*Cambridge Law Journal*, **71(3)**, November 2012, pp. 507–536
doi:10.1017/S0008197312000803

# ARTICLES

# REMEDIES AGAINST THE EU INSTITUTIONS AFTER LISBON: AN ERA OF OPPORTUNITY?

ALBERTINA ALBORS-LLORENS*

ABSTRACT. *This article considers some of the challenges which lie ahead for the Court of Justice of the EU in the field of remedies against the EU institutions following the entry into force of the Lisbon Treaty. It examines the evolving role of EU remedies and, in particular, recent decisions of the General Court applying the new standing rules in Article 263(4) TFEU.*

KEYWORDS: *Judicial Review; EU remedies; Article 263(4) TFEU; Regulatory acts; Action for Annulment.*

## I. INTRODUCTION

There is little doubt that European Union law has moved at a vertiginous pace over the past fifty years. As a result, there has generally been little room for long adjustment periods and it is unsurprising that controversy has been a constant companion in the development of this relatively new legal system. In particular, the democratic legitimacy of the Union has constituted one of the key points for debate. The Treaty of Lisbon has counteracted some of the unremitting criticism levelled at the Union's law-making process by simplifying and extending qualified majority voting in the Council and by turning the old co-decision procedure into the ordinary legislative procedure that now applies to the majority of legal bases under the TFEU. However, the EU system of governance remains one where neither a clear separation of powers nor a traditional system of checks and balances exists and where the decision-making process still seems excessively complex, lacking transparency and somewhat detached from ordinary citizens. Given these circumstances, the accountability of the Union institutions

* University Senior Lecturer and Fellow, Girton College, University of Cambridge. I am very grateful to Catherine Barnard, Angus Johnston, Joanne Scott and the anonymous referees for commenting upon earlier drafts of this paper. Address for correspondence: University of Cambridge, Faculty of Law, 10 West Road, Cambridge CB3 9DZ. Email: aa144@cam.ac.uk.

through the judicial scrutiny of their acts becomes a particularly important issue in EU law.

Outside the scope of EU law and notwithstanding the debate that surrounds the legitimacy of judicial review of legislation,[1] the important role of constitutional review, especially in the field of human rights, has been widely recognised in the academic literature.[2] The legitimacy of judicial review of executive and administrative action – which has weaker democratic credentials than legislative action – is less controversial even if different views subsist as to the desirable scope and intensity of that review.[3] In the sphere of EU law, the significance of judicial review has been emphasised repeatedly by the Court of Justice. In 1986, the seminal decision in *Parti écologiste "Les Verts" v European Parliament*[4] proclaimed that both the Member States and the Union institutions could not avoid the review of the compatibility of their acts with EU law and that, to this end, the Treaty provided a complete system of judicial protection.[5] It follows that, unless a comprehensive and effective system of judicial protection is really in place, the Court will not be able to serve fully the principles of democracy[6]- and thus fulfil its mandate to ensure that in the interpretation and application of the Treaties the rule of law is upheld.[7]

It is undisputed that the review of the compliance of Member State action with EU law has been the subject of dramatic and fast-moving developments at both substantive and remedial level, driven by the principle of effectiveness. The recognition of the principle of direct effect in *Van Gend en Loos*[8] was partly based on the need to offer individuals a mechanism additional to that available to the Commission under Article 258 TFEU to ensure the effective supervision of Member States.[9] Likewise, the doctrine of vertical direct effect of directives and the principle of State liability in damages were developed as punitive mechanisms against defaulting Member States.[10] Finally, the principle of effectiveness has been used to the full to ensure that, in the absence

[1] See, J. Waldron, "The Core of the Case against Judicial Review" 115 Yale L.J. 1346 (2006) and R.H. Fallon, "The Core of an Uneasy Case for Judicial Review" 121 Harvard L.Rev. 1693 (2008).
[2] See P. Craig, "Political Constitutionalism and Judicial Review" in C. Forsyth, M. Elliott, S. Jhaveri, M. Ramsden and A. Scully-Hill (eds.), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford, 2010), 19, 22–24 and D. Kyritsis, "Constitutional Review in Representative Democracy" (2012) 32 O.J.L.S. 297, 324.
[3] See P. Craig, note 2 above, pp. 24–42.
[4] Case 294/83 [1986] E.C.R. 1339.
[5] *Ibid.* at [23].
[6] See K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to the Development of European Constitutionalism" in T.Tridimas and P. Nebbia (eds) *European Union Law for the Twenty-First Century* (Oxford 2004), 17.
[7] See Article 19(1) TEU.
[8] Case 26/62 [1963] E.C.R. 1.
[9] *Ibid.* at [13].
[10] See e.g., Case 41/74 *Van Duyn v Home Office* [1974] E.C.R. 1337, Case 148/78 *Ratti* [1979] E.C.R. 1629 and Joined Cases C-6 and 9/90 *Francovich v Italy* [1991] E.C.R. I-5357.

of specific EU regulation, Member States guaranteed the existence of effective and non-discriminatory national remedies for private parties where national authorities and Member States acted in breach of EU law.[11] All of these momentous changes came about through the case law of the Court of Justice and in the absence of clear recognition in the wording of the Treaty. In this area, the Court of Justice appeared to act like a true constitutional court that preferred the over-enforcement of the right to effective judicial protection rather than a cautious approach that could risk the under enforcement of that right. However, as far as the control of the legality of EU acts was concerned, it soon became clear that gaps still remained and that the Court, ostensibly constrained by the letter of the Treaty and by the lack of political motivation from the Member States, was prepared to bridge only some of these gaps.[12] It is this approach that could be seen as consolidating a form of democratic deficit in the EU.

It is the argument of this paper that the Lisbon Treaty has introduced certain changes in the dynamic of judicial review of EU acts in the Union which may appear subtle but which have some potential to alter the complexion of judicial control in the EU. First, the evolving role of EU remedies will be considered. Secondly, the panorama of judicial control post Lisbon will be examined, as well as some recent decisions of the General Court applying the new standing rules in Article 263(4) TFEU. Finally, this paper will look at the future of EU remedies against the EU institutions.

## II. The system of Remedies provided in the Treaty: The Role of the Action for Annulment

The basic model of judicial protection against the acts of the EU institutions articulated in the TFEU has remained unchanged since the original version of the (then) EEC Treaty. The legality of EU acts can be subject to both direct and indirect judicial review by the Court. The action for annulment provided in Article 263 TFEU and the action for a failure to act in Article 265 TFEU are the specific direct actions that can be used, respectively, to contest directly the legality of the acts and of the omissions of the EU institutions. The plea of illegality, set out in Article 277 TFEU, is another declaratory action that allows any party to challenge a general act that constitutes the basis of another act which is the subject of proceedings before the Court. In other words, it is a direct action, because it is brought directly before the Union judicature, but it is not an *independent* action given that it is always subordinate to the

[11] See e.g. Case 33/76, *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland* [1976] E.C.R. 1989.
[12] Case C-50/00P, *Unión de Pequeños Agricultores (UPA) v Council* [2002] E.C.R. I-6677.

existence of another direct action – generally, annulment proceedings- already pending before the Court.[13] The action for damages provided in Articles 268 and 340(2) TFEU is also a direct action whose main purpose is not to seek judicial review of a Union – even though a consideration of the legality of an EU act takes place in the context of this action-act but to compel the EU institutions to make good any damage that they have caused in the performance of their duties.

The legality of EU measures can also be controlled indirectly through preliminary references on validity under Article 267 TEU. Typically, this operates when a legally binding act, such as a regulation, requires a measure of involvement from the national authorities to administer the scheme put in place by the regulation. Private parties may then challenge the national implementing measure before the national court on the ground that the underlying EU measure is illegal and this may trigger a preliminary reference on validity to the Court of Justice. If the court delivers a preliminary ruling stating that the EU measure is unlawful, the effects will be similar to those of a successful action for annulment and the review of the EU measure will have been achieved in an indirect way.[14]

A cursory examination of this landscape of procedural avenues prompts some observations. The action for annulment occupies a central position in the system of judicial review against the acts of the EU Institutions.[15] It is the action specifically provided by the Treaty for the direct challenge of EU measures, it is endowed with significant procedural advantages[16] and the effect of a successful challenge is that the act in question is treated as if it had never existed.[17] Furthermore, as observed by Jaeger[18], the admissibility of some of the other avenues of review has appeared dependent on whether an action for annulment could have been brought in the first place by an addressee of the measure or by a third party who would clearly have had the possibility of challenging the measure through an Article 263 TFEU action but did not do so.[19] This emphasises the position of the action for annulment as the first and principal port of call in the review of the legality of

[13] See Joined Cases 31/62 and 33/62 *Wöhrmann and Lütticke v Commission* [1962] E.C.R. 501 at 507, and Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno v Commission and Council* [1985] E.C.R. 2523 at [36].

[14] Case 66/80, *International Chemical Corporation v Amministrazione delle finanze dello Stato* [1981] E.C.R. 1191 at [13]–[16].

[15] See M. Jaeger, "Les Voies de Recours, Sont-elles Vases Communicants?" in G.C Rodriguez Iglesias (ed.), *Mélanges en homage à Fernand Schockweiler* (Baden-Baden 1999), 233.

[16] See the Opinion of Advocate General Jacobs in *UPA v Council*, note 12 above at para. 44 of the Opinion.

[17] Article 264 TFEU.

[18] See op. cit, note 15 above.

