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Effective Judicial Protection of Individuals

- A duty for the Court of Justice or the National Courts?

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Contents

Summary

The starting point and reoccurring theme of this work is the accommodation of the effective judicial protection of individuals in the European Union system of review of validity of its acts. The discussion of this issue was intense during the decade before the adoption of the Lisbon Treaty due to the Court of Justice's judgments in the two famous cases *Unión de Pequeños Agricultores* and *Jégo-Quéré*. Accordingly, the focus of this thesis is an examination of the respective roles of the European Court of Justice and the national courts in ensuring the right to an effective remedy and access to a competent court. The first part concerns the European level, by assessing the standing requirements for individuals in the action for annulment before the General Court. The alternative remedy at Union level, the preliminary ruling procedure is analysed in order to determine the completeness of the system. The study continues with an investigation of the possibilities for national courts to examine the validity of EU law and the conditions under which they can provisionally suspend its application when necessary. The national courts' duty to raise issues of Union law *ex officio* is dealt with subsequently.

The examination carried out in this work shows that there are still gaps left in the effective judicial protection of individuals. Therefore, three suggestions for change of the system are proposed, in order to remedy this *lacuna*. These are connected to the duties and division of competences previously discussed, and are assessed through a presentation of arguments in favour and against each proposition. The first change put forward entails an extension of the standing requirements for private applicants in actions for annulment. It is argued that the Court should change its interpretation of the condition of individual concern, combined with the adoption of a wide interpretation of the new concept 'regulatory act' in Article 263(4) TFEU. Secondly, the national courts should be allowed a more extensive mandate in applying and dealing with EU law, by *inter alia* proposing answers to the questions referred for a preliminary ruling and playing a larger part in this process altogether. A further development and clarification of the areas to be raised by the national courts of their own motion is also advocated. Lastly, the idea of harmonisation of the procedural rules to be applied domestically with regard to cases dealing with Union law is discussed.

In the view of the author, the solution should not be a choice of only one of the reform proposals presented. Instead, the aim should be a combination of all three propositions, to best accommodate the attainment of effective judicial protection equally for all citizens of the European Union.

Sammanfattning

Rätten till effektivt domstolsskydd för enskilda inom ramen för den Europeiska unionens system för giltighetsprövning av dess rättsakter, är utgångspunkten för den här uppsatsen. Debatten på det här området var intensive under årtiondet före antagandet av Lissabonfördraget, med anledning av de två kända rättsfallen *Unión de Pequeños Agricultores* och *Jégo-Quéré*. Följaktligen ligger fokus för diskussionen i det här arbetet på EU-domstolens och de nationella domstolarnas respektive roller med avseende på att säkra rätten till effektivt rättsmedel och domstolsprövning för enskilda. Uppsatsens första del behandlar detta skydd på EU-nivå, genom att undersöka möjligheten för fysiska och juridiska personer att väcka talan för ogiltigförklaring vid Tribunalen. För att avgöra om systemet för domstolsprövning som slagits fast i fördraget tillhandahåller ett komplett skydd, undersöks en alternativ möjlighet att få till stånd en giltighetsprövning via förhandsavgörande. Därefter behandlas de nationella domstolarnas möjligheter till giltighetsprövning av unionens rättsakter samt deras mandat att tillfälligt inhibera dess tillämpning. Härvid analyseras även dessa domstolars plikt att undersöka och ta upp frågor om EU-rätt *ex officio*.

Resultatet av undersökningen i detta arbete visar att det fortfarande föreligger brister i rätten till ett effektivt domstolsskydd för enskilda. Med anledning av detta framläggs tre förslag för att råda bot på dessa tillkortakommanden. Förslagen är inspirerade av metoderna för att tillgodose det effektiva rättsskyddet som presenterats tidigare. Framställningen bygger på belysning av argumentation för och emot lösningarna. Det första ändringsförslaget förespråkar en utvidgning av enskildas talerätt gällande giltighetsprövning vid Tribunalen. Författaren menar att detta bäst genomförs genom en omtolkning av kravet ’personligen berörd’ i kombination med en bred tolkning av det nyinförda begreppet ’regleringsakt’ i artikel 263(4) i Funktionsfördraget. Den andra framlagda lösningen syftar till att utöka de nationella domstolarnas mandat att tillämpa EU-rätten, genom en ökad delaktighet i processen för förhandsavgörande. Detta skulle till exempel kunna uppnås genom att den nationella domstolen bifogar ett förslag till lösning av den uppkomna frågan. Utökning och vidare tydliggörande av de områden inom EU-rätten som ingår i den nationella domstolens plikt att behandla är också att föredra i detta hänseende. Slutligen föreslås en harmonisering av de procedurella reglerna som ska tillämpas i fall som rör EU-rättsliga frågor.

Författaren anser att lösningen på problemet med brister i enskildas effektiva domstolsskydd inte kan åtgärdas genom att välja endast ett av de presenterade lösningsförslagen. Man bör istället fokusera på en kombination av dessa, så att alla unionsmedborgare åtnjuter ett jämlikt skydd.

Abbreviations

AG	Advocate General
CFI	Court of First Instance
EC	Treaty establishing the European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
GC	General Court
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

The European Union is based on the rule of law, meaning that neither the Unions' institutions, nor the Member States can avoid a review of their actions in light of the Treaty.[1] Pursuant to this, one may wonder whether and how the courts applying EU law contribute to facilitate the review of the Union's acts. This is of special importance to private applicants who have more limited ways of directly accessing the Union Courts. The limits for them to challenge the validity of Union measures have been thoroughly debated in the wake of two important cases finally decided in the first half of the last decade.[2] The question arose whether individuals' rights to effective judicial protection and access to a competent court were adequately accommodated through the system prescribed by the Treaties. Although in the view of the European Court of Justice the system of remedies was complete, clear gaps in the protection have been left for the Member States to address through Treaty amendments. This situation has been dealt with, at least partly, by the Treaty of Lisbon, but further investigation may still be appropriate.

Both the Court of Justice and the national courts have an obligation to ensure the maintenance of the rule of law. This is especially important for the Union by virtue of its ambition to promote the closeness with its citizens. The decentralised character of the Union makes it dependent on consistent implementation of its rules within its territory; otherwise, its proper functioning would be undermined.[3] Effective judicial protection as an instrument to obtain this kind of review is often referred to by the Court of Justice in order to impose duties on national courts. This perceived interference in the national procedural systems has been criticised in particular in light of the fact that such a line of argumentation on behalf of individuals is not likely to succeed before the Union courts. With the strong emphasis on the national courts' role in providing effective judicial protection, now expressly outlined in Article 19(1) TEU, the relationship and internal allocation of competences and duties in relation to the Court of Justice is of greatest importance when assessing the access to review.

[1] Case 294/83 *Parti écologiste' Les Verts' v Parliament* [1986] ECR 1339, para 23; Case C-50/00 P *Unión de Pequeños Agricultores v Council (UPA)* [2002] ECR I-6677, para 38.
[2] *UPA*, *supra* note 1; Case C-263/02 P *Commission v Jégo-Quéré & Cie SA* [2004] ECR I-3425.
[3] Sacha Prechal, 'Does Direct Effect Still Matter?', *CML Rev*., vol. 37, 2000, pp. 1047-1069, at p. 1066; Matej Accetto and Stefan Zleptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law', *EPL*,Vol. 11(3), 2005, pp. 375-403 , at p. 379.

1.2 Purpose and Main Objectives

The purpose of this thesis is to examine the level of protection for individual applicants' right to review the validity of Union acts. I further intend to examine the ways in which the right to effective judicial protection has influenced the Courts' case law and the duties subsequently imposed on national courts when dealing with the review of Union law. In addition, the Court of Justice's role is of importance in this regard. Thus, the completeness of the Union system of remedies will be examined, in relation to private applicants' alternatives to obtaining a review of Union law.

For the attainment of a nuanced and comprehensive account, I intend to examine the possibilities and conditions for national courts to apply or disapply Union law and their power to review it. Situations in which the Court of Justice has intervened in national procedural law to ensure individuals' access to review of Union acts are also of particular relevance here. These cases include the provisional dismissal of potentially illegal Union acts and the *ex officio* application of Union law by national courts.

In conclusion I will identify and examine different propositions for change to improve the system and to ensure individuals effective means of access to challenge the legality of EU acts, with regard to the areas examined in the work. I will furthermore present possible benefits and disadvantages of the solutions proposed.

1.3 Method and Material

In order to fulfil the aims set out for this work, I have undertaken a detailed analysis of material dealing with effective judicial protection and judicial review under European Union Law. I have carried out a detailed examination of different sources on this area with the main focus on the case law of the European Court of Justice and legal doctrine. I used both general doctrine and articles dealing with specific questions in order to obtain a wide understanding of the field together with diverging opinions to make the account as complete as possible. The case law includes principal cases from the Court of Justice and the General Court with regard to the Advocate General's opinion where necessary. One judgment from the ECtHR has also been of importance for this work. Where needed I have relied on material from the European Union itself. When working out my proposals to improve the system of protection I have found inspiration in the doctrine and case law when developing my argumentation in relation to the different solutions.

