

Private Party Standing and EU Risk Regulation

Expanded Standing Rights in the Public Interest

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Introduction

Standing determines a person's ability to obtain judicial review of a legal act by the government. Judicial review of EU measures, including risk regulatory measures, is an important device to ensure that the rule of law is respected. Even after the changes brought about by the Lisbon Treaty, private parties still have limited standing rights under EU law to challenge EU risk regulations. While they are able to challenge "decisions" addressed to them (or, in some cases, addressed to others), they generally have been unable to claim standing at the European courts to seek review of generally binding rules. These restricted standing rights for private parties have been the subject of debate and criticism, both before¹ and after the changes brought about by the Lisbon Treaty.²

This article discusses the EU law standing requirements for private parties, the rationale and justification for the current restrictive conditions, and the ef-

fects of expanded standing for private parties on the legality, quality and effectiveness of EU risk regulation. Thus, the focus is not on the formal legitimacy,³ but on the functional characteristics of judicial review. Of course, standing extends beyond risk regulation, and, the current restricted standing rights and any future expanded standing rights apply more broadly to any generally binding EU rules. There would appear to be no reason to limit an expansion of standing rights to risk regulation. Nevertheless, risk regulation may be different from other areas of regulation in that it relies heavily on science, involves a relatively high number of precautionary measures,⁴ and may be seriously politicized. As a result, the need for court review in the area of risk regulation may be greater, because the risk of unlawful decisions driven by politicized, precautionary science and activist policy-makers is greater. It is not the purpose of this paper, however, to explain exactly how the issues are different for risk regulation, as opposed to other ar-

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- 1 See for discussion of the pre-Lisbon situation, for instance, Anthony Arnall, 'Private applicants and the action for annulment under Article 173 of the EC Treaty' (1995) 32 *Common Market Law Review*, Issue 1, pp. 7-49. Ewa Biernat, *The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community*, Jean Monnet Working Paper 12/03, NYU School of Law, 2003. Albertina Albors-Llorens (2003). *THE STANDING OF PRIVATE PARTIES TO CHALLENGE COMMUNITY MEASURES: HAS THE EUROPEAN COURT MISSED THE BOAT?*. *The Cambridge Law Journal*, 62, pp 72-92. Paul Craig, *Standing, Rights, and the Structure of Legal Argument* (2003) 9 *European Public Law*, Issue 4, pp. 493-508. Teall Crossen and Veronique Niessen, *NGO Standing in the European Court of Justice - Does the Aarhus Regulation Open the Door?* *RECIEL* 16 (3) 2007, pp. 332-340. Marton Varju, 'The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention' (2004) 10 *European Public Law*, Issue 1, pp. 43-56. Angela Ward, *Judicial Review and the Rights of Private Parties in EU Law* (Oxford European Union Law Library), Oxford University Press, 2007.
- 2 For a discussion of the post-Lisbon rules, see, for instance, Stephan Balthasar, *Locus standi rules for challenges to regulatory acts by private applicants: the new art.263(4) TFEU*, *E.L. Rev.* 2010, 35(4), 542-550. M. Eliantonio, Ch.W. Backes, C.H. van Rhee, T.N.B.M. Spronken, Anna Berlee, *Standing up for your*

right(s) in Europe: A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts, European Parliament, Committee on Legal Affairs, 2012. Pieter-Augustijn Van Malleghem and Niels Baeten, *Before the law stands a gatekeeper - Or, what is a "regulatory act" in Article 263(4) TFEU?* *Inuit Tapiriit Kanatami, Common Market Law Review* 51: 1187-1216, 2014.

- 3 In 2002, Stone argued that, in Europe, "the formal legitimacy of review is simply a non-issue." *A Stone Sweet, Why Europe Rejected American Judicial Review - and Why it May Not Matter*, 101 *Mich. L. Rev.* 2744 2002-2003, pp. 2744-2780. Cf. Gregory A. Caldeira & James L. Gibson, *The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support*, 89 *Am. Pol.Sci. Rev.* 356 (1995) (arguing that high levels of trust may not be based on actual experience and thus may be vulnerable to new information). James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 *Am. J. Pol. Sci. Rev.* 459 (1995). James L. Gibson & Gregory A. Caldeira, *Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis*, *British Journal of Political Science*, 28(1), 63-91 (1998). For recent data on public trust in the European courts, see Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, *Theoretical Inquiries in Law*, Vol. 14:411, 2013, pp. 411-436.
- 4 After all, the precautionary principle applies to environmental and health and safety risk, i.e. risk regulation. For a discussion of the various possible meaning of the precautionary principle, see L. Bergkamp, *Understanding the Precautionary Principle, Parts I and II*, *Environmental Liability*, 2002, pp. 18-30 and pp. 67-82.

eas. Rather, I assume that enhanced standing is particularly important for risk regulatory measures, based on the theoretical argument set out above. Even if one rejects this assumption, however, it is still beyond doubt that standing rights are also highly relevant to risk regulation.

Standing is just one hurdle in the process of obtaining a remedy against an unlawful risk regulation. Other hurdles include the question of the scope of the court's jurisdiction (i.e., may the court rule on the *act* that is challenged, was it made by a *body* over which the court has jurisdiction, and may the court entertain the *grounds* invoked), the standard of review (i.e., against which standard will the court review the contested act, e.g. proportionality is an often invoked standard at the EU level), the intensity of review (which goes to the question of the rigor and depth of the court's review), other legal arguments (e.g., defenses, or procedural arguments), the consequences of a court finding that a standard was breached (e.g., minor breaches of serious requirements, or serious breaches of minor requirements, may not justify the remedy that is sought), and the available remedies (e.g. annulment, compensation, or other). A problem that arises in particular with respect to risk regulation is that many of the requirements relating to "better regulation," such as transparency, participation (consultation), a basis in sound science, adequate risk assessment, and impact assessment, are not generally binding, except insofar as the Lisbon Treaty⁵ and general principles of EU law render them mandatory. Consequently, broader standing rights may not result in the outcomes desired by applicants in all cases. They should help in some cases, however.