[19] The Court has repeatedly stated that a decision adopted by a Union institution which has not been challenged by its addressee within the time-limit laid down by Article 263(6) TFEU becomes definitive as against that person (see Case 156/77, *Commission v Belgium* [1978] E.C.R. 1881 at [20–24]. Such a rule is based on considerations of legal certainty and to prevent legally binding EU

Union acts. For example, in *TWD*,[20] the Court held that a reference for a preliminary reference on validity under Article 267 TFEU would be held inadmissible if it was clear beyond doubt that the applicant could have brought an action for annulment and did not do so within the time limit.[21]

Beyond enforcing a rule to prevent the evasion of time limits and the abuse of process, the system provided in the Treaty shows further indications of the role of other remedies in the Treaty as complementary to that of the action for annulment. Thus, an action for a failure to act under Article 265 TFEU will be inadmissible if the institution in question has not been first called upon to act.[22] This is laid down in the Treaty as an essential procedural requirement but also implies that, unless the institution is given effectively a second chance to adopt an act that could ultimately be the subject of an action for annulment (i.e. a final rejection of a complaint in competition proceedings), the action for a failure to act will not be admissible.

The early case law on the plea of illegality also suggested that the main purpose of this action was to allow applicants to challenge a general act (i.e. a regulation) that affects them when they could *not* have challenged it by means of an action for annulment, generally to due lack of standing.[23] *A sensu contrario*, it could follow that recourse to an Article 277 TFEU action would not be possible if the applicants would have had standing to challenge the measure through annulment proceedings and did not do so within the time limit provided in Article 263 TFEU. However, more recent case law is less clear on this point and supports a trend towards a relative autonomy of the plea of illegality which would thus appear as an additional mechanism to control the legality of general acts rather than as a palliative to the deficiencies of Article 263(4) TFEU. The consequences of this approach will be discussed later in this paper, particularly in the light of the Lisbon reforms affecting the standing of private applicants.[24]

measures from being called into question indefinitely (Case C-178/95, *Wiljo v Belgian State* [1997] E.C.R. I-585 at [19]).

[20] Case C-188/92, *TWD Textilwerke Deggendorf v Germany* [1994] E.C.R. I-833.

[21] However, given the complexity of the case law on standing, it proved quite difficult in the past (except for an addressee or in cases where there is a consistent line of case law) to demonstrate that the applicants would have clearly had standing to bring an action for annulment against a regulation (Case C-241/95, *R. v Intervention Board for Agricultural Produce Ex p. Accrington Beef* [1996] E.C.R. I-6699, at [15]).

[22] See the Order of the Court in Case C-249/99P, *Pescados Congelados Jogamar v Commission* [1999] E.C.R. I-833 3 at [10–22].

[23] See *Simmenthal v Commission* (Case 92/78, [1979] E.C.R. 777) at [39]) and more recently, Case T-120/99, *Kik v OHIM* [2001] E.C.R. II-2235 at [21].

[24] Thus, in Case C-11/00, *Commission v European Central Bank* [2003] E.C.R. I-7147, the Court took a literal reading of Article 277 TFEU, which allows "any party" to challenge the legality of a general act by means of a plea of illegality "*notwithstanding* the expiry of the time-limit" in Article 263 (6) TFEU. There, it held that Member States and institutions could bring an Article 277 TFEU to challenge a general act (but not a decision) even though, as privileged applicants,

Finally, the case law shows that, given the autonomous nature of the action for damages, the admissibility of an action for damages is not related to the admissibility of the action for annulment.[25] The Court, however, has been at pains to reiterate that an action for damages will be inadmissible where an applicant uses it to obtain the same result which an action for annulment could have achieved had it been brought within the two-month time limit.[26] This confirms that the action for damages may complement,[27] but cannot be a substitute for the action for annulment.[28]

## III. Annulment Proceedings before the Entry into Force of the Treaty of Lisbon

If the action for annulment is the centrepiece of the system of judicial review of EU measures, a position accorded both by the Treaty and by the case law of the Court of Justice, it would follow that it should be the principal vehicle for the challenge of Union acts, with the other remedies performing a supplementary role. The doctrines of direct effect, effectiveness and State liability were created and interpreted broadly by the Court to ensure the effective review of Member State action and the protection of individual rights. So, in the same manner, a similar approach concerning the action for annulment might have been expected, and indeed all the more so, given the supranational nature of the EU that ensures the direct impact of EU measures on the rights, obligations and interests of private parties.

However, the reality has been different, at least until the entry into force of the Lisbon Treaty. The predominant role of the action of annulment in the review of EU acts only seems to have been fulfilled in respect to actions brought by privileged applicants, while private parties have seen that, more often than not, their best chances to secure a decision on the legality of an EU act laid in the context of preliminary references on validity under Article 267 TFEU.

Some aspects of the action for annulment, like the definition of which acts would be reviewable, were interpreted liberally by the

they would have certainly had standing to bring an Article 263 TFEU action and had failed to do so within the time limit (at [76–78]). See M. Vogt, "Indirect Judicial Protection in EC Law: The case of the Plea of Illegality" (2006) 31 E.L.Rev. 364, 369–370 suggesting that, thus interpreted, the function of the plea of illegality is not so much to prevent a denial of justice – i.e. provide an opportunity for challenge when the action for annulment was not available – but to provide an *additional* mechanism to ensure an indirect challenge of general acts. See K. Lenaerts, D. Arts and I. Maselis, *Procedural Law of the European Union*, 2nd ed. (London, 2006), 348, for the concerns that the ruling generates in terms of legal certainty.

[25] See Case 5/71, *Zuckerfabrik Schöppenstedt v Council* [1971] E.C.R. 975 at [3].

[26] See Case T-180/00, *Astipesca v Commission* [2002] E.C.R. II-3985 at [139–147].

[27] Frequently both actions are brought together, see Case C-152/88, *Sofrimport v Commission* [1990] E.C.R. I-2477.

[28] See Case T-177/01 *Jégo-Quéré v Commission* [2002] E.C.R. II-2365 at [46].

Court[29] but others, notably the standing conditions imposed on private applicants bringing annulment proceedings against EU measures, acted as stumbling block for a fully-fledged use of the advantages of this remedy. These conditions remained unchanged until the entry into force of the Treaty of Lisbon, despite criticism from academic commentators.[30] Essentially, and under the original version of what is now Article 263(4) TFEU, private applicants were prevented from challenging genuine regulations and could only challenge acts which were in substance decisions either if they were the addressees of a decision or if they were directly and individually concerned by it.[31] The rationale behind this limitation seemed to be not only to prevent the opening of the floodgates but also to avoid the serious consequences flowing from the annulment of general acts.[32] Furthermore, and given that many EU regulations have the characteristics of legislative measures, the inability of private parties to challenge them conformed with traditional arguments that judicial review of legislation is not legitimate because it is undemocratic.[33] This argument, however, seems weaker in the context of EU law, particularly in those early stages of the development of the EU legal system when there was a serious democratic deficit in the adoption of EU legislation and the role of the European Parliament was mainly of a consultative nature.

The interpretation of the test of direct concern caused few difficulties and was consistent, with the Court taking the view that a private applicant would be directly concerned when the addressee of the measure had either no discretion in its implementation or, if it had some, it was purely theoretical.[34] However, when interpreting the test of individual concern, the Court created a formidable barrier of standing for private parties which resulted in many actions being dismissed as inadmissible.[35] The Court construed this test as meaning that a non-addressee would be individually concerned by a Union decision only if it could show that it was a member of group of people that is

[29] See, e.g., Case 22/70, *Commission v Council* (*ERTA*) [1971] E.C.R. 263.

[30] See, among others, A. Barav, "Direct and Individual Concern: an Almost Insurmountable Barrier to the Admissibility of Individual Appeals to the European Court" (1974) 11 C.M.L.Rev. 191; A. Arnull, "Private Applicants and the Action for Annulment since *Codorníu*" (2001) 38 C.M.L.Rev. 7; N. Neuwahl, "Article 173, paragraph 4, Past Present and Possible Future" (1996) 21 E.L.Rev. 17; J. Usher, "Direct and Individual Concern: An Effective Remedy or a Conventional Solution?" (2003) 28 E.L.Rev. 575.

[31] See Article 230(4) EC (post-Amsterdam), which in the original version of the Treaty was Article 173(2) EEC. See further, section IVA.

[32] See the Opinion of AG Lagrange in Case 16/62, *Confédération nationale des producteurs de fruits et légumes v Council* [1962] E.C.R. 471, 486. The reluctance of the Court to annul measures of a legislative nature has been well documented (see e.g. the Opinion of AG Cosmas in Case C-321/95P, *Greenpeace v Commission* [1998] E.C.R. I-1651 at paras. 92 and 100–101).

[33] See J. Waldron, op. cit., note 1 above, p. 1348.

[34] See Case 11/82, *Piraiki Patraiki v Commission* [1985] E.C.R. 207 at [6–10].

