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The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon

Magdalena Kucko*

ABSTRACT

In 2007, the Lisbon Treaty introduced changes to private parties' rights to file actions for annulment of European Union measures. As pre-Lisbon, it was exceedingly difficult for private parties to succeed in filing such an action, the aim of the new Article 263 TFEU was primarily to relax standing conditions for these actors. However, as the new provision contained terms that were not defined anywhere else in the Treaty, it took several decisions of the European Court of Justice to clarify the position of private parties under Lisbon. By analysing both the pre- and post-Lisbon case law of the European Court of Justice, this article identifies that the new Article 263 TFEU now contains two different standing tests: the 'general standing test' for legislative acts where applicants have to prove direct and individual concern, and the 'Lisbon test' of direct concern for regulatory acts that do not contain implementing measures. It concludes that, while the Lisbon Treaty has made it easier for natural or legal persons to challenge non-legislative acts of general application, the status of private parties wishing to challenge European Union acts that have been adopted under the ordinary legislative procedure has remained unchanged.

INTRODUCTION

Article 6 of the European Convention on Human Rights and Fundamental Freedoms lays down the fundamental right to an effective legal remedy. This right has furthermore been included in the Charter of Fundamental Rights of

the European Union,¹ and because of its importance, it has also found its way into the Treaty on the Functioning of the European Union (TFEU).²

As the European Union (EU) develops its policy through regulations, directives and decisions, it can effectively be regarded as having a fully functioning legal system. It is vital for an institution with such pervasive legislative power to contain a mechanism for testing the legality of its measures, and the principal TFEU provision through which this can be done is the annulment procedure codified in Article 263 TFEU.³

Apart from providing European institutions with the right to challenge the legality of EU acts, Article 263 TFEU also grants natural and legal persons, i.e. the so-called 'non-privileged' applicants listed in Article 263(4) TFEU, the right to file actions for annulment. According to Article 263(4) TFEU, non-privileged applicants are only allowed to bring an annulment action if they are either (1) addressees of the act; (2) the act in question is of direct and individual concern to them; or (3) against a regulatory act which is of direct concern to them and does not entail implementing measures.

The Lisbon Treaty introduced the aforementioned third type of case in which private parties can bring an action for annulment by removing the requirement for individual concern when it comes to challenging regulatory acts which do not entail implementing measures.⁴ Pre-Lisbon, private parties could traditionally only challenge acts to which they were not addressees if they were able to prove 'direct and individual concern' – and it was the requirement of individual concern as interpreted by the Court of Justice of the European Union (the Court) that made it 'exceedingly difficult' for them to prove their *locus standi* pursuant to the old Article 230 EC.⁵ Namely, in the *Plaumann* ruling from the early 1960s, the Court developed a highly restrictive test for establishing a private party's individual concern.⁶ The *Plaumann* formula, which will *inter alia* be discussed in this paper, has been severely criticised for making economically

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¹ Charter of Fundamental Rights of the European Union [2000] OJ C 364/01, Art. 44.

² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 (Treaty on the Functioning of the European Union), Art. 263.

³ *ibid* art 289; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, (6th edn, OUP 2015) 509.

⁴ Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community [2007] OJ C 306/1, Art. 214.

⁵ L Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities*, (5th edn, Sweet & Maxwell 2000) 146.

⁶ Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95.

arbitrary distinctions and for favouring private interests over public ones.⁷ Even though some attempts were made to alleviate the threshold set by *Plaumann*, the formula has remained unchanged until present time.⁸ It was nevertheless the aim of the Lisbon Treaty to, as the Court put it, ‘relax’ the admissibility conditions of the annulment action for natural and legal persons by removing the requirement of individual concern for regulatory acts that do not contain implementing measures.⁹ Unfortunately, the wording of the new provision does not provide us with much clarity, as the precise meaning of both the term ‘regulatory act’ and the expression ‘act which does not contain implementing measures’ has not been defined in the Lisbon Treaty.

In this article, I offer an interpretation of the status of natural or legal persons according to the new Article 263 TFEU as enacted by the Lisbon Treaty. The paper will seek to answer the question as to whether the new provision has successfully managed to make it easier for private parties to file an action for annulment of a EU measure. In order to do so, it will first provide a brief explanation of Article 263 TFEU itself. Then, the pre-Lisbon status of natural or legal persons will be analysed by looking at the old Treaty Articles and case law. Finally, in order to reach a conclusion as to the post-Lisbon status of private parties, the meaning of the new provision will be explained in the light of recent cases.