To set the baseline and illustrate the problem, the first part of this article analyzes current EU law standing requirements applying to private parties with respect to generally binding measures.⁶ This analysis is intended to sketch the general limitations on standing rights, not to provide an exhaustive review of the details of the full body of case law. The second part discusses the effects of restricted private parties' action rights on EU risk regulation, in particular the lawfulness, quality, and effectiveness of EU risk regulation. In this context, the rationale of judicial review is reviewed, also in relation to risk regulation. The flipside is discussed in Part 3, which focuses on the possible favorable and adverse effects, including "regulatory chill," of expanded standing of private parties on EU risk regulation. This part tries to an-

swer the question whether enhanced standing for private parties is in the public interest. Part 4 presents conclusions.

I. Private Rights of Actions under Current EU Law

With respect to the right to seek review by the European courts, the European Treaties have always made a distinction between *privileged* (and now also semi-privileged) applicants, on the one hand, and *non-privileged* applicants, on the other hand. Private parties are non-privileged applicants.

A prerequisite for any proceedings before the European courts is that the act about which the applicant complains, is intended to have "legal effects."⁷ Generally binding regulations have "legal effects," as they impose obligations on regulated persons and this affects their legal position. If risk regulatory measures come in the form of management decisions, advice, recommendations, opinions, or guidelines, however, they often do not have legal effects, since, due to their non-binding nature, they do not affect the legal position of the persons addressed. In theory, the form of the act does not matter, and a recommendation that is deemed to have legal effects for the applicant can be challenged before the European courts. For purposes of the analysis presented below, I assume that legal effects are not an issue.

1. Decisions

As a general rule, private parties have standing to seek review by the European court of decisions that are addressed to them or are of "direct and individual concern" to them.⁸ In its notorious *Plaumann* ruling, the Court of Justice has held that this condition requires that "[p]ersons other than those to whom a

5 Articles 1 and 11, Treaty on European Union (TEU), and Article 15 Treaty on the Functioning of the European Union (TFEU).

6 This article does not discuss specific rights of action for non-governmental organizations (NGO's) to challenge generally binding regulations or the implementation and enforcement thereof. For further discussion, see L. Bergkamp, *Are Standing Rights for Environmental Groups in the Public Interest?*, *Tijdschrift voor Milieuaansprakelijkheid*, 2001, pp. 153-157.

7 Article 263(1), TFEU.

8 Article 263(4), TFEU.

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” (emphasis supplied).⁹ This is not an issue with respect to decisions addressed to the claimants, but, by setting a condition that is met only in the most exceptional circumstances, it effectively rules out any challenge to generally binding rules.

2. General Applicable Regulation versus Decisions

While private parties have standing with respect to decisions addressed to them, the situation is very different with respect to legal acts that are of general application. EU risk regulation typically involves measures that are addressed not to a specific person or group of persons, but to an open-ended category of persons insofar as they are involved with a defined activity or product that is deemed to present some risk if left unregulated. Such measures are clearly not individualized decisions, although their implementation may require such decisions; for instance, individualized decisions are made in the context of an authorization program, such as the REACH Regulation's authorization regime for substances listed on Annex XIV. An applicant has standing to challenge an adverse authorization decision addressed to it.

Whether it can also challenge an authorization addressed to another person is a different matter; if a competitor is granted authorization with more favorable conditions, that person should be deemed to have a “direct and individual concern,” and should be able to claim standing. But this, of course, does not mean that a private party has standing to challenge also the authorization regime itself.

If the contested measure is a regulation, the applicant must show that it actually is a decision of individual concern disguised as a regulation.¹⁰ This generally is an insurmountable hurdle; if a regulation applies to a generally described, open-ended category, it is not a decision, even if there is only one company that falls within the category.¹¹ In some cases, it may be possible to claim “individual concern” also on the basis of a violation of a procedural right or participation right. In *Pfizer*, the Court of First Instance found that Pfizer was individually concerned by a legal act on the grounds that the pertinent legislation gave Pfizer, as an applicant, “the benefit of procedural guarantees,” which constituted “a particular situation which differentiate[d] Pfizer (...) from all other traders concerned by the [act].”¹² There have been a few other cases in which the court seemed to have accepted standing based on a right to participate.¹³ Whether a company can assert individual concern on this basis, thus depends on the specific circumstances of the case and the specific provisions of the legislation concerned.¹⁴

3. Regulatory Acts

Private parties are not entirely deprived of any right to challenge generally binding rules. The Treaty on the Functioning of the European Union (TFEU) also gives them a right to seek judicial review of “a regulatory act which is of direct concern to them and does not entail implementing measures.”¹⁵ Under this provision, there is some limited right to challenge generally binding EU rules. Three conditions are implied in this provision: (i) the measure must be a “regulatory act,” (ii) this act must be of “direct concern” to the applicant, and (iii) this act must not “entail implementing measures.” All three conditions must be met for a private party to have standing to bring proceedings challenging the act.

Note that this provision has been inserted into EU law by the Lisbon Treaty. Prior to Lisbon, the EU law

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

10 Case 789 and 790/79, *Calpak SA v Commission*, [1980] ECR 1949.

11 Paul Craig, *EU Administrative Law*, 2nd Edition, Oxford: Oxford University Press, 2012, p. 307.

12 *Pfizer*, Court of First Instance, T-13-99, 11 September 2002, ECLI:EU:T:2002:209, paras. 104-105.

13 Relevant cases are Case T-339/00, *Bactria v. Commission*, 2001 E.C.R. 11-1721, 151. Case T-109/97, *Molkerei Grossbraunshain v. Commission*, 1998 E.C.R. 11-3533, 1160, 68.

14 According to Scott and Sturm, the European courts have developed a doctrine which may be viewed as giving rise to a “participation exception.” That is to say, persons would enjoy standing to sue before the European courts, where they enjoy “specific procedural guarantees conferring upon them a right to participate in the political process.” Joanne Scott & Susan Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 *Columbia Journal of European Law* 565 (2007), pp. 565-594, at 579.