[35] For a recent study see T.Tridimas and G. Gari, "Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review before the European Court of Justice (2001–2005)" (2010) 35 E.L.Rev. 131,171–172.

fixed and ascertainable before the measure entered into force – i.e. a member of a *closed* category.[36] This highly formalistic test excluded a large number of applicants from challenging Union acts, even where the act had serious negative effects on their economic interests or their legal position or even potentially affected a fundamental human right.[37] Furthermore, and although the closed category test was, and continues to be,[38] the standard test to decide individual concern, the case law soon offered different constructions of the test, thus creating inconsistencies and undermining the certainty in the expectations of private applicants applying to review the legality Union acts by means of an Article 263 TFEU action.[39]

It is thus unsurprising that the Court was regularly called upon to adopt a less restrictive interpretation of the test of individual concern, particularly as this was not even set out in the Treaty itself but was the Court's own creation. A crucial point in this debate was the groundbreaking Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores (UPA) v Council*[40] and the ruling of the General Court in *Jégo-Quéré v Commission*[41] urging the Court to move towards a more flexible construction of individual concern. Advocate General Jacobs argued that an applicant should be individually concerned if a measure could have a substantial adverse effect on its interests.[42] The General Court suggested a slightly stricter construction based on whether the measure either restricted rights or imposed obligations on the applicant.[43] Both constructions required a shift from a formalistic test to one based on the real impact that an EU measure had or might have on the interests or legal position of a private applicant.

The Court of Justice, however, refused to modify its approach to individual concern, arguing that it could not amend the letter of the Treaty[44] and that it was for the Member States either to "establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection"[45] or to amend the conditions of standing provided in the Treaty through political

[36] Case 25/62, *Plaumann v Commission* [1963] E.C.R. 95.
[37] For an early example where the applicants contended that if their Article 263 TFEU action was dismissed as inadmissible, they would be deprived of any judicial protection, see Case 40/64, *Sgarlata v Commission* [1965] E.C.R. 215, 227. See, more recently, for a case where the applicants contended a possible breach of a fundamental human right, Case C-345/00, *FNAB v Council* [2001] E.C.R. I-3811 at [35–40].
[38] For a recent example, see Case T-16/04, *Arcelor v European Parliament and Council* [2010] E.C.R. II-211, at [94–122].
[39] See A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" [2003] C.L.J. 72, 77–79.
[40] Case C-50/00P, note 12 above.
[41] Case T-177/01, note 28 above.
[42] See Case C-50/00P, note 12 above, at para. 60 of the Opinion.
[43] Case T-177/01, note 28 above, at [51].
[44] Case C-50/00P, note 12 above, at [44].
[45] *Ibid.*at [41].

agreement.[46] Advocate General Jacobs had convincingly demonstrated in his Opinion that an indirect avenue of challenge before the national courts may not always be available – leading to a denial of justice – or that, even if it is, that it may not be as satisfactory as a direct action.[47] In fact, in *UPA* the Council regulation at issue did not require any implementation into national law, thus making a challenge before the national court particularly difficult, if not impossible. On the facts, the applicants could not even "break the law" in order to trigger proceedings before the national court that could result in a preliminary ruling on validity being made.[48]

The Court not only adopted an uncharacteristically cautious view of its own jurisdiction[49] but shifted responsibility to the Member States, effectively asking *them* to ensure effective judicial protection, presumably by providing national rules and procedures that would permit an indirect challenge to the validity of a Union measure.[50] This approach is reminiscent of that followed by the Court in the field of national remedies for breach of EU law before the national courts, where the Court regularly held that national remedies must be applied and interpreted to ensure the full effect of EU law.[51] The key difference, however, is that these principles applicable to national remedies were born from the need to fill a gap in the Treaty, which is silent as to the remedies that apply where private parties invoke EU law before a national court against a national authority.[52] There is no direct action under the Treaty that allows a private party to challenge the conformity of national acts with EU law before the EU judicature. By contrast, the Treaty specifically provides a remedy, the action for annulment, to challenge the legality of the action of the EU institutions that could itself be directly interpreted by the Court in the light of the principle of effective judicial protection.

The approach of the Court in *UPA* had important consequences. First, most actions for annulment continued to be dismissed as

[46] *Ibid.* at [45].
[47] See note 16 above.
[48] In this respect, see Arnull's comments on the *Unibet* case (Case C-432/05 [2007] E.C.R. I-2271) where the Court held that effective judicial protection – in a case concerning the possibility of an action reviewing the compatibility of *national* law with EU law- would *not* be secured if an applicant had to break the law first. Arnull observes that, by contrast, the Court of Justice seemed to accept in the appeal against the General Court's decision in *Jégo-Quéré* that standing under Article 263 TFEU would not be granted *even* if an applicant would have to break a Union act first in order to trigger proceedings before the national court that could result in an indirect challenge to the validity of an EU act (see A. Arnull, "The Principle of Effective Judicial Protection in EU law: An Unruly Horse" (2011) 36 E.L.Rev. 51, 56.)
[49] Only a decade earlier, and despite the silence of the Treaty, the Court had held that the European Parliament should have standing to challenge EU measures. See Case C-70/88, *Parliament v Council* (Chernobyl) [1991] E.C.R. I-4529.
[50] In Case C-511/03, *Ten Kate* [2005] E.C.R. I-8979, the Court extended the same conclusion to cases where a private applicant does not satisfy the standing conditions to bring an action for a failure to act under Article 265 TFEU ( at [29]).
[51] See new Article 19(1) TEU.
[52] See Case 33/76, note 11 above.

inadmissible because of the immovably stringent interpretation of the standing conditions, and challenges to the legality of EU measures continued to be diverted to the preliminary ruling procedure. Judgments delivered by the Court after *UPA*, such as the ruling in *Gestoras Pro Amnistía v Council*,[53] a case decided before the entry into force of the treaty of Lisbon and in the context of the old Third Pillar, suggest a generous application of Article 267 TFEU to ensure effective judicial protection,[54] which contrasted with the attitude adopted towards Article 263 TFEU. There, despite the fact that old Article 35(1) TEU did not enable national courts to request references for preliminary rulings on the validity of common positions, the Court held that, given that the function of the preliminary ruling procedure is to ensure that that the law is observed in the interpretation and application of the Treaty, Article 35 TEU could not be interpreted narrowly. The Court concluded that a preliminary reference should be available for any acts intended to produce legal effects, even where the letter of the Treaty was not clear in this respect.[55] Secondly, the stand taken by the Court in *UPA* suggested that national courts were effectively to become the principal entities responsible for ensuring that private applicants had a suitable platform to challenge not only the illegal action of the Member States but also that of the EU institutions. This is certainly a very practical strategy to prevent an opening of the floodgates but not one that is necessarily in the best interests of private applicants.

The ruling in *UPA* devalued the argument that, although national courts and the Union judicature are jointly entrusted with the task of ensuring the interpretation and application of EU law, the Court of Justice should remain responsible for securing a *complete* system of judicial review, a position that only the Court, with its unique and panoramic view of EU law, can fulfil. In that case, the Court avoided dealing with a gap in the system of judicial review[56] and it is therefore hardly surprising that the ruling was criticised[57] but it can also be argued that it ultimately provided a decisive and much-needed impulse

[53] Case C-354/04P, [2007] E.C.R. I-1579.

[54] See K. Lenaerts, " The Basic Constitutional Charter of a Community Based on the Rule of Law" in M. Poiares, Maduro and L. Azoulai (eds.), *The Past and Future of EU Law* (Oxford, 2011), 295, 308.

[55] *Ibid.* at [52–54]. In the same ruling, however, the Court had read old Articles 35 and 41(1) TEU literally by denying the possibility of an action for damages against the Union institutions in matters falling within the old Third Pillar, at. [44–48].

[56] Although the Order of the General Court (Case T-173/98 [1999] E.C.R. I-3357), the ruling of the Court and the Opinion of the Advocate General in *UPA* were solely focused on the admissibility of the action, it is clear from the arguments of the applicants before the General Court that there were concerns about the substantive legality of the regulation, including procedural irregularities and lack of reasoning (at [24] of the Order of the General Court). There was no chance for these substantive issues to be considered after the action was declared inadmissible.

[57] See J.M. Cortés Martín, "*Ubi Ius, Ibi Remedium? – Locus Standi* of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads" (2004) 11 Maastricht J. Eur.& Comp. L. 233, 259–261.

for political change. Thus, while the rulings of the Union judicature in the years after *UPA* continued to uphold the traditional construction of the test of individual concern, the ill-fated Constitutional Treaty attempted and the Lisbon Treaty succeeded in amending for the first time the original wording of what is now Article 263(4) TFEU -finally showing a degree of interest from the Member States on this provision- with potentially important, and perhaps unanticipated, consequences.

## IV. Closing gaps? The Lisbon Reforms

Following the disappearance of the three-pillared structure, the Court now has full jurisdiction (subject to two exceptions) in the provisions pertaining to the area of freedom, security and justice[58] but special rules still apply in matters falling within the Common Foreign and Security Policy, where the Court has no jurisdiction, except in the two cases provided in Article 275 TFEU.[59] Furthermore, the Lisbon Treaty has also introduced a number of amendments to the existing system of remedies provided in the TFEU. At first sight, they appear relatively minor, but on closer examination they take on a broader significance. Our focus is on the changes introduced to the action for annulment and their interplay with the other Treaty-based remedies available for the challenge of EU acts.

### *A. The Action for Annulment*

Some of the most important amendments introduced by the Treaty of Lisbon concern the action for annulment. There are three main changes. Two of these changes – to the first and third paragraphs of Article 263 TFEU – broaden the general possibilities of judicial review of Union acts, while the change to the fourth paragraph of Article 263 TFEU intends to promote a more comprehensive access to justice for private parties. They will be considered in turn.

The first paragraph of Article 263 TFEU, which sets out whose acts can be reviewed by means of an action for annulment, has been amended to include those acts of the European Council – which after Lisbon has the status of an institution of the Union – intended to produce legal effects. Furthermore, it also now covers the acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.[60] While the Court had consistently held that the

[58] See Article 276 TFEU and Article 10(1) of Protocol 36 on Transitional Provisions. See further, K. Lenaerts, "The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice" (2010) 59 I.C.L.Q. 255.