I. ARTICLE 263 TFEU

Article 263 TFEU gives the Court the power to review the legality of acts of European institutions such as the Council, Commission and the European Central Bank (ECB) other than recommendations and opinions. Acts of the European Parliament (Parliament), the European Council and other EU bodies, offices or agencies can also be reviewed, but only if they are intended to produce legal effects vis-à-vis third parties.

Pursuant to Article 263(2) TFEU, there are four grounds on the basis of which the aforementioned acts can be annulled, namely lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, and misuse of power.

⁷ Damian Chalmers, Gareth Davies and Gionio Monti, *European Union Law*, (2nd edn, CUP 2010) 397.

⁸ Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677; Case C-263/02 *Commission v Jégo-Quéré & Cie SA* [2004] ECR I-3425.

⁹ Case C-132/12 *Stichting Woonpunt v Commission* [2014] ECR EU:C:2014:100, para. 43.

Article 263(2) TFEU stipulates that an action for annulment can be brought by Member States, the Parliament, the Council or the Commission. Given the absence of any words of limitation, it is clear that these applicants have unlimited standing to challenge a measure – they are the so-called ‘privileged’ applicants who are always allowed to bring actions for annulment.¹⁰ The Court of Auditors, the ECB and the Committee of Regions – the ‘semi-privileged’ applicants – are mentioned in Article 263(3) TFEU, which gives them standing only to protect their own institutional prerogatives.¹¹

As mentioned above, 263(4) TFEU also grants natural or legal persons the right to file actions for annulment. They may do so under the conditions laid down in Article 263(1) and (2) TFEU, meaning that they can only seek to annul acts enacted by one of the institutions listed in Article 263(1) TFEU and only on the basis of one of the grounds mentioned in Article 263(2) TFEU.

Furthermore, all applicants must adhere to the time limit of two months after publication of the measure in question set in Article 263(6) TFEU.¹²

If an annulment action is well-founded, the Court will declare the act void according to Article 264 TFEU, even though it is possible that only part of the measure will be affected by the illegality ruling.¹³ Nullity is retroactive, thus an act annulled under Article 264 TFEU is considered as having been void *ab initio*,¹⁴ and such a ruling has an effect *erga omnes* by binding all national courts in the EU.¹⁵

II. PRE-LISBON SITUATION

The EEC and EC Articles

¹⁰ Paul Craig and Gráinne de Búrca (n 3) 514; Chalmers, Davies and Monti (n 7) 413, 397.

¹¹ Damian Chalmers, Gareth Davies and Giorgio Monti (n 7) 397.

¹² Cases C-478/11 - C482/11 *Gbagbo e.a. v Council* [2013] ECR EU:C:2013:258.

¹³ Treaty on the Functioning of the European Union, Art. 264(2).

¹⁴ Case C-228/92 *Roquette Frères SA v Hauptzollamt Geldern* [1994] ECR I-1445, para. 17; Cases T-481 and 484/93 *Vereniging van Exporteurs in Levende Varkens v Commission* [1995] ECR II-2941, para 46; Case T-171/99 *Corus UK Ltd v Commission* [2001] ECR II-2967, para. 50.

¹⁵ Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze* [1981] ECR 1191; AG Toth, ‘The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects’ (1984) 4 *Yearbook of European Law* 1, 49.

The right of natural and legal persons to file an action for annulment was first enshrined in Article 173(2) of the Treaty establishing the European Economic Community (EEC). Article 173(1) EEC gave the Court the competence to review acts ‘other than recommendations or opinions of the Council and Commission’. It then went on to mention Member States, the European Council and the European Commission as applicants who can file appeals on the grounds of ‘incompetence, of errors in substantial form, of infringement of the Treaty or of any legal provision relating to its application, or of abuse of power’.

Article 173(2) EEC provides that ‘[a]ny natural or legal person may, under the same conditions, appeal against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to him.’

With the entry into force of the Treaty establishing the European Community (EC), the annulment procedure was codified in Article 230 EC. There were no substantial changes in the wording of the Article, except that now acts of the European Parliament and the ECB could also be subject to review by the Court. The European Parliament was given the status of privileged applicant together with the Member States, Council and Commission, while the Court of Auditors and the ECB could now file actions for annulment as semi-privileged applicants under Article 230(3) EC.

Article 230(4) EC read as follows:

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

Thus, prior to the entry into force of the Lisbon Treaty on 1 December 2009, it was only possible for private parties to bring an action for annulment against EEC/EC measures that were of ‘direct and individual’ concern to them. The exact meaning of these terms was provided by the Court and will be discussed now.