15 Article 263(4), TFEU.

on standing of private parties evolved somewhat, but the standing requirements had never been relaxed to any significant degree. The Lisbon treaty was intended to address this deficiency, at least to some extent. On the one hand, the Lisbon Treaty no longer requires “individual concern” (as opposed to “direct concern”) in relation to regulatory acts. On the other hand, not only the requirement of “direct concern” still applies, two further conditions must be met as well: “regulatory act” and “not entailing implementing measures.” To understand the reality of private parties’ action rights, each of these three conditions should be analyzed, as this often is the only way private parties can hope to challenge generally applicable regulations.

In construing the scope of private parties’ action rights under the Lisbon Treaty, the case law of the European Court of Justice suggests that account should be taken of the origins of the new provision (*in casu*, Article 263(4) TFEU), its wording and objectives, and the context, including the relevant provisions of EU law as a whole.¹⁶ The role of the new provision within the system of legal remedies established by the TFEU is of particular importance in this analysis.¹⁷

a. Direct Concern

The concept of “direct concern” is not unique to standing under the “regulatory act” provision; as noted above, it is also used in connection with the TFEU provision that grants standing in relation to decisions, and has been part of the pre-Lisbon “direct and individual concern” test. The Court’s pre-Lisbon construction of this term remains relevant under the new TFEU regime for regulatory acts.

“Direct concern” has generally not been interpreted solely in contrast with “indirect concern.”¹⁸ Rather, the Court’s interpretation has focused on the other conditions for admissibility of claims by private parties. In this vein, the Court has held that “direct concern” requires two things; (i) “the contested (...) measure must directly affect the legal situation of the individual,” and (ii) “it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.”¹⁹ Since private party rights are already contingent on the contested acts having legal effects and not entailing im-

plementing measures, it is hard to see where this interpretation leads.

A less convoluted, straightforward way to explain the requirement of “direct concern” would be to refer to the concept of “injury:” the applicant would have to be injured (or potentially injured) by the contested act.²⁰ In other words, the act must not only have legal effects, it must have such effects in relation to the applicant and the applicant must have an interest in being free from such effects.²¹ The Court has not yet given signs that it would be willing to endorse an interpretation of the term “direct concern” that limits it to interest and does not entail a separate enquiry into the degree of discretion left to the addressees of the contested measure. To the contrary, in some cases, the court required that private applicants show a legally protected interest in addition to the conditions for standing.²²

b. Regulatory Act

The concept of regulatory act is not defined in the Lisbon Treaty. One thing is clear: it is not synony-

16 Case C-583/11, *P Inuit Tapiriit Kanatami and others v European Parliament and Council*, para. 50. Cf. Advocate-General Opinion in *C-456/13 P, T & L Sugars Ltd and Sidul Açúcares Unipessoal Lda v European Commission*, para. 18.

17 This is an old theme, which was analyzed thoroughly by Advocate-General Jacobs in *C-50/00 P, Unión de Pequeños Agricultores v Council of the European Union (UPA)*.

18 But see Case T-346/10, *Borax Europe v ECHA*; Case T-343/10, *Etimine and Etiproducs v ECHA*.

19 Case T-262/10, *Microban International Ltd and Microban (Europe) Ltd v European Commission*, para. 27. Case C-386/96, *P Dreyfus v Commission*, [1998] ECR I-2309, para. 43, and Joined Cases C-445/07 P and C-455/07 P *Commission v Ente per le Ville vesuviane and Ente per le Ville vesuviane v Commission* [2009] ECR I-7993, para. 45).

20 Pursuant to the US Administrative Procedure Act, the right to seek judicial review is conditioned on suffering legal wrong due to agency action, or being adversely affected or aggrieved by agency action. 5 USCS § 702. A claimant may be required to show also that the interest it seeks to protect fall within the zone of interests to be protected or regulated by the instrument in question. *Dismas Charities, Inc. v. United States DOJ*, 401 F.3d 666 (6th Cir. Ky 2005).

21 In the context of civil actions, Holderness has argued that an open class of potential plaintiffs impairs or even destroys the alienability of resources and thus reduces their value. Holderness CG. Standing. In: Newman P (editor). *The New Palgrave Dictionary of Economics and the Law*. London: Macmillan. Volume 3, pp. 505-509. The injury requirement serves to keep the class of potential plaintiffs limited.

22 The Court of First Instance dismissed an application made by a scientific expert on the grounds that her opinion had been taken into account and her reputation had not been damaged, and, thus, she had no legally protected interest. Case T-32/99, *Nancy Fern Oliveri v. Commission and EMEA*, [2003] ECR II-6053.

mous with the term “regulation,” which, of course, is a defined term under EU law.²³ The term “regulatory act” was borrowed from the Constitutional Treaty,²⁴ under which its meaning was also unclear. The fact that it was undefined gave the Court the freedom to interpret it in line with EU law.

Although other approaches were available, the Court has given the concept a restrictive interpretation: regulatory acts are deemed to be acts of general application *excluding* legislative acts.²⁵ Given that legislative acts are defined formally to encompass all acts adopted pursuant to one of several legislative procedures and may take the form of a regulation, directive, or decision, such acts could involve not only general framework legislation, but also detailed and specific risk regulations. Even if they do involve detailed risk regulations, they would generally still be outside of the scope of private parties’ right to seek judicial review under the “regulatory act” provision, because private parties can only challenge legislative acts if they show “direct and individual concern.”²⁶ There was no reason for the Court to exclude legislation *en bloc* from this provision; instead, the Court should have included legislation that involves regulatory acts. To define this concept, the Court could have referred to criteria such as whether the legislation imposes specific binding requirements on regulated persons.