[59] See Articles 275 TFEU, 24 TEU and Article 40 TEU.

[60] This is also mirrored in the indirect avenue of judicial review provided in Article 267(1) (b) TFEU which now refers to preliminary references on the validity of "acts of the institutions, bodies, offices or agencies of the Union".

criterion for the reviewability for a Union act is its potential to produce legal effects, only those acts adopted by the Union institutions were previously covered in this provision. The new version of Article 263(1) TFEU is significantly broader because it formally extends the possibility of judicial review to other legally binding acts adopted by the Union, thus reflecting the stand taken by the Court in recent case law.[61]

Furthermore, the third paragraph of Article 263 TFEU has been amended to add the Committee of the Regions to the list of semi-privileged applicants, which can bring an action for annulment when their prerogatives have been infringed. This is important, particularly when considered in conjunction with Article 8(2) of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which further elevates the Committee to the status of a privileged applicant in the challenge of any legislative measure on the basis of the breach of the principle of subsidiarity. This applies whenever the Treaty gives the Committee the right to be consulted in the adoption of these measures, and irrespective of whether or not consultation has taken place.[62] The exercise of these powers will therefore broaden the possibilities of challenge of Union acts, even if only in the limited ambit of that specific ground for review and only where the challenge is at the request of the Committee of the Regions or initiated by national parliaments.[63] While in the past, challenges to EU measures on the basis of breach of the principle of subsidiarity have been scarce and pronouncements from the Court terse, these new powers may bring subsidiarity into a sharper focus, particularly given that the Committee of the Regions and national parliaments have an obvious interest in contesting measures that might breach that principle.

Finally, two amendments have been made to the fourth paragraph of Article 263 TFEU, which concerns the standing of private parties. The first reflects the case law after the Court's ruling in *Codorníu*[64] and refers to private parties being able to challenge "acts", and not simply decisions or decisions in the form of a regulation, when these acts are either addressed or of direct and individual concern to them. The second introduces a new standing test that will henceforth apply to the challenge of EU "regulatory acts". These two changes will be considered in turn.

Following *Codorníu*, the Court generally accepted that regulations could be challenged by private parties who satisfied the general

[61] See Case T-411/06, *Sogelma v European Agency for Reconstruction* [2008] II-2771 at [33–37]).
[62] See further K. Lenaerts and N. Cambien,, "Regions and the European Court: Giving Shape to the Regional Dimension of the Member States" (2010) 35 E.L. Rev. 609, 625–629.
[63] See Article 8(1) Of the Protocol of Subsidiarity and Proportionality.
[64] Case C-309/89, [1994] E.C.R. I-1853.

two-limbed standing test. The case law concerning directives, while accepting the same conclusion in some instances[65] had been less clear overall.[66] This amendment enhances certainty by enshrining in the letter of the Treaty the principle that *any* legally binding act – i.e. regulations, directives, decisions and legally binding *sui generis* acts[67] – can now, in principle, be challenged by a non-privileged applicant, subject to the fulfilment of the standing tests.

The importance of this change should not be underestimated, particularly when viewed in the light of the systems of judicial review in the Member States. While all the Member States recognise the judicial review of administrative decision-making,[68] the judicial review of legislation is a more contested issue. In some Member States, like France, the control of the constitutionality of legislation could only take place *a priori*[69] until the recent constitutional reforms of 2008, which introduced a new form of *a posteriori* constitutional review.[70] This enables the *Conseil d'Etat* or the *Cour de Cassation*, following a request from a national judge, to refer to the *Conseil Constituitionnel* a question on the compatibility of national legislation with the fundamental rights and freedoms protected in the Constitution.[71] Even in those Member States where constitutional courts have generally carried out the judicial review of legislation *a posteriori*, like in Germany, only political organs have standing to request the abstract review of legislation, while the concrete review of legislation at stake in proceedings between private parties is within the discretion of national courts and tribunals, which may suspend proceedings and refer a question on the constitutionality of legislation to the Constitutional Court.[72] The parallels between these avenues of abstract and concrete review with, on the one hand, the role of privileged applicants in the action for annulment and, on the other, with the EU system of preliminary rulings on validity, seem obvious.

[65] Case T-135/96, *UEAPME v Council* [1998] E.C.R. II-2335, at [62–68] and Case T-321/02, *Vannieuwenhuyze-Morin v Parliament and Council* [2003] E.C.R. II-1997 at [21].

[66] Case C-10/95, *Asocarne v Council* [1995] E.C.R. I-4149 at [28–34] and Joined Cases T-172/98, *Salamander and Others v Parliament and Council* [2000] E.C.R. II-2487, at [28–29].

[67] Case 22/70, note 29 above.

[68] See for example, the French system, covered extensively in L. Neville Brown and J.S Bell, *French Administrative Law* 5th ed. (Oxford, 1998).

[69] F.L Morton, "Judicial Review in France: A Comparative Analysis" (1988) 36 A.J.C.L. 89, 90–91 and A. Abaquesne de Parfouru,, "*Locus Standi* of Private Applicants under the Article 230 EC action for annulment: Any lessons to be learnt from France?" (2007) 14 Maastricht Journal 361, 377.

[70] This new form of control is the *exception d'inconstitutionnalité*, found in Article 61-1 of the French Constitution.

[71] See further F. Fabbrini, " Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation" (2008) 9 German Law Journal 1297, 1304–1307 and M. Bossuyt and W. Verrijdt, "The Full Effect of EU law and of Constitutional Review in Belgium and France after the *Melki* judgment" (2011) 7 *European Constitutional Law Review* 355, 360–362.

[72] See A. Saiz Arnaiz,, "Constitutional Jurisdiction in Europe: Between Law and Politics" (1999) 6 Maastricht Journal 111, 116–117.

Direct actions brought by individuals before national constitutional courts, where available, are generally limited to complaints that a violation of a fundamental human right has arguably taken place.[73]

The original version of the standing tests only allowed private parties to challenge decisions. However, matters were complicated in EU law, because while there was a general assumption that many EU regulations could generally be identified as Community "laws", it was also apparent that some regulations were more in the nature of general, and sometimes even individual, administrative acts. The application of the "abstract terminology test"[74] to distinguish "true" regulations from "disguised" decisions not only proved extremely difficult but also yielded inconsistent results, and the move in *Codorníu* provided a welcome clarification of the case law. This ruling implicitly endorsed the judicial review of EU legislative action at the instance of private parties who satisfied the tests of direct and individual concern. Even though the general standing test is a formidable barrier, the fact that EU legislation can, in principle, be directly reviewed by private applicants, still reflects a more liberal approach than that prevalent in the majority of the national legal systems.[75] The Treaty of Lisbon has now lent political weight to this approach and has laid it down in a legally binding form at Treaty level.

The second amendment to Article 263(4) TFEU makes a change unheralded by the Court's case law. Thus, this provision now gives standing to private applicants to challenge "regulatory" acts which are of direct concern to them and which do not entail implementing measures. This amendment therefore introduces a *special* standing test for the challenge of regulatory acts in addition to the *general* and traditional standing formula of direct and individual concern that applies to the challenge of all other EU acts by non-addressees. The most striking aspect of this Lisbon amendment is that private applicants falling within this proviso will no longer have to satisfy the test of individual concern which is, as discussed earlier, the most forbidding barrier to standing. However, it also introduces fresh uncertainties by referring to *regulatory* acts, a category not mentioned in the Treaty. To understand these changes we need to consider first and foremost what constitutes a "regulatory" act and secondly, what it means that it should not entail implementing measures.

The term *regulatory* act had already appeared in Article III-365(4) of the ill-fated Constitutional Treaty, a provision that enshrined a fraught compromise[76] and whose wording was identical to the new

[73] *Ibid* at p. 118.
[74] See Joined Cases 789 and 790/79, *Calpak v Commission* [1980] E.C.R. 1949 at [7–9].
[75] See Abaquesne de Parfouru, op. cit., note 69 above, pp. 377–378.
[76] OJ 2004 C 310/1. For an examination of all the difficulties leading to the formulation of this provision, see the Final Report of the Discussion Circle on the Court of Justice of 25 March 2003, CONV 636/03 at paras. 17–23 and R. Barents, "The Court of Justice in the Draft Constitution"

version of Article 263(4) TFEU. At the time, and although the concept of regulatory act was not formally defined in the Constitution, there was consensus that it referred to non-legislative acts of general application.[77] In the hierarchy of norms provided by the Constitution, these encompassed European regulations and European decisions of general application,[78] that implemented laws and framework laws.[79] As a result, Article III-365(4) appeared to subject the challenge of legislative acts to the general test of standing – i.e. direct and individual concern- while the special and more generous test of standing was reserved to non-legislative acts of general application, which included delegated legislation and implementing acts.[80] The opening provided by this new provision was welcomed but considered rather modest in scope.[81] It was argued that it simply plugged the specific gap that occurred in cases like *Jégo-Quéré*, where the applicants had challenged a non-legislative Commission regulation that did not require any implementing measures, but did not cater for the situation that arose in cases like *UPA*, where the Union measure was a legislative regulation and where the applicants would not have benefited from the more flexible standing rules.[82]

Following the entry into force of the Treaty of Lisbon, the debate on the notion of a regulatory act intensified. Articles 289 to 291 TFEU seem to make a distinction between legislative acts – defined as those adopted by legislative procedure –[83] and non-legislative acts, which are not expressly defined. Article 290(1) TFEU clearly says that delegated acts – where the Commission is given the power to adopt acts of general application to supplement or amend legislative acts – are non-legislative acts. By contrast, Article 291(2) TFEU simply refers to implementing acts adopted by the Commission, or in duly justified cases by the Council, which can be adopted where uniform conditions for the implementation of legally binding Union acts are needed. The implication is that these are also non-legislative acts because they are not adopted by legislative procedure, a conclusion supported by the fact that the wording of this provision is identical to that of Article I-37(2)

(2004) 11 Maastricht J. Eur.& Comp. L. 121, 130–134. The Discussion Circle was divided with some members in favour of the relaxation of the standing rules for *any* acts of general application but in the end the relaxation was confined only to the challenge of the so-called regulatory acts. (see paras. 20–22 of the Report).

