Judicial Review of Regulatory Acts
- New Prospects for Private Applicants after the Lisbon Reform

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Abstract

The Lisbon reform entailed changes to the system of judicial remedies for private applicants bringing direct actions of annulment to the Court of Justice of the European Union. Art. 263(4) TFEU has been added with a new limb, providing individuals with the right to challenge the validity of regulatory acts not entailing implementing measures adopted by the institutions of the Union, if they are of direct concern to them.

Prior to the Lisbon reform, individuals could only challenge an act of general application if it was of direct and individual concern to them. The individual concern requisite has been interpreted particularly strict and effectively bars many private actions from gaining admissibility. The CJEU has in its recent case-law defined regulatory acts as non-legislative acts of general application. The addendum encompasses direct actions against all acts of general application not adopted through the legislative procedure provided by art. 289 TFEU.

The reform was adopted for the purpose of increasing the individuals’ judicial protection, whilst maintaining the legitimacy of legislative acts. Although the changes do not provide a general relaxation of standing requirements, the right to effective judicial protection has been strengthened by alleviating the individual concern criteria. By relying on the pre-legislative works from the drafting history of art. 263(4) TFEU, the Court reaffirms its restrictive praxis on admitting direct actions against legislation, and resort to the conclusion that the treaties provide for a complete system of judicial remedies. That assertion is, as will be argued, not entirely convincing as the indirect preliminary ruling procedure under art. 267(b) TFEU is not an appropriate substitute to the direct action.

Keywords

European Union procedural law, direct action of annulment, admissibility, locus standi, regulatory acts, direct and individual concern, right to effective judicial protection.
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1 Introduction

The Lisbon reform entailed certain amendments to the established system of judicial remedies provided by the Treaties through which an individual can challenge the validity of legal acts adopted by the institutions of the European Union (EU) in front if the Union judiciary. The right for natural or legal persons to bring a direct action of annulment to the Court of Justice of the European Union (CJEU) is regulated in art. 263(4) Treaty on the Functioning of the European Union (TFEU, previously art. 230 EC). Art. 263(4) TFEU is structured in three consecutive grounds for standing, in which the third was added through the Lisbon reform and provides that individuals are entitled to challenge regulatory acts which are of direct concern to them and does not entail implementing measures.

The CJEU:s older case-law has often been criticized for being too strict to sufficiently provide individuals with standing to bring direct actions to the Union judiciary. The core in the restrictive case-law has been the strict interpretation of the requisite individual concern, which effectively hindered numerous actions from gaining admissibility because the applicants have been unable to prove that the act affected them individually as if they were formal addressees. The added third limb providing standing against regulatory acts does not include the individual concern requisite, which considerable lowers the threshold for gaining admissibility to the Union courts. The three grounds on which an individual can base standing according art. 263(4) TFEU are:

1) Standing to bring a direct action of annulment against binding decisions immediately addressed to the applicant (first limb)
2) Standing to bring a direct action of annulment against all challengeable legal acts which are of direct and individual concern to the applicant (second limb)

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3) Standing to bring a direct action of annulment against regulatory acts which are of direct concern to the applicant and does not entail implementing measures.

Based on this amendment the following question will be investigated: To what extent has the Lisbon reform providing natural or legal person standing to challenge regulatory acts not entailing implementing measures which are of direct concern to them, increased the individuals’ access to justice?

1.1 Purpose

This thesis aims at critically asses if and how the addition of standing to bring an action of annulment against regulatory acts to art. 236(4) TFEU has improved the possibilities of individuals to have their actions admitted to the Union courts. The purpose is to establish the scope of the added third limb, and contextualize the ground for standing against regulatory acts in the larger system of judicial remedies provided by the treaties, and to discuss the solidity of the CJEU:s conclusion that the system currently in force is complete and sufficient. The intention is to address both the procedural legal aspect on locus standi, and how the reformed requirements relates to the principle of effective judicial protection enshrined in art. 47 Charter of Fundamental Rights of the European Union (hence the Charter).

1.2 Scope and delimitations

The main focus of the analysis is the terminology and scope of the added third limb art. 263(4) TFEU, and its correlation to the general ground for locus standi provided by the second limb. The first limb providing standing against

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decisions will only be discussed briefly in the bypass, in as much as it is relevant for the general contextual analysis of art. 263(4) TFEU.

The admissibility of a direct action is contingent upon three requisites 1) firstly the disputed act must be subjectable to judicial review, 2) secondly the CJEU must have jurisdiction to review the legality of the disputed act, and 3) thirdly the applicant must have standing to challenge the disputed act.\textsuperscript{4} The object of this thesis is the question of admissibility with regards to standing for individuals applicants. The first two requisites will only be discussed briefly when tangent to the research question.

Furthermore, this thesis will not analyze the function of the indirect action through preliminary ruling procedure as an alternative to art. 263(4) TFEU any further than its systematic relation to the direct action. However, this thesis will raise a number of critical points with regards to the effectiveness of the indirect remedy, especially concerning the differences between the direct action and preliminary ruling procedures. Some critical arguments with regards to the variation in the national courts praxis to request preliminary rulings will be put forward, especially with regards to the praxis of the Nordic national courts.

The topic of \textit{locus standi} has been debated for a long time, and there is an enormous amount of case-law. What characterizes this topic is excessive material enlightening the issues from different angles. The thesis therefor foremost relies on the recent case-law of the CJEU, and the relevant commentaries. However, in many aspects the analysis of pre-Lisbon case-law is still relevant especially in relation to the concern-requisites and the relationship between \textit{locus standi} and the principle of effective judicial protection.

\textsuperscript{4} Paul Craig and Graine De Burca, \textit{EU Law – text, cases and materials} (5th ed, Oxford University Press 2011) which page 485.
1.3 Inquiry of sources

The analysis is based on a variety of sources, emanating from the relevant treaty provision to the case-law of the CJEU, supplemented by the opinions of the Advocate Generals. It should be noted that there is no relevant secondary legislation regulating the issue of *locus standi* for direct action. These are official sources of law and are available through the online database EUR-lex.\(^5\)

Furthermore, for the purpose of finding supportive arguments for a historical interpretation the analysis will rely on protocols and pre-legislative works (*travaux préparatoire*) to the Constitutional Treaty (CT). This is a relatively unusual source of EU-law, but has been relied on to a significant extent by the Union courts and the Advocate Generals in their most recent case law on the application of art. 263(4) TFEU. The reason for using the pre-legislative works of the CT is that the formulation of art 263(4) TFEU is an identical transplant from art. III-365 CT and was negotiated during the drafting conferences.\(^6\) The documents from the drafting history of art. III-365 are directly relevant for art. 263(4) TFEU.

Additionally, there will be references to relevant legal doctrine clarifying how the statements and praxis of the CJEU have been interpreted and analyzed by other legal scholars, but not necessarily as authoritative sources of EU-law. There is an extensive amount of material of higher dignity and authority than legal doctrine available which will be relied upon at first hand.

Throughout the work, sources are cited in accordance with the ‘*Oxford Standard for the Citation of Legal Authorities*’ reference system (OSCOLA).\(^7\)

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\(^7\) Available online at [http://www.law.ox.ac.uk/oscola](http://www.law.ox.ac.uk/oscola).
1.4 Method of argumentation

The first analytical section applies a traditional dogmatic method by inquiring the relevant legal sources, beginning with primary legislation followed by the case-law of the CJEU. The analysis relies heavily on the recent case law of the CJEU, supplemented by the argumentation found in the opinions of the Advocate Generals in order to define the meaning of the terms regulatory acts, direct concern and not entailing implementing measures. The structure of the argumentation is as far as possible integrated in the sense that the conventional methods of interpretation in EU-law applies, with support from direct references instead of separating the presentation of sources from the analysis. Given the fact that many terms have autonomous meaning for the purpose of art. 263(4) TFEU, it is necessary to find suitable and transparent definitions by applying the following established methods of interpretation:

1) Lexical interpretation
2) Teleological interpretation
3) Systematic interpretation
4) Historical interpretation

As methods of interpretation, they tangent each other and are often combined to find different perspectives and conclusions. For example, the historical interpretation is intended to provide supportive arguments and supplement the other interpretations. Supportive arguments to the reasons for formulating art. 263(4) TFEU the way it was can be found in the drafting history. Moreover, there are commentaries in the drafting documents that provide support for a solid teleological interpretation. In the same way, lexical interpretation is often necessary for making systematic comparisons between different provisions of the treaties. However, the interpretation of regulatory acts will inasmuch as possible follow a consecutive analysis of the above mentioned methods (1-4). On the basis of those finding, it will be further analyzed in what ways the relaxed requirements for regulatory acts have increased the individuals’ access to justice by comparing the scopes of the second and third limb.
1.5 Disposition

The disposition organized with an introductory overview of art. 263(4) TFEU, followed by a more in-depth analysis of each of the three limbs of the fourth paragraph. The analysis is mainly focused on the concern-requisites and the notion of regulatory acts. However, the first limb providing *locus standi* for actions against decision immediately addressed to the applicant will only be mentioned briefly and not subjected to any analysis further than the meaning of the substance-over-form principle. Afterwards, the analysis of the second limb will focus on the concern requisites and deconstruct them to the key elements in order to explain their scope of application. Thereafter, the addendum of regulatory acts will be systematically expounded by applying the abovementioned methods of interpretation, which forms the major part of the substantive analysis.

In chapter 4, the essay will pass to a more contextualized analysis of how the second and third limbs correlate, and discuss to what extent the relaxation of *locus standi* requirements for regulatory acts actually affects the individuals access to justice. It is necessary in that context in short terms account for if and to what extent art. 47 of the Charter and the principle of effective judicial protection affects application of art. 263(4) TFEU. The structure of the essay will have a distinction between the *de lege lata* analysis of the standing requirements, and contextualization of the CJEU:s recent case-law in the system of judicial remedies provided by the treaties, and critically examine the policies that underlies the restrictive praxis.

1.6 Methodological limitations

An investigation of a topic characterized by excess material must be selective in which sources to cite. Much of the legal doctrine and relevant material related to the application of art. 230 EC (art. 173 EEC), and is still relevant and

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8 *De lege lata* (also known as *lex lata*) is a Latin maxim meaning ‘the law as it exists’.
important. Analyses of the recent case-law on the application of art. 263(4) TFEU third limb is still relatively scarce throughout the doctrine, and has not yet encompassed the final judgments from the CJEU.