Acts that are deemed regulatory acts include *delegated acts* and *implementing acts*.²⁷ Delegated acts are adopted by the Commission pursuant to powers delegated by a legislative act, and involve “non-legislative acts of general application to supplement or

amend certain non-essential elements of the legislative act.”²⁸ Implementing acts are acts adopted pursuant to legislation and are intended to establish “uniform conditions for implementing legally binding Union acts.”²⁹ Such acts may be adopted by the Commission or by an agency, such as the ECHA.³⁰ Since, as noted, legislative acts are not regarded as regulatory acts, many risk regulatory measures cannot be directly challenged by private parties.

c. Not Entailing Implementing Measures

The requirement that the contested measure does not entail implementing measure is intended, according to the Court, “to ensure that individuals do not have to break the law in order to have access to a court.”³¹ The Court reasons that a person legally affected by a regulatory act not entailing implementing measures “could be denied effective judicial protection if he did not have a direct legal remedy before the European Union judicature for the purpose of challenging the legality of the regulatory act.” In such a case, if no direct action at the European courts were available, affected persons “would be able to obtain a judicial review of that act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national courts.”³² On the other hand, where further implementing measures are required, the affected person would still have a chance to challenge those measures, and, therefore, does not have to be granted a standing to challenge the legal act at issue.

23 Article 288, TFEU provides that a “regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”

24 Article II-365(4), Treaty establishing a Constitution for Europe (Constitutional Treaty).

25 Case C-583/11, P Inuit Tapiriit Kanatami and others v European Parliament and Council, para. 61.

26 It is conceivable, albeit unlikely, that legislation could be deemed a “decision” of “direct and individual concern” to an applicant, and, thus, give an applicant standing rights. Susan Rose-Ackerman, Stefanie Egidy & James Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union*, Cambridge University Press, 2015, p. 239. Cf. Paul Craig, *EU Administrative Law*, 2nd Edition, Oxford: Oxford University Press, 2012, p. 316.

27 For a discussion of problems associated with making this distinction, see Paul Craig, *Delegated Acts, Implementing Acts and the New Comitology Regulation*. *European Law Journal*, 2011, Vol. 36(5), pp. 671-687. The Commission notes that “an act

cannot be classified under two different headings at the same time: an act based on Article 290 is by definition excluded from the scope of Article 291, and vice versa. The authors of the new Treaty clearly intended the two articles to be mutually exclusive, and indeed the resulting acts have different legal names.” COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL. Implementation of Article 290 of the Treaty on the Functioning of the European Union. Brussels, 9.12.2009, COM(2009) 673 final, p. 3. Each of these two acts can be made in the form of a regulation, directive or decision.

28 Article 290, TFEU.

29 Article 291(2), TFEU.

30 Article 263(5), TFEU.

31 C-456/13 P, T & L Sugars Ltd and Sidul Açúcares Unipessoal Lda v European Commission, para. 29.

32 C-456/13 P, T & L Sugars Ltd and Sidul Açúcares Unipessoal Lda v European Commission, para. 29 (referring to C-274/12 P, Telefónica v Commission, para. 27).

The Court's reasoning is based on the doctrine of a complete system of legal protection.³³ According to this doctrine, the EU Treaties have established a complete regime of access to the courts via *direct* and *indirect* legal actions. The direct action is provided by Article 263 TFEU, while the indirect action (which can be effected through a plea of illegality) is laid down in Article 267 TFEU, which allows, and in some cases, requires national courts to seek preliminary rulings from the European Court. These direct and indirect action rights would jointly provide access to justice in all cases. Of course, whether this system should be regarded as complete is a function of the adequacy and effectiveness of the indirect actions before the Member State courts. Whether the indirect actions are adequate has not been the Court of Justice's concern.

Without questioning the adequacy of the indirect route, the Court has used this doctrine uncritically to limit standing for private parties in direct actions by giving a broad interpretation to the concept of implementing measure. In *T&L Sugars*, the Court found that even "simple administrative cooperation" or "the mere technical management" of EU measures (*in casu*, mere rubber-stamping of applications without any exercise of discretion),³⁴ is sufficient to conclude that a regulatory act entails "implementing measures."³⁵ As in other cases, it did so based on the rationale that they would be able to use the indirect route.

For a number of reasons, this argument is a subterfuge, not sound legal reasoning. As Advocate-General Jacobs demonstrated in the *UPA* case, there is a series of procedural and substantive impediments associated with the indirect action, which renders it often unavailable to private parties, or at the very least make the indirect route wholly impracticable and uncertain, since the referring national court, not any private party, is in control of the indirect procedure with the European Court.³⁶ A court may refuse to seek a preliminary ruling, and, if it does refer to the European Court, it may refuse to ask the questions that one or both of the litigants wish to see answered. Further, the answers provided by the Court do not always match the questions posed by the referring court.³⁷ As a result, proceedings before national courts do not guarantee an effective remedy for private parties that wish to challenge EU regulatory measures. In addition, the indirect action still requires involvement of the European court, which has to issue a preliminary ruling to the referring national court.

So, if the objective was to manage the workload of the European court by limiting standing, the strategy is of dubious effectiveness.³⁸ By systematically referring claimants to the national courts, however, the road to justice becomes costlier, lengthier, and more uncertain, and private parties therefore may be expected to forego a legal challenge more often than they would if a direct action were available. Whether this is a good or bad thing, is discussed further in parts 2 and 3, below.

II. Effects of Restricted Private Standing Rights on EU Risk Regulation

As discussed in Part 1, the current law on private rights to seek judicial review by the European courts is limited. This raises a question as to the effects of these limited action rights on the lawfulness, quality, and effectiveness of EU risk regulation. Of course, a question about effects is, at least in part, an empirical question, and would require a comparison of European court review and review by national courts, insofar as it serves as a substitute for or supplement to review at EU level. To be complete, the EU and national levels would have to be compared in terms of the applicable rules and the way they are applied in practice. For instance, to compare judicial review by the EU courts to review by national courts, a detailed comparison of the applicable standards of review and the intensity of review would be required. Given the severe paucity of empirical research, however, this

33 See, e.g., C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union*; and Case T-177/01, *Jégo-Quéré & Cie SA v Commission of the European Communities*.