Direct Concern

As historically, individual concern has been the greater obstacle to *locus standi* for non-privileged applicants, the case law on direct concern has remained limited. This may change in the future, as when it comes to regulatory acts enshrined in the new Article 263 TFEU, the test of individual concern has been removed, meaning that for this type of measures the direct concern test is the only requirement that private parties need to satisfy. More jurisprudence on this matter is therefore to be expected.¹⁶

Direct concern has two dimensions. Firstly, there needs to be a direct, causal link between the act that is being challenged and the damage the applicant has suffered. This essentially means that the measure must directly affect the legal situation of the applicant and no discretion is to be left to the addressees of the measure entrusted with its implementation.¹⁷ The implementation must be ‘purely’ automatic and result directly from EU rules – no other transitional rules can apply.¹⁸ If a margin of discretion is left to national authorities with regard to the implementation of a measure, the chain of causation will be broken, as in such a situation it can be argued that it is in fact the national measure that caused damage to the applicant. As was illustrated in cases such as the *International Fruit Case* and *Differdange*, in order to establish potential discretion, the Court will look whether the EU act at hand affords any leeway.¹⁹ Apart from this, it is vital to ascertain whether in practice, this discretion will actually be exercised by national authorities. For example, in *Piraiki-Pitraki*, the Court ruled that after having obtained Commission authorisation to continue a pre-existing regime restricting cotton imports from Greece, ‘there was no more than a theoretical possibility’ that France would not proceed in applying it. Therefore, the Commission authorisation legalising the national regime in question directly concerned the Greek cotton exporters who had sought to annul it.²⁰

Secondly, the interest affected by the EU measure in question must be of legal nature. If the measure infringes on a particular interest that has not been recognised by the Court as a legally protected interest, the applicant in question will not be able to prove direct concern.²¹ The *Front National* decision provides us with a good example of the Court’s approach in this respect. The issue in this case was that a number of independent MEPs, including several members of the

¹⁶ Damian Chalmers, Gareth Davies and Giorgio Monti (n 7) 415.

¹⁷ *ibid* 416; Paul Craig and Gráinne de Búrca (n 3) 515.

¹⁸ Case T-29/03 *BUPA and Others v Commission* [2008] ECR II-81; Case 69/69 *Alcan v Commission* [1970] ECR 385; Case C-386/96 *Société Louis Dreyfus & Cie v Commission* [1998] ECR I-2309.

¹⁹ Cases 41-44 *NV International Fruit Company v Commission* [1971] ECR 411; Case 222/83 *Municipality of Differdange v Commission* [1984] ECR 2889.

²⁰ Case 11/82 *Piraiki-Pitraki v Commission* [1985] ECR 207.

²¹ Damian Chalmers, Gareth Davies and Giorgio Monti (n 7) 417.

French far-right political party Front National, did not belong to any political group in the Parliament. The MEPs attempted to establish a mixed 'TDI' group but Parliament refused to grant it group status. This decision was then challenged both by the independent MEPs individually and the Front National itself. Front National was held not to have direct concern because no legal right was directly infringed by the Parliament's act: Front National had no legal right to form its own group or to join another group.²²

Individual Concern

The Plaumann Formula

The second part of the test that individual applicants had to pass is that of individual concern as defined in *Plaumann*. In 1961, the German authorities requested Commission authorisation for suspension of collection of duties on clementines imported from non-member states. The Commission refused to grant authorisation and addressed its refusal to the German Government. The applicant, an importer of clementines, contested the legality of the Commission's decision. As the decision had not been addressed directly to Mr Plaumann, he had to demonstrate individual concern, but the Court ruled that that the applicant had no *locus standi*. In doing so, it developed a formula that would remain in use until the present day.

According to the decision in *Plaumann*:

[P]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.²³

It is necessary that these attributes or circumstances are fixed and determinate and that they distinguish members from the rest.²⁴

²² Case C-486/01 *Front National v European Parliament* [2004] ECR I-6289. See also Case C-15/06 *Regione Siciliana v Commission* [2007] ECR I-2591.

²³ Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95.

²⁴ Damian Chalmers, Gareth Davies and Giorgio Monti (n 7) 418.

When applying the *Plaumann* test that will determine whether this is the case, regard must be had as to whether, at any certain date in the future, there is a possibility that the group in question will no longer be fixed and determinate.²⁵ In *Plaumann*, the Court effectively adopted this test by ruling that any of us could, in theory, become clementine importers in the future, and that therefore, Mr. Plaumann could not be distinguished from others.