1.4 Delimitations

I have limited my work in several ways. Firstly, I have chosen to look at only individuals, since their status of non-privileged applicants in relation to actions for annulment have limited their access to review of Union acts

considerably compared to EU Institutions and Member States. Further, the two latter groups play a larger part in and may thus influence the creation of Union measures and their content.

In this work the terms 'individual', 'private applicant', 'private litigant' and 'private party' will be used synonymously, referring to any natural or legal person, covered by Article 263(4) TFEU.

The access to review for individuals is the issue dealt with in this work; hence, I will look at the possibilities to obtain review of Union acts directly before the Court of Justice and through the preliminary ruling procedure. Other actions at Union level; the action for damages, the action for failure to act and the plea of illegality will not be dealt with in this paper, since they do not have the review of validity as their primary aim. Even though the effects of a declaration of invalidity under Article 340 TFEU might ultimately result in the act in question not being applied, this is not the intention behind this procedure and therefore, for the purpose of this work, should not be considered as an alternative way to challenge the validity of an EU act. The plea of illegality is not an independent action and may only be invoked in another proceeding before the Union Courts against acts, which constitute a basis for the challenged measure.[4] This plea cannot be invoked in the preliminary ruling procedure. Since this thesis is concerned with the *access* to an action before a court, this procedure will not be discussed further.

I have focused on cases or areas where the Court has referred to the principle of effective judicial protection in order to, *inter alia*, impose duties on Member States or their courts, such as interim measures and *ex officio* raising issues of Union law. These are not the only areas affected by this duty, but others are not as closely linked with the review of legality. The principle of effective judicial protection is a reoccurring theme in the types of procedures highlighted by this work and is also the basis for the different kinds of solutions addressed later on.

There is a wide range of solutions proposed for remedying gaps in judicial protection and enhancing the effectiveness of Union law in the doctrine. The three propositions chosen in this work are linked to the focus of the examination below; namely, the strict standing conditions, the national courts' mandate in relation to EU law and the imposition of uniform conditions in certain cases dealing with Union law.

1.5 Disposition

To begin with, Chapter 2 will present some basic principles of Union law, which are important to understand the examination later on. The origin and content of the principle of effective judicial protection will be presented in

[4] Henry G. Schermers and Denis F. Waelbroeck, *Judicial Protection in the European Union*, 6th ed., The Hague: Kluwer Law International, 2001, pp. 405 and 486-489.

this part. In Chapter 3 individual applicants' opportunities to obtain review of an allegedly invalid EU act will be examined and compared, by first looking at the action for annulment and then the preliminary ruling procedure. Development as well as critique and positive aspects will be mentioned. In the next chapter I present the national courts' role in the protection of individuals' rights by examining their duties under EU law and their mandate to review the legality of the same. Chapter 4 will also examine what the national courts can do when they are dealing with an illegal Union act. The second area of interest in this part is the Union's requirement on national courts to examine Union law *ex officio* in order to protect the rights of individuals where they have failed to raise the issues themselves. Lastly, in Chapter 5, I will examine some possible changes to resolve the *lacuna* problem of diverging levels of protection of individuals' right to effective judicial protection left after the adoption of the Lisbon Treaty. This examination will focus on three ideas by highlighting their possible benefits and disadvantages. I will conclude the work with some final comments.

2 Important Principles of EU Law

The implementation and application of European Union law, like any other legal system, is based on several basic principles. Some of these principles will be examined and explained in this chapter in order to provide a basis to understand the issues dealt with in this thesis. The origin and development of the principle of effective judicial protection will be outlined together with its status and function as a general principle of EU law. A short presentation of the concepts of legal certainty and uniform application will follow. Subsequently, principles governing the status and application of Union law will be elaborated; namely primacy and direct effect. Finally, the notion of national procedural autonomy will be considered together with its limitations.

2.1 Effective judicial protection

Effective judicial protection may be used by individuals to enforce all rights conferred upon them by Union law before the courts of the Member States.[5] The notion of this principle is not always referred to as effective judicial protection, and there are different views for its basis and its content. I will attempt with the following presentation of the principle's development to produce the understanding of the notion to be applied in this work.

The Court first used the principle of effective judicial protection to assure the right to an effective remedy in *von Colson and Kamann*, where the question regarded whether a specific national remedy was sufficient enough to ensure the level of protection for Union rights prescribed by a directive. The Court stated that the national remedies at issue had to 'guarantee real and effective judicial protection'.[6]

In the *Johnston* case, the principle was developed further with the inclusion of the right to effective judicial review and access to a competent court. Mrs. Johnston was deprived of any judicial remedy against a decision of the Chief Constable of the Royal Ulster Constabulary and thus could not contest the decision on grounds of discrimination on the basis of sex. The Court found that the United Kingdom had not sufficiently implemented the right to 'pursue [a] claim by judicial process' prescribed in Article 6 of Directive 76/207 on equal treatment of men and women.[7] An extension of the

[5] Jan H. Jans, Roel de Lange, Sacha Prechal and Rob J.G.M. Widdershoven, *Europeanisation of Public Law*, Groningen: Europa Law Publishing, 2007, p. 49.
[6] Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 23.
[7] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 17.

principle was made through the *Heylens* case, which made it also applicable in cases where the principle was not in codified form.[8]

The principle is also enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the first of which ensures individuals the 'right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Article 13 concerns the right to effective remedy in case of violation of a person's rights. These two articles, read together, have been used by the Court of Justice, as an inspiration in both *Johnston* and *Heylens* when developing the principle of effective judicial protection.[9]

The EU concept of judicial protection is more far-reaching than the ECHR Articles'. This is clear from the codification of the principle in Article 47 of the European Union Charter of Fundamental Rights (EUCFR) which lays down the 'right to an effective remedy and to a fair trial'. This Article encompasses all rights and obligations deriving from the Treaty, including administrative decisions by national authorities which are not encompassed within the interpretation of Article 6 ECHR.[10]

Effective judicial protection may be viewed as an elaboration of the principle of effectiveness.[11] However, the relationship between these two principles is not completely clear. Some authors view effective judicial protection as the main principle and effectiveness as a part of it.[12] From the recent case *Alassini*, the view of the Court of Justice on the relationship between the two principles seems clarified. In its assessment in that case, the Court examined the principle of effectiveness and the principle of effective judicial protection separately. The judgment indicates that the principle of effectiveness and its correlated principle of equivalence are a part of the principle of effective judicial protection; the Court refers to the two former as embodying the latter.[13] The strict understanding of the principle of effectiveness requires that national remedies and procedural rules must not render the exercise of Union rights by their beneficiaries

[8] Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (UNECTEF) v Georges Heylens and others* [1987] ECR 4097, para 14.
[9] *Johnston, supra* note 7, para 18, *Heylens, supra* note 8, para 14.
[10] Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 26 November 1996 in Joined Cases C-65/95 and C-111/95 *The Queen v Secretary of State for the Home Department, ex parte Mann Singh Shingara and ex parte Abbas Radiom* [1997] ECR I-3343, footnote 24; Takis Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford: Oxford University Press, 2006, p. 455-456.
[11] Jans et al, 2007, *supra* note 5, p. 51; Accetto, and Zleptnig, *EPL*, 2005, *supra* note 3, pp. 388 and 402.
[12] *Inter alia* Sara Drake, 'Twenty years after Von Colson: the impact of "indirect effect" on the protection of the individual's community rights', *EL Rev.*, vol. 30(3), 2005, pp. 329-348, at p. 335.
[13] Joined Cases C-317/08 to C-320/08 *Alassini and others* [2010] n.y.r., para 49; Further confirmed in Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki AE and Others v Ethnico Symvoulio Radiotileorasis and Ypourgos Epikrateias and Aktor Anonymi Techniki Etaireia (Aktor ATE) v Ethnico Symvoulio Radiotileorasis* [2010] n.y.r., para 78.

virtually impossible or excessively difficult.[14] The origin for the principles of effectiveness and the correlated principle of equivalence may be found in the duty of sincere cooperation in Article 4(3) TEU (ex-Article 10 EC), to which also the Court itself has referred.[15] Hence, there is a 'general legal basis for [Union] intervention in the process of decentralised enforcement, which is of Treaty status or at least equivalent to Treaty status'.[16]

Defining the principle of effective judicial protection thus entails a combination of several aspects of rights and their protection. The principle is a manifestation of the principle of *ubi jus ibi remedium*; where there is a right there must be a remedy.[17] This remedy must be sufficient for the protection of Union rights and entails right to judicial review before a competent court. The principle may have implications on, for example, issues concerning burden of proof and the obligation for the national authorities to give reasons for their decisions, but these aspects will not be discussed further here.[18] Access to a court with power to grant effective remedies is, for the purpose of this work, the most important requirement of the principle.