[77] See T. Tridimas, "The European Court of Justice and the Draft Constitution" in *European Law for the Twenty-First Century*, op. cit, note 6 above, pp. 113, 121 and C. Koch, "*Locus Standi* of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individuals' right to an effective Remedy" (2005) 30 E.L.Rev. 511, 520–521.

[78] See Articles I-33, I-35, I-36 and I-37 of the Constitution.

[79] These were legislative acts. See Article I-34 of the Constitution which defined legislative acts as those adopted by legislative procedure.

[80] See Articles I-35–I-37 of the Constitution.

[81] See A. Arnull, "April Shower for *Jégo-Quéré*" (Editorial) (2004) 29 E.L.Rev. 287, 288.

[82] See Koch, op.cit. note 77 above, pp. 525–527.

[83] Article 289(3) TFEU.

of the Constitution, where these were expressly identified as non-legislative acts. However, it is important to note that Article 291(2) TFEU does not make this explicit. It also follows from Article 289 TFEU that post-Lisbon – although not expressly mentioned in Articles 290–291 TFEU – there can be other possible types of non-legislative acts adopted directly on the basis of the Treaties, like for example decisions addressed to natural and legal persons such as those adopted by the Commission in the context of competition proceedings under Articles 101 and 102 TFEU[84], which under the Draft Constitutional Treaty had also been classed as non-legislative acts.[85]

A purely historic and contextual[86] interpretation of Article 263(4) TFEU therefore suggested that the concept of regulatory acts should be confined to *non-legislative acts of general application*.[87] This would now include non-legislative regulations and directives and also general decisions and *sui generis* acts. Technically, it would exclude legislative regulations and directives (given their legislative character) as well as non-legislative *individual* decisions and *sui generis* acts (given their individual nature).

Some commentators argued that, despite the arguments expounded above, the Court could[88] or should[89] interpret this notion broadly to include legislative acts as well as general non-legislative acts. There are good reasons to support this approach, namely that it would be consonant with the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Human Rights of the Union, address fully the gap identified in cases like *UPA* and chime with the non-formalistic approach that the Court followed when tackling the judicial review of Union acts, according to which it is the substance of the act and not the form that determines the application of the standing tests.[90]

A pronouncement from the General Court on this point was therefore eagerly awaited. The first real opportunity for the interpretation

[84] See Article 288 TFEU. For a list of examples, see A. Dashwood, M. Dougan, B. Rodger, E. Spaventa and D. Wyatt in *Wyatt ad Dashwood's European Union Law*, 6th edition (Oxford, 2011), 83–87.

[85] See Article I-33(1) of the Constitution.

[86] Article 207(6) TFEU, in the context of the Common Commercial Policy is the one other Treaty provision that uses the term "regulatory" and implies that it should refer to non-legislative acts.

[87] See the very interesting study by C. Werkmeister, S. Põtters and J. Traut, in "Regulatory Acts within Article 263(4) TFEU: A Dissonant Extension of *Locus Standi* for Private Applicants" (2011) 13 C.Y.E.L.S. 311, which carried out a grammatical, historical, systematic and teleological interpretation of the notion of "regulatory acts" and concluded that this notion refers to non-legislative acts of general application.

[88] See K. Lenaerts and N. Cambien, op. cit, note 62 above, 616–617.

[89] See M. Dougan, "The Treaty of Lisbon 2007: Winning Minds, not Hearts" (2008) 45 C.M.L.Rev. 617, 677–679 and S. Balthasar, "*Locus Standi* Rules for Challenges to Regulatory Acts by Private Applicants: the new Article 263(4) TFEU" (2010) 35 E.L.Rev. 542, 546–547.

[90] See R. Barents, "The Court of Justice after the Treaty of Lisbon" (2010) 47 C.M.L.Rev. 709, 725 and with reference to Article III-365(4) of the Constitution, T. Tridimas (op. cit., note 77 above, p. 125).

of the new notion arose in the context of the proceedings brought for the annulment of Regulation 1007/2009 of the European Parliament and Council on trade in seal products which provided restrictions on the placing of these products in the EU market.[91] In particular, this Regulation provided that the placing in the market would only be allowed where the seal products resulted from hunts traditionally conducted by Inuit communities and other indigenous communities and contributed to their subsistence. This legislative Regulation – adopted under the old Article 251 EC (now Article 294 TFEU) – was challenged by Inuit seal hunters, trappers and individuals and companies engaged in the processing of seal products.

Thus, in September 2011, the General Court finally interpreted the notion of regulatory act in *Inuit Tapiriit Kanatami and others v European Parliament and Council (Inuit I)*[92], and applied it again shortly afterwards in its decision in *Microban v Commission*.[93] In *Inuit I*, the Court chose a narrow interpretation of the concept of "regulatory act" and defined it as an "act of general application apart from legislative acts"[94] This hardly came as a surprise. The Court justified this construction in the light of the ordinary meaning of the word "regulatory"[95] the equivalent word in the different language versions of the Treaty[96] and the history of the Article 263(4) TFEU amendment – namely the decision of the *Praesidium* of the Convention for the establishment of the Constitution for Europe to remove legislative acts from the scope of the specific standing test.[97] Given that the Regulation at issue in *Inuit I* was clearly a legislative Regulation, the special standing test did not apply and the Court went on to apply the general standing test. Despite recognising that four of the applicants were directly concerned, the lack of individual concern resulted in the action being rejected as inadmissible.

The main contribution of *Inuit I* was, therefore, to provide a definition of regulatory acts. Two elements in that definition are important for our discussion. First, the act must be, by default, a *non-legislative* act, and secondly, it must have a *general* nature, which limits further the number of non-legislative acts falling within the scope of the new test.

The *non-legislative* quality of regulatory acts may cause some difficulties. On the one hand, it could be argued that the threshold for

[91] OJ 2009 L 286/36.
[92] Case T-18/10, Order of the General Court of 6 September 2011, not yet reported.
[93] Case T-262/10, Judgment of the General Court of 25 October 2011, not yet reported.
[94] Case T-18/10, note 92 above at [56] and Case T-262/10, note 93 above at [21].
[95] Case T-18/10, note 92 above at [42].
[96] *Ibid.* at [46].
[97] *Ibid.* at [49–50].

standing for the judicial review of legislative acts should be higher because these reflect the work of democratically elected bodies. After all, and as seen earlier, private parties do not have broad access to contest directly the constitutionality of legislation in their national legal systems. On the other, and while after Lisbon, many legislative acts are to be adopted by the ordinary legislative procedure, which is the most democratic of EU procedures, this is still one that entails an equal say for the Parliament *and* the Council (which is an intergovernmental body). Furthermore, and as observed by Dashwood, some of the special legislative procedures appear identical to the procedures used to adopt non-legislative acts.[98] Both of these observations call into question the idea that the democratic element of EU legislative acts should protect them from judicial review by private parties. Finally, the *Inuit* interpretation confirms that the application of the special standing test will be dependent on the way in which an act was adopted and not on the effects that the measure has on the applicant. Legislative measures will continue to be subject to the general standing test when they have a detrimental effect on private parties and this holds even in cases, like in *UPA*, when they do not entail implementing measures and hence a challenge via the national court is uncertain or impossible. The approach of the General Court is understandable given the historical background and the wording of the Lisbon test but it undeniably endorses a formalistic construction of the standing rules.

Problems and inconsistencies may arise in relation to the interpretation of the *general* character of regulatory acts. For example, a private applicant wanting to challenge an *individual* decision addressed to a third party will have to satisfy both direct and individual concern, and hence nominally a more restrictive standing test than that applicable to the challenge of a non-legislative regulation or general decision that requires no implementation. This seems at odds with the idea the decisions were, in the initial scheme of the Treaty, supposed to be more easily challengeable for private parties than general acts.[99]

A possible scenario could be a decision adopted by the Commission in the field of competition proceedings under Articles 101 or 102 TFEU. This would be a non-legislative measure that generally would require no further implementation, but one that would arguably fall outside the meaning of a "regulatory act" because of its individual nature and therefore would be subjected to the general standing test. Although the Court has traditionally adopted a more consistent and, above all, more flexible interpretation of the general standing tests in cases involving competition, state aid and anti-dumping proceedings[100]

[98] See Dashwood, Dougan, Rodger and Spaventa, op. cit., note 84 above at p. 85.
[99] See section III.
[100] See note 39 above.

there has been some recent criticism of the construction of individual concern in the field of State aids[101] which indicates that considerable difficulties continue to arise in the interpretation of this thorny test.