In this respect, one could also make a distinction between open and closed ('fixed') categories of applicants. A category can be regarded as an open one when its membership has not been fixed at the time of the decision. A closed category is one where membership is thus fixed. Individual concern can only be claimed in this second case.²⁶

The Plaumann Formula: Regulations and Directives

In *Plaumann*, an action for annulment was filed against a decision addressed to another. However, pre-Lisbon, there were also cases in which applicants tried to prove individual concern for legal acts that took the form of a regulation or directive. While the text of the old Article 230(4) EC was ambiguous as to whether private parties could challenge the validity of regulations or directives, prior to the entry into force of the Lisbon Treaty, the Court had established that such persons could in principle challenge the legality of a directive. Still, the applicant had to satisfy the strict *Plaumann* requirement of individual concern.²⁷

When it comes to challenging regulations, the pre-Lisbon situation was more complicated. Initially, there were two tests in case law: the closed category test and the abstract terminology test.²⁸ Eventually, the Court adopted the stricter abstract terminology test as exemplified in *Calpak* and a number of other judgments.²⁹ According to *Calpak*, a regulation could be regarded as a 'true

²⁵ Paul Craig and Gráinne de Búrca (n 3) 520.

²⁶ Trevor C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community* (6th edn, OUP 2007) 348; see also Case C-519/07 *Commission v Koninklijke FrieslandCampina NV* [2009] ECR I-8495.

²⁷ Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605; Case T-135/96 *UEAPME v Council* [1998] ECR II-2335; Case T-94/04 *EEB v Commission* [2005] ECR II-4919.

²⁸ Closed category: see Cases 41-44/70 *NV International Fruit Company v Commission* [1971] ECR 411; Case 100/74 *Société CAM SA v Commission* [1975] ECR 1393; Case C-354/87 *Weddel v Commission* [1990] ECR I-3487.

²⁹ Cases 789 and 790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 1949; Cases 103-109/78 *Beauport v Council and Commission* [1979] ECR 17; Case 162/78 *Wagner v Commission* [1979] ECR 3467; Case 45/81 *Alexander Moksel Import-Export GmbH & Co Handels KG v Commission* [1982] ECR 1129.

regulation' only if it applied to 'objectively determined situations and if it produced legal effects with regard to categories of persons described in a generalised and abstract manner'.³⁰ If a regulation was found to be a 'true regulation' then the Court would conclude that the applicant was not individually concerned.³¹

However, in *Cordoniu* the Court overturned this position by ruling that even if, upon application of the abstract terminology test, a regulation was to be regarded as a 'true regulation', it could nevertheless be of individual concern to the applicant.³² Just as in the case of directives, the applicant then had to satisfy the *Plaumann* test. It can thus be said that the dominant approach of the Court post-*Cordoniu* was 'pure *Plaumann*'.³³

Criticism and Attempts to Change the *Plaumann* Doctrine

The *Plaumann* test provoked much discussion in the literature, most of it critical.³⁴ The main concerns about the *Plaumann* formula were that the wording of the Treaty did not satisfy such a strict standing test, and that it essentially prevented private parties from exercising their right to judicial redress. From this, it followed that the right to effective remedy was not sufficiently guaranteed in the EU legal system.³⁵

³⁰ Cases 789 and 790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 1949, para. 9.

³¹ John Tillotson and Nigel Foster, *Text, Cases and Materials on European Union Law* (4th edn, Cavendish Publishing Limited 2004) 515.

³² Case C-309/89 *Cordoniu SA v Council* [1994] ECR I-1853.

³³ Exceptions to 'pure *Plaumann*': Cases T-480 and 483/93 *Antillean Rice Mills NV v Commission* [1995] ECR II-2305; Cases T-32 and 41/98 *Government of the Netherlands Antilles v Commission* [2000] ECR II-20; Case T-33/01 *Infront WM AG v Commission* [2005] ECR II-5897.

³⁴ Angela Ward, 'Locus Standi Under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity' (2003) 22 *Yearbook of European Law* 45; Anthony Arnall, 'Private Applicants and the Action for Annulment Since *Codorniu*' (2001) 38 *Common Market Law Review* 7; X Lewis, 'Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should it be Fixed?' (2006) 30 *Fordham International Law Journal* 5.