34 Advocate-General Cruz Villalón, Opinion in Case C-456/13 P, *T & L Sugars Ltd et al. v European Commission*, para. 46.

35 C-456/13 P, *T & L Sugars Ltd and Sidul Açúcares Unipessoal Lda v European Commission*, paras. 41-42. Whether or not the national decisions are of a "mechanical nature" is "irrelevant in ascertaining whether those regulations entail implementing measures within the meaning of the final limb of the fourth paragraph of Article 263 TFEU."

36 Advocate-General Jacobs in *Unión de Pequeños Agricultores v Council of the European Union (UPA)*.

37 See, for instance, Joined Cases C-503/13 and C-504/13, preliminary ruling in the proceedings *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt — Die Gesundheitskasse (C-503/13)*, *Betriebskrankenkasse RWE (C-504/13)*. For discussion of the discrepancies, see L. Bergkamp, *Is There a Defect in the European Court's Defect Test? Musings about Acceptable Risk*, *EJRR* 2015, pp. 309-322.

38 Paul Craig, *EU Administrative Law*, 2nd Edition, Oxford: Oxford University Press, 2012, p. 313.

article treats the problem as one of the logic of the system.

In this part, based on an analysis of the system, the effects of restricted standing are explored. As part of this analysis, and to give this issue a thorough treatment, the rationale of judicial review in general should be understood. Specific attention needs to be paid to judicial review's role in risk regulation. Based on this analysis, in part 3, below, the possible effects of expanded standing of private parties on EU risk regulation can be identified.

1. Judicial Review's Rationale

The key to understanding the rationale of judicial review is understanding its nature. Judicial review is a particular kind of supervision exercised by courts. Review is not appeal; a court may not usurp the powers of the legislature or government and substitute its own views as to the merits of a contested decision. In judicial review, courts assess only the legality of legislative, regulatory, or administrative decisions, not their merits. The question is not "is the contested act appropriate, moral, or right." Rather, the court focuses only on the question as to whether the act is in accordance with the applicable laws, including the laws granting decision-making powers, procedural law, and substantive law. This concept is expressed in Article 263 TFEU, which stipulates that the Court of Justice review the legality of legislative and other acts of the EU institutions for "lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers." Thus, judicial review is a limited exercise. Note, however, that it is not limited to a review of constitutionality, but covers infringement of any applicable legislation or principle of law.³⁹

EU judicial review reflects a particular conception of the role of the courts. Judicial review's theoretical justification is based on two main approaches: the *principal-agent* model and the *trustee* model.⁴⁰ The

first theory posits that judicial review is intended to enforce the constitution (or Treaty, in the case of the EU) and other legally binding documents against disobedient lawgivers or executives. Under the trustee model, reviewing courts have the task of checking and, where necessary, correcting, policy outcomes. This second model justifies judicial review of legislature's or executive's acts not by constitutional or legislative choices, but by its actual favorable effects on policies and the protection of rights and liberties. The empirical evidence regarding judicial review's effects on policy outcomes, however, is limited and mixed, and normative propositions play a substantial role in providing justification for the institution of judicial review based on the trustee role. In the principal-agent model, judicial review is limited to review against the positive law, to the exclusion of moral imperatives and desired law or policy. Although the EU opted unambiguously for this model, in some cases, the courts may be influenced by the perceived allure of the trustee model.

From a functional perspective, in the EU as elsewhere, the system of judicial review is intended to contribute to the balance of powers. It prevents the legislature (European Parliament and Council) and executive (Commission) from exceeding their powers, infringing upon the powers of the other branches of government, or violating the rights of EU citizens. As such, it protects the citizens against the state (the legislature or executive), and helps to ensure that government stay within the powers granted to it and the limits of law. In other words, judicial review protects citizens' rights and, in some cases, their legitimate expectations vis-à-vis their governments, and prevents unjustified encroachments on their liberty. As discussed below, both the rationale and function of judicial review should have a bearing on the issue of standing rights.

2. Judicial Review of Risk Regulations

There is a strong case to be made for judicial review of risk regulations by the European courts. The EU imposes risk regulations in the form of legislation (regulations or directives) and delegated or implementing measures. These two types of risk regulation pose related, but somewhat different sets of issues. Risk regulation by legislation poses the risk of *ultra vires* acts and acts violating the rights of the cit-

39 Cf. Angela Ward, *Judicial review and the rights of private parties in EC law*, Oxford: Oxford University Press, 2007. Michael Fordham, *Judicial Review Handbook*, Oxford: Hart, 2008. Richard Moules, *Environmental Judicial Review*, London: Hart Publishing, 2011.

40 Arthur Dyevre, *Technocracy and Distrust: Revisiting the Rationale for Judicial Review*, *International Journal of Constitutional Law*, 2015, Vol. 13, No. 1, pp. 30–60.

izens. Since the legislative procedures are regulated in the Treaty,⁴¹ legislative acts may also raise procedural issues. Risk regulation by delegated act or implementing act poses the same kinds of risk, and, in addition, may also raise issues in relation to the conditions for delegation,⁴² which are strict but not unambiguous under EU law. Thus, there are several ways in which EU risk regulations can breach EU law, including by violating a general principle of law.

If a proposed risk regulation violates EU law, and all institutions agree that it does, a political solution often is feasible. If, however, the institutions disagree, or if one or more Member States disagree with the institutions, judicial review is the only way to resolve the issue and ensure that the rule of law prevails. Where EU law is ambiguous on the scope of the authority granted or the EU institutions may overstep their authorities and encroach upon the powers of other institutions, judicial review establishes a mechanism for clarification, resolution, and correction. Judicial review insofar as it is initiated by so-called “privileged applicants” is therefore necessary to safeguard the allocation of powers and prevent one institution from infringing on the powers of another institution. As this rationale is entirely government-oriented, however, it does not justify judicial review initiated by private parties.