In the field of State aids, there are strong arguments to support the idea that many acts adopted by the Commission are general acts and that the real difficulty in satisfying the Lisbon test would be related, not to proving the general or non-legislative character of these acts but rather the lack of implementing measures. This illustrated by the recent decision of the General Court in *Iberdrola v Commission*.[102] This case concerned a Commission Decision declaring that a Spanish scheme which enabled Spanish companies to amortise the financial goodwill resulting from the acquisition of shareholdings in foreign companies was an aid incompatible with EU law. There, the Court applied the general standing test, concluded that the applicants were not individually concerned and declared the action inadmissible. In response to the arguments of the applicants that the act was a regulatory act and hence that the special standing test should apply – so that individual concern did not have to be shown – the Court took the view that the Commission decision entailed implementing measures: both recovery measures and measures for the implementation of the incompatibility decision. Thus, the special standing test did not apply "without it being necessary to rule on whether the decision was a regulatory act".[103] Despite this, earlier in the judgment the Court had stated that the Commission decision was *vis-à-vis* an individual "a measure of *general* application covering situations which are determined objectively and [entailing] legal effects for a class of persons envisaged in a general an abstract measure."[104] This, together with the fact that Commission decisions in this field are clearly non-legislative measures, suggests that they could easily be classified as regulatory acts. However, the existence of implementing measures means that the general standing test would, after all, still apply to many State aid cases.

The general quality of regulatory acts could also potentially introduce unjustified distinctions and asymmetries in the interpretation of the standing formula applied in competition and some state aid cases and the one applied to anti-dumping cases, when these three areas have traditionally been considered as embodying a separate and relatively consistent strand in the construction of the general standing test.[105]

[101] See M. Barennes, "The Standing of Competitors of the Aid Recipient in State Aid Cases" in H. Kanninen, N. Korjus and A.Rosas (eds.) *EU Competition law in Context* (Oxford 2009), 321, 332–333.

[102] Case T-221/10, Judgment of the General Court of 8 March 2012, not yet reported.

[103] *Ibid* at [44–48].

[104] *Ibid* at [25], emphasis added.

[105] In anti-dumping proceedings, the Court has traditionally used a more flexible construction of the general standing test based either on procedural participation (Case 264/82 *Timex v Council and Commission* [1985] E.C.R. 849) or, in the case of the principal importer of a product, the potential

Regulation 1225/2009,[106] the current EU parent anti-dumping regulation, provides that definitive and provisional anti-dumping duties must be imposed by regulation.[107] In the system provided by that parent regulation, the Commission adopts provisional duties[108] and the Council adopts definitive duties.[109] These anti-dumping regulations adopted by the Council and the Commission have the character of non-legislative regulations and they are general acts that leave little real discretion to the national authorities. If we apply the Lisbon amendment in this context, and depending on how the Court interprets the requirement that no implementing measures should be necessary, a challenge to these regulations could be even more straightforward than before because it would not be subordinate to the proof of individual concern, whereas the general test would still nominally have to be satisfied in many competition and State aid cases.

Finally, the interpretation of the requirement that the act should not necessitate further implementing measures will be as important as the notion of regulatory act. This requirement can be read as reinforcing the view that the new wording of Article 263(4) TFEU might simply be a discreet gap-plugging mechanism which ensures the possibility of a direct challenge to a general non-legislative measure *only* when no further implementing measures are due to be taken at either EU or national level. Presumably, the rationale for this would be, in the first case, that if there were EU implementing measures, these measures themselves could be challenged; in the second, that access to judicial review via the national court would necessitate the applicant to break the law first. It also supports the approach that indirect judicial review via the national courts is destined to continue to be the main, if less advantageous, option to private parties, with the Article 263 TFEU action performing a residual role. In this context, the Court has a unique opportunity. The key question is whether this requirement will be interpreted as referring to any substantial act of implementation or whether any kind of purely administrative action required from the Member States ( like collecting an EU duty or designating a competent authority) will count as an implementing measure. If the former, there will be difficulties attached to the definition of what is substantial. If the latter, the potential of the Lisbon amendment will be severely limited. The fact that this requirement was included in the Treaty

harm that the applicant could suffer as a result of the EU act (Case C-358/89 *Extramet v Council* [1991] E.C.R. I-2501). See also A. Arnull, "Challenging EC Anti-Dumping Regulations: the Problem of Admissibility" (1992) 13 E.C.L.R. 73 and R. Greaves, "*Locus Standi* under Article 173 EC when seeking the Annulment of a Regulation" (1986) 11 E.L.Rev, 119.

[106] OJ 2009 L 343/51.

[107] Article 14 of Regulation 1225/2009.

[108] Article 7(4) of Regulation 1225/2009.

[109] Article 9(4) of Regulation 1225/2009.

*in addition* to the test of direct concern (which is based on whether or not the addressee of the act has discretion in that implementation) could well provide support for the narrow view. Furthermore, the General Court's decision in *Iberdrola*,[110] also suggests that whenever the EU act provides for *any* measure of implementation, either the general standing test must be satisfied or the challenge must come through the national court.

In the case of directives, the interpretation of this limb of the test will be crucial. There are directives that leave practically no discretion to the Member States – and hence the satisfaction of the test of direct concern is feasible – but they all require mechanisms of implementation, which means that, in principle, this type of act could be fully excluded from the application of the Lisbon amendment unless a flexible notion of this expression were to be adopted. Naturally, the implementing measures could be challenged before the national court – which would open the possibility of an Article 267 TFEU reference – but the final result would be that, while non-legislative regulations and general decisions could be challenged by private applicants under the special standing test, directives (legislative and non-legislative) would still be automatically tied to the general test of standing. This result would have a grave impact in some specific areas of EU law, like environmental protection, where the bulk of measures are directives and where the test of individual concern is even harder to satisfy because of the inherent difficulty in proving membership of a closed class in these cases.[111] Ultimately, it would reinstate a situation where the form and mechanism of adoption of an act determines the possibilities of challenge under Article 263 TFEU, which was so problematic in the history of the old Article 230 EC. This time, however, delegated and implementing regulations and general decisions, and not individual decisions, would hold the wining cards.

A few weeks after the decision in *Inuit* one, the General Court gave its ruling in *Microban v Commission*.[112] This was the first case where the Lisbon test was found to be entirely satisfied. In that case, an American company and its subsidiary brought annulment proceedings against an implementing Commission Decision that removed triclosan from the list of antibacterial additives which could be used in the manufacture of plastics intended to come into contact with foodstuffs, a list of which had been drawn by a Commission Directive. The Court applied the *Inuit I* interpretation and found that the Commission Decision was a

[110] Case T-221/10, note 102 above.
[111] See, for example, the ruling in Case C-321/95P, note 32 above, and the Opinion of Advocate General Cosmas in this case at paras. 104–113.
[112] Case T-262/10, see note 93 above.

regulatory act.[113] The applicants were also found to be directly concerned as no discretion was left to the Member States.[114] Finally, and given that the decision in question effectively prohibited the use of triclosan, the measure was held not entail any implementing measures.[115] The applicants therefore managed to overcome the *locus standi* barrier in a situation where -had the general standing test been applied- they would probably have failed to demonstrate individual concern.

The Court went on to annul the decision on the substance, on the grounds of lack of legal basis and infringement of an essential procedural requirement. Undoubtedly, the decision in *Microban* provides a straightforward example of the opening provided by the Lisbon test and a success story for applicants who would have probably not satisfied the test of individual concern. However, it does not fully resolve the interpretation of the notion of "implementing measures." It remains to be seen whether the line taken in *Iberdrola* will apply beyond the specific framework of State aid cases.

A more significant opportunity to consider this notion might arise in the *Inuit II* case.[116] While *Inuit I* was pending, a second action for annulment was brought in November 2010 by the same applicants and some others against Commission Regulation 737/2010,[117] which had been adopted in August 2010 and which implemented Regulation 1007/2009 – the regulation at issue in *Inuit I*. In the same proceedings, Regulation 1007/2009 was simultaneously challenged indirectly by means of a plea of illegality under Article 277 TFEU. It is likely that the Commission Regulation at stake in *Inuit II*, which is an implementing act,[118] will fall within the definition of a regulatory act. What is less certain, however, is whether it will be considered to be a measure that does not entail further implementing measures. Depending on the interpretation given by the Court, the potential of the Lisbon test might be finally unveiled.

### *B. Other Treaty Remedies*

In the previous section we have seen that the Lisbon amendment to Article 263(4) TFEU offers some opportunities to the Court. The picture broadens when we look at the other Treaty remedies. The plea of illegality deserves special attention. The old Article 241 EC only provided for the use of this provision to challenge "regulations" but,

[113] *Ibid.* at [21–25].
[114] *Ibid.* at [ 27–30]
[115] *Ibid.* at [33–38]. For a hint towards a liberal interpretation, see [37].
[116] Case T-526/10 *Inuit Tapiriit Kanatami and Others v Commission*, OJ 2011 C 13/66.
[117] OJ. 2010 L 216/1.
[118] It was adopted on the basis of Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ( OJ 1999 L 184/23) – which has now been replaced by Regulation 182/2011, OJ/2011 L 55/13.

following Lisbon, the new Article 277 TFEU refers to the challenge of "any general act", which should therefore include regulations, directives and general decisions, as well as any other *general* legally binding acts. This change is a confirmation of an established line of case law[119] and implants in the Treaty the idea that all legislative and non-legislative acts of general application can now be challenged by means of a plea of illegality.