³⁵ Ami Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) 11 *Common Market Law Review* 1; Anthony Arnall, 'Private Applicants and the Action for Annulment since *Cordoniu*' (2001) 38 *Common Market Law Review* 7; Koen Lenaerts and Tim Corthaut,

Throughout the years, the Court defended its controversial rulings on the ground that applicants who did not have *locus standi* under Article 230 EC could always seek judicial protection by indirectly challenging a measure in national courts as provided for in Article 234 EC (now 267 TFEU). It has been argued that it was mainly the Court's fear of opening the floodgates to litigation, together with a desire not to obstruct the EC institutions in their task of implementing Community policies, which led to such a limitative interpretation of first Article 173 EEC and later Article 230 EC.³⁶

In *Extramet*, Advocate General Jacobs devoted several paragraphs of his Opinion to questioning the Court's reasoning.³⁷ However, his biggest attack on the *Plaumann* formula would come later, in *Unión de Pequeños Agricultores (UPA)*. This case concerned a Spanish trade association representing small agricultural producers who challenged a Council regulation which discontinued certain types of agricultural aid for small producers. Under the *Plaumann* test, the applicants could not demonstrate individual concern given that they were members of an open category of people. Advocate General Jacobs proposed a new test that would render an applicant individually concerned where a EU measure 'has or is liable to have, a substantial adverse effect on his interests'.³⁸ He thus shifted the focus from a formalistic test to one based on the economic impact of the EU measure.³⁹ The core of Advocate General Jacobs's Opinion was the stance that it is not *automatic* that a private applicant who does not have *locus standi* to bring an annulment action can *always* obtain a remedy by bringing an action before a national court that will then make a reference on validity to the Court: the national court may simply decide not to do so.⁴⁰

The General Court followed Advocate General Jacobs's Opinion in *Jégo-Quéré v Commission* and proposed a further relaxation of the *Plaumann* formula. In *Jégo-Quéré*, the General Court stated that:

[I]n order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and

Judicial Review as a Contribution to the Development of European Constitutionalism' (2003) 22 *Yearbook of European Law* 1.

³⁶ Josephine Steiner and Lorna Woods, *EU Law* (10th edn, OUP 2009), 294-95.

³⁷ Case C-358/89 *Extramet* [1991] ECR I-02501, Opinion of AG Jacobs, paras. 70-74.

³⁸ Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, Opinion of AG Jacobs, paras. 60, 103.

³⁹ Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2014) 274.

⁴⁰ Case C-50/00 *UPA* [2002] ECR I-6677, Opinion of AG Jacobs, paras. 36-49.

position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.⁴¹

Unfortunately, when *UPA* came before the Court, it chose not to follow Advocate General Jacobs's advice, but instead to insist on the *Plaumann* test.⁴² The Court also overturned the General Court's ruling in *Jégo-Quéré* on appeal.⁴³ In both cases, it stated that any potential reform must come from the Member States themselves instead of the Court.⁴⁴ It should be noted, though, that in its Report to the 1996 Intergovernmental Conference (May 1995) preceding the adoption of the Amsterdam Treaty,⁴⁵ the Court expressed its own doubts about the present law on standing:

It may be asked (...) whether the right to bring an action for annulment under Article 173 [later 230] of the EC Treaty, which individuals enjoy only in regard to acts of direct and individual concern, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions.

However, amendments to the wording of the Treaty provision concerning the annulment procedure were only made nine years later with the adoption of the Lisbon Treaty and the new Article 263 TFEU.

III. POST-LISBON SITUATION

A New Article 263 TFEU

The Lisbon Treaty finally succeeded in modifying the original standing rules applicable to natural or legal persons. By adopting the wording of Article III-365 of the ill-fated Constitutional Treaty,⁴⁶ the Lisbon Treaty introduced two amendments to the old Article 230 EC. Firstly, Article 263(4) TFEU states that

⁴¹ Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365, para. 51.

⁴² Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

⁴³ Case C-263/02 *Commission v Jégo-Quéré & Cie SA* [2004] ECR I-3425, paras. 29-39.

⁴⁴ *ibid* para 31; Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 45.

⁴⁵ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C340/01.

⁴⁶ Treaty Establishing a Constitution for Europe [2004] OJ C310.

‘any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them’, thus replacing the old formulation according to which individuals were able to challenge a *decision* addressed to them or a *decision*, ‘which, although in the form of a regulation’ was of direct and individual concern to them. This amendment can be seen as the result of a yearlong court practice according to which, as was noted above, the test of direct and individual concern was also used to test the legality of regulations and directives.⁴⁷ In addition, the amendment removed the requirement of individual concern for regulatory acts that are of direct concern and do not entail implementing measures. In order to assess the significance of this amendment, the terms ‘regulatory act’ and ‘implementing measure’ need to be analysed.

Regulatory Act

Initially, the meaning of the term ‘regulatory act’ was unclear. While the TFEU makes a clear distinction between legislative and non-legislative acts, with legislative acts comprising regulations, directives and decisions,⁴⁸ and non-legislative acts being delegated and implementing acts,⁴⁹ the Treaty does not provide any definition of the term ‘regulatory act’. In the absence of case law on the matter, the Future of Europe Convention that preceded the failed Constitutional Treaty provided some guidelines. The Final Report of the Discussion Circle, in discussing the standing requirements for natural or legal persons, expressed the view that the words ‘a regulatory act’ should be inserted into the new article, which would distinguish ‘legislative’ from ‘regulatory’ acts and adopt a ‘more open’ approach towards private individuals who challenge regulatory acts.⁵⁰

While the Final Report suggests that regulatory acts were intended to mean the same as non-legislative acts, it was non-binding and in any case concerned the Constitutional Treaty rather than the Lisbon Treaty. It was only after case law on the matter that the meaning of the term was settled.