2.2 General Principle of EU Law

Reference is expressly made to the general principles 'common to the laws of the Member States' in Article 340 TFEU and an implicit reference in Article 263 TFEU. In both cases, it is in terms of grounds of review in relation to the validity or legality of Union action.[19] Furthermore, Article 6(3) TEU explicitly recognises fundamental rights as general principles of Union law.

In the *Stauder* case, the idea of general principles of Union law, including human rights, was introduced.[20] The Court also referred to the general principles in *Internationale Handelsgesellschaft* and found their basis in the constitutional traditions and common fundamental rights of the Member States.[21] In *Nold*, the Court further included international conventions and

[14] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5; Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043, paras 12-16; Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595, para 14; Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Materials*, 4th ed., Oxford: Oxford University press, 2008, p. 320.
[15] See, for example, *Rewe-Zentralfinanz*, *supra* note 14, para 5; *Comet*, *supra* note 14, para 12; For a further presentation of the two principles, see below under Chapter 2.5.
[16] Michael Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*, Oxford: Hart Publishing, 2004, p. 54.
[17] Tridimas, 2006, *supra* note 10, p. 422.
[18] Jans et al, 2007, *supra* note 5, p. 50 and 241.
[19] Schermers and Waelbroeck, *supra* note 4, p. 32.
[20] Case 29/69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419, para 7.
[21] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 4.

human rights agreements signed by the Member States in the sources of inspiration for general principles.[22]

A general principle of EU law can be described as a fundamental principle of the legal system, encroaching certain basic values and enjoying a certain amount of recognition. The Union general principles may be divided into two types. The first group consists of principles based on the rule of law and governing the relationship between the individual and the Union, *inter alia* equality, legal certainty and the protection of fundamental rights. Due to their constitutional standing, these principles are binding on both the Union and the Member States. The second group consists of principles relating to the supranational relationship between the Union and its Member States, such as the principle of primacy and the duty of sincere cooperation.[23]

One of the areas where the general principles are used is as a basis of review of Union measures. The Court further uses the principles to interpret and fill gaps of Union law and a breach of them is considered a ground for liability for damages.[24] Inherent in a hierarchy of norms, such as the system of EU law as regards the relation between primary and secondary EU law, is the principle that a rule of lower dignity which breaches a rule of higher dignity will be invalidated at least regarding the infringements. This follows from the fact that lower standing rules usually derive their validity from the rules of higher rank. The status of general principles in this hierarchy is defined by their basis in the Treaties, which gives them a position equal to primary law.[25] The general principles of EU law are thus binding for the Member States, both in implementing Treaty obligations and when they are otherwise acting in an area falling within the scope of EU law.[26] The infringement of a general principle will moreover result in the annulment of the measure by the Court of Justice or the General Court.[27] Any act reviewable under Union law may be challenged due to its alleged infringement of a general principle.[28] Further, national courts are under an obligation to interpret national law in harmony with the general principles.[29]

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[22] Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491, para 12; Craig and De Búrca, 2008, *supra* note 14, p. 383.
[23] Tridimas, 2006, *supra* note 10, pp. 1-2, 4, 6 and 26; The division suggested by Tridimas is not the only one, but it is used here for pedagogical purposes.
[24] Sacha Prechal, 'Competence Creep and General Principles of Law', *REAL*, vol. 3(1), 2010, pp. 5-22, p. 5; Tridimas, 2006, *supra* note 10, pp. 17, 29 and 31.
[25] Tridimas, 2006, *supra* note 10, p. 50-51; Constantinos N. Kakouris, 'Do the Member States possess judicial procedural autonomy?', *CML Rev.*, vol. 34, 1997, pp. 1389-1412, at pp. 1391.
[26] Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, paras 17-19; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia OmospondiaSyllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT)* [1991] ECR I-2925, paras 42-45; Prechal, *REAL*, 2010, *supra* note 24, pp. 5-22, p. 8.
[27] Tridimas, 2006, *supra* note 10, p. 31; See further Chapters 3.1.1 and 3.2.2.
[28] *Ibidem*, p. 36.
[29] Jans et al., 2007, *supra* note 5, p. 124.

The Court of Justice has recognized the right to effective judicial protection as a general principle of EU law stemming from the constitutional traditions of the Member States.[30] This means that effective judicial protection must be ensured in relation to the review of Union measures. Even though the validity of primary law is not within the power of the Court of Justice to rule upon, it may still interpret Treaty provisions in accordance with the general principles of law. In this manner, the Court has been able to influence the application of primary law towards a higher degree of respect for the fundamental right to judicial protection.[31]

In *Alassini*, the Court expressly treated the principle of effective judicial protection as a fundamental right. The Court applied the reasoning used in relation to other fundamental rights by stating that they are not absolute and can be restricted by objectives of general interest as long as the measures are proportionate.[32] This is a further confirmation of the importance and fundamentality of the principle of effective judicial protection.

The consequence of the above for the Member States is that they are always bound to provide effective remedies and procedures when dealing with rights under Union law. Additionally, national rules, which hinder the effective judicial protection of an individual's rights under EU law, must be set aside.[33] The qualification of effective judicial protection as a general principle of law has moreover enabled the Court to use it as ground for the creation of jurisdiction for national courts and extended individuals' grounds of action and possibility of receiving remedies at national level. National procedural rules must thus be interpreted in the light of how well they ensure this protection for individuals.[34]

2.3 Legal Certainty and Uniform Application of EU Law

Legal certainty is another general principle of Union law which requires a specific level of clarity and preciseness of the legislation so that those who are the subject of the law know its content and how it will be applied in a certain situation. This is also of importance for the national courts' ability to ensure and protect the observation of those rights and obligations. The principle's substantive content is not definite; in fact, it may be used to

[30] *Johnston*, *supra* note 7, para 18; *Heylens*, *supra* note 8, para 14; Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] n.y.r., para 58.
[31] Tridimas, 2006, *supra* note 10, p. 51-52.
[32] *Alassini*, *supra* note 13, para 63.
[33] Dougan, 2004, *supra* note 16, p. 55; See further Chapter 2.4.
[34] Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271, para 44; Monica Claes, *The National Courts' Mandate in the European Constitution*, Oxford: Hart Publishing, 2006, p. 136.

support different views, even expressly competing ones. It is further not absolute and might have to subordinate itself to other considerations.[35]

The principle can be linked with the notion of uniformity and coherence of Union law in order to counteract discrepancies between the applications of its rules. The principle was used with this function in *Foto-Frost* in relation to the validity of EU acts. It was considered to be of utmost importance for the Union legal order as a whole that the rules were applied in the same way throughout its territory, with special regard to the otherwise negative effects on legal certainty.[36]

Uniform application of Union law was one of the arguments for primacy of Union law in *Costa v ENEL*.[37] Even though uniformity is not fully obtainable in a Union with several different traditions and legal systems, a certain degree of uniformity is essential for the effectiveness and proper functioning of the Union system.[38] Uniform application is of great importance particularly in cases where the validity of a Union act is at stake. In fact, one of the rationales behind the procedure in Article 267 TFEU is uniformity.[39]

2.4 Primacy and Direct Effect

The principle of primacy of EU law first brought up in the *Costa v ENEL* case, means that in case of conflict Union law takes precedence over national law, even if the Union rule is subsequent to the national one.[40] The principle applies to all kinds of legislation, i.e. all Union legislation has precedence over all national legislation, regardless of its dignity, thus also over the constitution.[41] This has taken some time for national (constitutional) courts to accept. The consequence is that national courts of all levels have become review courts interfering with the hierarchy set out by domestic law, which may not allow them the same power.[42] A lower national court must be free to ask the Court of Justice for a preliminary ruling, even if it is bound by the rulings of a higher court, especially in cases where such a ruling might be liable to give a result contrary to Union law.[43]

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[35] Case 29/84 *Commission v Germany* [1985] ECR 1661, para 23; Case C- 63/93 *Duff and others* [1996] ECR I-569, para 20; Schermers and Waelbroeck, 2001, *supra* note 4, p. 64; Tridimas, 2006, *supra* note 10, pp. 242-244, 246 and 248.
[36] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 15.
[37] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.
[38] Walter van Gerven, 'Of Rights, Remedies and Procedures', *CML Rev.*, vol. 37, 2000, pp. 501-536, at p. 521; Accetto and Zleptnig, *EPL*, 2005, *supra* note 3, p. 392.
[39] *Foto-Frost*, *supra* note 34, para 15; Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law*, 2nd ed., Cambridge: Cambridge University Press, 2010, p. 157.
[40] *Costa v ENEL*, *supra* note 37; Further developed in: Case 106/77 *Amministrazione delle Stato v Simmenthal SpA* [1978] ECR 629, para 21; Recently confirmed in *Winner Wetten*, *supra* note 30, paras 53 and 55; See also Craig and De Búrca, 2008, *supra* note 14, pp. 345-346.
[41] *Winner Wetten*, *supra* note 30, para 61; Claes, 2006, *supra* note 34, p. 98.
[42] Claes, 2006, *supra* note 34, pp. 4, 102 and 387-389.
[43] Joined Cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli* [2010] n.y.r., para 42.