So what is the justification for private rights of action? It lies in the recognition that sometimes none of the privileged applicants will seek judicial review of unlawful regulations, because it does not suit their interests or they otherwise have no sufficiently strong incentives (or even disincentives) to go to court. Note that this may be so irrespective of the merits of the case; privileged applicants may well condone violations of individual rights, for instance, if measures are deemed necessary to manage a risk. In initiating, developing, and adopting regulations, the EU institutions sometimes violate the law for political convenience, or they may sacrifice private interests to pursue some public interest or social good, even if the law does not authorize them to do so. In such cases, the privileged applicants may well agree that a risk regulation meets the requirements of EU law, even though there are legitimate questions about its legality. This kind of situation is not at all unlikely, since risk regulation often involves (perceived) needs to fight serious threats or issues that give rise to political “hot potatoes,” create an opportunity for “political marketing,” or present highly attractive op-

portunities for political or electoral gains. In these cases, private parties that are (potentially) injured by a risk regulatory measure should have standing to seek judicial review. The basis for privately initiated judicial review thus is to ensure that the EU, in regulating risks, complies with the law also where it is convenient for the institutions not to do so.

Private parties’ action rights may help not only to ensure that EU risk regulatory measures are lawful, but also that they are of better quality and more effective. The favorable effects on the quality and effectiveness of risk regulation derive from stronger compliance with those EU law requirements that are aimed at ensuring that EU risk regulations are science-based, clear, legitimate, and proportional,⁴³ and are developed in accordance with a process for producing sound EU risk regulation.

The EU process for developing risk regulations varies somewhat from area to area (and even between directives or regulations in the same area), but increasingly it converges around some common elements: risk assessment, possibly followed by a proposed, tentative risk management decision, announcement of the initiation of the regulatory process, public consultation, impact assessment, including cost-benefit analysis, and justification and adoption of the risk management decision.⁴⁴ In other words, the process is becoming more structured, and this development is likely to contribute to better regulation. As of yet, the EU has not adopted a comprehensive over-arching legislative framework for the making of implementing and delegated acts.⁴⁵ The current EU framework consists of some general

41 Article 288-299, TFEU.

42 See, for instance, Article 290, TFEU. Case 9-56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, English Special Edition 1957-1958 00133. Case C-270/12, *United Kingdom v Council and European Parliament*.

43 Only in a few cases has the court found legislative acts inconsistent with the proportionality requirement. Susan Rose-Ackerman, Stefanie Egidy & James Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union*, Cambridge University Press, 2015, p. 238.

44 See, for instance, Lucas Bergkamp and Guangdong Xu, *Design and Implementation of a Governance System for the Protection of the Environment and Public Health in China: International Models and Best Practices* (2016, forthcoming).

45 In the US, the Administrative Procedure Act provides such a framework. Cf. European Risk Forum, *LAW OF ADMINISTRATIVE PROCEDURES – OBSERVATIONS ON THE EUROPEAN COMMISSION’S RESPONSE TO THE EUROPEAN PARLIAMENT RESOLUTION*, August 2013, http://ec.europa.eu/smart-regulation/consultation_2012/docs/registered_organisations/erf_en.pdf.

provisions in the Treaties⁴⁶ combined with extensive guidance and “soft law” aimed at imposing a structured process to ensure high quality regulation. Where the political gains are high, however, the EU institutions may be inclined to deviate from these requirements in violation of EU law or guidance. In these cases, privately initiated judicial review can correct the deviation and restore the required process. Any such actions, however, would be limited to cases where legal requirements, as opposed to non-binding guidelines, have been breached.

III. Expanded Private Parties’ Action Rights and Effects on Risk Regulation

As discussed in Part 1 of this article, the EU has not been generous in granting standing rights to private parties to seek judicial review of EU measures other than legal acts of individual concern, which, subject to a few uncertain exceptions, means only individual decisions. The Lisbon Treaty was intended to relax standing, but the Court of Justice failed to take the opportunity. Through a restrictive interpretation of the conditions for private party standing, the Court has made it hardly any easier for private parties to obtain review of generally binding rules in direct actions. As Advocate-General Cruz Villalón argued in the *T&L Sugar* case, “it is no adequate response merely to apply the rules relating to the condition of direct concern that the Court laid down at a time when that condition operated in tandem with the condi-

tion of individual concern.”⁴⁷ The Court’s reluctance is hard to understand in light of its activism in other areas. Due to its reluctance, as a general rule, private parties cannot seek review by the European courts of generally binding regulations. This, in turn, implies that some EU risk regulations do not get the judicial review they need. To justify this deficiency, the Court insists, disingenuously and against its better judgment, that private parties can obtain review via the national courts of the Member States. The end result may be that some questionable and possibly unlawful EU risk regulations are not challenged, and that the quality and effectiveness of risk regulation suffers.

A substantial expansion of private standing rights would require a change in the Court’s policy or an amendment of the relevant Treaty provision. Expanded standing for private parties is desirable for the reasons previously discussed: it enables judicial review of risk regulations also where the privileged applicants do not challenge them (or challenge them on different grounds than private parties would invoke), it allows the court to strike down illegal regulations that would otherwise remain on the books, and it promotes the quality and effectiveness of risk regulations. In short, there is a strong public interest justification for liberal standing for private parties. Note that expanded standing at the EU level would not change anything at the national level; it would merely provide additional options for access to the European courts.

Arguments against expanded standing rights for private parties include (i) lack of legitimacy, (ii) practical problems (lack of practicality), including the Court’s workload, (iii) lack of necessity, and (iv) so-called “regulatory chill,” which refers to the phenomena that the government might fail to issue strict regulations for fear of being brought before the Court. Below, the validity and strength of each of these arguments is reviewed in turn.

1. Lack of Legitimacy

The argument that the courts do not have the power to relax standing requirements, is doubtful at best. In the *UPA* case, the European Court of Justice has taken the position that it does not have the power to interpret a standing requirement in a way that would effectively set aside the requirement.⁴⁸ According to

46 See Article 1 TEU, which requires that decisions are made “as openly as possible,” Article 10(3), which provides that “every citizen shall have the right to participate in the democratic life of the Union,” Article 11(2) TEU, which requires that the institutions maintain “an open, transparent and regular dialogue” with representative associations and civil society, and Article 15 TFEU, which grants a right of access to documents and imposes a transparency obligation, and states that the institutions have a duty to conduct their work “as openly as possible (...) in order to promote good governance and ensure the participation of civil society.”

