/de Búrca* (fn. 2), p. 509.

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

11 *Ibidem*, p. 107.

12 *Jégo-Quéré* (fn. 4), para. 30; *Mariolina Eliantonio/Nelly Stratieva*, From *Plaumann*, through *UPA* and *Jégo-Quéré*, to the Lisbon Treaty: The Locus Standi of Private Applicants under Article 230 (4) EC through a political lens, Maastricht Faculty of Law Working Paper 2009/13, 2009, <http://www.unimaas.nl/bestand.asp?id=12912> (accessed on 24 June 2011), p. 3.

13 *Craig/de Búrca* (fn. 2), p. 512; Case 38/64 *Getreide-Import Gesellschaft v Commission* [1965] ECR 203.

14 *Ewa Biernat*, The Locus Standi of Private Applicants under Art. 230 (4) EC and the Principle of Judicial Protection in the European Community, Jean Monnet Working Paper 12/03, 2003, p. 6; *Eliantonio/Stratieva* (fn. 12) p. 1.

15 *Jégo-Quéré* (fn. 4), para. 30.

16 *Mariolina Eliantonio/Betül Kas*, Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection be closed?, *Journal of Politics and Law*, 2010, vol. 3 (2), p. 121; See also *Anthony Arnall*, Private applicants and the action for annulment under Article 173 of the EC Treaty, 1995, *Common Market Law Review*, vol. 32 (1), p. 7 (pp. 7–22); *Angela Ward*, Amsterdam and amendment to article 230: an opportunity lost or simply deferred? In A. Dashwood & A. Johnston (Eds.), *The future of the judicial system of the European Union*, 2001, pp. 37–40; *Angela Ward*, Locus standi under Article 230 (4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity, *Yearbook of European Law*, 2003, vol. 22, pp. 45–77; *Adam Cygan*, Protecting the interests of civil society in Community decision-making – the limits of article 230 EC, *International and Comparative Law Quarterly*, 2003, vol. 52 (4), pp. 995–1012; *José Manuel Cortés Martín*, Ubi ius, Ibi Remedium? – Locus standi of private applicants under Art. 230 (4) EC Treaty at a European Constitutional Crossroad, *Maastricht Journal of European and Comparative Law*, 2004, vol. 11 (3), pp. 233–261; *Xavier Lewis*, Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: if the System is Broken, where Should it be Fixed? *Fordham International Law Journal*, 2006, vol. 30 (5), pp. 1496–1544; *Anatole Abaquesne de Parfouru*, Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France? *Maastricht Journal of European and Comparative Law*, 2007, vol. 14 (4), pp. 361–402.

17 Case C-309/89 *Codorniu SA v Council* [1994] ECR I-1853.

18 *Ibidem*, para. 19; *Biernat* (fn. 14), p. 7.

19 Case 26/76 *Metro-SB-Großmärkte GmbH & Co KG v Commission* [1977] ECR 1875; Case 730/79 *Phillip Morris Holland BV v Commission* [1980] ECR 2671; Joined Cases 239/82 and 275/82 *Allied Corporation v Commission* [1984] ECR 1005; *Schermer/Waelbroeck* (fn. 8), pp. 435–448; *Craig/de Búrca* (fn. 2), pp. 518–521.

20 *UPA* Opinion (fn. 4), para. 37.

21 *Ibidem*, para. 103.

22 *Marie-Pierre Granger*, Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quéré et Cie SA v Commission and Union de Petqueños Agricultores v Council*, *Modern Law Review*, vol. 66 (1), p. 133.

23 *Jégo-Quéré* (fn. 4), para. 47.

the *UPA* case that there was no ‘imperative reason why the concept of a person individually concerned should include the obligation for an individual to be individualised in a way similar to that of the addressee’²⁴ and created a different and more allowing test for individual concern in relation to generally applicable Community measures which concern the individual directly, namely that:

‘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.’²⁵ (Italics added)

However, the two cases did not end there. Both were finally decided and changed through judgments of the European Court of Justice.

Firstly, the judgment in the *UPA* case reaffirmed the conventional definition of individual concern as determined by the *Plaumann* test.²⁶ The Court expressed the importance of interpreting ‘individual concern’ in the light of the principle of effective judicial protection by taking account of the different circumstances able to distinguish an applicant individually. On the other hand, this interpretation could not result in setting aside the *Plaumann* conditions.²⁷ The conclusion was that the Treaty established a complete system of legal remedies for challenging the legality of Community acts through the combined effect of both direct and indirect means of protection. The responsibility of ensuring protection was explicitly laid down on the Member States’ national courts. Consequently, it was not for the ECJ to examine if national law offered protection, since it would be outside the scope of its jurisdiction.²⁸ Concerning the reform of the requirement of individual concern, the Court stated that such an action could only be made through a formal Treaty amendment.²⁹