Nevertheless, the primacy of EU law over national law does not mean that the national courts always have to set aside a conflicting domestic provision. This only applies to directly effective Union law. In other cases, the obligation on the national courts entails interpretation of the national provision in conformity with EU law.[44]

The principle of direct effect was first enunciated in the famous *van Gend & Loos* case.[45] The Court referred to the Union's status as a 'new legal order of international law' and to the 'spirit, general scheme and wording of the Treaty' as a justification for the creation of the extensive effects of directly effective provisions. These are immediately enforceable and create rights for individuals, which must be protected by the national courts. For an act to have direct effect, it must be sufficiently clear and unconditional.[46] Direct effect is a natural consequence for the functioning of a decentralised system such as the EU legal order and follows from the duty of sincere cooperation in Article 4(3) TEU.

Practically all binding forms of EU law are, according to the Court of Justice, able to have direct effect. This is definitely the case regarding primary law, regulations and decisions, where the Court expressly referred to the principle of effectiveness as grounds for its judgment.[47] General principles of Union law can also have direct effect.[48] Provisions of directives may, in principle be directly effective, with the requirements of clarity, preciseness and legal completeness having to be fulfilled.[49] However, direct effect of directives is not possible when the matter concerns a horizontal relationship on the individual level, albeit they might still have an indirect effect through the duty of consistent interpretation.[50]

From the viewpoint of this thesis, the most important aspect of direct effect is that a directly effective provision requires remedies in national courts for the enforcement of the conferred rights.[51] National procedural autonomy is the starting point in this regard but the principles of effectiveness and equivalence must still be fulfilled.[52] In fact, the principle of direct effect is

[44] Claes, 2006, *supra* note 34, p. 115.
[45] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 3.
[46] Claes, 2006, *supra* note 34, pp. 77-82; Craig and De Búrca, 2008, *supra* note 14, pp. 273 and 277; Case C-128/92 *H.J. Banks & Co. Ltd v British Coal Corporation* [1994] ECR I-1209, para 15.
[47] Case 39/72 *Commission v Italy* [1973] ECR 101, para 17; Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337, para 12; Craig and De Búrca, 2008, *supra* note 14, p. 277.
[48] Jans et al., 2007, *supra* note 5, p. 124.
[49] *Van Duyn*, *supra* note 47, paras 12 and 15; Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629, para 23; Craig and De Búrca, 2008, *supra* note 14, p. 281.
[50] *Von Colson*, *supra* note 6, paras 26 and 28; *Johnston*, *supra* note 7, para 53; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para 8; Claes, 2006, *supra* note 34, p. 145; Drake, *EL Rev.*, 2005, *supra* note 12, p. 337.
[51] *Rewe-Zentralfinanz*, *supra* note 14, para 5.
[52] Chalmers et al, 2010, *supra* note 39, pp. 276-285.

directly linked to the principle of primacy of Union law and the setting aside of national rules inconsistent with Union law.[53] Furthermore, provisions that have direct effect may, and in some cases must, be raised by national courts *ex officio*.[54]

2.5 National Procedural Autonomy

Enforcement and application of Union law is ultimately the task of the Member States and their respective national authorities, as governed by national procedural rules. This power to organise the effective enforcement of Union law is referred to as national procedural autonomy.[55] The principle was originally denounced in the *Rewe* and *Comet* cases, decided on the same day.[56] The principle of procedural autonomy applies unless the Union has regulated otherwise, and gives the national legal systems the right to appoint the courts and tribunals having jurisdiction, 'and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [Union] law'.[57]

However, the principle is not absolute. In the Courts' case law, national procedural rules have been subject to two requirements; equivalence (non-discrimination) and effectiveness. According to the principle of equivalence, national rules cannot be less favourable than those applicable to national actions of similar nature. The principle of effectiveness implies that the national rules must not render the exercise of Union rights virtually impossible or excessively difficult. The Court has since developed these principles further and especially given the principle of effectiveness strong authority.[58] Moreover, national rules governing actions regarding Union issues may be limited by other EU rules, such as general principles of law.[59] Thus, whether or not the principle of effective judicial protection is a part of the principle of effectiveness or not, its status as a general principle ensures its application and gives it precedence over conflicting national procedural law. As mentioned above, the Court seems to have laid down a clearer approach towards the relationship between the principles of equivalence and effectiveness and the principle of effective judicial protection. In the *Alassini* case, the latter was used as an additional step in the test under national procedural autonomy. Once it was determined that the principles of effectiveness and equivalence were complied with, the Court went on to

[53] Claes, 2006, *supra* note 34, p. 83.
[54] Joined Cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, paras 13-14; Case C-72/95 *Aannemersbedrij P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paras 57, 58 and 60.
[55] Jans et al, 2007, *supra* note 5, p. 40.
[56] *Rewe-Zentralfinanz*, *supra* note 14, para 5; *Comet*, *supra* note 14, para 13.
[57] *Van Schijndel*, *supra* note 54, para 17.
[58] *San Giorgio*, *supra* note 14, para 14; Case C-268/06 *Impact v Minister for Agriculture and Food and Others* [2008] ECR I-2483, paras 44 and 46; *Club Hotel Loutraki*, *supra* note 13, para 74; Jans et al, 2007, *supra* note 5, p. 43.
[59] Prechal, *REAL*, 2010, *supra* note 24, p. 14-15; see also *Unibet*, *supra* note 34, para 44.

examine whether the rules were still liable to impair the effective judicial protection of individuals.[60] The Member States' duty to provide remedies ensuring effective judicial protection has consequently been confirmed by the Lisbon Treaty in Article 19(1) TEU.

A lot has been written about the extent of national procedural autonomy and the degree of interference by the European Union, mainly through its Court of Justice. Some authors even take the view that, in reality, there is no procedural autonomy and that the national procedural rules are, in essence, ancillary to Union substantive law.[61] Other authors rather underline the importance of cooperation and that the Court actually tries to take into account the implications of its rulings in national law.[62]

The primacy of Union law may interfere with national procedural legislation to enable the effective application of Union law.[63] In the efforts to achieve this aim the result is sometimes the setting aside of the (constitutional) division of national courts' powers, by for example requiring them to raise issues of Union law of their own motion. It is also apparent from *inter alia* the *Verholen* case that the Court of Justice sometimes does not hesitate to impose a wider duty on national courts to accept standing in order to protect their rights derived from Union law.[64] Still, the Court has not gone so far as to require a positive assertion of jurisdiction to a national court or tribunal where a Member State has failed to designate one to rule on the individual's Union rights. This would, in fact, entail a positive examination of the domestic legal system of the Member State in question that falls outside of the Union Courts' jurisdiction according to Article 19(1) TEU and goes beyond the obligations pursuant to the principle of primacy.[65]

The court has further stated that there is no obligation to provide remedies which are not already available under national law unless an examination of the national legal system as a whole confirms that no other legal remedy exists to ensure individuals' Union rights, not even indirect ones.[66] However, the line might appear thin. In *Factortame I* the House of Lords was obliged to provide interim relief for applicants in a case before it.

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[60] *Alassini*, *supra* note 13, paras 52-65; See also Chapter 2.1.
[61] Kakouris, *CML Rev.*, 1997, *supra* note 25, pp. 1396 and 1405; John S. Delicostopoulos, 'Towards European procedural primacy in national legal systems', *ELJ*, vol. 9(5), 2003, pp. 599-613, at p. 609; Michal Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States', Forthcoming in Bruno de Witte and Hans Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States*, Antwerp: Intersentia, 2011, available at http://ssrn.com/abstract=1614922.
[62] Andrea Biondi, 'How to Go Ahead as an EU Law National Judge', *EPL*, vol. 15(2), 2004, pp. 225-238, at p. 229.
[63] See Chapter 4.
[64] Joined Cases C-87/90 to C-89/90 *A. Verholen and others v Sociale Verzekringsbank Amsterdam* [1991] ECR I-3757, para 24; Case C-97/91 *Oleificio Borelli SpA v Commission* [1992] ECR I-6313, para 13; *UPA*, *supra* note 1, paras 41-42; *Unibet*, *supra* note 34, para 42; Case C-240/09 *Lesoochranárske zoskeipenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] n.y.r., paras 50-51; Claes, 2006, *supra* note 34, p. 138.
[65] Dougan, 2004, *supra* note 16, p. 55; *UPA*, *supra* note 1, para 43.
[66] *Unibet*, *supra* note 34, paras 40-41.

