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## Access to Justice: Rays of Sunshine on Judicial Review or Morning Clouds on the Horizon?

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# ACCESS TO JUSTICE: RAYS OF SUNSHINE ON JUDICIAL REVIEW OR MORNING CLOUDS ON THE HORIZON?

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## INTRODUCTION

European Union law<sup>1</sup> is characterized by a number of firm foundations: the supremacy of EU law in the case of conflict with national law; the direct effect of the fundamental freedoms and the use of direct effect to ensure that the rights of individuals are not trodden on by unwilling national administrations; the duty of sincere co-operation imposed on the Member States and on the institutions and other bodies of the European Union; the respect for fundamental rights; the requirements in terms of equivalence and effectiveness which

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1. The major primary sources of EU law are to be found in the Treaty on European Union (“TEFU”) and the Treaty on the Functioning of the European Union (“TFEU”), and in the Euratom Treaty. *See generally* Consolidated Version of the Treaty on European Union 2012 O.J. C 326/13, [hereinafter TEU post-Lisbon]; Consolidated Version of the Treaty on the Functioning of the European Union 2012 O.J. C 326/47, [hereinafter TFEU].

European Union law makes of the legal systems of the Member States; the right to damages for loss caused by breach of EU law, and more generally the right to an effective judicial remedy. Yet despite this imposing array of principles, rights and remedies, the issue of the scope of judicial review still gives rise to cause for concern and remains a blemish on an otherwise robust and well-ordered system of law. While the Court of Justice of the European Union has undoubtedly robustly defended the rights of individuals affected by measures taken by the European Union's institutions in the area of Common Foreign and Security Policy,<sup>2</sup> the basic issue of standing to attack European Union legal acts which affect the interests of persons other than the addressees of such acts is still the subject of controversy and the state of the law is still far from satisfactory.

The individual litigant in European Union law has long faced a notoriously narrow road over the deep chasm of the abyss of inadmissibility: brave indeed were the souls who undertook such a perilous journey, for them the road journey on foot to Santiago de Compostella must have seemed like a day trip compared with the lesions on the road to Luxembourg.<sup>3</sup> The Court of Justice has failed adequately or at all to take account of the chorus of criticism of its interpretation of the concept of individual concern in relation to standing under what is now Article 263 TFEU. The Court's head remained, famously ostrich-like, buried firmly in the sand, and its failure to respond to the calls for a change of heart represents an enormous blemish on its record of complying with its own requirement (also made of the national courts) of the availability of effective judicial remedies.<sup>4</sup> While it was evident

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2. See e.g., *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, Joined Cases 402/05 & 415/05, [2008] E.C.R. I-6351 (hereinafter *Kadi*); *The Queen, on the application of: M & Others v. H.M. Treasury*, Case C-340/08, [2010] E.C.R. I-3913, ¶¶ 1–2, 65–74 (hereinafter "*M*").

3. This image is inspired by the drawing by Annette Elisabeth Klosa on the front cover of *Individuals' Access to Justice Under Community Law*. See generally HANS ROLAND SCHWENEFIEFER, *INDIVIDUAL'S ACCESS TO JUSTICE UNDER COMMUNITY LAW* (Diss., University of Groningen, 2009).

4. E.g., *Parti Écologiste 'Les Verts' v. European Parliament*, Case 294/83, [1986] E.C.R. I-1339, ¶¶ 17, 19, 22–26 (in relation to acts of the EU institutions); see also *Ferwerda BV v. Produktschap voor Vee en Vlees*, Case 265/78, [1980] E.C.R. 617, ¶¶ 12–19; *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, [1986] E.C.R. 1651, ¶¶ 16–19. The national courts are thus required to ensure that the

that the judges were fully aware of the problems, their response was simply to pass the buck to the Member States in the context of any modification of the Treaty.<sup>5</sup> Even if judges really agree that something ought to be done, there is always the question whether they should or could do it themselves or whether it should be left to the legislator or in this case to the Member States in an Intergovernmental Conference on amendment of the Treaty. As is well-known, the approach chosen by the Court failed to cover the institution in glory; the abandonment of responsibility simply proclaimed and confirmed the inadequacy of judicial protection in the European Union's system. Given that the TFEU now offers in certain circumstances a ray of hope for private litigants, to what extent has the Court been willing to transform a ray of hope into a beacon of light? Or are the clouds still the dominant feature on the horizon of judicial protection?

### I. BACKGROUND<sup>6</sup>

The arguments traditionally advanced to justify the Court's very narrow stance on individual concern in *Plaumann & Co v. Commission*<sup>7</sup> are principally managerial in nature,<sup>8</sup> but they are also founded on comparison with the approach to judicial review adopted in relation to the old ECSC Treaty, in particular as regards Article 33 ECSC.<sup>9</sup> The scope of judicial review in EC law was said to be designed to reflect a balance between the competing considerations of an absence of well-developed political controls and flexible management of the Community's

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rights conferred by EU law are upheld. *E.g.*, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, [1978] E.C.R. 629, ¶¶ 13–18; *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and Others*, Case C-213/89, [1990] E.C.R. I-2433, ¶¶ 17–20.

5. See generally *Union de Pequeños Agricultores v. Council*, Case C-50/00, [2002] E.C.R. I-6677 (hereinafter “UPA”); *Jégo-Quéré & Cie SA v. Commission*, Case T-177/01, [2002] E.C.R. II-2365.

6. This background is very brief, as the saga is well-known. For an extensive discussion, see generally Laurence W. Gormley, *Judicial Review: Advice for the Deaf?* 29 *FORDHAM INT'L L.J.* 655 (2006).

7. See *Plaumann & Co v. Commission*, Case 25/62, [1963] E.C.R. 95, 107.

8. The argument of opening the floodgates is a powerful one, but not one which should prevail against the interest of proper judicial control of the exercise of legislative and executive power.