Finally, the judgment in the appealed *Jégo-Quéré* case also reaffirmed the strict interpretation on standing. The court referred to the main principles in the *UPA* judgment: individuals are entitled to effective judicial protection, a notion stemming from the constitutional traditions of the Member States, Articles 6 and 13 of the ECHR and the decisions in *Johnston* and *UPA*. The Treaty has established a complete system of legal remedies on basis of Articles 263, 277 and 267 TFEU. Therefore, it was considered to be the Member States’ obligation to establish a system of legal remedies ensuring effective judicial protection. Consequently, they should allow private parties to contest actions carried out by national authorities but based on EU measures and in the proceedings be able to rely on the invalidity of the original EU act to prove unlawfulness.³⁰ In deciding the question of access to the proceedings, the Court reaffirmed the stand-

ing of the *Plaumann* test, stating that it continued to apply even when the national rules prevented an individual to bring proceedings on the invalidity of the EU measure. As mentioned in the *UPA* judgment the ECJ would otherwise have to examine and interpret the national procedural law, which is not possible within the boundaries of its jurisdiction.³¹

3. The Completeness of the Treaty System of Remedies

a) The preliminary ruling procedure as an alternative to Article 263 TFEU

A way for individuals to indirectly challenge the legality of EU actions is through the preliminary ruling procedure laid down in Article 267 TFEU. The ECJ has itself referred to this procedure as an alternative way for individuals to contest EU actions when underlining the completeness of the system of remedies.³² According to the Court:

‘Alongside the possibility, for those who comply with the conditions of admissibility laid down in the Treaty, of challenging a Community measure by bringing an action for annulment before the Community judicature, individuals have access to the legal remedies available in the Member States in order to assert their rights under Community law and the preliminary reference procedure enables effective cooperation to be established for that purpose between the national courts and the Court of Justice.

As to the argument that one of those remedies would not be effective in the present situation, that circumstance, even assuming it to be established, cannot constitute authority for changing, by judicial action, the system of remedies and procedures established by Articles 173 and 177 of the Treaty and 178 of the EC Treaty (now Article 235 EC) which is designed to give the Community judicature the power to review the legality of acts of the institutions.’³³

The aim of the preliminary ruling procedure is the interpretation of EU Law or an assessment of the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union in order to enable the national court to decide a case before it. It is for the national court to decide whether to refer the matter to the ECJ.³⁴ The most important aspect of the procedure is the uniform interpretation of Union Law promoting consistent application.³⁵ When the validity of an act is doubtful to the

24 Ibidem, para. 49.

25 Ibidem, para. 51.

26 Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paras. 39–42.

27 Ibidem, para. 44.

28 Ibidem, paras. 40–42.

29 Ibidem, paras. 44–45.

30 Ibidem, paras. 29–32.

31 Ibidem, para. 33.

32 Ibidem, para. 40; Case C-263/02 P *Commission v Jégo-Quéré & Cie SA* [2004] ECR I-3425, para. 30.

33 Joined Cases C-300/99 and C-388/99 *Area Cova and others v Council* [2001] ECR I-983, paras. 53–54.

34 Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3215.

35 Case 66/80 *SpA International Chemical Corporation v Amministrazione delle finanze dello stato (ICC)* [1991] ECR 1191, para. 11.

national court, it has an obligation to send a question on the matter for preliminary ruling to the ECJ even if it is a court against whose decisions there is judicial remedy.³⁶

For the individual the preliminary ruling procedure contains some obstacles to the way of participation and the power to influence the procedure. Firstly, the applicant has no right to decide whether a reference at all is to be made and, if it is, he does not have the power to decide its content, i. e. which measures are to be examined and on which grounds.³⁷ Finally, the national courts have no power to declare the general EU measure invalid.³⁸

The only way in which an individual may influence the procedure is by written observations, which may be submitted by the Member States, institutions of the European Union and the parties in the main proceeding. In other words, when the reference has been handed in, the parties only have the chance or possibility to affect the proceedings by giving their views and arguments on the issue during short oral submissions. This is much more restricted than the procedure in actions for annulment where there is a full exchange of pleadings.³⁹

One of the further problems in using the preliminary ruling procedure as an alternative to the direct action is that in some cases where the act challenged is by nature self-sufficient, i. e. does not call for implementation measures, there may be no way to contest the legality of the act in the national courts, since there would not be any national measure to challenge. In these cases the only option for the applicant would be to breach the EU act in question and when judicial action is brought against them, to use the illegality of the EU provision as a defence. To force individuals to breach the law in order to have its legality checked by a court has been considered absurd by both the CFI and Advocate General *Jacobs*.⁴⁰ This problem has been addressed by the law-makers and, Article 263 (4) TFEU has now been partly amended, as discussed below.

Furthermore, as also AG *Jacobs* pointed out in paragraph 103 of his opinion, there are several procedural disadvantages concerning the preliminary reference procedure in comparison with the direct action, such as the participation of the institutions who have adopted the measure, the possibility to award interim measures or possibility to third party intervention. The former procedure is also more lengthy and consequently, more costly. According to the preliminary statistics of the European Court of Justice from 2010 the duration of a prelimi-

nary ruling reference before the Court of Justice was 16,1 months.⁴¹ This does not comprise the time spent before the national courts.

b) The action for damages under Article 340 (2) TFEU as an alternative

The action for damages under Article 340 TFEU has as its aim to recover losses caused by the action of the EU institutions. The requirement for liability is a sufficiently flagrant violation of a superior rule of law for the protection of individuals. This was determined by the *Schöppenstedt* case⁴² and has been developed further in the *Bergaderm* case⁴³ which declares that a breach is sufficiently serious if the Community institution has manifestly and gravely disregarded the limits on its discretion. Furthermore, in cases where there is considerably reduced or no discretion the mere infringement of Community Law may be enough to fulfil this criteria.⁴⁴