Although interim measures as such were not an unknown concept under British law, they had previously not been possible to obtain against the crown.[67]

[67] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others (Factortame I)* [1990] ECR I-2433; Thomas Elimansberger, 'The relationship between rights and remedies in EC law: In search of the missing link', *CML Rev*., vol. 41, 2004, pp. 1199-1246, at p. 1211; Sergio Ariel Apter, 'Interim Measures in EC Law: Towards a Complete and Autonomous System of Provisional Judicial Protection before National Courts?', *EJCL*, vol. 7(2), 2003, available at http://www.ejcl.org/72/art72-1.html, Ch. 4.2.

3 A Complete System of Remedies?

As the Court has stated in several cases, the Treaty has created a complete system of remedies.[68] The actions available are those provided for in the Treaty: the action for annulment, the action against failure to act, the plea of illegality and the action for damages. The remedies available at Union level are completed by the possibility of challenging EU acts before the national courts, through the preliminary ruling procedure. In the following part, I will start with an examination of the possibility for individuals to challenge the validity of an EU measure before the General Court, and in cases where that is not possible, the right to challenge the validity before a national court. As mentioned before, the action against failure to act and the action for damages will not be dealt with here, since this work is concerned specifically with the direct possibility of declaring Union acts invalid by individuals. I will further not discuss the plea of illegality.

3.1 Direct Challenges of Validity Before the General Court

3.1.1 *Locus Standi* Under Article 263(4) TFEU

The best way to obtain a ruling on the validity of Union law is to apply directly to the General Court who has been entrusted with competence to examine EU law and to annul an act that is illegal. The acts challengeable by individuals are, according to Article 263(4) TFEU, of three different types. First, and least problematic, is the right to challenge acts addressed to the applicant himself. If the act is addressed to someone else, the individual may challenge it only if he is directly and individually concerned. The content of these two requirements has been defined through the European Union Courts' case law and will be thoroughly examined below. The third possible group of acts to challenge are regulatory acts without the involvement of implementing measures. In relation to these, the individual only has to show direct concern. This relaxation of the standing rules in relation to generally applicable Union acts has been adopted pursuant to the Lisbon Treaty, as a reaction to a wave of critique after the Courts' judgments in *UPA* and *Jégo-Quéré* which will be discussed further on in this chapter.[69]

It might also be mentioned that the annulment action is time barred: two months after an act's publication, notification or from when it came to the applicant's knowledge a direct action is no longer possible according to

[68] *Inter alia Les Verts*, *supra* note 1, para 23; *UPA*, *supra* note 1, para 40; *Jégo-Quéré* P, *supra* note 2, para 30.
[69] *Jégo-Quéré* P, *supra* note 2; *UPA*, *supra* note 1.

Article 263(6). Consequently, after this time period the act is definitive. This deadline is in certain cases also applicable to preliminary references.[70]

The consequence of a judgment in a direct action concerning an act not withstanding the review is a declaration that the act in question is void pursuant to Article 264 TFEU. The effect is retroactive and of *erga omnes* character. The Court may qualify, according to the same article, the scope of the effects of its judgment.[71]

The condition of direct concern is fulfilled where a direct causal link is identified between the applicant's situation and the contested act, or, in the words of the Court:

> '[The measure] must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from [Union] rules without the application of other intermediate rules.'[72]

Thus, a directly effective act would normally be considered of direct concern to an individual applicant, provided that the act affects the applicant's rights. This is a consequence of the similarities between the two concepts, albeit the notion of direct effect is wider. An act, which is immediately enforceable usually does not require implementing measures, and rights conferred might not be limited to the addressees of a decision. In fact, in the original expression of direct effect one requirement was that the provision did not leave any discretion on the addressee responsible for its implementation. The additional requirement for direct concern is, as mentioned, the establishment of a direct link between the challenged act and its impact on the applicant's legal situation.[73]

The definition of individual concern was established in the *Plaumann* case, where the Court took on a very restrictive approach towards who could be regarded as individually concerned. The concept was defined as follows. Applicants are individually concerned if the 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'[74]

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[70] Case C-310/97 P *Commission v AssiDomän Kraft Products AB, Iggesunds Bruk AB, Korsnäs AB, MoDo Paper AB, Södra Cell AB, Stora Kopparbergs Bergslags AB and Svenska Cellulosa AB* [1999] ECR I-5363, para 57; Further, see Chapter 3.2.1.

[71] Case C-228/92 *Roquette Frères SA v Hauptzollamt Geldem* [1994] ECR I-1445, para 17; Schermers and Waelbroeck, 2001, *supra* note 4, p. 506; Tridimas, 2006, *supra* note 10, p. 32.

[72] Case C-386/96 P *Société Louis Dreyfus & Cie v Commission of the European Communities* [1998] ECR I-2309, para 43.

[73] *Van Gend & Loos*, *supra* note 45; Schermers and Waelbroeck, 2001, *supra* note 4, pp. 455 and 458.

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

More than one individual may be considered individually concerned, but the mere fact that only one company is in reality affected is not enough to render the case admissible.[75] The situation of the applicant is compared to the hypothetical situation of any other operator in the same area – i.e. any other individual actually or potentially in the same situation.[76]

Looking at the case law, generally, three types of categories of claimants are usually recognised standing. Firstly, members of a clearly defined group of persons whose interests were supposed to have been taken into account by the Union institution before adopting the specific act.[77] Secondly, individuals who have had a right to participate in the procedure of decision-making leading to the adoption of the challenged act are normally also granted standing.[78] Individual concern has generally been more easily obtained in this way in certain areas, such as anti-dumping, competition and state aids.[79] The last category concerns a group of persons differentiated by special circumstances or by the enjoyment of specific rights.[80]

3.1.2 Jégo-Quéré and UPA

The Court of Justice lays down a duty on national courts to go far, even to grant standing, in the protection of individuals' rights under Union law. Conversely, it has not been so generous with regard to the standing rules of applicants in the actions for annulment.[81] Individuals have tried to invoke the same ground of effective judicial protection before the Court of Justice, but with less success.[82] The lack of protection afforded to individuals due to

[75] Case 38/64 *Getreide-Import Gesellschaft v Commission of the EEC* [1965] ECR 203; Schermers and Waelbroeck, 2001, *supra* note 4, p. 431; Craig and De Búrca, 2008, *supra* note 14, p. 509.
[76] *Jégó-Quéré*, *supra* note 69, para 30.
[77] Case 11/82 *SA Piraiki-Patraiki and others v Commission* [1985] ECR 207, para 31; Case C-152/88 *Sofrimport SARL v Commission* [1990] ECR I-2477, para 11; Case C-390/95 P *Antillean Rice Mills and others v Commission* [1999] ECR I-769, paras 25-30; Schermers and Waelbroeck, 2001, *supra* note 4, p. 444; Dougan, 2004, *supra* note 16, p. 315.
[78] See, *inter alia*, Case 26/76 *Metro I* [1977] ECR 1875, para 13; Case T-96/92 *Comité Central d'Entreprise de la Société Générale des Grandes Sources and others v Commission* [1995] ECR II-1213, paras 30-32 and 37 ; Case T-12/93 *Comité Central d'Entreprise de la Société Anonyme Vittel and Comité d'Etablissement de Pierval and Fédération Générale Agroalimentaire v Commission* [1995] ECR II-1247, paras 40-42 and 48; Schermers and Waelbroeck, 2001, *supra* note 4, pp. 435-441.
[79] Schermers and Waelbroeck, 2001, *supra* note 4, p. 436; Craig and De Búrca, 2008, *supra* note 14, pp. 518-521.
[80] *Inter alia* Case C-309/89 *Codorníu SA v Council* [1994] ECR I-1853; Case C-358/89 *Extramet Industrie SA v Council* [1992] ECR I-3813; *Antillean Rice Mills*, *supra* note 77; Schermers and Waelbroeck, 2001, *supra* note 4, pp. 447-448; Anthony Arnull, *The European Union and its Court of Justice*, 2nd ed., Oxford: Oxford University Press, 2006, p. 79.
[81] Claes, 2006, *supra* note 34, p. 138.
[82] *Inter alia* in Case T-109/97 *Molkerei Grossbraunshain GmbH and Bene Nahrungsmittel GmbH v Commission* [1998] ECR II-3533; Joined Cases T-172/98, T-175/98-T-177/98

the restrictive interpretation of the requirement of individual concern was highlighted in two famous and debated cases: *Jégo-Quéré* and *Unión de Pequeños Agricultores*, hereafter *UPA*.[83] The cases dealt with two problematic situations in relation to regulations without any implementing measures, brought about by the wording of Article 230(4) EC at the time. The changes made pursuant to the Lisbon Treaty in the new Article 263(4) TFEU have partly addressed the situation. Nonetheless, the cases are of interest in this work due to their comprehensive analysis of the system of legal remedies and the fact that some of the problems enumerated therein still persist. The cases further show the complexity of the issue and the Court's viewpoints on the matter. Even though *Jégo-Quéré* initially pointed towards a change in the Court's approach, the argument of effective judicial protection was not enough for the Court of Justice to change the strict interpretation of standing rules in direct actions under Article 263(4) TFEU.