However, two important implications for the use of the plea of illegality can be drawn in the post-Lisbon era. First, the litigation in the *Innuit II*[120] already shows what could become a trend to counteract some of the problems arising from the exclusion of legislative acts from the application of specific standing test in Article 263(4) TFEU. More often than not, legislative regulations will require some EU measures of implementation or will delegate power to the Commission to adopt further measures. In these cases, private applicants who satisfy the Lisbon test could use pending annulment proceedings against EU implementing or delegated measures to raise a plea of illegality under Article 277 TFEU and challenge the underlying legislative regulation(s). In the past, the fact that direct and individual concern would have had to have been satisfied in relation to the main action, acted as a barrier to the fully-fledged use of the plea of illegality and few actions were successfully brought under this provision. Now that this barrier has been dismantled and the challenge of non-legislative acts seems easier, fresh opportunities arise.[121] However, the potential of this avenue will depend on how extensively the Court interprets the third limb of the Lisbon standing test and hence on how often private parties will manage to satisfy it. A literal interpretation of "implementing measures" in cases concerning the challenge of regulatory acts which would encompass any further action, however minor, at national level, will automatically restrict the scope of the plea of illegality as a safety net mechanism for the challenge of legislative acts.

Secondly, if more recent case law developments suggesting, through a literal reading of Article 277 TFEU, that the role of the plea of illegality is to ensure an *objective* control of general acts and thus to protect the principle of legality over the principle of legal certainty are followed through, then Article 277 TFEU could offer broader access to review for private applicants. This is because this action might be used regardless of whether an applicant would originally have had standing

[119] Case 92/78, *Simmenthal*, note 23 above, at. [40] and Cases T-6/92 and T-52/92, *Reinarz v Commission* [1993] E.C.R. II-1047 at [56].

[120] Case T-526/10, note 116 above.

[121] Directives (legislative and non-legislative) could also be challenged in this fashion but only on the rare occasions where they constitute the basis of another EU measure that could be the subject of the main action – i.e. a Commission decision adopted on the basis of the directive – and hence this does not represent a significant change from the pre-Lisbon state of affairs.

to challenge a general act through an action for annulment but failed to do so within the time limit. Imagine a delegated Commission regulation that provides the detailed arrangements for a system of import licences under which the national authorities only need to put in place some purely administrative arrangements to implement it. If the Court were to interpret the notion of implementing measures flexibly, a private applicant could satisfy the special standing test in Article 263(4) TFEU to challenge the regulation in these circumstances. However, even if the applicant did not bring the action for annulment within the time limit, the plea of illegality could still provide a subsequent chance for challenge, for example in the context of an action for annulment against a subsequent Commission decision based on the previous regulation.

The action for a failure to act provided in Article 265 TFEU represents the necessary complement to the action for annulment, as it helps to ensure that not only unlawful acts but also unlawful omissions are subject to judicial review. As a result, the same conditions ought to apply to both, particularly when the Court itself has frequently confirmed that they constitute one and the same mechanism of review.[122] The Treaty of Lisbon has amended this provision to bring it into line with Article 263 TFEU in two respects: by including the European Council in the list of applicants and by subjecting to review the failure to act of the bodies and agencies of the Union. However, some fresh differences have also been introduced without any clear rationale. The European Central Bank, which under the old Article 232 EC had the status of a semi-privileged applicant, seems to have been implicitly elevated to the rank of a privileged applicant under Article 265 TFEU, given its status as an institution of the Union[123]; yet this is despite the fact that it continues to be, post-Lisbon, a semi-privileged applicant in annulment proceedings under Article 263 TFEU. Meanwhile the Committee of the Regions act is not mentioned as an applicant in Article 265 TFEU, despite its new-found status as a semi-privileged applicant in Article 263 TFEU.

Furthermore, and moving on to the standing of private parties, the formula in the old Article 232 EC has been left unaltered, and therefore Article 265 TFEU continues to provide that a private applicant can "complain to the Court that an institution, body or agency of the Union has failed to *address* to that person any act other than a recommendation or an option." This wording has always been more stringent than its parallel in Article 263 TFEU because it does not seem to cover the standing of a private applicant to challenge the failure to adopt general or individual acts that would have been of direct and

[122] See Case C-68/95, *T. Port v Commission* [1996] E.C.R. I-6065 at [59].
[123] Article 13 TEU.

individual concern to the applicant.[124] Although the action for a failure to act is rarely used – particularly because it involves a pre-litigation procedure consisting in calling an institution to act and only where no response is given can the action prosper – this different standard of admissibility could have been potentially damaging for private parties. The Court had closed this gap in the case law, acknowledging that the same standing conditions should apply to both remedies.[125] For the sake of clarity and certainty, it would have been desirable that this case law development had found its way in to the wording of the Treaty.

However, this prompts another question: what of the Lisbon amendment to Article 263(4) TFEU? Technically, one would have expected that Article 265 TFEU should now provide a mirrored specific standing test and state that a private applicant should be able to challenge the failure of an EU institution to adopt "a regulatory act that would have been of direct concern to the applicant and that it would not have entailed implementing measures". It is to be hoped that the Court seizes the opportunity to interpret the new Article 265 TFEU in the spirit of securing a seamless interplay between the action for annulment and the action for a failure to act. In fact, the narrow definition of regulatory acts adopted by the Court in *Inuit I* would make this formula easier to apply. If the term had been interpreted to cover legislative acts, it seems unlikely that an action under Article 265 TFEU brought by a private applicant against the failure of the EU institutions to adopt one of these acts could ever be declared admissible given the broad margin of discretion generally involved in the adoption of the majority of these acts. However, it is also not hard to see that, depending on how the Court interprets the notion of implementing measures, the Lisbon formula may still be extremely difficult to satisfy for a private applicant.

As explained earlier, preliminary references on validity under Article 267 TFEU also provide a mechanism for the indirect review of acts of the EU institutions. This has been frequently highlighted by the Court[126] and the decision in *UPA* firmly catapulted this avenue to the forefront of judicial scrutiny of EU acts at the request of private parties.[127] The Treaty of Lisbon does little to detract from this approach. While only minor changes have been made to the text of old Article 234

[124] In this respect, see the observations by H.G. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities*, 4th ed. (Deventer 1987) 256 referred to the more flexible Dutch and Italian language versions of this provision, which could accommodate a broader interpretation, in comparison to the narrower Danish, French, Irish and German texts.

[125] Case C-68/95, note 122 above at [59].

[126] See *inter* alia, Case 314/85, *Foto Frost v Hauptzollamt Lübeck-Ost* 1987] E.C.R. 4199, at. [16] and Case 321/95P, *Greenpeace v Council* [1998] E.C.R. I-1651, at [32–33].

[127] See section III.

EC (now Article 267 TFEU),[128] the new Article 19 TEU provides that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law". This gives constitutional weight to the Court's assertion in *UPA* that it is the responsibility of the Member States to ensure the existence of remedies and procedures that would allow for a preliminary reference on validity to be made. Furthermore, the requirement of no implementing measures in the special standing test in Article 263(4) TFEU fits with the idea that the liberalisation of the general standing test may well be limited to the avoidance of situations of denial of justice and is not to apply more broadly.[129] Therefore, Article 267 TFEU can certainly continue to be construed as the main and most realistic route for the challenge of EU acts by private applicants – despite the disadvantages that it entails and particularly the fact that it confers a right to referral upon the national courts and not private litigants, thus precluding the latter from full involvement in and direct control over the proceedings.[130] It is evident that the interpretation of Article 263(4) TFEU which the Court follows will be crucial in determining the balance of power in the relationship between the direct and indirect avenues of judicial review provided in Articles 263 TFEU and 267 TFEU respectively.

Finally, and seemingly forgotten by the Lisbon Treaty, remains the action for damages against the Union Institutions, which is now set out in Articles 268 and 340(2) TFEU. The text of these provisions is virtually identical to the old Articles 235 EC and 288(2) EC.[131] Despite the terseness of these provisions, the evolution of case law on non-contractual liability arising from unlawful Union acts has been abundant and, at times, intensely controversial. The initial conditions for liability were established early on in the case law. These were: the illegality of the act, the existence of actual damage and a causal relationship between the illegality of the act and the damage caused to the applicant.[132]

[128] See note 60 above and Article 267(4) TFEU, which sets out the urgent preliminary ruling procedure.

[129] For recent confirmation of this approach see Case T-221/10 *Iberdrola*, note 102 above at [43].

[130] See note 16 above.

[131] Two aspects of the wording of Article 340 TFEU merit some consideration. First, Article 340(3) continues to extend non-contractual liability in relation to any damage caused by the ECB or its servants in the performance of their duties. Given that ECB is now a Union institution (Article 13(1) TFEU) and that Article 340(2) TFEU already covers the non-contractual liability of the Union "institutions", it is questionable why the separate paragraph to cover the ECB has been maintained. Secondly, despite the changes made to Article 263 TFEU in terms of the reviewability of acts of the bodies and agencies of the Union, Article 340 TFEU does not expressly refer to non-contractual liability arising from the actions of these entities – although there is support in the case law for them attracting liability (see Case T-209/00, *Lamberts v Ombudsman* [2002] E.C.R. II-2203) and provisions in the decisions establishing some of the EU agencies sometimes specifically provide a basis for such liability, like Article 21(2) of Council Regulation 2062/94 establishing a European Agency for Safety and Health at work OJ 1994 L 216/1).

[132] See Case 4/69 *Lütticke* [1971] E.C.R. 325 at [10] and Case 26/81 *Oleifici Mediterranei* [1982] E.C.R. 3057 at [16].