⁴⁷ Case C-309/89 *Cordoniu v Council* [1994] ECR I-1853; Case C-10/95 *Asocarne v Council and Commission* [1995] ECR I-4149; Case T-420/05 *Vischim v Commission* [2009] ECR II-03911.

⁴⁸ Treaty on the Functioning of the European Union, Art. 289.

⁴⁹ *ibid* Arts. 290-91.

⁵⁰ The European Convention Secretariat, *Final Report of the Discussion Circle on the Court of Justice*, Convention 636/03.

Inuit I & II

The first opportunity for the General Court to interpret the meaning of the words ‘regulatory act’ arose in *Inuit Tapiriit Kanatami and Others v European Parliament and Council (Inuit I)*,⁵¹ followed by *Microban v Commission*.⁵²

In *Inuit I*, Inuit Tapiriit Kanatami, an association representing Canadian Inuits and a number of other companies involved in the manufacturing of seal products, filed an action for annulment against a Parliament and Council regulation – adopted under the ordinary legislative procedure – which imposed restrictions on the import of these products into the EU. The applicants claimed that the regulation in question was to be regarded as a regulatory act, and that there was therefore no need to show individual concern. The General Court however, referring to the drafting history of the Constitutional Treaty,⁵³ defined a ‘regulatory act’ as an act ‘of general application apart from legislative acts’.⁵⁴ It follows that the term is applicable only to non-legislative acts, for example (but not exclusively) general implementing and delegated acts covered by Articles 290 and 291 TFEU. On the other hand, legislative acts (regulations, directives and decisions) do not fall within this definition and are subject not only the test of direct concern but also to the stricter *Plaumann* test of individual concern.⁵⁵

As the act challenged in *Inuit I* was a legislative regulation, the General Court concluded that the general standing test (direct and individual concern) had to be applied. The result was that the applicants were denied *locus standi*, due mostly to the fact that they failed to pass the *Plaumann* test.

The General Court’s decision in *Inuit I* was appealed before the Court of Justice in *Inuit II*,⁵⁶ however the Court confirmed the lower court’s interpretation of ‘regulatory act’. It stated that ‘the concept of “regulatory act” provided for in the fourth paragraph of Article 263 TFEU does not encompass legislative acts.’⁵⁷ The Court also held that the new Treaty provision was in line with Article 47 of the Charter of Fundamental Rights of the European Union,

⁵¹ Case T-18/10 *Inuit Tapiriit Kanatami & Others v. European Parliament & Council* [2011] ECR 11-05599.

⁵² Case T-262/10 *Microban v. Commission* [2011] ECR 11-07697.

⁵³ Case T-18/10 *Inuit Tapiriit Kanatami & Others v. European Parliament & Council* [2011] ECR 11-05599, para. 50.

⁵⁴ *ibid* para. 56.

⁵⁵ Catherine Barnard and Steve Peers (eds) (n 40) 276.

⁵⁶ Case C-583/11 *Inuit Tapiriit Kanatami v Parliament and Council* [2013] ECR EU:C:2013:625.

⁵⁷ *ibid* para. 61.

thus providing a complete system of legal protection based on a combination of Articles 263 and 267 TFEU.⁵⁸ In addition, it ruled that the test for direct concern remained unchanged post-Lisbon by overruling the General Court's attempt to restrictively interpret this requirement.⁵⁹

Microban v Commission

Several weeks after it had determined the scope of 'regulatory act' in *Inuit I*, the General Court delivered its decision in *Microban v Commission*.⁶⁰ This was the first judgment in which the Lisbon Treaty exception was fully satisfied in a situation where the applicant would otherwise not have passed the general test of standing due to lack of individual concern. In *Microban*, an American producer of antibacterial additives brought an action for annulment against a Commission decision addressed to the Member States. The decision removed triclosan, a chemical substance, from the list of additives that could be used in the manufacture of plastics intended for the packaging of food products, which had been summed up in a previous Commission directive. The decision in question was an implementing act.