In some respects, the legal method applied in the thesis is biased to the Scandinavian method and terminology. However, the thesis relies foremost on the case-law of the CJEU, legal doctrine from a variety of sources and legal orders, and to the pre-legislative works of the CT which represents the collective view of the EU-law.
2 Direct action – art. 263(4) TFEU

Art. 263 TFEU regulates direct actions of annulment of legal acts adopted by the institutions of the European Union. The provision is organized in 6 consecutive paragraphs. The first two paragraphs regulate the jurisdiction of the CJEU and the substantial grounds for judicial review and annulment. The second and third paragraphs regulate the *locus standi* for the Member States and the different institutions the union.\(^9\) Natural or legal persons (individuals) are unprivileged in the sense that their right to access the Union courts are subjected to restrictions formulated in the fourth paragraph.\(^10\) Compliance with the requirements under art. 263(4) TFEU for standing is mandatory for the action to gain admissibility, and can be assessed by the GC *ex officio* independent of a formal objection of inadmissibility.\(^11\) Art. 263(4) TFEU is formulated as follows:

> “Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

The fourth paragraph is divided in three limbs depending on the status of the act the applicant intends to dispute. Individuals can gain *locus standi* to challenge a legal act in three situations:

1) The first limb entitles individuals standing to challenge decisions immediately addressed to them by the formulation: any natural or legal person may, under the conditions laid down in the first and

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\(^9\) Regional governments and authorities do not constitute Member States for the purpose of art. 263 TFEU, see Anthony Arnulf, The European Union and its Court of Justice (2nd ed, Oxford University Press 2006) p. 69.


second paragraphs, institute proceeding against an act addressed to that person.

2) The second limb provides the individuals with a general standing against all types of legal acts adopted by the institutions. The provision imposes that the act must be of 1) direct and 2) individual concern to the applicant for the action to be admissible. Hence, admissibility under the second limb applies to an action brought by an applicant who is not the immediate addressee of the act in question, but nonetheless directly and individually concerned by the act.

The first two limbs are identical to art. 230 EC both in formulation and application, whilst the third limb was added to the Lisbon Treaty. The third limb is a direct implant from the drafted Constitutional Treaty.

3) The third limb is provides that a natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures. The formulation contains three elements; regulatory act, not entailing implementing measures and direct concern.

The application of the first and third limb relates to the characteristics of the act itself whilst the second is contingent upon the effect towards the applicant. If the requisites of the first and third limbs are fulfilled, there is no need to assess whether it is of individual concern.

2.1 Locus standi for actions against immediately addressed decisions

The first limb is straightforward. It provides standing the direct addressee of a decision automatically. The only requisite is that it explicitly addresses the individual immediately.\textsuperscript{12} The right for individuals to challenge decisions

\textsuperscript{12} Eliantonio (n 2) p. 122 and, KPE Lasok and Timothy Millet, Judicial control in the EU (Richmond Law and Tax Ltd 2004) para. 97.
immediately addressed towards them has long been established and is now completely accepted, and is unequivocally guaranteed through art. 263(4) TFEU and art. 47 of the Charter. The question of what qualifies as a decision is not the form, but the substance. The CJEU has in its consistent case law held that an individual can challenge an act that is legally binding, and capable of affecting the applicant’s legal position by bringing about a change in his legal position.\(^\text{13}\) Hence, it is not the formal labelling of the act that defines whether it has the character of a challengeable decision.\(^\text{14}\) Much of the pre-Lisbon legal doctrine addresses a distinction between decisions and decisions adopted in the form of regulations. Even though the CJEU:s case-law mandating that such regulations entailing effects amounting to being a decision is still valid, the simplification and enhanced transparency of the legislative process have in many ways limited the possibilities to adopt decisions in legislative forms.\(^\text{15}\)

Furthermore, for a decision by an institution to be challengeable, it needs to be final and not preparatory. In the \emph{IBM} case, the action of annulment concerned a letter written by the Commission to the applicant (immediate addressee) as an initiating step of a competition procedure, investigating whether the addressee had abused its dominant position on the market. The letter contained a number of statements and objections which marked the Commission’s initial stance in the matter. However, the CJEU found that the letter did not lay down the Commission’s definite position, and was in that regard only provisional and not final.\(^\text{16}\) The statements of objections did not in themselves alter the applicant’s legal position in any way, and could thereby not be considered a challengeable act. Hence, the action was dismissed as inadmissible.

\(\text{13}\) Case 60/81, \textit{International Business Machines Corporation v Commission \textit{(IBM)}} ECLI:EU:C:1981:264 para. 9
\(\text{14}\) Craig (n 4) p. 486-487.
\(\text{15}\) The distinction between decisions and “true regulations” has been significantly loosened by the judgment in \textit{Codorniu}, see Eliantonio (n 2) p. 123. After the adoption of art. 263(4) TFEU the abstract terminology test is no longer significant, see Ulf Bernitz and Anders Kjellgren, \textit{Europarättnens grunder} (5th ed, Norstedts Juridik AB 2014) p. 209.
\(\text{16}\) \textit{IBM} (n 13) paras. 10-11.
2.2 General locus standi for actions against all types of legal acts

An applicant is entitled to bring an action against all types of legal acts, regardless of whether the requisites under the first and third limb are satisfied, if it is of direct and individual concern to him or her. Compliance with both concern-requisites is necessary for the action to be admitted to the GC. The assumption is that this ground applies to natural or legal persons which are not the immediate addressees of the act. The purpose of the concern-requisites is undoubtedly to limit the circle of natural and legal persons entitled to bring a direct action to those individuals which are sufficiently affected by the act to have a real legal interest. The remedy balances two simultaneous functions where the first is to ensure a judicial remedy for individuals to enjoy effective judicial protection, and the other to provide the EU-legal order with a constitutional control mechanism of the legislative process. In the light of that purpose, the jurisprudence of the CJEU materializing the scope of the requisites have been relatively restrictive, in particular the older case law relating to art. 230 EC and art. 173 EEC. Maintaining a restrictive praxis furthermore alleviates the work-load of the Union courts.

2.2.1 Direct concern

The applicant must be able to show direct concern in order to acquire locus standi to challenge the legal act. The concepts applies to situations where an institution adopts an act which does not address the applicant individually, but nonetheless affects the applicant’s legal and economic situation. The Union measure must directly affect the applicant’s legal and economic situation and

19 Harding (n 17) p. 355-358.
leave no discretion to the formal addressee entrusted with its implementation, where such implementation is purely automatic.\textsuperscript{20} The formula has two elements, the first which relates to the effect on the applicants situation, and the second which concerns the amount of discretion enjoyed by the implementing authority.\textsuperscript{21}

A measure affects the legal situation of an individual, when it either revokes a right or imposes an obligation of the individual. The concept of ‘effect on an individual’s legal position’ has a broad meaning, and it is not required that the person utilizes or relies upon that right. For example, in the joined cases \textit{NV International Fruit Company}, the CJEU held that an imposition of a system for import licenses affects the legal position of importing companies as it restricts the amount of the goods they are allowed to import.\textsuperscript{22}

With regards to the element of discretion, the CJEU assessed the admissibility of an action for annulment of a Commission decision addressed to the Member State but challenged by a group of municipalities, in the case \textit{Differdange}.\textsuperscript{23} The decision mandated that the Member State were allowed to provide a certain amount of aid provided that the reduced the amount of output of steel produced in the Member State. The action for annulment was based on the ground that the municipalities would be adversely affected by losing tax income. The CJEU dismissed the action as inadmissible because the contested decision did not specify which undertakings were to be closed, and therefore left the Member State with a margin of discretion with regards to the manner of implementation. In this regard, an act such as a regulation which has direct applicability should automatically satisfy the non-discretion element, whilst directives are in principle not of direct concern because they entail a necessary discretion for the implementing authorities as to form and method.\textsuperscript{24}


The measure is of direct concern if it interferes with the individual’s legal position, without the need for intermediate measures.\textsuperscript{25} If the provision of the act cannot be relied upon by direct applicability, or is fit for execution without further implementing measures that specifies the content of the measure it cannot be of direct concern. In \textit{Lootus}, for example, the GC found that a regulation granting fishing opportunities to the Member States for distribution did not give rise to direct concern, because it did not confer any effects. In the case, the Member State enjoyed discretion to regulate how and to what amounts to distribute the opportunities, and the Member States could voluntarily trade the fishing opportunities as they saw fit. The case show two important aspects: Firstly, the measure must interfere with an existing legal relationship, because the fact that the applicant might have had historic rights acknowledge by national law is irrelevant. Secondly, that if the act does not specify how and to what extent the Member State is to allocate the rights provided by the measure, an implementing intermediate measure is necessary for execution.\textsuperscript{26} Where the implementation of an act is entrusted to the Member States, and the provisions therein do not obtain their precise scope until implemented, it is the implementing measure that is of direct concern.\textsuperscript{27} Furthermore, it is in relation to the Union measure itself that the assessment of whether it directly affects the legal position is to be considered, not the relevant law of the Member States.\textsuperscript{28}

The case-law acknowledges one exception to the discretion element. When the Union measure bestows a limited degree of discretion upon the implementing authority, where the exercise of that discretion is purely theoretical and unrealistic.\textsuperscript{29}

\textsuperscript{25} Case T-127/05, \textit{Lootus Teine Osaühin v Council (Lootus)} ECLI:EU:T:2007:2 para. 39. Compare case C-294/83, \textit{Les Verts v Parliament} ECLI:EU:C:1986:166 para. 36: “a measure is of direct concern when there is a complete set of rules which in themselves are sufficient and require no implementing provisions”.

\textsuperscript{26} \textit{Lootus} (n 25) para. 40.


\textsuperscript{28} \textit{Lootus} (n 25) para. 47.

2.2.2 Individual concern

To gain *locus standi* under the second limb of art. 263(4) TFEU the applicant must prove that he is individually concerned by the disputed act. Within the subject of *locus standi* for actions of annulment, the application of the individual concern-criteria has been the most controversial.\(^{30}\) Ever since the CJEU adopted the *Plaumann* judgment many applications have been dismissed for lacking individual concern.\(^ {31}\) The precedent established in the case has been consolidated by the CJEU in an extensive amount of case law and has not been overruled.\(^ {32}\) The *Plaumann* precedent is formulated as follows:

"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."\(^ {33}\)

The test applies equally to all types of legal acts, and not only to decision addressed to another person than the applicant.\(^ {34}\)

The formula stipulates that for a person to be individually concerned, he must be affected due to reasons that differentiate, or distinguishes him from other persons. The idea is that the applicant should be affected by the act in a comparable manner as an immediate addressee. The act must, in order to be of individual concern, affect the individual as if it were a decision addressed to him directly. This is a particularly strict interpretation of the individual concern criteria that extensively curtails individual applicants’ abilities to gain admissibility.\(^ {35}\)

\(^{30}\) Eliantonio (n 2) p. 121

\(^{31}\) Case 25/62, *Plaumann & Co. v Commission (Plaumann)* ECLI:EU:C:1963:17,

\(^{32}\) Reaffirmed by the CJEU in plenary session, Case C-50/00 P, *Unión de Pequeños Agricultores v the Council (UPA)* ECLI:EU:C:2002:462

\(^{33}\) *Plaumann* (n 31) para. 107. The test applies to all types of acts of general application.