The first problematic situation dealt with by the cases concerned regulations imposing prohibitions. In *Jégo-Quéré*, the CFI found that the applicant, whose legal status was directly affected, did not have individual concern in relation a regulation prohibiting certain mesh sizes on specific fishing vessels under the requirements found in the case law of the Union Courts.[84] However, the applicants had stated that if the case would be declared inadmissible by the CFI they would be denied any legal remedy since they had no standing before the national courts.[85] The Court thus investigated the issue and first found that the alternatives to the direct challenge in Article 230(4) EC; namely action for damages or preliminary ruling by a national court, were not guaranteeing sufficient protection in the light of Articles 6 and 13 ECHR and 47 of the EUCFR.[86] Further, since there was no national measure to contest in the domestic court, the only way for the applicant to get a review of the validity of that regulation was to infringe the prohibition and rely on the act's invalidity as a defence.[87] The court proposed an opening of the *locus standi* with regard to provisions of general application directly affecting the legal situation of individuals:

> 'in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a [Union] 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 by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.'[88]

Salamander and others v Parliament and Council [2000] ECR II-2487; *UPA*, *supra* note 1; *Jégo-Quéré* P, *supra* note 2.

[83] *UPA*, *supra* note 1; *Jégo-Quéré* P, *supra* note 2.

[84] Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365, para 38.

[85] *Ibidem*, para 39.

[86] *Ibidem*, para 47.

[87] *Ibidem*, para 45; Arnull, 2006, *supra* note 80, p. 82.

[88] *Jegó- Quéré*, *supra* note 84, para 51.

The second type of regulation was dealt with in the *UPA* case, where the applicant challenged a regulation withdrawing a benefit (aid) previously conferred upon it by Union law replacing it with a new system. In this case, the only way for UPA to challenge the regulation was through the procedure in Article 230 EC since no national measure was taken. The applicant could not even infringe the regulation as above, since it concerned a benefit and not a prohibition.[89] Direct concern was easily established, meaning that the decisive point for standing lied in whether the applicant was individually concerned. The CFI, with reference to existing case law, answered the question in the negative.[90]

Advocate General Jacobs took the opportunity to examine how well the existing system at the time met the requirement of effective judicial protection of private applicants. He carefully scrutinised the alternative ways to obtain a review of an act, with focus on the preliminary ruling procedure, and arrived at the conclusion that these remedies were not adequate substitutes to a direct action under Article 230 EC.[91] The solution advocated by AG Jacobs was to relax the test of individual concern for the applicant to have standing if 'by reason of his particular circumstances, the measure has or is liable to have, a substantial adverse effect on his interests'.[92]

The ECJ did not agree. It reaffirmed the preceding case law's stricter view. Although it acknowledged individuals' right to effective judicial protection, it moved the duty to uphold it to the national legal systems in case remedies at Union level would not be available. Thus, it declared the scheme provided for in the Treaties complete and left the Member States to 'establish a system of legal remedies and procedures, which ensure the respect for the right to effective judicial protection'.[93] The subsequent ruling in the appealed *Jégo-Quéré* case followed the same line.[94]

According to the Court, the justifications for leaving the system as it was were the following: firstly, the Court referred to the complete system of remedies created by the Treaties as already mentioned in *Les Verts.*[95] The main alternative mentioned was the indirect challenge in Article 234 EC (now 267 TFEU), but also damages actions and the plea of illegality were referred to. Since the Treaty had laid down the system, the responsibility for ensuring that no individual would be deprived of effective judicial protection of his rights fell on the Member States. Thus, the argument of a

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[89] T-173/98 *Unión de Pequeños Agricultores v Council of the European Union* [1999] ECR II-3357, para 61; Arnull, 2006, *supra* note 80, p. 87.
[90] *Unión de Pequeños Agricultores*, *supra* note 89, para 65.
[91] Opinion of Advocate General Jacobs delivered on 21 March 2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, para 37.
[92] *Ibidem*, para 60.
[93] *UPA*, *supra* note 1, paras 39-42.
[94] *Jégo-Quéré* P, *supra* note 2, paras 29-32.
[95] *UPA*, *supra* note 1, para 40; *Jégo-Quéré* P, *supra* note 2, para 30; *Les Verts*, *supra* note 1, para 23.

lacuna in the system of protection was overcome. If no review was available directly before the Union judicature, the national courts had to interpret the domestic rules governing standing before them in a way that would not deprive individuals of a remedy.[96] The Court of Justice also stated that it could not interpret the Treaty against its wording, and that a change could only be made through amendments of the Treaty.[97] The reasoning was based on the premise that the alternative interpretations put forward would, in practice, deprive the requirement of individual concern of its meaning and set aside the express condition laid down in Article 230(4) EC.[98] There was further no possibility for the Court to step in and grant standing where it could be established that no other remedy would be available in the national courts, since the examination of national law required for such an undertaking would fall outside the jurisdiction of the Court.[99]

The Courts' reasoning in refusing to change its interpretation of direct and individual concern, in my view, does not seem not particularly persuasive. First, it is the Court itself that initially set the interpretation in *Plaumann*; it was not defined in the Treaty text. Further, the Court had earlier deviated from the explicit wording of Article 230 EC when allowing the European Parliament standing in actions for annulment, and when including its acts for review.[100]

The two cases still left a considerable gap in the protection for individuals. The result was that there would be no remedy for individuals wanting to challenge an act without any implementing measures because there would be nothing to challenge before the national court. The only recourse for the applicants would be to breach the rules laid down in the regulation and subsequently rely on the invalidity of that act in proceedings against them. This was a very unsatisfactory solution.[101] In the *UPA* situation, the measure was not even one which was possible to breach since it entailed positive measures. The Court left it to the Member States and to Treaty amendments to change the situation. Some part of the problem has actually been addressed through the Treaty of Lisbon, as discussed below.

An interesting reflection worth mentioning is made by Claes, who points out that the scope of effective judicial protection seems to be narrowed down for the interpretation of standing in Article 263(4) TFEU. The Court spoke of a *principle* of effective judicial protection and not a *right*.[102] It seems, according to Claes, that this principle does not 'by and of itself create a right to judicial review or right to access to a Court having jurisdiction to conduct

[96] *UPA*, *supra* note 1, paras 41-42; *Jégo-Quéré* P, *supra* note 2, paras 31-32.
[97] *Ibidem*, paras 43-45 and para 36 respectively.
[98] *Ibidem*, para 44 and paras 36, 38 respectively.
[99] *Ibidem*, para 43 and para 33 respectively.
[100] *Les Verts*, *supra* note 1, para 25; Case C-70/88 *Parliament v Council (Chernobyl)* [1990] ECR I-2041, paras 25-27.
[101] AG Jacobs in *UPA*, *supra* note 91, para 43; *Jégo-Quéré*, *supra* note 84, para 45.
[102] *UPA*, *supra* note 1, para 44, to be compared with para 41 describing the Member States' duty to 'ensure respect for the right to effective judicial protection; the same difference is clear from *Jégo-Quéré* P, *supra* note 2, paras 31 and 36.

such a review, as seemed to be the case for the national courts in *Johnston*, *Heylens* or *Borelli*'.[103] The consequence of this would seem to be that the standard of effective judicial protection applied on Union level and on national level is not the same, and that the requirements in the latter case are much higher.[104]

3.1.3 After Lisbon

The scope of acts challengeable under the direct actions has been widened through the changes pursuant to the Lisbon Treaty. Individuals are still able to challenge acts addressed directly to them as before. Further, the reference to decisions in Article 230 EC has been abolished and Article 263 TFEU now talks about *acts*, which may be challenged if the applicant can show direct and individual concern. This seems more in line with the case law of the Court of Justice, which in reality allowed challenges not just to decisions but also regulations and directives.[105] The scope appears to be even wider now not only encompassing the acts challengeable before the changes but also acts of bodies and agencies of the EU.[106]

As mentioned before, some of the changes brought about by the Lisbon Treaty were aimed at addressing the gap in individuals' effective judicial protection left after the judgments in *UPA* and *Jégo-Quéré* in cases where the act at issue entailed no action for implementation on behalf of the Member States. Now, Article 263(4) TFEU allows individuals to challenge 'regulatory' acts that do not entail implementing measures without having to show individual concern, only direct concern.