47 Advocate-General Cruz Villalón, Opinion in Case C-456/13 P, *T & L Sugars Ltd et al. v European Commission*, para. 24. “After all,” he explains, “the condition of direct concern, as interpreted by the Court in relation to the pre-Lisbon version of the Treaty, was already based on the understanding that where implementation was purely automatic there was no obstacle to the recognition of standing to bring proceedings. It could be argued, therefore, that the condition relating to the absence of implementing measures — in other words, the absence of acts going beyond purely automatic implementation — is inherent in the condition relating to direct concern.” *Id.*, para. 25.

48 C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union (UPA)*, para. 44.

the Court, a “system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty” would have to be established by the EU legislature.⁴⁹ As Craig has persuasively argued, this argument assumes what is to be proven, namely, that a liberal reading of the concept of “direct concern” (e.g., as a test of “substantial adverse impact”) “would stray beyond the bounds of legitimate judicial interpretation.”⁵⁰ Indeed, the Court practices pettifoggery here, given its well-known practice of stretching the meaning of the Treaty and EU legislation through, often unsophisticated, teleological interpretation.

Judicial relaxation of standing requirements and expanded private rights of action could be created by interpreting the conditions of Article 263 (direct concern, regulatory act, not entailing implementing measures) in line with the text and context of this provision, as well as the purpose of judicial review and the importance of compliance with the rule of law by the EU. Indeed, non-compliance with the rule of law is a ground for annulment of an act under Article 263 TFEU. All three conditions could legitimately be interpreted in way that gives private entities that are injured (or threatened to be injured) by EU risk regulatory measures, a right to seek judicial review. An “injury” condition, which could be read into the requirement of ‘direct concern,’ limits the potential for politically motivated, strategic, or otherwise meritless proceedings. By promoting compliance with the rule of law where EU institutions are tempted to cave in to political convenience, expanded standing would also do much to address part of the EU ‘democratic deficit,’ which, despite the insistence of some that the EU should not be measured by the standards of democracy, is becoming an ever larger problem.

2. Lack of Practicality

The “floodgate” or workload argument reflects bureaucratic concerns, rather than concerns for compliance with the rule of the law. In essence, the point is that relaxation of standing requirements would open the floodgates and result in a stream of cases, which would flood the European court system.

This argument is unconvincing for a least two reasons. First, based on the European Court’s own logic (see above), cases about the legality of EU risk regulatory measures would still reach the European

courts, albeit indirectly via the preliminary ruling process. Thus, it is not clear whether and, if so, to what extent, limited standing reduces the European courts’ workload; it may merely result in a delay. Second, it is simplistic to assume that relaxed standing would result in a permanent increase in workload for the European courts. Standing is only one of the hurdles; others include the scope of the court’s jurisdiction and the standard and intensity of judicial review. Nevertheless, broader standing rights can help to encourage compliance with the rule of law, and exert a preventive effect. Currently, due to restricted standing, the EU institutions have weakened incentives to comply with the rule of law, because they know that private parties cannot challenge their actions. Once standing is expanded and there is an effective threat of potential proceedings, the EU institutions will have the proper incentives to respect the rule of law. Any increase in “direct action” cases will likely only be temporary, as the institutions will quickly learn that they face court action if they breach the law. Of course, to increase the effectiveness of this system, the procedures, norms and rules for excellence in science-based rule-making would have to be made binding on the institutions.

3. Lack of Necessity

The argument that expanding action rights would not be necessary can take on several forms. For one, it would not be necessary because an EU institution or one of the Member States can initiate legal action if a breach of the law occurs. This argument assumes that there always is a privileged applicant willing to step up for an injured private party. As discussed under B, above, this argument is false, and fails to recognize the potential lack of incentives for these potential claimants to pursue violations of law.

Another version of this counter-argument is that expanded private action rights are not necessary because risk regulation measures already comply with the rule of law and additional legal challenges will not change anything. Likewise, this argument is based on assumptions that are unproven and implau-

49 C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union* (UPA), para. 45.

50 Paul Craig, *EU Administrative Law*, 2nd Edition, Oxford: Oxford University Press, 2012, p. 314.

sible, in particular in the contentious area of risk regulation. It has also been suggested that expanded private standing is not necessary, because it is intended to remedy the “democratic deficit” but there is no such deficit in relation to technocratic risk regulation.⁵¹ Any such argument, however, applies a limited concept of “democratic deficit,” and fails to recognize that the primary function of judicial review is the observance of the rule of law and the protection of citizens against government overreach.

4. “Regulatory Chill”

The term “regulatory chill” has been used to describe the phenomena that countries might fail to raise environmental standards for fear of capital flight.⁵² This is the idea of the ‘race-to-the-bottom:’ regulatory competition between states competing for investment would result in ever more relaxed regulatory standards. Likewise, the EU institutions could be reluctant to adopt much needed, but stringent risk regulatory measures for fear of being challenged and having to appear before the Court of Justice. However, while “regulatory chill” in an international environment of competing states can be rationally explained, “regulatory chill” within the same state due to judicial review can occur only if judicial review is somehow skewed against the government.

There is no rational reason to assume that the EU institutions would fail to adopt risk regulations because they could be challenged in court by private parties. If private parties were to launch meritless le-

gal challenge to EU risk regulations, the courts would simply deny their claims and order them to pay the defendants’ costs. Only if, in fact, there is a breach of EU law, the EU institutions would have to fear that risk regulations will not survive judicial review. Conversely, as long as they ensure compliance with EU law in initiating, developing, and adopting regulatory measures, court proceedings will have no effect, and private parties have no incentive to launch such proceedings. In some cases, legal challenges may have a “nuisance value” and could potentially be used strategically, but in the case of judicial review, this is not a plausible strategy, because the government, unlike private parties, cannot give in to such tactics.