There are no restrictions on the standing of individuals to bring actions for damages; therefore, any individual may bring an action of this kind before the Court of Justice.⁴⁵

The purpose of the action for damages is, as stated above, different from the purpose of the action in Article 263 TFEU. The aim of the former is only to award compensation for loss suffered and not to make a ruling on the validity of the EU act even though the judgment might have as a result that the act in questions is not applied. This procedure may be suitable where economic loss has been suffered and there are no other remedies available to the applicant, due to the self-sufficient nature of the regulation for example. Nevertheless, the cause of the problem, or the alleged illegal measure is still not solved.⁴⁶

4. The Impact of the Treaty of Lisbon

Within the work with the proposal for the Constitutional Treaty the Working Group II concerned with the 'incorporation of the Charter/accession to the ECHR' investigated the question of effective judicial remedies and access of individuals to the European Court of Justice. Out of this the following three propositions to solve the matter emerged.

Some legal systems provide an alternative procedure in which an individual can turn to the constitutional court when they feel that their constitutional rights have been infringed by the state. Such systems can be found

36 Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association (IATA) v Department for Transport* [2006] ECR I-403, paras. 29–30.

37 Case C-332/92 *Eurico Italia Srl, Via 220 Srl and F&P SpA v Ente Nazionale Risi* [1994] ECR I-711, para. 17; *UPA* Opinion (fn. 4), para. 42.

38 Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para. 20.

39 *UPA* Opinion (fn. 4), para. 46; *Schermers/Waelbroeck* (fn. 8), pp. 452 and 501; *Damian Chalmers et al*, *European Union Law: Text and Materials*, Cambridge Press, 2nd edition, 2010, p. 151.

40 *Jégo-Quéré* (fn. 4), para. 45; *UPA* Opinion (fn. 4), para. 43.

41 Provisional Annual Report of the Court of Justice of the European Union 2010: Statistics of Judicial Activity of the Court of Justice, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/ra09_stat_cour_provisoire_en.pdf (accessed on 17 June 2011), p. 14.

42 Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975.

43 Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission* [2000] ECR I-5291.

44 *Ibidem*, paras. 43–44.

45 *UPA* Opinion (fn. 4), para. 72.

46 *Schermers/Waelbroeck* (fn. 8), pp. 405 and 489.

for example in Germany and Spain.⁴⁷ A solution like this was proposed by the working group during the drafting of the Constitutional Treaty. The positive aspects of this solution would be that the procedure prescribed by Article 263 TEU would not be altered. On the negative side, the scope of the actions could become very wide and hard to distinguish from that of direct actions.⁴⁸ There has been, however, too much opposition to this solution and, it was therefore discarded.

The second proposal was to enshrine an obligation of the Member States to provide for effective rights of action before their courts. The positive aspects of this solution would mean no enlargement of the rights of direct action for individuals and a codification of the existing case law of the ECJ. Furthermore, it is said to be the solution best corresponding with the principle of subsidiarity.⁴⁹ This solution was later encompassed through the Lisbon Treaty into article 19 (1) TEU.⁵⁰

The third suggestion was an amendment to Article 230 (4) EC, now Article 263 (4) TFEU: The working group recognised only the lacuna of protection in respect of 'self-executing' regulations containing directly applicable prohibitions on individuals. There were, however, some concerns as to whether the division of work between the Union and the national courts would be profoundly altered.⁵¹ The suggestion to alter Article 230 (4) EC has been incorporated through the Lisbon Treaty (to Article 263 (4) TFEU), removing the requirement of individual concern when challenging a regulatory act without implementing measures. Initially it may be mentioned that the wording is now referring to 'acts' instead of decisions, in accordance with the Court's case law on challengeable measures.⁵² The range of acts susceptible to review has also been widened with the general statement including all acts of bodies and agencies of the EU.⁵³ The basic approach to the system of judicial review has, however, not changed in that direct and individual concern still needs to be present to challenge most of the Union acts. The strict interpretation of standing applies in relation to non-regulatory acts as well as to regulatory and non-regulatory acts requiring implementation.⁵⁴ For the latter situation, the applicants have the possibility to challenge the measure indirectly through the preliminary ruling procedure, in our view indicating reliance on Article 267 TFEU as an alternative also by the Treaty drafters. However, if access is denied on Union level in relation to an act not considered regulatory which does not entail implementing measures, a complete lack of remedy would arise since

there would be no national remedy to challenge in the domestic courts.