However, problems began to arise as the Court adopted – in *Zuckerfabrik Schöppenstedt*[133] – a stricter interpretation of the requirement of illegality of the act in cases where liability stemmed from "legislative action involving choices of economic policy", whereas mere illegality would be sufficient in the case of individual decisions. This formula was interpreted by the Court so restrictively in some instances that it appeared almost impossible that a private applicant could be successful in an action for damages against an illegal regulation or directive.[134] A more liberal approach became discernible in the 1990s[135] and culminated with the decision of the Court in *Bergaderm*[136] where the Court unified the conditions of liability applicable to Member State liability and to liability arising from unlawful acts of the Union institutions. Following *Bergaderm*, a stricter common threshold of illegality now applies where either the Union institutions or the national authorities have acted in the exercise of broad discretion – with the form of the act no longer being the decisive element. [137] Thus, a breach of EU law will be sufficiently serious to attract liability in those cases where the enacting institution has "manifestly and gravely disregarded the limits of its discretion".[138] This is still a mighty test to satisfy and reflects an intense deference towards the exercise of discretion by the political institutions when making policy choices, which is common in many systems of judicial review.[139] However, it also promised a more predictable approach and a welcome sense of equality in the chances of suing the State or suing an EU institution in damages where EU law has been infringed. Despite these developments, which again show that the Court can move forward with its interpretation of Treaty provisions in order to improve the prospects of natural and legal persons, criticism of the overall reasoning of the Court still remains[140] and recent cases show that even where the threshold of illegality is made out, the other two conditions for liability, and particularly the existence of a causal link, are not easy to satisfy.[141]

Following the entry into force of the Treaty of Lisbon, the interpretation of Article 263(4) TFEU is likely to have implications for actions under Articles 268 and 340(2) TFEU, particularly as applicants

[133] Case 5/71 [1971] E.C.R. 975 at [11].
[134] See, in particular, Cases 116 and 124/77, *Amylum v Council and Commission* [1979] E.C.R. 3497, where the Court held that for this condition to be satisfied the action of the EU institutions would have to be "verging on the arbitrary" ( at [19]).
[135] See Cases C-104/89, *Mulder v Council* [1992] E.C.R. I-3061.
[136] Case C-352/98 P, *Bergaderm v Commission* [2000] E.C.R. I-5291. See also T. Tridimas, "Liability for Breach of Community Law: Growing Up and Mellowing Down" (2001) 38 C.M.L.Rev. 301, 321–330.
[137] Case C-352/98P, note 136 above, at [46].
[138] *Ibid.* at [43].
[139] See Cases 116 and 124/77, note 134 above at [13].
[140] See J. Wakefield "Retrench and Reform: The Action for Damages" (2009) 28 Y.E.L. 390. 432–434
[141] Case C-440/07P, *Commission v Schneider Electric SA* [2009] E.C.R. I-6413.

frequently bring these two actions together before the Court.[142] In the past, not only was it difficult to obtain an award in damages against an EU institution but it was also difficult for applicants to satisfy the standing conditions in an action for annulment.[143] If, however, Article 263(4) TFEU begins to be interpreted more liberally, pressure may begin to shift towards a more generous interpretation of the conditions for a successful action for damages.

## V. Conclusions

This paper has tried to outline some of the challenges which lie ahead for the Court of Justice in the field of remedies against the EU institutions. The first is a fundamental dilemma and refers to the hierarchy of avenues of judicial review as far as private applicants are concerned. Annulment proceedings are, in the system of the Treaty, the centrepiece of the system provided for the review of the legality of EU acts. As seen above, this is not the role that they have fulfilled in relation to private applicants, whose best chances of success seem to have lain in the indirect mechanism of review provided by Article 267 TFEU.[144] If the requirement of absence of implementing measures in the new Article 263(4) TFEU is interpreted narrowly, the effect of Lisbon will be to entrench firmly preliminary references on validity as the principal avenue of review for private parties and to confirm the relegation of the action for annulment to the performance of a residual role. The general and rigorous standing test in Article 263 TFEU would continue to apply to many annulment actions, with all too predictable consequences for private parties. The special standing test would only be applicable to cases where the inadmissibility of the action would lead to a total denial of justice because no action before the national court that could trigger a preliminary reference is available – and not even all of these cases will be covered now that the General Court has confirmed in *Inuit I* that legislative acts fall outside the test.

This prompts the obvious observation that the obligation to provide effective judicial protection refers both to the availability of protection and to the quality of that protection. The Court has already begun to use the Charter as a primary source of EU law to annul acts of the EU

[142] See note 27 above.

[143] On the parallels between the restrictive approach of the Court in the interpretation of the action for annulment and the action for damages, see A. Arnull, "The Action for Annulment: A case of Double Standards?" in D. O'Keefe and A. Bavasso (eds.), *Judicial Review in European Union Law*: *Liber Amicorum in Honour of Lord Slynn of Hadley* (Deventer 2000) 177 at 186,187 and189.

[144] For recent endorsements of this conclusion, see the decisions of the General Court in *Iberdrola* (Case T-221/10, note 102 above, at [43]) and in Case T-291/04, *EnviroTech Europe*, Judgment of 16 December 2011, not yet reported at [117]).

institutions[145] and the principle in Article 47 of the Charter, like all the other fundamental rights and principles previously recognised in the case law of the Court, is likely to become more visible and its implications more prominent in the post-Lisbon world. Devolving responsibility to the national legal systems is understandable from a practical point of view given the ever-increasing workload of the Court, but it does not tackle the underlying issue concerning the disadvantages inherent in the indirect route, particularly in cases where the interests of a private applicant or his/her rights are seriously affected by an EU measure. Futhermore, it does not fully address concerns about the accountability of the EU or secure a sense of confidence in the limits which should operate to contain the powers of the EU political institutions, which should flow from the idea that individuals are "citizens" of the Union. This is all the more so, when a growing number of areas of EU law is likely to attract the interest of private parties in terms of judicial review.[146]

The second issue refers to the interpretation of the notion of regulatory act, which may draw some unwarranted distinctions between the direct challenge of general acts and individual decisions, and which may limit the benefits of the Lisbon test depending on the form in which an act was adopted. In *UPA*, the Court firmly shifted responsibility to the Member States in any reform of the standing conditions attached to the action for annulment, but it may well find that the ball is now back in its court. On the one hand, the new special standing test (devised through political agreement) appears deceptively simple if seen from a historical perspective. On the other, it has placed the Court in a difficult position because, in reality, it leaves ample margin for interpretation and, as seen above, no matter what path the Court takes, ramifications are bound to follow in terms of the coherence of the Treaty's system of judicial review. The General Court has taken a stance already in defining a regulatory act, and some possible consequences of this choice have been outlined above. The decision in *Inuit I* has been appealed[147] and it remains to be seen whether the definition of regulatory act will be upheld. Next, the General Court will have to consider fully the notion of implementing measures; again, its choice will be crucial in outlining the real potential of the Lisbon test.

A third point refers to the possible new role of the plea of illegality, previously a remedy with limited utility for private applicants. It has been argued that the plea of illegality might be called upon to perform a

[145] See Joined Cases C-92/09 and C-93/09, *Schecke and Eifert v Land Hessen* [2010] E.C.R. I-11063 and Case C-236/09 *Association Belge des Consommateurs Test-Achats*, Judgment of 1 March 2011, not yet reported.

[146] See J. Scott, "In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law" (2011) 48 C.M.L.Rev. 329 at 349–353.

[147] Case C-583/11 P, O.J. 2012 C 58/3.

much more significant function after Lisbon, by providing a more readily available route for the indirect challenge of legislative acts on which other measures contested before the Court are based. Moreover, further cases might also provide an opportunity to determine whether the availability of this action for private applicants is determined solely by the need to ensure legal certainty – and thus would remain unavailable if the general act subject to the indirect challenge could have been challenged by means of an action for annulment- or as an additional avenue for the challenge of general EU acts that are relevant in the context of proceedings pending before the Court under a different Treaty provision.

Finally, and although the Treaty of Lisbon has hardly modified the Treaty provisions dealing with the action for a failure to act and the action for damages, the contribution of these actions to the achievement of comprehensive system of protection should not be underestimated. In relation to the first, the Court could, as it has done in the past, align the requirements in Article 265 TFEU with those in Article 263 TFEU, – including the application of the mirrored formula of the Lisbon amendment to Article 263(4) TFEU. With reference to the second, opportunities to shed further light on the conditions for liability, and particularly on the required level of discretion that engages the stricter test of illegality of an EU act and on the construction of the required causal link, should be used to the full.

The Treaty of Lisbon may not have been welcomed as the most exciting or revolutionary of Treaties, but at least in the field of judicial protection against the acts of the EU institutions it certainly opens a world of opportunity not only in what it says but, even more, in what it leaves unsaid. In the light of the obvious lack of political appetite for further change it is logical that the Court continues to be cautious, but ultimately the solution that would avoid many of the difficulties continues to be a more flexible and consistent interpretation of the test of individual concern, which is the true stumbling block in unlocking the full potential offered by Article 263 TFEU to private applicants. Recent decisions of the Court suggest that this test is being interpreted as restrictively as ever, if not even more so.[148] A re-formulation of this test, which admittedly may never happen, remains the greatest opportunity of all.

[148] See the recent decisions of the General Court in Case T-221/10, *Iberdrola v Commission*, note 102 above, at [1–44] and also in Case T-291/04 *Enviro Tech Europe* (note 144 above), where the Court adopted a particularly narrow construction of the test and expressly held that the fact that applicants may suffer a major economic loss as a result of an EU measure cannot justify a finding that they are individually concerned (at [111] of the judgment). The applicants brought an action for damages against the Commission, which was also declared inadmissible (at [121–166]).