\(^{34}\) Bernitz, *Europarättsens Grunder* (n 15) p. 211

\(^{35}\) Lenaerts, *Procedural Law of the European Union* (n 10) p. 256, Eliantonio (n 2) p. 121, comp. Arnulf (n 9) p. 69, and further Pieter-Augustijn Van Malleghem and Niels Baeten
It should be noted that *locus standi* under the second limb addresses all types of legal acts, and that the test for establishing individual concern is the same for decisions and regulations.\(^{36}\) The provision encompasses, in principle, all types of legal acts except for recommendations and opinions. However, the practical application differs greatly depending on the form of the legal act, and that the higher dignity and degree of general applicability a legal act has, the more difficult it is for an applicant to claim individual concern. If the legal effects of the disputed act are the same as a legislative measure which individuals cannot bring an action, there is arguably no need for individual protection from the point of view of individual concern.\(^{37}\) The *Plaumann* formula is not entirely definite, as there is a margin of discretion for the Union courts to determine whether if the applicant is distinguished. A more precise formulation or explanation of the test in generally applicable terms cannot be found within the praxis of the CJEU. However, there is an extensive amount of case-law on the practical application of the individual concern-criteria available for analysis.

In *Plaumann*, the applicant was an importer of clementines established in Germany. In the contested decision, the Commission refused a request from the German government to suspend import tariffs on fresh clementines. The applicant filed an action of annulment against the decision in front of the CJEU. The Court dismissed the action as inadmissible since the applicant was not individually concerned because they were only affected by reason of commercial activity which may at any time be practiced by anyone at any time and was therefore not distinguished as in the case of the addressee. The mere belonging to an economic sector or market cannot justify individual concern to a governing measure.

In another important case of similar character, the applicant sought annulment of a regulation stipulating that a term for wine should be reserved for sparkling wine from Luxembourg and France.\(^{38}\) The applicant had been producing wine under a registered graphic trademark which included the term reserved by the

\(^{36}\) *Before the law stands a gatekeeper – Or, what is a “regulatory act” in Article 263(4) TFEU?* [2014] CML Rev 1187 p. 1187.

\(^{37}\) Case C-50/00 P, *UPA* (n 32), Opinion of AG Jacobs, para. 2.

regulation. The regulation was of general applicability and prohibited the applicant from using its trademark in its business and therefore interfered with the applicant existing individual right. The CJEU held that the applicant had established a situation that distinguished them individually from all other traders, in the sense that the regulation interfered with existing specific rights.\textsuperscript{39} The case affirmed that even purely legislative regulations are subjectable to judicial review, under the same conditions as decisions adopted in the form of regulations.\textsuperscript{40}

It is important to note, that the line of difference does not lie between whether the amount of distinguishable individuals can be determined. In Codorníu, the applicant had their established and registered trademark threatened by the contested regulation and would be prohibited from using it. In that way, the individual concern lied very close to the issue of whether the regulation affected their legal position. In Plaumann, the applicant was not distinguished because the decision affected all importers identically by reason of commercial activity which may at any time be practiced by any person. As the CJEU has consistently held, the mere possibility to objectively define the number of legal subjects, and not even their identities that the provisions apply to, does not entail that they are individually concerned.\textsuperscript{41} But where the measure affects a group of natural or legal persons identifiable at the time of adoption by reason of criteria specific to the members of that group, they may be individually concerned. To be considered individually concerned, they must form part of a closed class of traders, whose existing rights prior to the adoption of the measure are altered.\textsuperscript{42}

The CJEU consider the meaning of a closed class in Piraiki-Patraiki.\textsuperscript{43} The Commission adopted a decision authorizing protective measures taken by France regarding imports of cotton from Greece. A group private applicants contested the validity of the Commission decision, and could, as far as they had

\textsuperscript{39} Arnull (n 9) p. 79.
\textsuperscript{40} After the Codorníu judgment the applicant solely needs to comply with the concern requisites, see Albors-Llorens (n 29) p. 74.
\textsuperscript{41} Woonlinie (n 11) para.45.
\textsuperscript{42} Woonlinie (n 11) para. 46, comp. case C-125/06 P, Commission v Infront WM (Infront) ECLI:EU:C:2008:159 paras. 71-72.
\textsuperscript{43} Case C-11/83, Piraiki-Patraiki v Commission ECLI:EU:C:1985:18.
entered into contracts prior to the protective measures, which would be wholly or partially prevented from execution through the authorization, during the period the decision applied. The closed class thus includes two elements; the measure must interfere with the applicants existing special rights, and the applicant must be identifiable at the time of adoption.\textsuperscript{44}

A common way for the Commission to regulate market conditions and to enforce EU-law is to adopt decisions against formally addressed to the Member States to implement towards individuals.\textsuperscript{45} If the act is formally addressed to the Member State, but nonetheless explicitly intended to affect a specific person, it can be assumed to be of individual concern. In \textit{Woonpunt} and \textit{Woonlinie}, the CJEU found that recipients of state-aid belonged to a closed class individually concerned by a Commission decision against that aid-scheme.\textsuperscript{46} The applicants were recipients of state-aid in various form for the supply of accommodation for less favored citizens. After the Commission and the Member State alterations to the aid, the Commission adopted the contested decision directed towards the Member State. The CJEU found that the applicants belonged to a closed class due to the fact that 1) only those undertakings favored by the scheme could be affected by the decision, and 2) the recipients were ascertainable by the governmental decree.

In another case, \textit{Extramet},\textsuperscript{47} an applicant challenged a Council regulation of general application imposing a definite anti-dumping duty on imports of calcium metal originating in China, and provisional collection of such duties. The applicant was the largest importer of calcium metal, which formed the main source of supply in their business. The CJEU found that the applicant had established a situation which was peculiar to the applicant differentiated from other traders in as much as it 1) was the largest importer of the product, 2) the end-user of the product, 3) its business was dependent on to a very large extent on imports of the product and 4) the difficulties of obtaining the product from the community producers.\textsuperscript{48} The case must be considered exceptional in the

\textsuperscript{44} To that reasoning, see \textit{Infront} (n 40) paras. 70-78.

\textsuperscript{45} Bernitz, \textit{Europarättens Grunder} (n 15) p. 209.

\textsuperscript{46} \textit{Woonpunt} (n 11), and \textit{Woonlinie} (n 11).

\textsuperscript{47} Case C-358/89, \textit{Extramet Industrie SA v the Council (Extramet)} ECLI:EU:C:1991:214.

\textsuperscript{48} Ibid para. 17.
sense that the CJEU considered the degree of factual injury to determine whether the applicant was individually concerned.\(^{49}\) In fact, the subsequent case-law of the CJEU indicates no change in policy.\(^{50}\)

Although the concept of individual concern is rooted and defined through an extensive amount of case law, it is difficult to systematize any consistent substance to the *Plaumann* test, in particular because much of the older case-law is not wholly motivated and in some cases inconsistent. Under such circumstances, only the facts of the cases in conjunction with the conclusions of the courts is open to analysis.\(^{51}\) But considering the definition of individual concern, and its application in the case-law, the requirement renders the possibilities for individuals to access the Union judiciary virtually impossible except for very limited cases.\(^{52}\) A few conclusive remarks can nonetheless be established:

1. The mere belonging to an economic sector targeted by the measure is not sufficient to be individually concerned.\(^{53}\)
2. It is not sufficient that the group of individual affected can be calculated and identified.
3. Only interference with existing specific legal relationship can be of individual concern.
4. If an act addressed to the Member State explicitly mentions in relation to whom it is to be implemented, that person is individually concerned.
5. ‘True regulations’ are equally challengeable as decisions *sui generis* adopted in the form of regulations, provided that they are of direct and individual concern.

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\(^{49}\) Eliantonio (n 2) p. 223.
\(^{50}\) Arnell (n 9) p.77-78.
\(^{51}\) Skepticism about the consistence of the application of the individual concern-criteria has been raised, see e.g. Clive (n 27) p. 256-257.
\(^{52}\) Eliantonio (n 2) p. 122.
\(^{53}\) E.g. Sahlstedt (n 11) paras. 30-32.
3 Locus standi for action of annulment against regulatory act

In contrast to the second limb, locus standi for action against a regulatory act does not require that the applicant shows he or she is individually concerned. Consequently the Plaumann test is inapplicable to the matter of whether an applicant has standing concerning regulatory acts.\textsuperscript{54} However, standing against regulatory acts still requires that the claimant is directly concerned.\textsuperscript{55} The term regulatory acts was incorporated through the Lisbon reform and only occurs within art. 263(4) TFEU without being defined anywhere else in the treaty or any ancillary documents or in secondary legislation. There has been considerable uncertainty about the scope of the relaxed requirements for standing since the Lisbon Treaty entered into force. The CJEU has in its recent case-law clarified the notion of regulatory acts, implementing measures, and direct concern for the purpose of art. 263(4 TFEU).\textsuperscript{56} The conclusions of the CJEU have not passed without criticism.

It follows from a comparative reading of art. 263(4) TFEU that the third limb, referring to regulatory acts has a more restrictive scope than that of the second limb which addresses acts in general. In contrast to the first limb concerning immediately addressed decisions, the third limb is addressed to acts of general application. In the view of the CJEU the category cannot encompass all acts of general application, or the distinction between ‘acts’ and ‘regulatory acts’ would be nullified.\textsuperscript{57}

It is not an easy task to find a completely unequivocal definition of the term regulatory act. Depending on which method of interpretation applies the term can be given substantially different meanings. The point of departure is, however, that the term has an autonomous meaning for the purpose of EU-law,

\textsuperscript{54} Koen Lenaerts, ‘Effective judicial protection in the EU’ (Assises de la Justice Conference, Brussels, November 2013) p. 10.
\textsuperscript{55} The General Court held that the direct concern requirement under art. 263(4) TFEU is identical to art. 230(4) EC, see case Microban International Ltd and Microban (Europe) Ltd v Commission (Microban) ECLI:EU:T:2011:623 para. 32.
\textsuperscript{56} Cases Inuit (n 6), Woonlinie (n 11), Woonpunt (n 11), C-274/12 P, Telefónica SA v Commission (Telefónica) ECLI:EU:C:2013:852, and Microban (n 55).
\textsuperscript{57} Inuit (n 6) para. 58.
which must be interpreted with respect to the provisions purpose, context of application and drafting history.\(^{58}\)

The central case of the analysis is *Inuit*, in which the CJEU was confronted with an appeal of a GC order dismissing a direct action as inadmissible. The action concerned a regulation which banned the placing of seal products on the European market, except when resulting from hunting traditionally conducted by intuits and other indigenous communities and contributed to their subsistence.\(^{59}\) The applicants, an organization of Canadian intuits and seal product manufacturers brought an action against the regulation, claiming that it adversely affected their economic interests. The GC, found that the regulation was a legislative act, against which individuals can only bring an action of annulment if it is of direct and individual concern to them. In its appeal, the applicants argued that the regulation was a regulatory act, not requiring individual concern.