The new wording of Article 263 (4) TFEU entails further problems. The term regulatory act is not defined anywhere in the Treaty.⁵⁵ The Treaty only distinguishes between legislative and or non-legislative acts.⁵⁶ The terminology refers to the procedure under which the acts were adopted. Legislative acts may be adopted under an ordinary and a special procedure, the difference being the extent of involvement of the Council and the European Parliament. The ordinary procedure corresponds to the co-decision procedure under which none of the two institutions may adopt measures rejected by the other one.⁵⁷ Under the special legislative procedure the Council and Parliament respectively only have consulting roles with regard to each other's adopted acts.⁵⁸ There are some different opinions in the academia as to which types of acts should be considered regulatory acts. On the one hand, the term may be limited to only non-legislative acts.⁵⁹ On the other hand, the choice by the drafters not to use the same terminology in Article 263 (4) could suggest that the interpretation should go beyond merely non-legislative acts to encompass all acts of general application.⁶⁰ Legislative acts resulting from the special legislative procedure are for example similar to non-legislative acts from the viewpoint of substance and procedure. Furthermore, the democratic legitimacy of measures adopted under the special procedure is not such as to allow them to escape possible challenge and review initiated by individuals.⁶¹ The problem of democratic deficit in the EU originates from the fact that the legislative/executive institutions of the Union – the Council and the Commission – are not directly elected.⁶² Access for European citizens to initiate judicial review of the institution's acts promotes the sense of participation in the decision making of the EU and the possibility to hold them accountable for their actions.⁶³ Therefore, only acts adopted by a directly elected institution would carry enough democratic legitimacy to fall outside the scope of regulatory act in Article 263 (4) TFEU. In any case, a situation where the ability to challenge an act is dependent on its form is highly objectionable and would go against the Court's own case law.⁶⁴

47 *Eliañtonio/Kas* (fn. 16), p. 125.

48 *Working group II*, Incorporation of the Charter/accession to the ECHR, Working Document 21, p. 4.

49 *Ibidem*, p. 7.

50 *Eliañtonio/Kas* (fn. 16), p. 126.

51 *Working group II*, Incorporation of the Charter/accession to the ECHR, Final document, p. 16.

52 *Chalmers et al* (fn. 39), pp. 398 and 414–415.

53 *René Barents*, The Court of Justice after the Treaty of Lisbon, *Common Market Law Review*, vol. 47, 2010, 709–728, p. 726.

54 *Eliañtonio/Kas* (fn. 16), pp. 127–128.

55 *Eliañtonio/Stratieva* (fn. 12), p. 8; *Barents* (fn. 53), p. 725.

56 Art. 289 TFEU.

57 Art. 289 (1) TFEU; Art. 294 TFEU.

58 Art. 289 (2) TFEU.

59 *Barents* (fn. 53), p. 725; *Koch*, pp. 520–523.

60 *Stephan Balthasar*, Locus standi rules for challenges to regulatory acts by private applicants: the new art. 263 (4) TFEU, *European Law Review*, vol. 35 (4), 2010, 542–550, p. 545.

61 *Alexander H. Türk*, Judicial Review in EU Law, 2009, p. 169.

62 *Eliañtonio/Stratieva* (fn. 12), p. 6.

63 *Ibidem*, p. 7.

64 *Calpak* (fn. 6); *Codorniu* (fn. 17); *Balthasar* (fn. 60), p. 725.

II. General Principles Justifying the Rights of the Individual

1. The Notion of Effective Judicial Protection

The principle of effective judicial protection is one of the main notions in the jurisprudence of the European Court of Justice. The Court considers this principle as a general principle of European Union Law originating from the constitutional traditions common to the Member States.⁶⁵ This qualification implies that effective judicial protection is part of primary law due to the general principles' basis in the Treaties.⁶⁶ This principle was first enunciated in *von Colson*,⁶⁷ while it gave only reference to the right to effective remedy. It has been further developed in *Johnston* where the right to effective judicial review and access to a competent court has been added.⁶⁸ The Court does not define the notion of effective judicial protection. However, it indicates that the principle of effectiveness and its correlated principle of equivalence are an embodiment of the principle of effective judicial protection.⁶⁹ One of the most important aspects of the principle is the right to judicial access.⁷⁰

The principle is enshrined in the European Convention on the Protection of Human Rights and Fundamental Freedoms in Articles 6 and 13, which provide the right 'to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', and the right to an effective remedy in case of violation of a person's rights. The principle of effective judicial protection is also reaffirmed by Article 47 of the Charter of Fundamental Rights. This concept is however wider than the Convention's since it includes all rights and obligations within the Treaty. Thus, also administrative decisions by national authorities are covered, unlike Article 6 ECHR.⁷¹

The principle of effective judicial protection should be respected both by the institutions of the Member States and of the European Union due to its status as primary law. The Court of Justice has the duty to see that the institutions of the European Union enforce the rights of individuals. The Court further exercises control over the way in which the Member States fulfil the obligation imposed on them by the Treaty.⁷²

The achievement of effective judicial protection is a duty attributed to the European judges. It is an obligation imposed on them by the Human Rights legislation, which is applicable in all Member States.⁷³ The wording of the Court in *Jégo-Quéré* and *UPA* implies that the requirement of protection is higher in the national courts than on Union level. In relation to the national judges' duties the Court refers to a *right* to effective judicial protection, whereas the Court uses the term *principle* while interpreting the standing rules.⁷⁴

The Court has imposed a strict duty on the national systems to ensure effective judicial protection. The result is that the national court must allow standing for individuals claiming an infringement of their Union rights.⁷⁵ Differences may occur between the Member States due to different stages of implementation and recognition of EU Law.⁷⁶

2. The Right to an Effective Remedy

An individual's right to an effective remedy has long been considered a fundamental right according to Article 13 ECHR. A series of cases demonstrated that a lacuna in the European legal system existed precluding individuals from achieving an effective remedy. First in 1996, the Court of Justice concluded that, where a breach of Community Law by a Member State is attributable to the national legislature, individuals are entitled to reparation, where the rule of Union law breached is intended to confer rights.⁷⁷

In the case of infringement of European Law, the Court has not provided specific remedies to be available in national courts. Due to different national legal systems a variety of remedies for law infringement are present. The Court of Justice tried to create a harmony between

65 Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 18; Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (UNECTEF) v Georges Heylens and others* [1987] ECR 4097, para. 14; Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] n.y.r. in June 2011, para. 58.