9. See *Opinion of Advocate General Roemer, Plaumann & Co v. Commission*, Case C-25/62, [1963] E.C.R. 110.

powers.<sup>10</sup> While it is undoubtedly the case that the European Union's political controls are nowadays much more developed and much more astute than they used to be, nevertheless they are still less well-developed than in (many of) the Member States of the European Union. This means that an effective system of judicial control is even more than normally an essential safeguard against the abusive exercise of executive power,<sup>11</sup> and it therefore unsurprising that the Court of Justice has traditionally taken a wide view of the type of acts which may be open to review.<sup>12</sup> Re-reading the early case-law provokes very mixed emotions because of the Court's rather Janus-faced attitude to judicial review, not so much having its cake and eating it, but appearing to be virtuous and open while slamming the door in the face of challenges to acts of the Institutions as much as possible: on the one hand the Court appeared willing to go for a wide-ranging scope of judicial review as regards the instruments that would be subject to control;<sup>13</sup> yet on the other

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10. See CLARENCE J. MANN, *THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION* 51 (The Hague, 1972).

11. See, e.g., *Mulder et al v. Council & Commission*, Joined Cases 104/89 & 37/90, [1992] E.C.R. 3126, ¶¶ 9, 12, 33; M, [2010] E.C.R. I-3913, ¶¶ 34–74. See generally *Kadi*, [2008] E.C.R. I-6351; *Criminal Proceedings against E & F*, Case 550/09, [2010] E.C.R. I-6213, 6270 & 6273–6274, ¶¶ 44, 57, 59, 60.

12. See, e.g., *Commission v. Council*, Case 22/70, [1971] E.C.R. 263, ¶¶ 38–50; *International Business Machines Corporation v. Commission*, Case 60/81, [1981] E.C.R. 2639, ¶¶ 8–9; *Commission v. United Kingdom*, Case 114/86 [1988] E.C.R. 5289, ¶¶ 12–14; *Luxembourg v. European Parliament*, Joined Cases 213/88 & 39/89, [1991] E.C.R. 5643, ¶¶ 13–15; *Reynolds Tobacco & Others v. Commission*, Case C-131/03, [2006] E.C.R. I-7795, ¶¶ 55–57.

13. More recently, the General Court recalled that the: “Community institutions cannot, merely by means of their choice of legal instrument, deprive individuals of the judicial protection which is afforded to them by the Treaty, even if that legal instrument is a directive (orders in Case T-223/01 *Japan Tobacco and JT International v Parliament and Council* [2002] ECR II-3529, paragraph 28; Case T-154/02 *Villiger Söhne v Council* [2003] ECR II-1921, paragraph 39; Case T-213/02 *SNF v Commission* [2004] ECR II-3047, paragraph 54; and the order of 25 April 2006 in Case T-310/03 *Kreuzer Medien v Parliament and Council*, not published in the ECR, paragraphs 40 and 41). Similarly, the mere fact that the contested provisions form part of a measure of general application which constitutes a real directive and not a decision, within the meaning of the fourth paragraph of Article 249 EC, taken in the form of a directive is not of itself sufficient to exclude the possibility that those provisions may be of direct and individual concern to an applicant (see, to that effect, the orders in *Japan Tobacco and JT International v Parliament and Council*, paragraph 30, and in Case T-321/02 *Vannieuwenhuyze-Morin v Parliament and Council* [2003] ECR II-1997, paragraph 21).” *Arcelor SA v. European Parliament & Council*, Case C-16/04, [2010] E.C.R. I-211, ¶ 94.

hand the Court has always taken an extraordinarily narrow view of individual concern.<sup>14</sup> Yet even though the Court of Justice has been willing to accept that in the evaluation of acts involving economic policy choices the Union's institutions and other bodies had to be allowed a certain margin of discretion, that discretion was not unfettered so as to leave individuals entirely at the mercy of the institutions.<sup>15</sup>

The concept of direct concern as one of the two criteria for parties other than addressees of acts to challenge acts of the institutions relatively quickly settled down to an examination of whether the act concerned had direct legal consequences for the applicant, and whether the addressee of an act had a discretion as to whether to comply with it, or had already made plain how it would proceed if the act were to be addressed to it,<sup>16</sup> an approach that, it is submitted, is unexceptionable.

But the devil lay in the Court's approach to the second criterion, individual concern. It has always appeared wholly unconvincing and in market terms even quite outrageous to say merely that anyone at any time could import clementines, and that there was nothing to distinguish the Plaumann firm from the rest of the world. The fact of the matter is that only a certain number of firms actually import clementines or would even think of doing so within a relatively narrow appeal window of two months (plus extension on account of distance); just as in reality only a certain number of persons are actually engaged in sugar refining. Thus if their identity is known in advance, even if

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14. See generally *Plaumann*, [1963] E.C.R. 95.

15. See, e.g., *SA Roquette Frères v. Council*, Case 128/79, [1980] E.C.R. I-3333, ¶¶ 22–27; *Remia BV v. Commission*, Case 42/84 [1985] E.C.R. I-2545, ¶¶ 34–38; *Ricoh & Co. Ltd v. Council*, Case C-174/87 [1992] E.C.R. I-1335, ¶¶ 69–72; *Rica Foods (Free Zone) NV v. Commission*, Case C-40/03, [2005] E.C.R. I-6811, ¶¶ 54–55 (in the absence of manifest error of appraisal or a misuse of powers, or exceeding the bounds of permitted discretion, the Court will be unwilling to intervene). See also the very instructive distinction drawn by Léger, Adv. Gen., between discretion of a 'political' nature (action as political authorities, laying down legislation or policy guidelines) and discretion of a 'technical' nature (action as administrative authorities): the intensity of the Court's judicial review being less in cases in which the discretion is of a political nature. See generally, *Rica Foods*, [2005] E.C.R. I-6811.