### 3.1 Lexical interpretation

Through a lexical comparison of the terms *regulatory act* and *regulation* a number of difficulties arise. It cannot be denied that there is a certain similarity between the words within certain official languages.\(^{60}\) In English for example, the noun *regulation* and the adjective *regulatory* stem from the same verb; *to regulate*. By cross reading the treaty text in the major Latin languages the same etymological derivation is evident.\(^{61}\) Such a reading is however not satisfactory in comparison with several other language versions where there is no such etymological link between the words. If one considers Swedish, the word *regleringsakt* (regulatory act) is not derived from the word *förordning* (regulation) which is in fact the formal term for binding normative acts adopted

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\(^{58}\) Case C-583/11 P, *Inuit* (n 5), Opinion of AG Kokott para. 32.


\(^{60}\) *Inuit*, Opinion of AG Kokott (n 58) para. 31, particularly in relation to art. 288 TFEU.

\(^{61}\) The French terminology regulations and regulatory acts are called ‘règlement’ and ‘actes réglementaire’. Spanish: ‘reglamento’ and ‘actos reglamentarios’ and in Italian: ‘regolamento’ and ‘atti regolamentari’.
by the government, with lower hierarchal dignity than legislation.\(^{62}\) In the Polish language version the terms *rozporządzenie* (regulation) and *akty regulacyjne* (regulatory act) are not related such as in the English, French, Spanish and Italian versions. The term *rozporządzenie* derives from traditional Polish way of referring to normative acts (of legislative character). By juxtaposition, the term regulation, in the Polish language, has a broader understanding and use, encompassing also non-normative measures. It would appear that the Slavic language versions do not suggest any overall similarities, which impedes the possibility of etymologically construe a precise and convincing definition.\(^{63}\) Because of the fact that the treaties are now valid in 24 different versions an exclusive literal interpretation could lead to arbitrary results. Considering the fact that the drafters chose to use the term regulatory act instead of regulation must indicate that there is an intentional difference between the two terms. On the other hand, it is possible that the purpose of a regulatory act is through a measure of general application regulate certain conditions within the union, which can be done through all types of legal acts listed in art. 288 TFEU. In the German version of the treaty, the drafters utilized the words *verordnung* and *rechtsakt mit verordnungscharakter* which gives the impression that such an act has similar characteristics as a regulation, regardless of its formal definition, art. 288(1) TFEU. The regulatory characteristics implied in the wording seem to refer to the general applicability and purpose of regulating in broad sense, whilst an alternative possibility could be that the regulatory act has the same direct applicability in the Member States as a formal regulation. A solely literal interpretation does not lead to any satisfactory conclusions, except that no language version adopted the term for regulation as equivalent to regulatory act.

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\(^{62}\) In the same way, the Finnish term ‘*asetus*’ meaning regulation refers to legal acts of lower standard than legislation, and is etymologically opposite to the word ‘*sääntelytoimi*’ (regulatory act).

\(^{63}\) In Czech a regulatory act is: ‘*právní akt*’, literally meaning legal act, whilst the Slovak text uses ‘*regulačný akt*’ being the direct translation from English. In Bulgarian, the word ‘*Регуляция*’ originates from Latin and has the same meaning as regulation and linguistically unrelated to the term ‘*подзаконови актове*’.
3.2 Contextual interpretation

From a contextual analysis it is observed that the first limb of art. 263(4) TFEU refers to ‘acts’ in contrast to ‘regulatory acts’ in the third limb. The first paragraph lists the types of acts which may be subject to judicial review, and therein makes a distinction between ‘legislative’ and other types of acts. Such an inconsistency cannot be supposed as accidental. By making an internal systematic comparison between the different paragraphs and limbs of art. 263 TFEU, it is possible to draw the conclusion that regulatory acts are in fact a narrower category than ‘acts’. If regulatory acts would not be considered a narrower category of acts, the difference between the second and third limb would be inexistent. Furthermore, if there was no intentional distinction between acts and regulatory acts, the individual concern requisite should have been alleviated for all types of acts.

Such an internally limited reading of art. 263 TFEU does not make it possible to conclude that the term ‘legislative act’ in the first paragraph is perpendicular to ‘regulatory act’. For example, compared to the fact that art. 291 TFEU contrasts ‘legislative acts’ and ‘implementing acts’, and that art. 297(2) TFEU mentions ‘non-legislative act’ instead of regulatory act there appears to be a terminological inconsistency in the treaties which suggests that there are alternative contrasts than legislative and regulatory. Furthermore, art. 290(1) TFEU prescribe that a legislative act may adopt non-legislative acts of general application (delegated acts), which suggest that there is some qualitative difference to regulatory acts. It can be argued that the inconsistency of in the terminology of the treaties renders it impossible to conclude a direct contrast between legislative and regulatory acts. Such an argument is not entirely convincing, because regulatory acts basically have general applicability, which non-legislative act do not necessarily have. Hence, there must be a qualitative difference between the two categories, although there seems to be a

64 Inuit, Opinion of AG Kokott (n 58) para. 36.
65 Inuit (n 6) para. 58.
66 Cases C-132/12 P, Woonpunt, Opinion of AG Wathelet para. 56-57 and C-133/12 P, Woonlinie, para. 29-30, this view has been raised in the legal doctrine see Balthasar (n 24) p. 545.
considerable overlap for non-legislative acts of general applicability. However, in this regard the fact that the term regulatory acts do not appear anywhere else in the treaties, ancillary protocols or secondary legislation it is more prudent to accept that regulatory acts form an autonomous category which are not legislative as in the meaning of the art. 263(1) TFEU, but not identical to non-legislative.

3.3 Teileological interpretation

Instead, regulatory act must be defined based on its purpose, context of application and drafting history. Applying a teleological method of interpretation is a long-established tool of the EU-law method. The true purpose of the Lisbon reform has been a matter of intense debate however.

The purpose of the relaxed standing requirements in art. 263(4) TFEU was undisputedly to strengthen the individual’s legal protection by increasing the availability of judicial remedies. In particular to avoid the necessity for the individual to infringe the law in order to gain access to judicial proceedings.67 However, the opinions vary concerning if the intention of the reform was to provide an overall relaxation of the standing requirements or against a specific type of acts. Whether that argument speaks in favor of an extensive or restrictive interpretation of the concept of regulatory acts depends on if the term is read in isolation or contextualized in a larger system of individual judicial remedies provided by the treaty through, on the one hand, direct action of annulment under art. 263 TFEU and, on the other, indirect action via the national courts requesting a preliminary ruling on the validity of the legal act, art. 267 TFEU. Seen in isolation, and with respect to the criticism against the Plaumann precedent, the term ‘regulatory act’ ought to be given an extensive scope. If the individual concern-requirement had to be interpreted in the light of the principle of effective judicial protection, regulatory acts should arguably

67 Cases Inuit (not 6) para 59, and Telefónica (n 56) para. 27, see further Telefónica (n 56), Opinion of AG Kokott paras. 40-41.
be interpreted in the same light. Advocate General Kokott deems it not necessary and cannot be inferred that the right to effective judicial protection requires an extension of the direct legal remedies. She furthermore stressed that the Lisbon reform did not bring about and substantial change in the fundamental right to effective judicial protection. From that premise it is not for the Union courts to by means of jurisprudence expand the scope of locus standi. It appears from this reasoning that the underlying policy of the system of judicial remedies has not changed. Advocate General Wathelet argues that Kokott’s conclusion is too narrow and insufficient to meet the criticism that led to the reform of the standing requirements art. 263(4) TFEU. Resorting to that argument must be done carefully, although the criticism against the previous system should be taken into account, the purpose of the reform must be interpreted foremost in the light of the intentions of the drafters, not the critics.

### 3.4 Historical interpretation

The CJEU finds the most convincing arguments in the drafting history of art. 263 TFEU. It is clear that the serious criticism put forward by Advocate General Jacobs against the result in the UPAs-case, and the GC attempts to relax the praxis in Jégo-Quéré, following the courts restrictive praxis led to a clamor for reform. The addendum in art. 263(4) TFEU is an identical transplant from the CT’s art. 365-III. Recourse to pre-legislative works is not uncommon, but is not a decisive mean of interpretation and not binding upon the CJEU. Usually, the Union courts do not rely on pre-legislative works when

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68 Balthasar (n 24) p. 545.
69 Inuit, Opinion of AG Kokott (n 58) para 108.
71 Woonpunt, Opinion of AG Wathelet (n 66), para. 60 and Woonlinie, Opinion of AG Wathelet (n 66) para. 31.
72 UPAs, Opinion of AG Jacobs (n 34).
73 Balthasar (n 24) p. 543, Van Malleghem (n 35) p. 110, and generally Koch (n 70).
interpreting primary EU-law. However, the increased transparency of the drafting procedure of the Constitutional Treaty and the Lisbon Treaty has left a massive body of substantial material. We can now rely on the drafting history of art. 263(4) TFEU, by relying on the pre-legislative works of art. 365-III CT, which provide supportive sources potentiating the authority of the teleological method. Such a methodological premise enables the possibility of giving the regulatory act a convincing and solid autonomous meaning. There are comments in the protocols from the negotiations of the Constitutional Treaty indicating that the purpose behind the reform was to simplify and relax the standing requirements for certain types of legal acts. The fact that the original suggestion for the wording of art. 365-III containing the phrase: ‘legal measure of general application’ was exchanged to ‘regulatory acts’ shows that the threshold was not intended to be lowered for all types of acts. The discussion circle suggested the following phrasing to the convention:

“All natural or legal person may under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, and against [and act of general application][a regulatory act] which is of direct concern to him without entailing implementing measures.”

The Convention finally settled on the term ‘regulatory act’ instead of the very broad concept of act of general application, on suggestion from the Presidium. The representative of the CJEU adduced to the discussion circle on the role of the Union judiciary that if the proposed distinction between legislative and regulatory acts would be adopted “it would seem appropriate to take a restrictive approach to actions by individuals against legislative measures and to provide a more open approach with regard to actions against regulatory measure”. It appears that there is a consensus between the CJEU,
Advocate General Kokott and the pre-legislative works that legislative acts enjoy such a significantly higher legitimacy that the dividing line must be drawn between legislative and non-legislative acts. The CJEU:s conclusion from the historical interpretation provides compelling support for defining a regulatory act as: a ‘non-legislative act of general application’.  