66 *Takis Tridimas*, *The General Principles of EU Law*, 2nd edition, 2006, pp. 50-51; *Constantinos N. Kakouris*, 'Do the Member States possess judicial procedural autonomy?', *Common Market Law Review*, vol. 34, 1997, p. (1389) 1391.

67 Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para. 23.

68 *Johnston* (fn. 65), paras. 17-18.

69 Joined Cases C-317/08 to C-320/08 *Alassini and others* [2010] n.y.r. in June 2011, para. 49; Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki AE and others v Ethnico Symvoulío Radiotileorasis and Ypourgos Epikrateias and Aktor Anonymi Techniki Etairia (Aktor ATE) v Ethnico Symvoulío Radiotileorasis* [2010] n.y.r. in June 2011, para. 78.

70 *Erin F. Delaney*, 'Right to an effective remedy'; *Judicial protection and European Citizenship*, Federal Trust Constitutional Online Paper Series No. 17/04, 2004, p. 3.

71 Opinion of Advocate General *Ruis-Jarabo Colomer* delivered on 26 November 1996 in Joined Cases C-65/95 and C-111/95 *The Queen v Secretary of State for the Home Department, ex parte Mann*

Singh Shingara and ex parte Abbas Radiom [1997] ECR I-3343, footnote 24; *Tridimas*, (fn. 66), pp. 455-456.

72 Art. 19 TEU, Arts. 258-260, 263-264, 267-268 and 340 TFEU.

73 *Biernat* (fn. 14), p. 23.

74 *Jégo-Quéré P*, (fn. 32), para. 31 compared to 36; *UPA*, (fn. 26), para. 44 compared to 41.

75 Joined Cases C-87/90 to C-89/90 *A. Verholen and others v Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757, para. 24; Case C-97/91 *Oleificio Borelli SpA v Comission* [1992] ECR I-6313, para. 13; Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271, para. 44; *Monica Claes*, *The National Courts' Mandate in the European Constitution*, 2006, p. 138.

76 *Elantonio/Kas*, (fn. 16), p. 129.

77 Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport ex parte Factortame Ltd and others* [1996] ECR I-1029, para. 51.

the national systems to enforce European Law.⁷⁸ Furthermore it created a system of general principles regarding the adequacy of national laws on remedies in order to protect European rights: the principle of equivalence of EU Law remedies to national remedies and the requirement of effective remedies for law infringements.⁷⁹ National law may still have the choice of remedy for breach of European Law. But European Law requires this choice to be analysed thoroughly. In 2002, the Court of Justice held that it was for the Member States to establish a system of legal remedies and procedures to ensure respect for the right to effective judicial protection.⁸⁰ Consequently, Member States and their courts play an important role in safeguarding the right to effective judicial protection. It is their primary responsibility to ensure that individuals can access the national courts and gain indirect access to the Court of Justice.⁸¹ If a Member State does not allow a remedy by way of injunctive relief, it does not preclude consideration of this remedy if it is capable of guaranteeing real and effective judicial protection.⁸² However, this duty does not require the national court to provide remedies not already available under national law unless, through an examination of the national legal system, it is clear that there does not exist any legal remedy (not even indirect) capable of ensuring the individual's Union rights.⁸³

3. Why is the Court so restrictive?

There are several possible reasons for the Court's restrictive approach towards allowing standing for individuals in actions for annulment. Firstly, it may be argued that the difference between the wording of Article 263 TFEU and the standing rules in Article 33 of the ECSC Treaty would warrant different interpretations of the requirements for access to review.⁸⁴ Even though the ECSC Tre-

ty did prescribe more lenient conditions, a comparison to-day seems outdated.⁸⁵

Another reason for adopting a strict approach could be the international origin or character of the European Union, making the Court of Justice in principle an international tribunal. Traditionally, individuals are not allowed standing before such a tribunal and, therefore, their possibilities for access to the EU Courts should be limited.⁸⁶ This ground was, however, refuted by AG *Jacobs* with reference to the way in which the Union has developed since its creation, no longer being a purely intergovernmental body.⁸⁷ In fact, the Court has itself acknowledged the Union's character as a new legal order.⁸⁸

Other views focus on the Court's own motives behind its position in relation to individuals' *locus standi*. According to *Rasmussen*, the restrictive interpretation of the standing conditions is part of a 'hidden agenda' according to which the goal is for the Court to become a supreme appellate court of the Union.⁸⁹ By limiting the cases brought through Article 263 TFEU individuals have to go through the preliminary ruling procedure, in effect promoting this function of the Court. The creation of the CFI, now the General Court, may be viewed as a further confirmation of this.⁹⁰ The Court's hidden intentions are also the theme of *Elia Antonio* and *Statieva's* view that the Court has taken on a role of a guardian of the Treaty and the Union legal order.⁹¹ The reasoning is based on the Court's reoccurring affirmation of the primacy of EU Law and the approach taken by it in areas such as state liability and direct effect. By its case law the Court of Justice is in effect trying to strengthen the Union's position in relation to the Member States. By restricting access through Article 263 TFEU it is protecting the legal order from challenge.⁹²