16. See, e.g., *Front National v. European Parliament*, Case C-486/01, [2004] E.C.R. I-6289, 6326; *Regione Siciliana v. Commission*, Case C-15/06, [2007] E.C.R. I-2591, 2607.

there is not formally a closed class situation,<sup>17</sup> the sense of injustice felt by those excluded from consideration of their case on the merits is manifest; the Court's observation that even where the Institutions knew (more or less) precisely who would be affected by a measure, it could not be open to challenge is wholly inadequate.<sup>18</sup> Thus both Advocate General Jacobs<sup>19</sup> and the then Court of First Instance<sup>20</sup> were entirely right to take on board the overwhelming criticism of the *Plaumann* interpretation of individual concern.<sup>21</sup> While there had been a certain *souplesse* in regard to particular areas in which a specific administrative regime had been put in place, and there had been some apparent chinks in the armour,<sup>22</sup> it rapidly became apparent that it was not going to lead to a wholesale reinterpretation of the Treaty provisions. The real problem was that the Court of Justice would simply not understand—or perhaps chose to turn the proverbial deaf ear—to the glaringly obvious point that it was *its own interpretation* of the concept of individual concern that was the problem, as opposed to the wording of the Treaty. It noted that “such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.”<sup>23</sup> The buck was then proverbially passed:

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17. See e.g., *Alfred Toepfer v. Commission*, Joined Cases 106 & 107/63, [1965] E.C.R. 405; *Société C.A.M., SA v. Commission*, Case 100/74, [1975] E.C.R. 393.

18. E.g., *Zuckerfabrik Watenstedt GmbH v. Council*, Case 6/68, [1968] E.C.R. 409, 415.

19. See *Extramet Industrie SA v. Council*, Case C-358/89, [1991] E.C.R. I-2501; see generally, *UPA* Case C-50/00, [2002] E.C.R. I-6677.

20. *Jégo-Quéré et Cie SA v. Commission*, Case T-177/01, [2002] E.C.R. II-2365; see also Gormley, *supra* note 6 at 669–75. The author argues that the notably strong First Chamber of the Court of First Instance was well within its rights to challenge the *Plaumann* test; moreover, given that Advocate General Jacobs in *UPA* had expressly been asked to address the admissibility points in detail (as is clear from his Opinion), it was open season for discussion. The fact that in *UPA* the Court after all shied away from change but admitted that other approaches to standing could well be imagined points to the judgment in *UPA* being the product of a highly divided court!

21. Advocate General Jacobs in *UPA* cited an impressive list of extra-judicial writings by members of the Court of Justice and the Court of First Instance, see *UPA*, [2002] E.C.R. I-6677 at 6682 n.5; as to examples of criticism by academic commentators, see *id.* at n.6; L.W. Gormley, *Judicial Review: Advice for the Deaf?*, 29 *FORDHAM INT'L L.J.* 655, 664 (2006).

22. See *id.* at 662–63 (giving some classic examples).

23. *UPA*, [2002] ECR I-6677 at 6735 ¶43.

While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.<sup>24</sup>

The Court of Justice could simply have approved the Court of First Instance's redefinition of individual concern in *Jégo-Quéré*: that would not have required a change in the Treaty, but would have been simply a welcome evolution in the case-law. Evolution is not wholly unknown even in Luxembourg, and the Court has been willing to change its mind in other cases, even if this is indeed an extremely infrequent occurrence.<sup>25</sup> However, the Court clearly felt that if there was to be a change, it had to be made at the level of the Treaty. Such a choice—to act judicially or to leave a matter to the legislator—is often a difficult one for judges, but it arose essentially because the Court failed to understand where the problem really lay. That deaf ear remained resoundingly deaf in the judgment on appeal in *UPA*.<sup>26</sup>

Nevertheless, an implicit invitation to the Member States to consider the matter was made. That implicit invitation did not fall entirely on stony ground: in results of the deliberations of the discussion circle on the Court of Justice in the Intergovernmental Conference that produced the ill-fated Constitution,<sup>27</sup> standing for appeals against regulatory acts not entailing implementing measures was subject only to the

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24. *Id.*, at ¶44.

25. *E.g.*, *Brasserie de Haecht SA v. Wilkin*, Case 48/72, [1973] E.C.R. 77; *SA CNL-SUCAL NV v. Hag AG*, Case C-10/89, [1990] E.C.R. I-3711; *Keck & Mithouard* Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097.

26. *See UPA*, [2002] E.C.R. I-6677. That the Court of Justice was piqued by the Court of First Instance jumping the gun seems apparent, but there are many reasons why the Court of Justice should not have been afraid to follow the line taken by the Court of First Instance. The formulation adopted by the Court of First Instance would have been sufficient to prevent someone from having to break the law to challenge it—the fishermen could thus have challenged a regulation which prevented them from doing what they had hitherto done (it affected their legal position, in a manner which was both definite and immediate, by restricting their rights or imposing obligations on them (i.e. not to fish with nets which failed to meet prescribed specifications).

27. Draft Treaty Establishing a Constitution for Europe, (never ratified), art. III-365(4), 2004 O.J. C 310/1, at 310/160.



condition of the act being of direct concern to the applicant.<sup>28</sup> This terminology is now contained in the fourth paragraph of Article 263 TFEU.