Conclusions

Private parties’ standing rights under EU law are limited, except where decisions are concerned. Even after Lisbon, private standing rights with respect to generally binding rules such as risk regulations remain basically non-existent, except where ‘decisions’ are involved. The lack of private standing to challenge generally binding risk regulations reduces the incentives for the EU institutions to comply with the rule of law.⁵³ In some cases, the European courts might accept standing based on a right to participate in regulatory procedures. As there is no general right to participate, however, any such standing right is dependent on the specific legislation concerned. If EU law were to provide a general right to participate in the development of generally applicable regulations, or general principles of EU law were deemed to confer any such right to be heard, this may effectively result in a broadening of private parties’ standing. Until that happens, in most cases, private parties will be deprived of standing, reducing the incentives for the EU institutions to comply with EU law aimed at producing better regulation.

The current restrictions on private parties’ standing is the result, to some extent, of the ambiguous language of the pertinent Treaty provisions, but, to a larger extent, of an overly restrictive interpretation by the Court of Justice. Indeed, the Court has been “notoriously and scandalously restrictive”⁵⁴ and unduly prevented private parties’ access in direct actions. The condition of “direct concern” is interpreted by the Court, *not*, as reason suggests, as requiring that the applicant’s interest are directly affected by

51 Majone argues that the Commission does not suffer from a democratic deficit because it deals with technical regulatory matters. Democratic legitimacy would apply only to redistributive legislation. Giandomenico Majone, *Regulating Europe*, Abingdon: Routledge, 1996. Note that Majone does not make the argument set out in the text above.

52 Cf. G. Porter, Trade competition and pollution standards: ‘Race to the bottom’ or ‘Stuck at the bottom?’, *Journal of Environment & Development*, 1999, Vol. 8, No. 2, pp. 133-151. E. Neumayer, Do countries fail to raise environmental standards? An evaluation of policy options addressing “regulatory chill,” *International journal of sustainable development*, 2001, 4(3). pp. 231-244.

53 Keleman has argued that the restricted standing rights of private plaintiffs and other legal impediments “will continue to channel and restrain the development of adversarial legalism in Europe, but will not halt it.” R. Daniel Keleman, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, Cambridge: Harvard University Press, 2011, p. 10 and 32.

54 Joanne Scott & Susan Sturm, Courts as Catalysts: Rethinking the Judicial Role in New Governance, 13 *Columbia Journal of European Law* 565 (2007), pp. 565-594, at 579.

the contested decision, but with reference to a further set of unnecessarily complicated conditions, including that it leaves no discretion to the decision maker. The term “regulatory act” has been given a very limited application by excluding all legislative measures, although there is no justification or policy rationale for limiting this concept in such way. The condition of “not entailing implementing measures” has been construed to require that no action at all, not even purely administrative or “mechanical” action, is needed by further decision-makers. Again, a more reasonable construction would consider whether the implementing measures that are required by the contested decision, could, as a matter of law, vary the outcome for individual applicants.

The stated rationale for such restricted access is that private parties could seek court review of the legality of EU regulations through indirect action. This rationale, however, is factually incorrect and misleading. Increasingly, the denial of private rights of action is an issue because the Court’s judgments can be called neither “neutral,”⁵⁵ nor authoritative based on the excellence and quality of the legal reasoning.⁵⁶ There is reason to believe that the Court’s judgments could benefit from the opinions presented by private litigants, who do not have political incentives to hold back.

It is time for change. It has long been recognized that the current EU law on private action rights cannot be justified, and that there are strong arguments to support full standing for injured private parties in legal challenges to generally binding EU measures. Such expanded action rights are fully consistent with the EU’s insistence on respect for the rule of law, the legality and legitimacy of EU regulatory procedures, and accountability of the EU institutions and agen-

cies. Private direct actions for judicial review are not likely to lead to a permanent and substantial increase in the European courts’ workload, but they will lead to better compliance with the EU law requirements governing the initiation, preparation, development, and adoption of regulatory measures. There already is some hard law and much soft law aimed at ensuring that science-based regulation be developed in accordance with a sound, transparent, participatory, and rational regulatory procedure. Compliance with this body of law, however, is not guaranteed, in particular not in those cases that offer high political return on disregard for the rule of law.

Expanded private standing will contribute to the legality, proportionality, quality, and effectiveness of EU risk regulation, and, thus, to better regulation. Who could be against that?

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- 55 Already in 1998, Rasmussen expressed the fear that that “the price of too many years of too unmitigated activism will be a decline in judicial authority and legitimacy.” H. Rasmussen, Hjalte. (1998). *European Court of Justice*. Copenhagen: GadJura, p. 301. The legitimation and authority of the European Courts of Human Rights is now directly called into question in the UK. “British judges not bound by European court of human rights, says Leveson,” *The Guardian*, 24 May 2015, available at <http://www.theguardian.com/law/2015/may/24/british-courts-echr-leveson>.
- 56 Examples of poor legal reasoning include (1) Case 1/03, *Van de Walle and Others*, [2004] ECR I-7613. For a critique, see L. Bergkamp, A new court-made environmental liability regime for Europe, *Env. Liability* 12 [2004] 4, 171; (2) Case T-333/10, *ATC and Others v Commission*. For a critique, see L. Bergkamp, *The Quiet Revolution in EU Administrative Procedure: Judicial Vetting of Precautionary Risk Assessment*, *European Journal of Risk Regulation*, Volume 5 (2014), Issue 1, pp. 102 – 110; (3) *Joined Cases C-503/13 and C-504/13*, preliminary ruling in the proceedings *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt — Die Gesundheitskasse (C-503/13), Betriebskrankenkasse RWE (C-504/13)*. For a critique, see L. Bergkamp, *Is There a Defect in the European Court’s Defect Test? Musings about Acceptable Risk*, *European Journal of Risk Regulation*, Volume 6 (2015), Issue 2, pp. 309 – 322. Cf. Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge: Cambridge University Press, 2014.