A final consideration may also be mentioned. Due to the increasing number of cases brought before the Union Courts, it may be argued that the restrictive approach taken towards standing in Article 263 (4) TFEU is a way of limiting the Courts' workload.⁹³ Whether or not this is in fact the case, such an approach is highly criticisable and has been strongly advocated against.⁹⁴ Arguably, the pushing of cases through Article 267 TFEU instead of di-

78 Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5; Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043, para. 13; Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifazi and others v Italian Republic* [1991] ECR I-5357.

79 *Rewe* (fn. 78), para. 5; *Comet* (fn. 78), paras. 12–16; Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595, para. 14; *Craig/de Búrca* (fn. 2), p. 320; Case C-268/06 *Impact v Minister for Agriculture and Food and others* [2008] ECR I-2483, paras. 44 and 46.

80 *UPA* (fn. 26), paras. 39–42; *Jégo-Quéré P* (fn. 32), paras. 29–32; *Cornelia Koch*, *Locus Standi of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individuals' Rights to an Effective Remedy*, *European Law Review*, vol. 30/4, 2005, p. 511 (511).

81 *Inter alia: Verholen* (fn. 75), para. 24; *Borelli* (fn. 75), para. 13.

82 Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd. and others (Factortame I)* [1990] ECR I-2433, para. 21; *Claes* (fn. 75), p. 138.

83 *Unibet* (fn. 75), paras. 40–41.

84 Case 16/60 *Producteurs de Fruits v Council* [1962] ECR 901; *Anthony Arnall*, *The European Union and its Court of Justice*, 2nd edition, 2006, p. 92.

85 *Biernat* (fn. 14), p. 17.

86 *Eric Stein/G. Joseph Vining*, *Citizen access to judicial review of administrative action in a transnational and federal context*, *American Journal of International Law*, vol. 70/2, 1976, p. 222 (219).

87 *UPA Opinion* (fn. 4), para. 78.

88 Case 26/72 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 3.

89 *H. Rasmussen*, *Why is article 173 Interpreted Against Private Plaintiffs?*, *European Law Review*, vol. 5, 1980, p. 122 (112), referred to by *Arnall* (fn. 84), p. 93 and *Costas Kombos*, *A Paradox in the Making: Detecting Something Positive in UPA Under the Ten Kate Effect*, *European Law Journal*, vol. 15/4, 2009, pp. 506 and 518 (506).

90 *Kombos* (fn. 89), p. 518.

91 *Elia Antonio/Stratieva* (fn. 12), p. 10.

92 *Ibidem*.

93 *Arnall* (fn. 84), p. 93.

94 *Ibidem; UPA Opinion* (fn. 4), para. 102.

rect access to the Union Courts through Article 263 (4) does not necessarily limit the workload. The range and type of cases brought before national courts cannot be controlled by the Court of Justice and the process for the applicants is only prolonged.⁹⁵ In any case, such considerations should be solved by other means than the restricting of applicants judicial rights.⁹⁶

III. Legal Certainty

When it comes to private party proceedings on European level, legal certainty is certainly the most fundamental right for the parties to enhance their desired outcome. Private parties handle cases differently than privileged applicants namely the Commission, the Council, the Parliament and the Member States which always have 'standing' to bring actions against Union acts.⁹⁷ This covers a general power to seek judicial review against acts of the EU institutions and grants them general, unstrained policing powers against the EU institutions.⁹⁸ The outcome of the case, will it be positive or negative for the private applicant, is crucial for his (financial) future. It is a case between David and Goliath. But not only is the outcome closely connected to the level of legal certainty of the private parties. Starting a proceeding and going through the different levels of legal steps on national courts has to be based on a high believe in predictability, justifiability and fairness of the European legal system – to just mention three roads leading towards legal certainty.

1. Legal Certainty on the Autopsy Table

When taking a closer look on the body of legal certainty, one can find a lot of non legal but maybe more sentimental views required to put trust into a legal system. Furthermore, legal certainty is a package of requirements that a fair and democratic legal system has to provide if it wants to rule within the scope of humanity and constitutional legality. Hopes and expectations into the European legal system are necessities to bring legal certainty to life. The counterpart of this is the enemy of every trust, namely fear of failure and a certain level of uncertainty – whereas a high level of uncertainty would lead to an administrative chaos.⁹⁹ To start a proceeding the applicant, no matter if private or privileged, has to be able to predict the outcome (up to a certain level) of a proceeding. He has to have as much access to information regarding the legal body as possible paired with clear and understandable delivery of this information. The principle of legal certainty

requires that those subject to the law should be able to clearly ascertain their rights and obligations.¹⁰⁰ Furthermore, those who act in good faith on the basis of the law as it is or as it seems to be should not be frustrated in their expectations. In the most recent *Heinrich* case from 2009 legal certainty was stated as: 'Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly'.¹⁰¹ These statements underline that a private applicant to the European Court of Justice has to be able to trust the judgement that it is fair and that his case has been treated equally to other judgements and cases which are based on proportionality and predictability.