3.5 What are non-legislative acts of general application?

The precedent established by the CJEU:s judgment in Inuit settles that the concept of regulatory acts have an autonomous meaning as a non-legislative act of general application. To completely delimit the scope of application of standing under art. 263(4) TFEU third limb, it is prudent to distinguish legislative and non-legislative acts.

3.5.1 Acts of general application

An act is of general applicability if it applies to objectively determined situations and it produces legal effects with respect to categories of persons envisaged in general, or specified in the abstract. The formal labelling of the act is not determinant, since a decision for example can entail legal effects towards everyone at the same time. The nature of the applicability of the act does not depend on whether the number, or even the identity of the persons to whom it applies can be precisely determined at a given time. As long as the provisions apply by virtue of the objective legal or factual situation defined in the measure, they are of general applicability. It is irrelevant whether a provision of general applicability actually affects various legal subjects differently. The evaluation of whether an act is of general application...

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79 Inuit (n 6) paras. 59-60.
80 Microban (n 55) para. 23.
81 Case 101/76, Koninklijke Scholten Honig NV v Council and Commission.

ECLI:EU:C:1977:70.
overlaps the test for individual concern, as they both address the legal content of the act.\textsuperscript{82}

3.5.2 \hspace{1em} Legislative and non-legislative acts

From a strictly formalistic view a legislative act is an act of general application intended to entail binding legal effects adopted in accordance with the procedure dictated by art. 289(3) TFEU. From such a perspective it is the form under which the act is adopted, in other words through a legislative or non-legislative procedure, that determines the classification of the act. I can be argued that this would be inconsistent with the courts previous emphasis on substance over form as determinant of how an act is to be classified particularly.\textsuperscript{83} The simplification process that preceded the adoption of the Lisbon Treaty aimed at increasing the transparency and establish a unitary systematic in the treaty.\textsuperscript{84} It aimed at increasing democratic legitimacy of the legislative procedure through the progression to parliamentarization.\textsuperscript{85} The strive for strengthening the legal security in the application of EU-law on both the national and institutional procedural and administrative levels motivates a formalistic and narrow understanding of the concept of legislative acts.

The point of departure is the non-legislative acts are defined in contrast to legislative acts, which are acts adopted through a legislative process, art. 289(3) TFEU. Art. 290(1) TFEU, provides that the legislative body can delegate competence to the Commission to adopt ‘non-legislative acts of general application’ to supplement the provisions of the basic act. Delegated acts are regulatory acts \textit{ipso jure} because they satisfy the wording of art. 290(1) TFEU, which is identical to the definition of regulatory acts concluded by the CJEU, and are adopted in a non-legislative procedure provided by art. 289 TFEU. However, even if delegated acts should be assumed the most common

\textsuperscript{82} Lenaerts, \textit{Procedural Law of the European Union} (n 10) p. 249.
\textsuperscript{83} See \textit{IBM} (n 13).
\textsuperscript{84} CONV 424/02, Final report of Working Group IX on Simplification pp. 21-22.
form of regulatory acts, it is not an exclusive identical category, since there are other types of acts adopted by other institutions that qualifies as non-legislative acts of general application. If the drafters intended that only delegated acts qualifies as regulatory acts, they would reasonably phrased art. 263(4) TFEU third limb as: Any natural or legal person may... institute proceedings against a delegated act which is of direct concern to them and does not entail implementing measures.

The question is if such a definition of regulatory acts for the purpose of art. 263(4) TFEU provides justice to the overall objective of improving the individuals’ access to justice through the locus standi-reform. Such an interpretation does not respond to the clamor for reform that have been brought forward, especially concerning the UPA-case, which would still not surpass the admissibility threshold of art. 263 TFEU.86 The consequence of such formalistic definition based on art. 289 TFEU is that legal acts that would otherwise be legitimately challengeable could be shielded from judicial review through the procedure it was adopted.87

A directly perpendicular approach would be to let the substance and legal effects of the act determine how to classify it. Such a material method would be more consistent with the courts praxis concerning for example individual decisions adopted in the form of regulations or directives.88 The point of departure would in that case be that if a legal act is generally applicable, intended to be legally binding upon legal subjects, adopted by a competent institution, and gives rise to rights and obligations for individuals it would be considered legislation for the purpose of art. 263 TFEU.

Jürgen Bast suggest an alternative interpretation that balances the formal definition and material approach emphasizing that a legislative act under the Lisbon Treaty is an act subjected to enhanced public scrutiny.89 The treaty definition is not consistently based on a procedural concept that requires

87 Nordlander (n 86) p. 303-304.
88 IBM (n 13).
89 Bast (n 85) p. 894.
involvement of both the Council and the Parliament, which is the form of the ordinary legislative procedure. But the treaty dictates a competence based definition wherein a legislative act is a binding instrument adopted on the basis of a treaty provision expressively provides an institution legislative power. Bast claims that there is a considerable grey zone between two clear categories of legal acts:

1. Legal acts adopted through ordinary legislative procedure (art. 289(1) TFEU), should always qualify as legislative acts.
2. Legal acts adopted by other institutions than the European Parliament and the Council (i.e. the Commission and European Central Bank) should never qualify as legislative acts.

Art. 289(3) TFEU provides that acts adopted through a legislative procedure are legislative acts. Since both the ordinary and special legislative procedures are regulated in paragraphs 1-2 of the same article, and are referred to as legislative, both forms must be encompassed by the third paragraph. Hence, there is no such grey-zone since the treaty text clearly classifies acts adopted through the legislative procedure as legislative acts. In very few provision the treaties prescribe that the legislative institutions may adopt acts in other procedural forms that deviates from the ordinary legislative procedure. Art. 103(1) TFEU for example allows for the Council to adopt acts in order to give effect to the principles laid down in art. 101 TFEU on proposal from the Commission, and after consulting the European Parliament.

3.6 Entailment of implementing measures

The Treaty states that unprivileged applicants may have standing to take action against regulatory acts not entailing implementing measures. ‘Not entailing implementing measures’ is a negatively formulated requisite which

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90 Art. 289 and 291 TFEU.
91 Bast (n 85) pp. 894.
92 In French: ‘une procédure législative spéciale’.
presupposes a positive definition of what constitutes an implementing measure. An implementation is generally understood as a measure taken by the competent authority to give legal effect and executability of the provisions of the basic act. In the EU-law context, implementation is the measure taken when the provisions of a directive, which lacks direct applicability, are transposed into the national law in order to have full effect in the Member States.

The General Court settled the issue in the Microban case. Microban International Ltd (applicant, henceforth Microban) sought the annulment of a decision by the Commission to not include a certain chemical on a list of substances permitted for trade. The decision intended that the chemical in question would not be permitted for sale within the Union after a certain date, and therefore had relevance for Microban’s business. With regards to the procedural issue of admissibility, the General Court held that the decision entails the immediate effect that the trade of products containing the chemical ipso facto becomes prohibited after the transition period regardless of any national measures. The legal effects arise throughout the Member States independently from any national measure. The fact that the Member States could voluntarily prohibit the handling of the chemical before the prohibition entered into force did not cause the basic decision to entail any implementing measures.

One important aspect on whether a regulatory act entails implementing measure is that it should be assessed only by reference to the position of the applicant, or the person claiming standing to bring the action. It is in other words irrelevant if the act in question entails implementing measures with regards to other persons or not. When assessing the whether the regulatory act entails implementing measures reference is exclusively made to the subject-matter of the action, and the purpose thereof. If the action only concerns partial annulment, it is only the provisions in question that must not entail any implementing measures. The conclusion of that reasoning is that a regulatory act does not entail implementing measures, if its applicability towards the applicant is necessarily dependent on an intermediate measure. In Microban,

93 Microban (n 55).
94 Telefónica (n 56) para. 30 Woonlinie (n 11) para. 37 and Woonpunt (n 11) para. 50.
95 Telefónica (n 56) para. 31 Woonlinie (n 11) para 38 and Woonpunt (n 11) para. 51.
the prohibition of the contested measure became effective on its own independent from national measures.

Moreover, attention should be given to the fact that a natural or legal person who is unable to challenge a regulatory act directly before the European Union’s judicature because of the restrictive conditions governing admissibility under art. 263(4) TFEU are still protected from its application by the ability to challenge the implementing measures themselves. The court holds in this regard that an individual may plead to the invalidity of the basic in a dispute in front the national court and potential preliminary ruling procedure under art. 267 TFEU. If the Member States are obliged to implement the act, an individual can in a national dispute plea to the invalidity of the basic act as reason for not applying the national provisions. Since the national courts are not competent to rule on the validity of legal acts, they are obliged to request a preliminary ruling. The availability of remedies against the implementing measure, and the form of action required to necessitate a judicial review, is thus dependent on constitutional and procedural law of the Member States.

3.7 Implementing measures and direct concern

Regardless of whether the action concerns a regulatory or non-regulatory act, the applicant needs to prove direct concern, which has the same meaning as direct concern under the second limb. It has been concluded in the recent case-law that the direct concern requisite under the second and third limb are substantially identical. Older case-law is thus directly relevant for assessing whether the act is of direct concern or not. As the CJEU consistently held, direct concern entails that the Union measure must directly affect the applicants’ legal and economic situation and leave no discretion to the formal addressee entrusted with its implementation, where such implementation is purely automatic. What is the substantial difference between direct concern

96 Telefónica (n 56) para. 28.
97 Telefónica (n 56)para. 29.
98 Microban (n 55) para. 30.
and *not entailing implementing measures*? Firstly, if there is an implementing measure that is necessary for the provision to gain effect towards the applicant, regardless of whether it is automatic or not, the latter requisite is not fulfilled. In comparison to the situation in *NV International Fruit Company*, the execution of the provision was contingent on that the national authorities granted the applicant with an import license but the decision was only automatic. Secondly, if the implementing authority enjoys a degree of discretion on how to implement neither of the requisites are fulfilled, and standing under either the second or the third limb of art. 263(4) TFEU is excluded.