## II. *THE RAY OF HOPE?*

The revised fourth paragraph of Article 263 TFEU is just one of a number of improvements made to judicial review in EU law under Article 263 TFEU. Before discussing the meaning of the term ‘a regulatory act’, it is perhaps useful to recall the other new elements in Article 263.<sup>29</sup> The *first* of these is the distinction drawn between legislative acts and other acts.<sup>30</sup> The actual instruments that may be used by the institutions in exercising the Union’s competences are unchanged: regulations, directives and decisions, and the non-binding (and thus not subject to review) recommendations and opinions.<sup>31</sup> *Secondly*, acts of the European Council are now subject to review by the Court on the same basis as acts of the European Parliament, i.e. acts intended to have legal effects *vis-à-vis* third parties.<sup>32</sup> *Thirdly*, there is specific provision for judicial review of the legality of acts of bodies, offices or agencies of the Union intended to have legal effects *vis-à-vis* third parties; in these cases the acts establishing

28. As to the discussions in the Discussion Circle, see Gormley, *supra* note 6 at 684; SCHWENSFEIER, *supra* note 3 at 332 (citing additional literature and sources).

29. In addition to the changes discussed in the text, the Committee of the Regions becomes a semi-privileged litigant; it seems very odd that the opportunity was not taken at the same time to confer such status on the Economic and Social Committee (which has the right to be consulted on various proposed legislation). See generally, JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 230-234 (Cambridge Univ. Press, 2010) (outlining the changes which were made to the Court); S. van der Jeught, *Le Traité de Lisbonne et la Cour de Justice de l'Union Européenne*, 17 J. DE DROIT EUROPÉEN 297, 297-303 (2009); I. PERNICE, *DER VERTRAG VON LISSABON: REFORM DER EU OHNE VERFASSUNG?* (Nomos, Baden-Baden, 2008); M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MARKET L. REV. 677 (2008); Laura Parret, *En Wat Met de Rechtsbescherming?* 57 SOCIAAL-ECONOMISCHE WETGEVING 103 (2009).

30. Legislative acts are legal acts adopted by legislative procedure. See TFEU, *supra* note 1, art. 289(3), 2012 O.J. C 326/47 at 172. Such procedure will be the ordinary legislative procedure, *id.* art. 289(1), art 294, at 174, or a special legislative procedure, *id.*, art. 289(2), at 172.

31. *Id.* art. 288, at 171-72.

32. The European Council cannot exercise legislative functions. See TEU post-Libson, *supra* note 1, art. 15(1), 2012 O.J. C 236 at 23. It does however have the power of decision. See e.g. *id.* art. 15(5); *id.* art. 18(1), *id.* at 26; *id.* art. 22(1), at 29; *id.* art. 26(1), at 31; *id.* art. 48(3), (6) at 42; *id.* art. 49(1), at 43; *id.* art. 50(3), at 44.

those bodies, offices or agencies may lay down specific conditions or arrangements concerning actions brought by natural or legal persons against their acts.<sup>33</sup> *Fourthly*, even if logically the third change, the specific provisions relating to acts against which natural or legal persons may institute proceedings have been tidied up and a new category of acts open to challenge has been added, so that the fourth paragraph of Article 263 TFEU reads:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is of direct concern to them and does not entail implementing measures.<sup>34</sup>

All these changes make subtle but concrete improvements and for the most part clarify and indeed simplify its terms.

But undoubtedly the greatest interest is in relation to regulatory acts, in respect of which clarity is less than convincingly evident. Two points are of interest: what is meant by the term ‘a regulatory act’, and what is meant by the additional phrase ‘and does not entail implementing measures’? There is no reason to suppose that the linking phrase ‘which is of direct concern to them’ should be given a different interpretation than hitherto, and indeed that has been the approach of the General Court in all the cases before it so far.<sup>35</sup> But before turning to what the General Court has decided, some preliminary observations are appropriate.

On one view it can be argued that a regulatory act is any binding act that is not a legislative act.<sup>36</sup> This view is really does

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33. See TFEU, *supra* note 1, art. 263, 2012 O.J. C 326, at 162.

34. *Id.*

35. This is implicit in the General Court’s Order in *Inuit Tapiriit Kanatami v. European Parliament & Council*. Case T-18/10 [2011] E.C.R., 5599 ¶ 50. This is expressly dealt with in its judgment in *Microban International Limited v. Commission*. Case T-262/10, [2011] E.C.R. II-7697, ¶¶ 31–32. There is absolutely no ground for interpreting the concept of direct concern in the last part of the fourth paragraph of Article 263 TFEU in a different manner than it is interpreted earlier in that paragraph; the old case-law applies in both contexts. In her Opinion in *Inuit Tapiriit Kanatami*, Advocate General Kokott took the same view: Case C-583/11 P, ¶ 29–31 (delivered Jan. 17, 2013). (The printed ECRs are no longer produced after the end of 2011.)

36. In relation to the same term in Art. I-34 of the Constitution. See e.g. Anthony Arnulf, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 88 (2nd ed. 2006); Antonio

seem unduly wide, and it ignores the fact that not every non-legislative act is regulatory in nature. Various authors have defended a narrower view, arguing that the term covers binding acts that are not legislative acts, as long as they are of general application.<sup>37</sup> However, there seems no good reason why a decision addressed to an individual could not be deemed a regulatory act,<sup>38</sup> as when the Commission imposes a competition prohibition and fine; similarly, State aid decisions are regulatory in character, as are decisions on European Regional Development Fund (ERDF), Social Fund or Cohesion Fund applications. Sometimes general acts may really be hybrid because of their individual effects, as with regulations adopted in relation to anti-dumping duties where individual duties are applied (as opposed to duties per country); again, more general in nature, countervailing duties against subsidies can also be viewed as regulatory measures, as can day-to-day acts in the field of agriculture and fisheries.