It seems to be a difficult task for the European legal authorities to build up a legal system that meets all requirements mentioned before in order to raise legal certainty in the heads of all European citizens. As mentioned before legal certainty has indeed become a general principle of law on the European legal playground over the past decades.¹⁰² It is an unwritten principle which derived from the common constitutional traditions of the Member States and the development of the European Court of Justice. The Union's foundation is set on the principles of democracy, liberty, the fundamental freedoms, human rights and the rule of law. The ECJ has therefore created a wide system of jurisprudence on general principles of law, covering procedural rights, fundamental rights, equal treatment and non-discrimination, proportionality, legal certainty and legitimate expectations. National administrative scholars were the godfather for those principles, the most influential in this regard certainly the German Law which inspired the introduction of proportionality and legitimate expectations into the Union's legal order.¹⁰³ General principles are binding upon the EU institutions whenever they act, on the Member States when they implement Union Law and when they act within the scope of Community Law. This ensures that on every level of European legislation, legal certainty has to be put into consideration.¹⁰⁴

95 *Craig/de Búrca* (fn. 2), p. 526.

96 *Schermer/Waelbroeck* (fn. 8), p. 501.

97 *Naboth van den Broeck*, A long hot summer for individual concern? The European Court's recent case law in direct actions by private parties and a plea for a foreign affairs exception, *Legal Issues of Economic Concern*, 2003, vol. 30, nr. 1, p. 62.

98 *Damian Chalmers/Gareth Davies/Giorgio Monti*, *European Union Law: Cases and Materials*, vol. 2, 2010, p. 413.

99 *Craig/de Búrca* (fn. 2), p. 472; *Cace C-453/00 Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren* [2004] ECR I-837.

100 *Alan Dashwood/Derrick Wyatt*, *European Union Law*, vol. 6, 2011, p. 137.

101 Case C-345/06 *Heinrich* [2009] ECR I-1659, para. 44.

102 *Wyatt & Dashwood* (fn. 100), p. 131; *Chalmers/Davies/Monti* (fn. 98), p. 411; *Craig/de Búrca* (fn. 2), p. 472, *Schwarze*, *European Administrative Law* (1992), chapter 6; *Schonberg*, *Legitimate Expectations in Administrative Law* (2000); *Tridimas*, *The General Principles of EC Law* (2006), 2nd edition, chapter 6.

103 *Georg Nolte*, *General Principles of German and European Administrative Law – A Comparison in Historical Prospective*, *Modern Law Review* 57 (1994), p. 191.

104 Case C-143/93 *Gebroeders van Es Douane Agenten BV v Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431, para. 27; Case C-177/96 *Belgian State v Banque Indosuez and Others and European Community* [1997] ECR I-5659, para. 27; *Chalmers/Davies/Monti* (fn. 98), p. 412;

2. Legal Certainty in Practice

As discussed earlier, but again worth mentioning and to summarise in the light of legal certainty, private parties have access to the EU system by two direct ways, namely the action for annulment¹⁰⁵ and the action for failure to act¹⁰⁶ and one indirect way, the plea of illegality¹⁰⁷. Besides these remedies – in order to assess the legality of Union measures – private parties can challenge European Law in preliminary rulings on validity of the acts of the institutions¹⁰⁸ and action for damages¹⁰⁹. Furthermore, they can not only bring proceedings against national governments, they can also have access to the European Court of Justice to challenge the legality of decisions made by the Commission and the Council. But the procedural requirements are different. Whereas the action for annulment, the plea of illegality, the action for a failure to act and the action for damages has to be taken out in a contentious procedure, the preliminary ruling procedure is non-contentious. That means that it is based on a cooperation between national courts and the European Court of Justice, where the initiative to review lies with the national courts and not with the parties in the national proceedings.¹¹⁰

Many ways lead to a judicial review. At first sight, all those different proceedings do not seem to be very supportive when it comes to legal certainty. But still they have been developed to actually protect and enhance legal certainty for European citizens. European citizens have to be, as well as the Member States, subject to EU Law. Nevertheless, the possibility for citizens to bring proceedings to the European Court of Justice to challenge the legality of decisions made by the Commission and the Council in the early times of EC Law have been severely limited due to the impact of *locus standi* conditions¹¹¹ first mentioned in the EC and Euratom Treaties. This was one step backwards to the development of legal certainty in EU Law. As we have seen before, private applicants have to meet certain criteria to be able to access the European Court of Justice. Regarding the question on how much trust a private applicant can have into the European legal system, this was one more step towards legal uncertainty. Europe is a concern to every European citizen, thus, is European law and legislation. European Law penetrates everyone's life every day and has direct effect on the interests of EU nationals (such as natural persons, undertakings, companies, consumers, users etc). But if the law making lies just in the hands of the European Institutions and the individuals have no means whatsoever to directly plea in front of the Court, how can they build up

a healthy amount of legal certainty? Let us have a look at a more recent case. 2002 was a year of new hopes that the European Court of Justice grants wider access for private parties and makes one step forward to more legal certainty. In the same year the Court decided that this step was too big. It was a legal rollercoaster year, definitely not in favour of legal certainty.