There is a considerable overlap between the two requisites as they both addresses the issue of necessary intermediate measures and are in substance quite similar. A clearer distinction requires an extensive elaboration of the case-law on direct concern. The assessment of direct concern entails a degree of flexibility with regards to the exercise of discretion in the implementing measure whilst the other suggests a complete absence of implementation.99 In this regard, the requirements of direct concern, and the absence of implementing measures will in principle maintain that directives will fall outside the scope of direct challenge, whilst regulations normally satisfy the conditions if they are non-legislative. This should arguably include delegated regulations (art. 290 and 291 TFEU) and decisions of general application (art. 288(4) TFEU), in as much as they substantially produce legal effects for the individual.100

99 Nordlander (n 86) p. 301.
100 Balthasar (n 24) p. 543-544.
3 Right to effective judicial protection – art 47 Charter of Fundamental Rights in the European Union

The right to effective judicial protection has an essential role in the rule of law of the EU:s legal system, both as constitutional right for the individual and as an essential aspect of democratic accountability.\textsuperscript{101} It is now enshrined in art. 47 of the Charter, which applies to the institutions of the EU and the Member States when they are applying EU law. The Union courts are equally bound by the principle and have an obligation to ensure the rights of the individuals as they emanate from the Charter. Art. 47 encompasses all rights and obligations provided by the EU-law, and thus not restricted to rights enshrined in primary legislation.\textsuperscript{102} However, the application of art. 47 in the EU procedural law differs from the national procedural orders. The question is whether the principle of effective judicial protection offers a self-standing ground for \textit{locus standi} to actions of annulment. It was confirmed by the CJEU in \textit{Inuit} that although art. 263(4) TFEU must be interpreted in the light of the Charter, art. 47 was not intended to change the system of judicial remedies provided by the TFEU, and in particular not the rules relating to direct actions of annulment.\textsuperscript{103} An interpretation of art. 263(4) TFEU in the light of art. 47 of the Charter cannot lead to disapplication of the requirements specifically laid down by the treaties. Consequently, as deduced by the CJEU in \textit{Inuit}, art. 47 does not require that an individual has an unconditional and automatic right to bring an action of annulment to the Union courts.

In the case \textit{Telefónica} an applicant brought an action against a Commission decision declaring a tax scheme, under which financial good will resulting from acquisitions of foreign shares could be amortized for a longer time constituting state aid.\textsuperscript{104} The action was dismissed as inadmissible by the GC on the ground that the disputed act was not an act ‘not entailing implementing

\textsuperscript{101} Commentary of the Charter of Fundamental Rights of the European Union (n 18) p. 359.
\textsuperscript{102} Ibid p. 360.
\textsuperscript{103} \textit{Inuit} (n 6) para. 97.
\textsuperscript{104} \textit{Telefónica} (n 57).
measures’ and that the applicant failed to show individual concern. In its appeal, the applicant relied on three grounds challenging the order of the GC. Firstly, that the GC had infringed the applicants right to effective judicial protection, and secondly that the GC was incorrect in concluding that the applicant was not individually concerned by the challenged act, and finally that the GC had misinterpreted the concept of an ‘act not entailing implementing measures’. The CJEU concluded that the third and second pleas were to be examined first, and that the question of whether the applicant’s right to effective judicial protection was infringed only arose if the GC had misapplied the *locus standi* rules under art. 263(4) TFEU. The Court furthermore maintained with regards to the first plea, that art. 263 TFEU and 277 TFEU on the one hand, and art. 277 TFEU on the other establishes a complete system of legal remedies, and that the applicant can challenge the validity of the act in front of the national court and necessitate a reference for preliminary ruling. This is consistent with CJEU findings in the *UPA*-case, where the action was not admissible because the applicant was not individually concerned by the contested regulation. The issue in the case was whether an applicant that was directly, but not individually concerned could nonetheless have standing because he would be deprived of effective judicial protection. The CJEU insisted that the treaties require that an individual can only challenge an act if he is both directly and individually concerned by it. Furthermore, Advocate General Jacobs suggested a significantly relaxed reinterpretation of the notion of individual concern. The CJEU rejected it by reaffirming the *Plaumann* precedent, which is still the ruling test for whether an applicant is individually concerned. In another debated case, *Jégo-Quéré*, the GC attempted to relax the requirements by reinterpreting the individual concern on the ground that the *Plaumann* test was too strict to provide a sufficient and effective judicial protection. The suggested reinterpretation of the GC was rejected by the CJEU on the ground that it removed all meaning from the requirement of
individual concern and that the GC erred in law by deviating from the established case-law.\textsuperscript{112} Expanding the scope of \textit{locus standi} through the jurisprudence of the courts would go beyond the wording of the treaties.

It appears from this reasoning, that the principle of effective judicial protection, either on its own or based on art. 47 of the Charter, does not provide for a self-standing ground. An individual cannot in the context of direct actions invoke the principle for the purpose of admissibility on its own. Hence, the principle is contingent upon whether a right to bring action follows from the treaties themselves, and thus only operates within the boundaries of art. 263(4) TFEU.

Furthermore, it must be considered that if the Union courts would allow for an individual to rely solely on art. 47 of the Charter, it would have adverse effect on the application of art. 263 TFEU by depriving it of its effectiveness. The requisites in art. 263(4) TFEU are formulated for the purpose of limiting the \textit{locus standi} to individuals which are sufficiently concerned by the act in question. It follows from the wording of art. 47 of the Charter that a right to an effective remedy appertain to those ‘whose rights and freedoms guaranteed by the law of the Union are violated’. Evidently the right to a remedy is not universal, and does not apply to those whose rights are not violated by the adoption of a legal act. If the Union courts were to adopt a separate and wider doctrine of \textit{locus standi} on the basis of art. 47 of the Charter, the treaties would lose authority.

\textsuperscript{112} Case C-263/02 P, Commission v Jégo-Quéré ECLI:EU:C:2004:210 para. 36-39.
4 Analysis

Many different perspectives on the addendum of regulatory acts to art. 236(4) TFEU and the recent case-law from the CJEU can be taken. This analysis is divided in two parts, where the first forms a perspective on the institute of *locus standi* in itself from an individual and procedural point of view. The second part is to contextualize the new remedy, and the notion of regulatory acts in a larger perspective of the judicial order and discuss the policies which underlie the praxis of the court. On the basis of those findings the thesis will raise some critical point of views on the solidity of the assertion that the treaties provide for a complete set of judicial remedies.

4.1 How and to what extent has the reformed standing requirements for challenging regulatory acts affected the individuals’ possibilities gaining admissibility?

This part of the analysis addresses the material procedural issue of standing. The reformed *locus standi* requirements are not general and only apply to regulatory acts specifically, which have been defined as acts of general applicability except for legislative acts which do not entail implementing measures. Exactly what types of acts do generally fall into that description? It foremost encompasses acts by the Commission such as regulations and decisions which give rise to right and obligations within the Member States, because it is the most active institution producing legal acts. The Commission is the active in its adoption of legal acts within the areas of environmental politics, agriculture, and competition law in general, including free movement, state aid regulations and services of general economic interests etc. As mentioned above, delegated acts adopted on the basis of a delegation, art. 290(1) TFEU are regulatory acts *ipso jure*. For the purpose of simplicity and foreseeability art. 290(3) TFEU stipulates that the word ‘delegated’ must be
inserted in the title of a delegated act. It must be maintained that art 263(4) TFEU is generally formulated and can be applied to all types of legal acts, and it is hence not the category or formal labelling of the act that determines on what ground the individual base standing upon, but rather under which formal procedures the acts have been adopted and what legal effects they produce towards the applicant and whether they are applicable to him or her.

In comparison, implementing acts, are by definition not considered legislative acts since adopted by either the Member States or the Commission (art. 291(1-2) TFEU). If the implementing act is adopted by the Commission in accordance with para. 2, it is of general application, and whether the applicant has standing depends on if is of direct concern.

In order to conclude the extent of the relaxation of the standing requirements under art. 263(4) TFEU concerning regulatory acts actually confer, the answer must be sought within the meaning of the individual concern criteria. Presumed that the challenged act is a regulatory act not entailing implementing measures, the question can be reformulated to what the individual does not have to comply with, in relation to the requirements for general locus standi.

Many actions fails to gain admissibility on the ground that the individual cannot show that he is individually concerned by the disputed act. There are two factors that leads to dismissal of the action, either the applicant is substantially not differentiated by circumstances that distinguishes him, or the applicant fails to prove that such circumstances exists. In some cases, such as in Plaumann where the applicant only appeals to the fact that he or she is part of an economic sector that is affected by the act, it can logically be deduced that the applicant is not individually concerned. In the Codorníu-case the CJEU could more or less assume individual concern because of the fact that the applicant had an established trademark right which would be removed by the legislation. In such a situation, only those actors with an established or registered trademark could have their legal situation affected by the prohibition in the regulation. From such a perspective, it can be concluded that the threshold for gaining access to justice is lowered, and that the amount of individuals entitled to bring an action of annulment to the Union courts is
increased beyond the limitations of the closed class test with regards to regulatory acts.

On the other hand, there are cases when the action is dismissed because the applicant cannot show that he is individually concerned, even if such circumstances may exist. For an action to gain admissibility, the applicant has to prove that the act affects him adversely as if the act was an immediately addressed decision.\textsuperscript{113} In the abovementioned Extramet-case the applicant could through substantial evidence show that the contested regulation was of individual concern. From a procedural view burden and level of evidence required forms the heavier part of a successful action, and can entail both practical difficulties, high costs and substantial time effort. The applicant is often interested in a rapid annulment of an act, but might be discouraged by the evidence requirements to gain admissibility. In that regard the exemption of the individual concern criteria results in an easier procedural situation because applicant is not required to provide evidence thereto.

Furthermore, the recent case-law has clarified the scope of application of the third limb by defining which types of acts and individual may bring an action solely on the ground of direct concern. Because the scope of the first and third limbs are now relatively transparent it is easier for the applicant to structure the action according to the suggested order of assessment. It is only when the disputed act is regulatory that the individual can invoke \textit{locus standi} on the ground of direct concern. In this regard, the simplification of the categories of acts, and the labelling of delegated and implementing acts makes it easier for the applicant to deduce on which ground to base claim to standing.

The new case-law is important as it consolidates the CJEU:s settled jurisprudence on the relationship between the formal standing requirements provided by the treaties and the fundamental right to effective legal protection. It appears from the CJEU:s handling of the appeals in \textit{Telefónica}, \textit{Woonpunt} and \textit{Woonlinie} the ground that a dismissal violates the applicants’ right to effective legal protection cannot be assessed unless the GC erred in law by misapplying the formal standing rules under art. 263(4) TFEU. That means that

\textsuperscript{113} Lenaerts, \textit{Procedural Law of the European Union} (n 10) p. 256.
the principle does not stretch further than the formal rules, and does not provide for a self-standing *locus standi* ground. However, the principle can be invoked as interpretative support when claiming that an act concerns the applicant directly and individually.\(^\text{114}\) That conclusion is not new, since the principle has newer provided a self-standing ground for standing.

A closely related question is how the addendum to art. 263(4) TFEU and the CJEU:s recent case-law has affected the indirect remedy through the national courts? The CJEU briefly, and in very general terms, maintained its previous statements that the national courts are obliged to provide individuals with an effective judicial remedy, and insisted that it is irrelevant for the question of admissibility of direct actions whether such an effective judicial remedy is available under national procedural law. As things stand, the national courts are under the same obligation as before, and the individual still needs to initiate national proceedings and convince that court to request a preliminary ruling on the validity of the disputed act.