Arguments on the basis of the drafting in the Discussion Circle in the run up to the adoption of the ill-fated Constitution are, with respect, in fact of very little help. As is well-known, the

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Tizzano (2003) Dir. UE 455 at 471. Dougan, *supra* note 29 at 677–79 points out many problems. See, e.g., Koehn Lenacris, *Le Traité de Lisbonne et la Protection Juridictionnelle des Particuliers en Droit de l'Union* 45 CAHIERS DE DROIT EUROPÉEN 711, 725 (2009); Melchior Wathelet & Jonathan Wildemeersch, *Recours en Annulation: Une Première Interprétation Restrictive du Droit d'Action élargi des Particuliers?* 20 J. DE DROIT EUROPÉEN 75 (2012).

37. See, e.g., René Barents, *The Court of Justice in the Draft Constitution*, 11 MAASTRICHT J. EUR. & COMP. L. 121, 134 (2004); Carlos M. Alves, *La Hiérarchie du Droit Dérivé Unilatéral à la Lumière de la Constitution Européen: Révolution Juridique ou Sacrifice au Nominalisme?*, 1-2 CAHIERS DE DROIT EUROPÉEN 691, 726 (2004).

38. Schwensfeier feels that the term 'regulatory act' only covers non-legislative acts of general application (a view apparently shared by the Parliament and the Commission). See SCHWENSEFEIER, *supra* note 3 at 340; Letter from European Union Commission to the Aarhus Convention Compliance Committee (Feb. 26, 2010), available at [http://www.uncece.org/env/pp/compliance/C2008-32/correspondence/FrEC\\_ReplyQuestion\\_26Feb2010.pdf](http://www.uncece.org/env/pp/compliance/C2008-32/correspondence/FrEC_ReplyQuestion_26Feb2010.pdf). But, as is explained in the text below, it is submitted that this approach is too narrow. See U.N. Econ. & Social Council, Apr. 11-14, 2011, 32nd meeting, available at [http://www.uncece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1\\_as\\_submitted.pdf](http://www.uncece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf) (adopted 14 Apr. 2011). See also, Gertjan J. Harryvan & Jan H. Jans, *Internal Review of EU Environmental Measures*, 3 EUR. REV ADMIN. L. 53, 63 (2010). Christoph Werkmeister, Stephan Pöters, and Johannes Traut give an interesting discussion of the meaning of regulatory acts looking at the different language versions of the TFEU. See Christoph Werkmeister, et al, *Regulatory Acts Within Article 263(4) TFEU: A Dissonant Extension of Locus Standi for Private Applicants*, 13 C.A.M.B. Y.B. EUR. L. STUD. 311 (2012).

wording used in Article III-365(4) of the Constitution is that used in the 4th paragraph of Article 263 TFEU. But these discussions are actually inconclusive, failing to explain *why* the term ‘regulatory act’ was preferred to other suggestions, and what precisely should be understood by that term.<sup>39</sup> It appears, therefore, that a more pragmatic approach is required: taking account of what an act seeks to do, rather than the name given to it, looking to the effects of the measure rather than merely to its form.

### III. JUDICIAL RESPONSES: MORNING CLOUDS

Two decisions of the General Court cast important light on the meaning of regulatory measures. First, in Case T-18/10 *Inuit Tapiriit Kanatami et al v European Parliament & Council* a number of representatives of the Inuit and various trading companies sought the annulment of Regulation 1007/2009<sup>40</sup> which imposes a ban on the importation and sale of seal products, save ‘only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence.’ The other exceptions in the regulation are not relevant here. The General Court, dealing with the case by way of an Order,<sup>41</sup> had to consider the meaning of a ‘regulatory act’. It noted that the fourth paragraph of Article 263 TFEU permitted a natural or legal person to institute proceedings against:

an act addressed to that person;

a legislative or regulatory act of general application which is of direct and individual concern to that person, and certain acts of general application, namely regulatory acts which are of direct concern to the person concerned and do not entail implementing measures.

The General Court found that this third group was not restricted to delegated legislation, but covered any regulatory act. On the basis of the history of the adoption of Article III-365(4) of the Convention, it found that the intention was to

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39. See SCHWENEFIEER, *supra* note 3 at 337–39.

40. Council Regulation No. 1007/2009/EC on Trade in Seal Products, 2009 O.J. L 286/36.

41. *Inuit*, [2011] E.C.R. II-5599, ¶ 38–40

draw a clear distinction between legislative and regulatory acts. The idea was to avoid the situation so clearly criticised by Advocate General Jacobs in which an individual would be forced to break the law to have access to the courts. For legislative acts, the old requirements of direct and individual concern still stood, however. The conclusion was that 'regulatory acts' meant all acts of general application apart from legislative acts. The Court then went on to consider whether the applicants could satisfy the old direct and individual concern arguments: it found some of the applicants were directly concerned, on the ground that they were active in the placing on the EU market of seal products and affected by the general prohibition of the placing on the market of those products. Those whose business activity was not such placing on the EU market and/or those covered by the Inuit or other indigenous people exception were not directly concerned. The finding of direct concern for four of the applicants was to no avail, however, as they were found not to be individually concerned within the *Plauman* doctrine.

In its second decision, and the first judgment on this question, in *Microban International Ltd et al v Commission*,<sup>42</sup> the General Court dealt with additives which could be used in the manufacture of plastic materials and articles intended to come into contact with foodstuffs, particularly dealing with the product 'triclosan'. That product had been included in the provisional list of additives.<sup>43</sup> However, following withdrawal of the application by its manufacturer for authorisation, the Commission removed that product from the list, while permitting its use for a transitional period.<sup>44</sup> Unsurprisingly, the manufacturer did not contest that decision. Microban was a producer of additives designed to provide protection in a range of products designed to come into contact with foodstuffs.<sup>45</sup> The Commission argued that the decision was not a regulatory act.

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42. *Microban*, [2011] E.C.R. II-7697, ¶¶ 1–10.

43. This provisional list is provided for by a Commission Directive. See Commission Directive 2002/72/EC 2002 O.J. L 220/18, Annex III.