Applying *Inuit*, the General Court found that the Commission decision was (a) a non-legislative act of general application and thus a regulatory act and (b) of direct concern to the applicant as it directly affected the applicant's legal status, and clearly no discretion over its implementation was left to the Member States since it imposed a direct prohibition on the use of triclosan. It then addressed the issue of direct concern by emphasising that the interpretation of direct concern under the Lisbon Treaty would remain the same as pre-Lisbon.⁶¹ Finally, the Court recognised the applicant's standing and annulled the Commission decision on the grounds that it had no legal basis and that it breached a procedural requirement.⁶²

Although the judgment in *Microban* demonstrated how the new test developed under the Lisbon Treaty could benefit natural or legal persons, it did little to clarify the meaning of the injunction that the regulatory act must 'not entail implementing measures'. However, it did not take long before the courts interpreted this requirement as well.

⁵⁸ *ibid* paras. 48-51.

⁵⁹ *ibid* paras. 64, 66.

⁶⁰ Case T-262/10 *Microban v. Commission* [2011] ECR 11-07697.

⁶¹ *ibid* paras. 21-32.

⁶² *ibid* para. 69.

Implementing Measures

In reading Article 263(4) TFEU, it is clear that even if the impugned act can be categorised as a regulatory act, if implementing measures are present, then the exception will not apply and the applicant will again need to resort to the *Plaumann* formula.⁶³ Three recent cases elucidate the meaning of ‘implementing measures’.

Palirria Souliotis v Commission

In *Palirria Souliotis v Commission*, the General Court held that the direct concern test referring to the absence of the addressee’s discretion is different from the requirement set in Article 263(4) TFEU that the regulatory act in question cannot entail implementing measures.⁶⁴ This would form the starting point for the judgments in the following two cases.

Telefónica v Commission

The *Telefónica v Commission* case was the first to shed light on the meaning of the expression ‘implementing measures’.⁶⁵ The case concerned a Commission decision declaring that a Spanish financial aid scheme constituted illegal state aid. The Spanish government was required to recover the aid that was incompatible with the common market, and Telefónica SA, a company which had profited from the scheme, filed an action for annulment against the Commission’s decision.

In its ruling, the Court stated that the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person invoking the right to bring proceedings under Article 263(4) TFEU. It was irrelevant whether the impugned act entailed implementing

⁶³ Paul Craig and Gráinne de Búrca (n 3) 530.

⁶⁴ Case T-380/11 *Palirria Souliotis v Commission* [2013] ECR EU:T:2013:420, para. 44.

⁶⁵ Case C-274/12 P *Telefónica SA v Commission* [2013] ECR EU:C:2013:852.

measures ‘with regard to other persons’.⁶⁶ The Court went on to explain that when determining whether the measure in question entails implementing measures, reference should be made solely to the subject matter of the annulment action, and where only partial annulment of an act is sought, only the implementing measures which that specific part entails must be taken into account.⁶⁷ The Court made clear that the absence of implementing measures equals the absence of *any* measure to be taken by the addressee of the measure (that is, the Member State) that could generate ‘specific consequences’ for the applicant.⁶⁸

Ultimately, the Court rejected the application on the ground that the contested decision entailed implementing measures in Spain with regard to Telefónica SA.⁶⁹ Specifically, the contested decision simply declared the financial scheme in question to be inconsonant with the common market and did not contain any ‘specific consequences’ for each taxpayer. Those consequences had to be embodied in several administrative documents, which constituted ‘implementing measures’ as codified in Article 263(4) TFEU.⁷⁰

The Court highlighted that even though in this case, action under Article 263 TFEU was not possible, the applicant could still bring the contested decision before a national court, which could then start a preliminary ruling procedure pursuant to Article 267 TFEU.⁷¹

T & L Sugars v Commission

Most recently, in April 2015, the Court in *T & L Sugars and Sidul Açúcares v Commission* provided further clarification as to the expression ‘an act which does not contain implementing measures’.⁷² The applicants in this case were a group of cane sugar refiners established in the EU. In order to increase the sugar supply to the EU market (which was experiencing a shortage at the time), the Commission adopted several regulations. The purpose of these measures was (i) to allow European Union producers to market a limited quantity of sugar in excess of the domestic production quota, and (ii) to introduce a tariff quota

⁶⁶ *ibid* para 30.

⁶⁷ *ibid* para 31.

⁶⁸ *ibid* para 35; Catherine Barnard and Steve Peers (eds) (n 40) 277.

⁶⁹ Case C-274/12 *Telefónica SA v Commission* [2013] ECR EU:C:2013:852, para. 58.

⁷⁰ *ibid* para 35.

⁷¹ *ibid* para 59.