However, if the individual can obtain a reference for preliminary ruling to the CJEU, it entails the effect that it becomes a one-instance procedure. If an action can be admitted to review in front of the GC the individual can potentially litigate in two instances which is in general considered to be an advantage for the parties.\(^\text{115}\) In the preliminary procedure the individual is restricted to litigate in front of the CJEU, and the conditions and frameworks that the Court imposes. It must be noted, that even if the applicant can convince the national court that the validity of the basic act is in doubt, the preliminary ruling procedure is contingent on how the referring court phrases its questions. From a procedural point of view, the applicant does not have the same possibility to frame and formulate the application in relation to the legal result sought. Generally, the preliminary ruling procedures are lengthier and more costly than annulment procedures.\(^\text{116}\) These practical deficiencies of the

\(^{114}\) E.g. *Jégo-Quéré* (n 111) para. 36, and *UPA* (n 32) para. 44, *Inuit* (n 6) para. 98, *Lootus* (n 25) para. 50.

\(^{115}\) The purpose of attaching the GC to the Court of Justice in order to establish two levels of jurisdiction was partly to improve the judicial protection of individuals, see Commentary of the Charter of Fundamental Rights of the European Union (n 18) p. 362.

\(^{116}\) Eliantonio (n 2) p. 125.
preliminary ruling procedure appears less than satisfactory in terms of effective judicial protection.\textsuperscript{117}

The indirect action provides two relevant advantages for the applicant. Firstly, the CJEU is obliged under the treaty two answer the question referred by the national court, and the applicant gains access to the CJEU automatically. Secondly, a reference for preliminary ruling on the validity of a legal act can be ask whenever in time, in contrast to the direct action which must be filed within two months from the adoption of the act.\textsuperscript{118}

Additionally, as the CJEU held in \textit{Telefónica} an individual can always challenge the validity of the implementing act by pleading to the invalidity of the basic act. The possibility and chances of successfully reaching the CJEU and a final annulment is another topic. The reasoning of the CJEU in this regarded must be considered with a degree of skepticism, because it entails a number of central procedural issues which vary greatly within the national procedural systems.\textsuperscript{119} From the procedural point of view of the individuals, this assertion remains unsatisfactory.\textsuperscript{120} Firstly, whether the implementing measure can be challenge through a direct and abstract action or if it must be contingent on a concrete dispute is dependent on the national law. Secondly, the propensity of the national courts to request preliminary rulings vary substantially between the different Member States.\textsuperscript{121} Thirdly, in some Member States the possibilities of reaching the supreme appellate instance is subjected to restrictive requirements, which in practice blocks the parties from reaching the instance against whose decision there is no judicial remedy under national law which is required to request a preliminary ruling.\textsuperscript{122} The lower instance, is not automatically required to refer questions to the CJEU unless it is necessary to give judgment on the subject matter.\textsuperscript{123} The success of the possibility to

\textsuperscript{117} Harding raises practical procedural difficulties of the preliminary ruling as a substitute to the direct action, see Harding (n 17) p. 357-358.
\textsuperscript{118} Article 265(3) TFEU.
\textsuperscript{119} Harding (n 17) p. 357.
\textsuperscript{120} Nordlander (n 86) p. 302.
\textsuperscript{122} Art. 267(3) TFEU.
\textsuperscript{123} Art. 267(2) TFEU. See Case C-99/00, \textit{Kenny Roland Lyckeskog v Kammaråklagaren} ECLI:EU:C:2002:329 para. 19.
challenge the validity of the implementing act is thus dependent on whether the applicant is able to convince the non-final court that the validity of the basic act is in doubt, and that the question is necessary to give judgment on the subject matter of the case. Due to the fact that there is significant variation within the Member States with regards to these central issues the chances of successfully challenging an implementing act are unequal for the citizens of the Union.

This assertion must be scrutinized critically. If the purpose of the treaty provisions is to ensure the individual access to justice and effective legal remedies the application of the indirect action is given heavy reliance. The mere theoretical possibility of reach the CJEU does not suffice as an effective judicial remedy, at least not in the meaning of art. 47 of the Charter. The likelihood of successfully challenging the validity of a Union act, especially of legislative character appears to be rather minimal. In practice, these inconsistencies causes legal uncertainty for the applicant not knowing whether to bring direct actions based on standing under art. 263(4) TFEU, or to necessitate a preliminary ruling reference via the national court. The risk of pursuing the wrong avenue of judicial review is losing the possibilities of redress.

4.2 How does the new possibility to gain standing against regulatory acts relate to the system of judicial remedies?

The Lisbon reform of standing requirements have sprung out from the debate of whether art. 230 EC was sufficient to ensure that individuals could rely on

124 Balthasar (n 24) p. 547
125 For an in-depth analysis on the varying propensity to request preliminary rulings, see Broberg & Fenger (n 121) ch. 2. Studies have shown a reluctance from Scandinavian courts to challenge the validity of implementing measures, see Marlene Wind, 'The Nordics, the EU and the Reluctance Towards Supranational Judicial Review' [2010] 48(4) JCMS 1039 p. 1047.
126 Commentary of the Charter of Fundamental Rights of the European Union (n 18) p. 360
127 Woonlinie, Opinion AG Wathelet (n 66) para. 34-35 and Woonpunt, Opinion of AG Wathelet (n 66) 61-62
128 Nordlander (n 86) p. 302
their fundamental right to effective judicial protection. The question of admissibility of actions of annulment, and in particular standing for individuals, is a matter of policy rather than law.\footnote{CONV 572/03 (n 78) p. 4, CONV 575/03 Oral presentation by M. Bo Vesterdorf, President of the Court of First instance of the European Communities, to the “discussion circle” on the Court of Justice on 24 February 2003 p. 4, and Harding (n 17) p. 357.} Naturally the CJEU has an amount of jurisprudential discretion within the frames of the provisions laid down in the treaties, but the issue has much broader political dimensions.

The EU-law is unique because it is a legal order founded on international law, but in many ways penetrate the veil of dualism that hinders international law from having direct effect in the national legal orders. The Member States have conferred considerable legislative competence and decision making to the Union and its institutions through the treaties. That entails that the Unions legislative process have to rest on democratic legitimate grounds and transparent procedures. The CJEU:s judgments in Inuit, Woonlinie, Telefónica and Microban cases defining regulatory acts as acts of general application other than legislative draws a clear line that highlights the legitimacy of legislation. It is a misconception that the judgments strengthens the protection of the legislation from challenge and in some way diminishes the individuals possibilities to gain standing to dispute acts adopted through the ordinary procedure. In fact, the CJEU only consolidated the status quo concerning the possibilities to judicially contest the validity of legislative acts.

The definition of regulatory acts that the CJEU has formulated on the basis of a wide analysis of the treaty texts and pre-legislative works should be considered to be the interpretation most conform to the Treaties. Because of the fact that the term regulatory acts only occur in art. 263(4) TFEU, and not at all in any ancillary protocols or secondary legislation, it must have an autonomous meaning. The conclusive definition is consistent with the purpose the locus standi reform, videlicet to increase the individuals’ judicial protection whilst not adventuring the legislative process. A clear advantage with the definition is that it formulates rather clear frames for which acts are considered regulatory or legislative, by referring to the formal adoption procedure (art. 289 TFEU). Such formulation entails that it is relatively simple to categorize the act and thereby if the third limb is applicable to the applicants action, which is
important from the perspective of maintaining legal certainty and consistency. On the other hand it can be argued that such a conclusion leads to a staler and less flexible system which can result in the consequence that individuals are unable to gain standing, even if they might have a legitimate claim.

The opinions on whether a wider conclusion than CJEU arrived at in *Inuit* seems to vary. Whilst the criticism put forward by Advocate General Wathelet to the conclusions of Advocate General Kokott and the CJEU is considerable and relatively strong, the amount of discretion left for the Court was limited. During the drafting conferences of the Constitutional Treaty the presidents of the GC and the CJEU stated that a relaxation of the standing rules for direct actions lie within the prerogative of the Member States. The President of the CJEU maintained that the current system is complete and sufficient, and suggest a continued restrictive stance towards admitting actions against legislative acts.\(^{130}\) However, the President of the GC, Bo Vesterdorf, added that the “opinion among the members of the CFI (now the General Court) is divided as to whether the judicial protection afforded to individuals is adequate”.\(^{131}\) Conclusively, the delimitation to regulatory acts that the drafters finally agreed upon,\(^{132}\) appears to be a compromise of a clamor of reform for a strengthened judicial protection and a defense of legitimacy and authority of legislative acts.

There is a clear relationship between the direct and indirect action. The CJEU consistently held that even if the action is inadmissible for failing to satisfy the requirements of art. 263(4) TFEU, the applicant can turn to the national court and request a reference for a preliminary ruling. The Court has in it reasoning at the same time insisted that the national courts are obliged to provide the citizens with effective judicial remedy to protect their rights stemming from the EU-law and to uphold the individual’s right to effective judicial protection. The CJEU:s reasoning is not entirely consistent in this respect. The central question is whether the indirect action is an appropriate substitute for the direct action.

\(^{130}\) CONV 572/03 (n 78) pp. 3-4.
\(^{131}\) CONV 575/03 (n 129) p. 4.
\(^{132}\) CONV 734/03 (n 76) para. 3, compare CONV 636/03 (n 76) para. 20.
when the applicant seeks to have the legal act annulled?\textsuperscript{133} The direct action in front of the Union courts is a self-standing abstract judicial review, in the sense that it is not contingent on a real dispute. Whilst the CJEU refers the responsibility to ensure individuals legal protect to the national courts, it does not require that they must offer self-standing remedies of abstract judicial review under two conditions. Firstly, the procedural rules governing actions for safe-guarding an individual’s right under EU-law must not be less favorable than those under national law.\textsuperscript{134} Secondly, the procedural rules must not render it practically impossible or excessively difficult to exercise rights conferred by Union law.\textsuperscript{135} Many of the national legal orders of the union, for example all of the Nordic states, do not allow for the courts to review the validity of legislation unless it becomes a relevant subject matter of a concrete dispute. Critical voices have suggested that national courts in legal orders with less propensity to review legislation has shown reluctance to request preliminary rulings.\textsuperscript{136} The CJEU has furthermore consistently maintained that an individual cannot be require infringe the law in order to have is rights and obligations under EU-law reviewed, even if it is the only way to necessitate a reference for preliminary ruling. Apart from the difficulties to prejudicially access the CJEU through the indirect action, the differences in the conduct of procedure can have adverse effects on the applicants’ possibilities of success.

Moreover, the CJEU reaffirms that an applicant cannot rely on the unavailability of judicial remedies under national law as ground for gaining standing under art. 263(4) TFEU. A common argument raised by the applicants in the case-law is that if they are not granted \textit{locus standi} for a direct action of annulment, they would in practice be deprived of their right to effective judicial protection, since there is no plausible judicial remedy to access the national courts. As the CJEU elaborated in the \textit{UPA}-case, assessing whether the applicant should gain standing under art. 263(4) TFEU based on un-

\textsuperscript{133} Takis Tridimas, \textit{The General Principles of EU-law} (2nd ed, Oxford University press 2006) p. 420.