44. Commission Decision No. 2010/169, 2010 O.J. L 75/25.

45. In his perceptive case note on *Microban*, Mathijs van Wolferen argues that the reason why Microban suffered damage was that the producer withdrew its application for approval of "triclosan." (2012/5) 13 EHRC 41 at 52. However, the legal effect on Microban was directly as a result of the Commission's reaction to that withdrawal, which was a standard response.

The General Court disagreed, finding that the decision concerned was adopted in pursuance of powers conferred on the Commission to adopt implementing measures; the decision was not legislative in character, but applied to objectively determined situations and produced legal effects relating to categories of persons considered in general and in the abstract. Anyone engaged in the production and/or marketing of 'triclosan' and materials and articles containing it would be affected by the ban on its marketing within the EU from 1 November 2011. Rightly, in view of the aim of the fourth paragraph of Article 263 TFEU to open up standing requirements (at least to an extent), the General Court refused to interpret direct concern in the last part of that provision in any manner other than the traditional one, which applied to the first mention of that term. Accordingly, the General Court found Microban directly concerned in relation to a regulatory act not entailing implementing measures and then proceeded to annul the decision on two grounds: the wrong choice of legal basis and, for good measure, the total absence of any legal basis at all for the decision!

These decisions show that the General Court has taken the narrower view of what constitutes a regulatory measure, following *inter alios* Schwensfeier and the Commission in emphasising the need for the act to be of general application as well as non-legislative in nature.

While the judgment of the General Court in *Microban* was not appealed, the judgment of the General Court in *Inuit* was, and Advocate General Kokott delivered her Opinion on the appeal on 17 January 2013.<sup>46</sup> Opining that the appeal should be dismissed, she dealt initially with the General Court's interpretation of the expression 'regulatory act'. She had little difficulty in concluding that it would be inappropriate to embrace legislative acts within the term 'regulatory acts' and thus she approved the General Court's characterisation of 'regulatory acts' as all European Union acts of general application other than legislative acts. She noted that the applicants' arguments were conceptually ill-founded: not all

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46. See generally, Opinion of Advocate General Kokott, *Inuit Tapiriit Kanatami*, [2013] E.C.R. I \_\_\_\_ (delivered Jan. 17, 2013) (not yet reported).

regulations, directives or decisions were adopted through a legislative procedure; the argument that a ‘regulatory act’ was clearly different from a legislative act was likewise unconvincing, as was the argument that implementing measures were not covered by the distinction between legislative and non-legislative acts. For good measure, she noted that today a challenge to a Commission implementing measure in the fisheries sector would be open to a firm in a situation analogous to that in *Jégo-Quéré*, although a litigant in the *UPA* situation would be left to the route of challenging either implementing measures adopted by the Commission or implementing measures adopted by the national authorities. She then examined whether the applicants surmounted the ordinary hurdles of direct and individual concern, finding that they failed to take these hurdles.

### III. COMMENTS AND PROBLEMS

Neither the General Court nor the learned Advocate General attempted to give any reason for requiring legislative acts to be of general application. The legislative history in the papers from the Discussion Circle on the Court during the Constitutional Convention does not support confining the term ‘regulatory act’ to acts of general application (a formulation in terms of acts of general application was actually rejected);<sup>47</sup> it does, of course support the distinction being drawn between legislative and regulatory acts.<sup>48</sup> In fact, there is no good reason to confine regulatory acts to acts of general application at all. However, the General Court did not seek to justify itself, given that it was unnecessary to deal with the issue of a wider criterion in order to resolve the dispute in *Microban*. There are plenty of acts that, though not legislative in nature, and not of general application, are clearly regulatory in nature. A competition decision addressed to an undertaking, for example, is essentially regulatory and addressed to specific persons; under long-

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47. See SCHWENSEFEIER, *supra* note 3 at 337–39.

48. Advocate General Watthet has however opined in *Stichting Woonlinie et al v Commission*, Case C-133/12 P, ¶ 29–30 (Opinion delivered on 29 May 2013) that the real distinction in the TFEU is between legislative and implementing acts., observing that non-legislative acts are referred to in art. 297(2) TFEU as ‘non-legislative acts’. He took the view that the measures had to be of general application, whether it were a legislative act or not (¶ 38).

standing case-law, complainants and others who have taken a substantial part in the procedure, can attack the act, but under the new fourth paragraph of Article 263 TFEU it may well be that those with a broader competitive relationship would now also be admissible, because the old more restrictive approach in Cases 10 & 18/68 *Società 'Eridania' Zuccherifici Nazionali v. Commission*<sup>49</sup> would not apply to regulatory measures (as only direct concern is required). However, there is no suggestion that the whole world could attack, say, a decision appointing an individual to a particular position, or a competition decision, and the existing criteria for direct concern should be enough to see off mere busybodies, while enabling a wider range of persons to challenge regulatory acts which do not involve implementing measures.

Under Article 290(1) TFEU, “[A] legislative act may delegate to the Commission power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the act.”<sup>50</sup> On the basis of *Microban*, it appears that replacement of an annex, or additions to or deletions from a positive or negative list will relatively speedily be regarded as regulatory. It would appear that the actual act amending the legislative act could be open to challenge more widely than the legislative act being amended was, no matter how strange that might seem at first sight. The justification must be sought in the specificity of the amendment, even though its effect is of general application to prohibit the manufacture and marketing of the product concerned: the amendment is essentially hybrid in nature.

Taking but one concrete example, adaptation to technical progress, such as in the form of revision of the REACH regulation,<sup>51</sup> is just one out of many areas in which delegated acts may well be found to be regulatory in nature. Amendments

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49. *Eridania v. Commission*, Case 18/68, [1969] E.C.R. 459.