As we all know by now, one of the most fundamental rights of the legal system in Europe is the right to an effective judicial remedy. In the *Jégo-Quéré* case the Court opened the door to the Court wider, but closed it again in *Unión de Pequeños Agricultores (UPA)*. While in *Jégo-Quéré* the Court of First Instance decided to go a wider road of interpretation of Art. 230 EC, the ECJ changed its opinion on individual concern again and, the private applicant was where he actually started and definitely not happy about the outcome. According to *van den Broek*¹¹², in general, the door may have been opened a bit more than before, and certainly not less.

IV. Analysis

In a democratic system the control of the law-making system is an essential part for its legitimacy. The trust in the European Union by its citizens is highly dependent on that it can legitimize its actions and the way in which this is done. We believe that a very important part of this is the possibility of judicial review of the Union's actions. In order to promote the closeness between the EU and its citizens, it is imperative that they are ensured effective possibilities to have direct access to the European Court of Justice.

It has become clear through this essay that individuals may challenge the validity of Union acts both directly and indirectly. The Court has systematically held that the system provided for in the Treaty is complete. Conversely, we have found that the alternatives to the direct action in Article 263 TFEU, are not satisfactory for the judicial protection of the individuals.

The EU solution is a strengthening of those principles by the Lisbon Treaty, Article 19 (1), which means an exclusive transfer of responsibility to the Member States, which results in a difference between judicial protection in the Member States and the ECJ. The protection is dependent on the willingness of the Member State to change its national law to comply with the Union duties. It is important for the uniform application of EU law that this transferred responsibility is uniformly fulfilled by each Member State. This is, as in other areas of harmonization in the EU, difficult to achieve with 27 different legal cultures. Hence, the individuals' protection lies in the hands of the Member States, with the general principles of law being the only guidelines. This is the aim of the ECJ, but we are sceptical if it really is the right way to solve the problem. Direct possibility to challenge the validity of a provision is, in our view, a much more effi-

¹⁰⁵ Art. 263 TFEU (former Art. 230 TEC).

¹⁰⁶ Art. 265 TFEU (former Art. 232 TEC).

¹⁰⁷ Art. 277 TFEU (former Art. 241 TEC).

¹⁰⁸ Art. 267 TFEU (former Art. 234 TEC).

¹⁰⁹ Art. 268/Art. 340 TFEU (former Art. 235 TEC).

¹¹⁰ *Albertina Albors-Llorens*, Private Parties in European Community Law: Challenging Community Measures, 1996, p. 7.

¹¹¹ See chapter 1 on Access to the Court of Justice for Individuals, 2nd subheading on Development.

¹¹² *Van den Broek* (fn. 97), p. 61–79.

cient way to ensure effective judicial protection. The only obstacle at the moment is the strict interpretation of the criterion ‘individual concern’, which is entirely a result of the Court’s own understanding of the concept. The ECJ’s argument that it is not within its power to change this is not convincing. On the contrary, the interpretation of EU Law is the essence of the Court’s jurisdiction and, it has many times before been willing to give broad interpretations and developments of EU Law concepts.

The access to the Court of Justice for individuals is very difficult due to its restrictive approach to the requirements of direct and individual concern. Although there have been some tendencies towards relaxation of the criteria, this has been ultimately rejected by the ECJ. Instead the Court has referred the responsibility to the Member States’ own legal systems and ultimately to Treaty amendments. It is, however, clear that neither the preliminary ruling procedure nor the action for damages provide for a sufficient alternative to direct actions for individuals. During the work on the Constitutional Treaty the law makers have discussed alternative solutions, but the final changes made through the Lisbon Treaty have not considerably changed the situations. The decision was to change the working of Article 263 (4) TFEU by excluding the condition of individual concern in relation to regulatory acts without implementing measures. This term is still nowhere defined. Speculations regarding its meaning have been made, but ultimately it is up to the Court to define its content and range. We advocate a wide interpretation in order to make up for the lack of effective judicial protection which would otherwise be the result to avoid risk of complete denial of justice. Therefore, the effective

judicial protection, which has been emphasised in both case law and our most important human rights instruments, it is not efficiently ensured.

With regard to legal certainty, it has become clear that the Court kind of plays with private applicants and uses the national courts as gatekeepers. This is not the way to increase legal certainty. The Court could finally decide which road it wants to go and perhaps incorporate on this stage a system comparable to the German *Verfassungsbeschwerde* or the Spanish *recurso de amparo* where individuals can challenge Community acts. Thus, the road is long to ensure legal certainty. But the fundament of legal provisions has been made, only the Court needs a bit more contact to the private applicants. Direct actions are not always available as it depends on the interpretation of the individual concern regarding the case. Sometimes a private applicant is forced to wait for the implementation of a national act to finally violate it in order to have access to the Court. This is on the one hand very subjective and depends very much on the understanding of the Court. On the other hand, it is not really understandable and way out of the law of order.

Conclusively, there has been a lot of emphasis on the way to ensure and incorporate the rights of individuals in the EU, especially now after the entry into force of the Lisbon Treaty and consequently, the adoption of the European Charter of Fundamental Rights and the forthcoming accession to the ECHR. At the same time, the European Court of Justice is determined to hold on to the restrictive interpretation of the *locus standi* of individuals to access its procedures. This contradiction makes the European Union lose credibility.