\textsuperscript{134} Case C-432/05, \textit{Unibet ltd v Justitiekanslern (Unibet)} ECLI:EU:C:2007:163 para. 52, recalling that the treaties were not intended to create new legal remedies in domestic law, para. 40, see Lenaerts, ‘Effective judicial protection in the EU’ (n 54) p. 13.

\textsuperscript{135} \textit{Unibet} (n 134) para. 53.

\textsuperscript{136} Wind (n 125) pp. 1040.
availability of national remedies would necessitate an inquiry of the national law which would go beyond the jurisdiction of the Union courts.\textsuperscript{137}

There is a considerable risk in obliging the national courts to automatically admit abstract actions for judicial review. Because of the facts that the CJEU is on the one hand forced to adjudicate on a preliminary ruling on request from a national court, and on the other hand the sole institution competent to interpret the validity of a legal act adopted by the Union such a requirement would entail that individuals could gain automatic access to the Union judiciary through the national courts. The risk of adopting such praxis is that the direct action subjected to formal requisites laid down in art. 263(4) TFEU could lose their functions. If the CJEU would refer the applicant to a possible circumvention of art. 263(4) TFEU, the requirements specified in the treaties would lose their authority.

Since the debate about the \textit{locus standi} to bring direct actions of annulment on the one hand and the possibility of necessitating a reference of preliminary ruling on the other revolves around the term ‘effective’. It is used in the sense of effective judicial and legal protection, effective remedies etc. As Advocate General Wathelet critically put forward, it is unreasonable to suggest that the mere theoretical possibility of relying on the indirect action for reaching an annulment is effective since the chances of success are for the first very low, and for the second not uniform within the judiciary systems of the Member States.\textsuperscript{138} Reliance on the availability of a preliminary ruling procedure as reason for maintaining a restrictive scope of \textit{locus standi} could in some situations result in denial of an effective remedy.\textsuperscript{139} In the Nordic states, among others, judicial review is only possible if it is relevant for the subject matter of a concrete dispute, the possibility of gaining admissibility to the supreme appellate instance is subjected to the requirement that a precedent is necessary for the application of law, and are statistically disinclined to request

\textsuperscript{137} \textit{UPA} (n 32) paras. 43–44, reaffirmed by the CJEU in \textit{Telefónica} (n 56) para. 55.


\textsuperscript{139} Eliantonio (n 2) p. 124, and Koch (n 70) p. 515.
preliminary rulings. Under such circumstances, the possibilities of accessing the CJEU indirectly are at best microscopic.

The system of judicial review is based on the theoretical principle of separation of powers under which the CJEU is mandated to control the constitutionality of the institutions work, in particular that it respects the principles of conferral of powers, subsidiarity and the rule of law. It is now completely accepted that there is a possibility for to challenge legislative acts that are of direct and individual concern to them, although direct actions is fundamentally foreign to many legal orders. In England, the courts are not allowed to review the validity of Acts of Parliament at all, whilst in France the right to challenge legislative acts are reserved for privileged applicants. The EU system based on review is relatively alien to Nordic legal systems, which do not allow the courts any mandate to annul legal acts, and those not acknowledge any fundamental right for an individual to challenge the validity. Instead the Nordic constitutional traditions have adopted a system of judicial preview in which the legislation is heavily scrutinized during the legislative process. However, the courts can refuse to apply legislation which violates superior law, in concrete and real disputes. This is a result of what is known as the principle of distribution of functions which considers the sovereignty of the legislative assembly and attributes the legislation high legitimacy. From such a perspective, the conclusion of the CJEU, that regulatory acts cannot encompass legislative acts defends not only the authority of the treaties and the Member States, but also the democratic legitimacy of the legislative institutions.

The restrictive praxis of the CJEU may be motivated by protection of the authority of the treaties and legitimacy of the legislative process. But it would be negligent to omit that a restrictive praxis on standing effectively avoids risk.

140 Bernitz, ‘ Förhandsavgöranden av EU-domstolen ’ ( n 121 ) p. 41-42, Wind ( n 125 ) pp. 1045. In 2004, the Swedish government received a reasoned opinion from the Commission stating that the level of preliminary references was unacceptably low, C(2003) 3899, on file with the author. For an analysis of the Swedish court praxis, see Ulf Bernitz, ‘ Kommissionen ingriper mot svenska sista instansers obenägenhet att begära förhandsavgöranden ’ [2005] 8 Europarättslig Tidskrift p. 109, and Hans Ragnemalm, EG-rätt i Regeringsrätten, (published in Hans Ragnemalm and Mats Melin, EG-domstolen Inifrån, Jure Förlag AB 2006)
141 Bast ( n 85 ) p. 888
142 Balthasar ( n 24 ) p. 547
144 Ibid p. 26-27
of popular actions where individuals lacking individual concern or legitimate personal interest brings actions of annulment. The fact that an order of annulment has far reaching consequences erga omnes and retroactively, an open system could lead permanent litigation and uncertainty. However, some commentators have argued that the disruptive effects of an annulment should be considered when dealing with the substance, rather than admissibility, of the claim.

Whereas the criticism against conclusions reached by the CJEU for not satisfying the concerns that lead to the Lisbon reform is not entirely unfounded. But claiming that the exclusion of legislative acts deprives the reform of any real effect is peculiar, since regulatory acts encompasses a large amount of acts, which are now challengeable regardless of whether it entails individual concern or not to the applicant. For these types of acts, the sphere of individuals with standing to bring an action has been significantly increased through the reform. With regards to the restrictive praxis concerning standing to bring actions against legislative acts, the treaties have always required the applicant shows individual concern, and the right has never extended further than that. The proposition that the current system does not satisfy the right to effective judicial protection falls short because it does not solidly prove that individuals should have a legitimate right to challenge legislative measures in the first place, without being individually concerned by it.

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145 Bernitz, Europaråttens Grundr p. 209.
146 Latin maxim meaning “Towards all”.
147 Lenaerts, Procedural law of the European Union (n 10) p. 250, Albors-Llorens (n 29) p. 73 and Harding (n 17) p. 358.
149 E.g. Inuit (n 6) paras. 97-98.
5 Conclusions

The added third limb entails standing for individuals to bring an action of annulment against regulatory acts. For the purpose of EU-law regulatory acts are non-legislative acts of general application. Before the Lisbon reform, standing under art. 230(4) EC against acts of general application was subjected to the requirement of individual concern. The reform has relaxed the requirements for those acts of general applications which are not adopted through the legislative process. The abolition of the individual concern significantly lowers the threshold for individuals to gain standing with regards to non-legislative acts. The alleviation of individual concern increases the amount of individuals able to challenge regulatory acts which do not have to prove that the act affects them by virtue of factors distinguishing them from others and affected by the act as if they are the immediate addressees of a decision. As a result, the applicant must not be part of a closed class in order to be individually concerned.

Procedurally, the reform entails an alleviation of the heavy burden of proof necessary to show that the applicant is part of a closed class. In order to gain admissibility under the third limb, the applicant only needs to establish how the measure affects his or her legal position, which is the first element of the direct concern criteria. The Court will be able to determine if the act is legislative or not, to what extent it requires implementing measures, and the amount of discretion left to the implementing authority.

Systematically, the CJEU assesses whether the applicant has standing on the basis of the third limb before the second limb. The GC erred in law in Woonpunt and Woonlinie by avoiding to consider if the act was regulatory first, which furthermore means that individual must not explicitly state that standing is based on the third limb.

There is a clear correlation between the legislative process and the stricter requirements for gaining locus standi against legislative acts where the democratic legitimacy of the legislation provided by the Lisbon Treaty, and the
enhanced scrutiny of the acts motivates a continued restrictive praxis. However, at the same time, there is a correlation between the delegations of competence to other institutions, in particular the Commission to adopt legally binding acts of general application, and a need for relaxed admissibility requirements. Since the adoption of regulatory acts are not subjected to the same scrutinizing preview as legislative acts, the legality of the non-legislative process needs to be ensured through judicial review.

The jurisprudence of the CJEU balances several different aspects on to what extent the individuals should be able to initiate proceedings against different legal acts. Firstly, the CJEU considers that the right to effective judicial protection requires that an individual must be able to challenge acts under the conditions laid down by the treaties. Secondly, the CJEU consistently holds that it does not have competence to extend the requirements any further than the treaty text. Through such an extension the CJEU would expand its jurisdiction further than the treaties confer, and risk unravelling the authority of the treaties. Thirdly, the CJEU considers that legislation must enjoy a higher degree of legitimacy than other types of acts of general application. A legislative act is an act adopted through the ordinary legislative procedure, whilst non-legislative acts are adopted in other forms, or by non-legislative bodies. Adopting such a formalistic definition emphasizes that the legitimacy of legislation emanates from the procedure and competence of the adopting institutions.

The reasoning of the CJEU in adopting a praxis dividing regulatory acts from legislative acts is logic, coherent and conform to the treaties. But the Court motivates its continued restrictive stance by resorting to the hypothesis that the treaties provide for a complete system of judicial remedies sufficient to satisfy the individuals’ right to effective judicial protection. But the indirect action is not an appropriate substitute for the direct action to ensure that individuals are provided with effective judicial protection. Firstly, the constitutional and procedural traditions in the Member States vary considerably and the possibilities to gain access to the national courts and the forms of actions available is not harmonized. Secondly, the propensity of the national courts to
review legal acts, or refer questions of validity to the CJEU vary in the Member States. The fact that the indirect action is theoretically available does not make it effective. The system is not complete until the national courts in all Member States provide equal and sufficient remedies to individuals. The question is if such a result is possible to reach without harmonizing the national procedural law, which neither the legislative institutions nor the CJEU has competence to interfere with.
6 References

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**III. Case law from the General Court**


**IV. Opinions of Advocates General**


V. Pre-legislative work

CONV 424/02, Final report of Working Group IX on Simplification.

CONV 572/03, Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the “discussion circle” on the Court of Justice on 17 February 2003.

CONV 575/03, Oral presentation by M. Bo Vesterdorf, President of the Court of First instance of the European Communities, to the “discussion circle” on the Court of Justice on 24 February 2003.

CONV 636/03, Final report of the discussion circle on the Court of Justice.

CONV 734/03. Articles on the Court of Justice and the High Court.

VI. Soft-law


VII.  Books


VIII. Articles


IX. Other

Ulf Bernitz, ‘Förhandsavgöranden av EU-domstolen – Svenska domstolars hållning och praxis’ [2010] 2 SIEPS