There are, however, still some concerns left. The concept of regulatory act is not defined anywhere. The phrasing was kept after the work on the Constitutional Treaty, which proposed a new system of norms for the Union.[107] The Lisbon Treaty abolished this idea and kept the system of acts made up by regulations, decisions, directives, recommendations and opinions. The two latter are not encompassed by the review in Article 263 TFEU since they do not have binding force. The access to review for individuals of the three remaining acts will depend on whether they will fall within the concept of 'regulatory acts' in Article 263(4) TFEU or not. This will in turn be determined by how they were adopted. The Treaty differentiates between legislative and non-legislative acts in Article 289 TFEU. Legislative acts may be adopted in two ways, namely through the ordinary and the special legislative procedures. The question is to which of these the term 'regulatory act' is referring. In this regard it is decisive

[103] Claes, 2006, *supra* note 34, p. 140.
[104] See also Arnull, 2006, *supra* note 80, p. 87.
[105] Chalmers et al, *supra* note 39, pp. 398 and 414-415.
[106] René Barents, 'The Court of Justice after the Treaty of Lisbon', *CML Rev.*, vol. 47, 2010, pp. 709-728, at p. 726.
[107] EU web page 'A Constitution for Europe: The Union's founding principles', http://europa.eu/scadplus/constitution/legislation_en.htm#TYPOLOGY, accessed on 7 May 2001.

whether the focus is on the general applicability of the act or if the intention is the distinction with legislative acts.[108] In my view, it is a question of whether to rely on the content of an act or on its form. I will discuss this further in Chapter 5.1, for now it suffices to say that a situation in which legal protection becomes dependent on the form of the act – if it is legislative or not – is highly undesirable. It might even be said to go against previous case law, according to which only the contents of an act were decisive for its reviewability.[109]

In any case, non-legislative acts of general application are included in the scope of 'regulatory acts'. This is, however, according to Barents, not the case concerning legislative acts in the meaning of basic regulations and basic directives.[110] Accordingly, in relation to those acts, individual concern still needs to be shown.[111] So what about legislative acts adopted under the special procedure? Türk argues that those should fall within the ambit of regulatory acts, since those are substantively and procedurally the same as non-legislative acts of general application.[112] Balthasar seems to agree; he means that the choice not to use the term 'non-legislative act' in Article 263(4) TFEU indicates a different meaning of this concept, i.e. an intention not to restrict the application to non-legislative acts. The need for effective judicial protection would warrant the same conclusion. Further, the risk of legislative acts being challenged and possibly declared invalid a long time after their adoption would be lessened with an inclusion of them in the concept, thus promoting legal certainty.[113]

We will have to await the Court's interpretation in order to get an answer to what a regulatory act is. Whatever the intention of the creators, those do not bind the Court.[114] Nonetheless, the absence of change to the wording requiring direct and individual concern does probably not merit a change in

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[108] Alexander H. Türk, *Judicial Review in EU Law*, Cheltenham: Edward Elgar, 2009, p. 168.
[109] Joined Cases 789/79 and 790/79 *Calpak SpA et Società Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 1949, para 9; Barents, *CML Rev.*, 2010, *supra* note 106, p. 725.
[110] Barents, *CML Rev.*, 2010, *supra* note 106, p. 725; See also Chalmers et al, 2010, *supra* note 39, p. 415; Cornelia Koch, 'Locus Standi of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individuals' Right to an Effective Remedy', *EL Rev.*, vol. 30(4), 2005, pp. 511-527, at p. 520.
[111] The restriction in relation to these acts is further justified with regard to their similarity to national legislative act from a functional point of view. Challenges to those types of acts in the Member States are usually not possible. However, the democratic legitimacy of the national legislators is higher and therefore a higher level of scrutiny should be applied in relation to Union acts. Although the ordinary legislative procedure would seem to qualify for an avoidance of such examination, acts adopted under the special legislative procedure do not, since the Council and European Parliament only have a consultative role in respect of each others' adopted measures in this process. See Türk, 2009, *supra* note 108, p. 169; Stephan Balthasar, 'Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: the New Art. 263(4) TFEU', *EL Rev.*, vol. 35(4), 2010, pp. 542-550, at pp. 546-547.
[112] Türk, 2009, *supra* note 108, p. 169.
[113] Balthasar, *EL Rev.*, 2010, *supra* note 111, pp. 543 and 545.
[114] Koch, *EL Rev.*, 2005, *supra* note 110, p. 520.

interpretation of those concepts in the eyes of the Court. Hence, a relaxation of the test applied for individual concern is probably not forthcoming.[115]

Would the changes, then, entail a different result in the two cases discussed above? Depending on the interpretation of the term 'regulatory act', they might just have. *Jégo-Quéré* would probably have had standing after the changes, since that case concerned a delegated act by the Commission, i.e. a non-legislative act of general application, and the requirement of direct concern was fulfilled. *UPA* may not be so lucky, since that type of regulation would be qualified as legislative due to its adoption under the ordinary legislative procedure according to Article 43(2) TFEU. Thus, *UPA* would still need to show both direct and individual concern.[116]

Consequently, there are still cases where individual concern is of importance; these are in relation to non-regulatory acts not entailing implementing measures, for which there would still be a lack of remedy if the acts were to be considered legislative and the applicants would fail the test of individual concern. Secondly, regulatory or non-regulatory acts entailing implementing measures also have to be of indirect concern to the applicant, but here, the implementing measure could, at least, be challenged through the preliminary ruling procedure.[117]

3.2 Right to Challenge the Validity of EU Acts Before National Courts

3.2.1 The Preliminary Ruling Procedure

The preliminary ruling procedure is an additional channel through which individuals are able to challenge the validity of Union acts.[118] It is very important, where there is no remedy at Union level, that individuals have the possibility to enforce their Union rights before a national court. The process is indirect, with the national court formulating and referring the problem to the Court of Justice. The function of the procedure is to ensure the uniform interpretation and, consequently, the uniform application of Union law.[119]

Whilst Treaty provisions are unchallengeable by their very nature even before the Union courts, there are other directly applicable Union rules,

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[115] *Ibidem*, p. 527.
[116] John A. Usher, 'Direct and Individual Concern – an Effective Remedy or a Conventional Solution?', *EL Rev.*, vol. 28(5), 2003, pp. 575-600, at p. 599; Koch, *EL Rev.*, 2005, *supra* note 110, p. 526.
[117] Mariolina Eliantonio and Betül Kas, 'Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?', *JPL*, vol. 3(2), 2010, pp. 121-133, at p. 128.
[118] *UPA*, *supra* note 1, para 40; *Jégo-Quéré* P, *supra* note 2, para 30.
[119] Case 66/80 *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato (ICC)* [1981] ECR 1191, para 11; Schermers and Waelbroeck, 2001, *supra* note 4, pp. 227-228; Chalmers et al, 2010, *supra* note 39, p. 158.

which are possible to challenge before the national courts. In fact, Article 267(1)(b) TFEU is worded more broadly than Article 263 TFEU. The former allows review of the validity of 'acts of the institutions, bodies, offices or agencies of the Union' with no further qualification. Consequently, practically any act of the Union may be challenged through the preliminary ruling procedure.[120] Further, right to challenge the validity of Union acts before national courts does not depend on whether there are any national implementing measures.[121] It may also be noted that with the abolishment of the three-pillar structure, the Courts' competences have widened significantly.[122]

The route to challenge Union law through the national courts is restricted in certain circumstances. It is not possible to challenge an act before the national court if the applicant could have challenged it directly on Union level but failed to do so.[123] If it is clear that the claimant has standing before the General Court, he must challenge the validity of the act within the two-month time limit prescribed in Article 263(6) TFEU either directly before the GC or before the national courts.[124] However, according to the Court of Justice's ruling in *TWD*, if there is any doubt as to whether the applicant would have had standing under Article 263(4) TFEU the use of the indirect action is permissible. The requirement in this regard is 'undoubtedly clear'.[125] Furthermore, the applicant in *TWD* had been expressly informed by the possibility to challenge the act within the sphere of the Union judiciary.[126] It is not apparent whether this aspect of the case entails a separate subjective condition amounting to the knowledge of standing before the GC. Nonetheless, the Court has subsequently referred to the awareness of standing in later case law, indicating that this is in fact the case.[127] Academic opinion also seems to support this interpretation. In the interest of judicial protection and with regard to the strict standing conditions for direct actions, the *TWD*-principle should be applied restrictively.[128]

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[120] Case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] n.y.r., para 38; Schermers and Waelbroeck, 2001, *supra* note 4, p. 501; Dougan, 2004, *supra* note 16, p. 317.

[121] Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, para 40.

[122] Barents, *CML Rev.*, 2010, *supra* note 106, p. 717.

[123] Case C-188/92 *Textilwerke Deggendorf GmbH (TWD) v Commission and Germany* [1994] ECR I-833, para 17.

[124] Dougan, 2004, *supra* note 16, p. 51.

[125] *Banks*, *supra* note 46, para 111; Case C-241/95 *The Queen v Intervention Board for Agricultural Produce, ex parte Accrington Beef Co. Ltd, and Others* [1996] ECR I-6699, para 16; Joined Cases C-346/03 and C-529/03 *Giuseppe Atzeni and Others, Marco Scalas and Renato Lilliu v Regione autonoma della Sardegna* [2006] ECR I-1875, paras 31-34; Case C-441/05 *Roquette Frères v Ministre de l'Agriculture, de l'Alimentation, de la Pêche et de la Ruralité* [2007] ECR I-1993, paras 47-48.

[126] *TWD*, *supra* note 123, paras 11 and 24.