⁷² Case C-456/13 *T & L Sugars and Sidul Açúcares v Commission* [2015] ECR EU:C:2015:284.

allowing economic operators concerned to import certain quantities of sugar without having to pay import duties. The applicants were negatively affected by these regulations and filed an action for annulment before the General Court. As it was clear to the applicants that it would be impossible to prove individual concern, they sought to challenge the regulations on the basis of direct concern, which involved showing that the regulatory acts in question entailed no implementing measures. The General Court declared the action for annulment inadmissible.⁷³ On appeal, the applicants submitted that the Commission determined every detail of the contested regulations, while the Member States functioned merely as ‘mail boxes’. According to the applicants, the General Court erred when holding that even ‘automatic’ or ‘merely ancillary’ measures adopted by Member States under a EU regulation constitute decisions ‘implementing’ that regulation. They asserted that the existence of discretion should be taken into account when determining whether a Member State measure taken under the EU act in fact adds anything to that act.⁷⁴

The Court of Justice upheld the General Court’s decision. It first reiterated its reasoning from *Telefónica* by stating that when determining whether a regulatory act entails implementing measures, reference should be had to the position of the applicant, and that it is irrelevant whether the act contains implementing measures with regard to others.⁷⁵ It then found that the regulatory acts in question only produced legal effects vis-à-vis the applicants through the intermediary of acts taken by the national authorities. In this case, the regulations in question required the applicants to apply for certain certificates, and according to the Court, the decisions of national authorities in granting or denying such certificates constituted implementing measures within the meaning of Article 263(4) TFEU. The Court emphasised that the ‘mechanical’ nature of the required measures at national level did not call such a conclusion into question.⁷⁶ As in *Telefónica*, the Court noted that the route of Article 267 TFEU remained open to the applicants.⁷⁷

CONCLUSION

When the new Article 263(4) TFEU was enacted under the Lisbon Treaty, its

⁷³ *ibid* paras. 4-12.

⁷⁴ *ibid* paras. 18-20.

⁷⁵ *ibid* para. 32.

⁷⁶ *ibid* paras. 40-41.

⁷⁷ *ibid* paras. 40-41.

practical implications for natural or legal persons were unclear. Pre-Lisbon, the Court had developed a clear pattern of case law where, in order to be admissible before the Court, applicants filing an annulment procedure had to comply with the requirements of direct concern and the strict *Plaumann* formula establishing individual concern. By being highly restrictive, the *Plaumann* test rendered it practically impossible for many private parties to be admissible before the Court. The criticism that this formula triggered led to the adoption of a new article under the Lisbon Treaty, which removed the requirement of individual concern for regulatory acts that are of direct concern and do not entail implementing measures. In order for an act not to have to pass the *Plaumann* test, it is therefore essential that it is both of a regulatory nature and that it does not contain any implementing measures – if one of these two requirements is not satisfied, individual concern will have to be proven after all.

The meaning of the term ‘regulatory act’ was clarified in *Inuit* and *Microban*. It is now clear that it encompasses acts of general application apart from legislative acts, thus excluding legislative acts (directives, regulations and decisions enacted according to the ordinary legislative procedure) from its coverage. *Telefónica* and *S & L Sugars* further explained the meaning of the expression ‘act which does not contain implementing measures’. It is now clear that the question whether a regulatory act entails implementing measures should be assessed exclusively by reference to the subject matter of the annulment action and the person using the right to bring these proceedings under Article 263(4) TFEU. The requirement of absence of implementing measures equals the absence of *any* implementing measures taken by Member States, meaning that even measures that are automatic or merely ancillary will fall under this definition.

Thus, Article 263 TFEU now entails two standing tests: the ‘general standing test’ for legislative acts where applicants have to prove direct and individual concern, and the ‘Lisbon test’ of direct concern for regulatory acts that do not contain implementing measures.

It can be concluded that the Lisbon Treaty has made it easier for natural or legal persons to challenge non-legislative acts of general application. This means that private parties will now have more chances to successfully challenge measures of the Commission that were enacted in cases where the Parliament does not exercise its direct democratic power. The *Microban* case provides a good example in this respect. However, as *Telefónica* and *S & L Sugars* have shown, applicants wishing to subject regulatory acts to judicial review will also have to prove that no implementing measures took place in Member States, which can sometimes be harder than expected. Nothing, however, has changed with regard to acts adopted under the ordinary legislative procedure, as when it comes to these measures, the *Plaumann* formula has remained in force. To that

end, natural or legal persons who have been significantly affected by such legislative measures and have good reasons for questioning their legality, will in most cases not be able to file annulment actions for the sole reason that they are unable to satisfy the strict test of individual concern. It remains to be seen whether any future treaty will bring change in this respect.