50. The conditions under which delegation takes place will be laid down in the parent legislative act; they may include the possibility of revocation of the delegation by the European Parliament or the Council, and/or the subjection of the entry into force of the delegated act to no objection being raised by the European Parliament or the Council within a period set by the parent legislative act. See TFEU, *supra* note 1, art. 290, 2008 O.J. 115.

51. European Parliament & Council Regulation, 2006 O.J. L 396/1, as last amended by Commission Regulation 2012 O.J. L 41/1.



to the REACH regulation have been taking place under the comitology procedure prescribed in that regulation, but since 1 March 2011 they take place under the new comitology rules contained in Regulation 182/2011,<sup>52</sup> with the application of the transitional provisions contained in Article 11 of that latter regulation. The same is true in relation to other areas where amendments are still being adopted by old-style implementing measures under the comitology procedure prescribed in the parent acts.

However, it is worth recalling that a subtle but explicit change appears to be taking place in measures taken by the Commission on the basis of powers conferred now by the European Parliament and the Council. What used to be called implementing measures or adaptations to technical progress adopted under comitology, actually become *delegated acts* in the post-Lisbon terminology in certain circumstances. Thus post-Lisbon implementing acts are not the same as pre-Lisbon implementing acts: any amendment of non-essential elements of parent legislation will have to be adopted under the delegated non-legislative act procedure, as will supplementary measures, whereas previously this would have been achieved through implementing measures. New-style implementing measures are different in nature from those adopted hitherto: they will deal only with 'uniform conditions for implementing legally binding Union legislation'. Jean-Claude Piris explains that as delegated powers involve amendments to legislative acts, supervision is at the level of the European Parliament and the Council, whereas implementing legislation 'new style' deals with uniform implementing conditions, which means legislation which would otherwise have been adopted at national level; accordingly supervision would continue to be by committee arrangements.<sup>53</sup>

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52. Council Regulation No. 182/2011 2011 O.J. L 55/13 (laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers) [hereinafter *Implementing Powers Regulation*]. See 2011 O.J. C 206/11 (providing the Standard Rules of Procedures For Committees); Council Regulation, 2011 O.J. C 183/13 (laying out the rules of procedure for the appeal committee).

53. PIRIS, *supra* note 29 at 102–03. See Robert Schütze, 'Delegated' Legislation in the (New) European Union: A Constitutional Analysis 74 *MOD. L. REV.* 661 (2011) (giving a constitutional perspective on new-style delegation).

New style implementing acts adopted by the Commission (or in duly justified cases and in the cases provided for in Articles 24 and 26 TEU<sup>54</sup> adopted by the Council) may constitute regulatory acts, but may not, or may do so only in part; again, it seems that more depends on the context or effects than on a clear one-categorization-fits-all approach. Some examples may illustrate the difficulties. The Commission is empowered under the Customs Code<sup>55</sup> to issue (by way of regulations) binding tariff information, but it has hitherto proved notoriously difficult to challenge such acts;<sup>56</sup> it seems likely that this situation should change, as this type of act can typically be characterized as a regulatory act.<sup>57</sup> Although the act is normative (as a regulation), it is nevertheless clearly not legislative, as it is not adopted by a legislative procedure. It appears regulatory in nature as it forms a specific act of general application designed to govern the actions of customs authorities of the Member States. The same approach must apply in respect of binding origin information. Although in relation to competition, state aids, and dumping there is a well-defined set of persons whose appeals are admissible even under existing case-law, there remains, as has been explained above in relation to competition law, the set of persons who up to now have not been held to have standing: those in a very general competitive relationship with the addressee of a decision in the competition or State aids fields; those who are independent importers in anti-dumping cases. It is submitted that the concept of regulatory measures must be wide enough to embrace such

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54. These deal with certain matters relating to the EU's Common Foreign and Security Policy. See TFEU *supra* note 1, art. 291 (2), 2012 O.J. L 326/173 & TEU, *supra* note 1, arts. 24 & 26, 2012 O.J. L 326/30–31.

55. See LAURENCE W. GORMLEY, *EU LAW OF FREE MOVEMENT OF GOODS AND CUSTOMS UNION* (Oxford, 2009). The Community Customs Code is contained in European Parliament & Council Regulation 2913/92, 1992 O.J. L 302/1 as last amended by Council Regulation 1791/2006, 2006 O.J. L 363/1. The Modernised Customs Code is only partially in force as yet, and then only as regards procedural matters. See European Parliament & Council Regulation, 2008 O.J. 145/1.

56. A singular exception is *Sony Computer Entertainment Europe Limited v. Commission of the European Communities*, Case T-243/01, [2003] ECR II-4189. More typical is the fate of litigants in *Apple Computer International v. Commission of the European Communities*, Case T-82/06, [2008] ECR II-279.

57. See Laurence W. Gormley, *Some Problems of the Customs Union and the Internal Market*, in *FROM SINGLE MARKET TO ECONOMIC UNION ESSAYS IN MEMORY OF JOHN A. USHER* 87, 90–92 (N. Nic Shuibhne & L.W. Gormley eds., 2012).

persons, offering them access to the direct route for appeals to the centralised Union judiciary, as opposed to the indirect route of persuading a national court to make a reference for a preliminary ruling.

Sometimes the Commission is empowered to adopt individual measures in pursuance of a parent regulation. Examples include novel foods and novel food ingredients;<sup>58</sup> nutrition and health claims made for food,<sup>59</sup> and geographical indications and designations of origin for agricultural products and foodstuffs.<sup>60</sup> Here too, as with decisions in the competition, State aids and dumping fields, the acts are essentially regulatory, even if they do not readily fall into the categories of delegated or implementing acts; they are acts involving the exercise of powers in a given situation.

If new-style implementing measures necessarily entail national implementing action, they will continue to be governed by the traditional approach to standing of the Court of Justice. Both delegated acts and implementing acts, in so far as they are regulatory in nature, would benefit from the new approach. But whether they will depends on the conditions of the second point being fulfilled.

Turning now to the second point, the term ‘implementing measures’ must be understood, it is submitted, as covering any implementing measures, whether at Union level or at national level.<sup>61</sup> This certainly excludes directives, as they always require implementing measures at national level.<sup>62</sup> Sometimes other EU acts may in one or more provisions expressly compel or authorize the Member States to adopt particular measures or types of measures. Would the inclusion of such obligations in a

58. European Parliament & Council Regulation 258/97, 1997 O.J. L 43/1, last amended by Regulation 596/2009, 2009 O.J. L 188/14.

59. European Parliament & Council Regulation 1924/2006 (O.J. 2006 L 404/9, corr. O.J. 2007 L 12/3), last amended by Regulation 116/2010, 2010 O.J. L 37/16.

60. Council Regulation 510/2006, 2006 O.J. L 93/12), last amended by Regulation 417/2008, 2008 O.J. L 125/27) governing the PDO-regime.

61. Advocate General Wathlet has opined in *Stichting Woonlinie et al v Commission*, Case C-133/12 P, ¶ 48, (Opinion delivered on 29 May 2013) in relation to the concept of an act not entailing implementing measures, that such measures should be removed from the national sphere and confined to Union law, or at least measures adopted by the national authorities without there being any discretion on their part, should not be covered by this concept.

62. See van der Jeught, *supra* note 29, at 300.

non-legislative act of general application defeat any attempt to challenge other aspects of the act? The Implementing Regulation for the Customs Code<sup>63</sup> is a good example of an area in which such complications may occur. It is also unclear just what implementing measures are, certainly at the national level. Suppose that a decision is issued by the Commission on binding tariff information or binding origin information and is then applied by national customs offices to the products concerned. Is the application of that decision to a concrete case an implementing measure within the meaning of Article 263 TFEU? It seems that the better view must be that it is not, otherwise the new Article 263 TFEU would do nothing to ease the notorious difficulty in challenging such decisions; in reality the regulation is being applied in a specific case, as opposed to being implemented through national measures. Similarly, the fact that effect is given to anti-dumping measures, for example, by national customs authorities when they register imports or collect duties, should not be seen as involving national implementing measures for the purposes of the fourth paragraph of Article 263 TFEU. Again, it is difficult to argue that the act by which a Member State grants a State aid is an implementing measure of a Commission decision finding the proposed aid compatible with the internal market (the decision deals with the compatibility issue and is not itself implemented, save in the sense that the Member State concerned must comply with any conditions laid down by the Commission). On the other hand, a decision requiring a Member State to obtain repayment of unlawfully granted aid would involve implementing measures—an enforceable legal act of the Member State requiring repayment. It is submitted that acts which are merely carrying out the instructions or the logical individual consequences of a regulatory act do not prevent the regulatory act from being open to challenge merely on demonstration of direct concern.

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63. Commission Regulation 2454/93, O.J. 1993 L 253/1, as last amended by Regulation 1063/2010, 2010 O.J. L 307/1.

## CONCLUSION

Roland Schwensfeier, after an outstanding consideration of individuals' access to justice in the EU context, felt that the new wording of Article 263 TFEU was 'a sham package'.<sup>64</sup> On the basis of the case-law so far, this view may be on the harsh side. For the reasons advanced above, it is submitted that the General Court and Advocate General Kokott were, with respect, misguided in confining the ambit of regulatory acts to acts of general application. It remains to be seen what the Court of Justice will make of the appeal in *Inuit*,<sup>65</sup> in the meantime an appeal against an Order of the President of the General Court<sup>66</sup> dismissing an application for interim measures to suspend the operation of Regulation 1007/2009 was dismissed by Order of the President of the Court of Justice as not being capable of bringing any advantage to the applicant.<sup>67</sup>

While the General Court's definition may perhaps suffice for a great number of cases, the objections advanced above make it clear that it does not yet go far enough. Bearing in mind that the whole point of the amendment to standing requirements was to open up judicial review somewhat, it would be a retrograde step if the door were again immediately to be slammed shut as far as possible.

If *Inuit* and *Microban* are the indicators that the ray of light remains a ray, rather than something which will develop into a beam, they do not advance the cause of effective judicial protection at the level of the centralised Union judiciary far enough to give cause for rejoicing. Until such time as the Court of Justice is prepared to acknowledge that the *Plauman* definition of individual concern, while explicable, is fundamentally flawed, judicial review at European Union level remains under a cloud. It is to be hoped that the Court of Justice will eventually set matters right, although it would be unwise to advise litigants to hold their breath in expectation. As for the definition of 'regulatory acts', it may well be that the

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64. See SCHWENSEFEIER, *supra* note 3 at 341–42.

65. *Inuit Tapiriit Kanatami et al v. European Parliament and Council of the European Union*, Case C-583/11 P (delivered Jan. 17, 2013).

66. *Inuit Tapiriit Kanatami v. European Parliament & Council*. Case T-18/10 RII-INTP, [2011] E.C.R., (not yet reported), ¶ 50.

67. *Id.*

Court will wait until the facts compel it examine an act which is not of general application before addressing the issue. It can always side-step the issue by finding no direct concern.

*VALEDICTORY*

Konrad Schiemann has continued the tradition of distinguished British judges in the European Court of Justice in contributing to the development of European Union law, and has followed his own path as successor to Gordon Slynn and Jack Mackenzie Stuart. I have had the pleasure of working with him on the Editorial Board of the *European Law Review*, where his wise counsel and eminent decency and generosity of spirit have been highly valued. Those characteristics, with his determination to address the arguments and decide on the merits of the case, have been invaluable; he is rightly held in very high esteem indeed.