[127] *Inter alia Accrington Beef*, *supra* note 125, para 16; *Atzeni*, *supra* note 125, para 33.

[128] Derrick Wyatt, 'The Relationship Between Actions for Annulment and References on Validity After *TWD Deggendorf*', in Julian Lonbay and Andrea Biondi (eds), *Remedies for Breach of EC Law*, Chichester: John Wiley & Sons Ltd, 1997, pp. 55-66, at pp. 64-65; Dougan, 2004, *supra* note 16, p. 328; Tridimas, 2006, *supra* note 10, p. 250.

A ruling of invalidity in a preliminary reference is, of course, binding on the referring national court.[129] It is further binding on all other courts and all authorities in the Member States, and it sets out the law *ab initio*.[130]

3.2.2 An Adequate Alternative to Direct Actions?

Instead of relaxing its own standing rules, the Court has required national courts to open up access for individuals under their duty of sincere cooperation and pursuant to the obligation to protect individuals' right to effective judicial protection.[131] In *Verholen*, the Court stated that even though it was for the national rules to determine standing in the Member States' courts, these rules were not allowed to render the exercise of Union law rights virtually impossible. Consequently, if an individual's rights under EU law are at stake national rules must allow them standing.[132] The Court applied this reasoning in practice in the *Borelli* case, where national procedural restrictions were denying jurisdiction to review a preparatory administrative decision, which was binding on the Commission when it took the final decision.[133] Thus, it is the national courts' duty to allow individuals to challenge the legality of EU acts. The success of relying on the Member States to ensure effective judicial protection is nonetheless dependent on their compliance and willingness to reform their legal systems when needed.[134]

The decentralised nature of the Union system brings about that the actual application of EU rules to specific cases usually is done on the national level.[135] However, there are several reasons why the indirect action through the national courts should be questioned as being a satisfactory alternative to a direct action.

Firstly, it is not within the national courts' mandate to declare a challenged Union act invalid.[136] The right to effective judicial protection requires access to a court, which is competent to rule on the matter. Thus, a direct action for annulment is more appropriate than bringing the case before the national courts with their restricted mandate.[137] Further, the detour through the national courts is burdensome on the applicant from several aspects,

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[129] Case 52/76 *Luigi Benedetti Munari F.lli s.a.s.* [1977] ECR 163, para 26.
[130] *ICC*, *supra* note 119, paras 13 and 18; Chalmers et al, 2010, *supra* note 39, p. 158.
[131] *UPA*, *supra* note 1, para 42; *Jégo-Quéré* P, *supra* note 2, para 32.
[132] *Verholen*, *supra* note 64, para 24.
[133] *Borelli*, *supra* note 64, para 13.
[134] Eliantonio and Kas, *JPL*, 2010, *supra* note 117, p.129.
[135] Schermers and Waelbroeck, 2001, *supra* note 4, p. 197; Jans et al, 2007, *supra* note 5, p. 241; Chalmers et al, 2010, *supra* note 39, p. 158.
[136] *Foto-Frost*, *supra* note 36, para 20; AG Jacobs in *UPA*, *supra* note 91, para 41; See further Chapter 4.2.1.
[137] AG Jacobs in *UPA*, *supra* note 91, para 42; Schermers and Waelbroeck, 2001, *supra* note 4, p. 452.

such as time and economy.[138] The time the Court of Justice takes to answer a question for reference is added to the time in the national court, and if the procedure is too lengthy, national courts may be reluctant to use the procedure.[139] The preliminary statistics of the Court of Justice from 2010 show that the average length of a preliminary ruling procedure is 16.1 months. The economic implications of such a prolonged procedure can be considerable. Arguably, sixteen months for the action before the Court is in fact not a bad result, on the contrary, the time period for the actions has decreased during the recent years.[140] Although the average time for an action for annulment brought before the General Court seems to comprise of almost the double amount of time, the costs incurred by the applicant are more foreseeable, due to the case being handled in one instance only.[141] In addition, there are no guarantees that the first instance national court will send a preliminary reference. Hence, this route might as well amount to a much longer process than the seventeen months spent at Union level when adding the time spent on appeals at national level.

Another problem with the preliminary ruling procedure, from the viewpoint of the individuals seeking redress, is the fact that the reference to the Court of Justice does not constitute a remedy for them. They do not have means to demand a reference, this lies within the power and discretion of the national court to make and the possibility for the applicant to influence the content of the question referred is very limited.[142] Ultimately, the national court may even decide not to refer at all.[143] There is further no insurance that the national court will not misinterpret and falsely define the bases for invalidity raised as unfounded.[144] In addition, it is the national court that formulates the question and has the main role in the reference. The applicants have only an inferior role with their written observations and short oral submissions, unlike in the direct actions, where there is a full exchange of pleadings and the institution which adopted the measure is allowed to participate fully.[145]

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[138] AG Jacobs in *UPA*, *supra* note 91, para 44.

[139] Report of the Committee on Legal Affairs, *Report on the role of the National Judge in the European Judicial System,* (A6-0224/2008), 4 June 2008, p. 4; Arnull, 2006, *supra* note 80, p. 142.

[140] Provisional annual report of the Court of Justice of the European Union 2010: Statistics of judicial activity of the Court of Justice, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/ra09_stat_cour_provisoire_en.pdf, accessed on 24 May 2011, p. 14.

[141] Provisional annual report of the Court of Justice of the European Union 2010: Statistics of judicial activity of the General Court, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/ra09_stat_tribunal_provisoire_en.pdf, accessed on 24 May 2011, p. 9; Note that the average time of 25.4 months not only comprises actions for annulment brought by individuals, but encompasses all direct actions before the General Court. Observe that the average time has been recalculated by me using the average time per case stated on p. 9 and the number of cases stated on p. 5 of the report.

[142] Case C-332/92 *Eurico Italia Srl, Viazzo Srl and F& P SpA v Ente Nazionale Risi* [1994] ECR I-711, para 17; AG Jacobs in *UPA*, *supra* note 91, para 42.

[143] Schermers and Waelbroeck, 2001, *supra* note 4, p. 452.

[144] AG Jacobs in *UPA*, *supra* note 91, para 42.

[145] *Ibidem*, para 46; Schermers and Waelbroeck, 2001, *supra* note 4, pp. 452 and 501; Arnull, 2006, *supra* note 80, p. 130; Chalmers et al, 2010, *supra* note 39, p. 151.

The Court of Justice will furthermore not examine questions requested by the parties, where these have not been referred by the national court.[146] Moreover, any interim relief granted by the domestic court is confined to the Member State in which the action is brought, unlike the relief awarded by the Court of Justice in accordance with Article 278-279 TFEU, which has effects in the whole territory of the Union.[147]

It is also in the interest of legal certainty that acts may not be invalidated a long time after their adoption when the Union Institution or the Member States have taken measures according to it.[148] It is much more in line with this principle that Union acts are challenged within the time limit of two months laid down in Article 263(6) TFEU, since there is no time limit for bringing actions challenging the validity of EU acts regarding the preliminary ruling procedure.[149] Another advantage of the direct actions is that the applications are published in the Official Journal. This enhances openness and transparency, which facilitates for interested parties to intervene in questions affecting them or in questions regarding acts against which they themselves might bring an action. Thus, several cases concerning the same issue will be dealt with simultaneously.[150]

There are no direct sanctions if a national court fails to refer and the Court of Justice will not step in and give standing under Article 263(4) TFEU. This would, in fact, go beyond its competence and standing would be dependent on the rules in the applicants' relevant Member State. [151] If the duty to refer is violated, the state may only be liable for damage if the breach is sufficiently serious and a causal link can be shown between the violation of the duty to refer and the damage.[152] Additionally, an award of damages does not remove the source of the problem and does not bring about a reference of the question to the Court of Justice.

Lastly, it has to be recalled that the action for annulment and the preliminary ruling procedure have different objectives and are within the Treaty two procedures independent of each other. The action for annulment is an autonomous form of remedy with its own objective and conditions differing from the purpose of the court-to-court procedure in Article 267 TFEU.

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[146] Case C-189/95 *Criminal proceedings against Harry Franzén* [1997] ECR I-5909, para 79; Case C-435/97 *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others* [1999] ECR I-5613, paras 28-29, See also *Ferenc Schneider*, *supra* note 120, paras 28-29.
[147] AG Jacobs in *UPA*, *supra* note 91, para 46.
[148] *TWD*, *supra* note 123, paras 16-17.
[149] AG Jacobs in *UPA*, *supra* note 91, para 48.
[150] *Ibidem*, para 47.
[151] *Ibidem*, paras 50-53; *Jégo-Quéré*, *supra* note 84, para 48; *UPA*, *supra* note 1, para 43; *Jégo-Quéré* P, *supra* note 2, para 33.
[152] Opinion of Advocate General Trstenjak delivered on 6 July 2010 in Case C-137/08 *VB Pénzügyi Lízing Zrt. V Ferenc Schneider* [2010] n.y.r., para 73; Case C-224/01 *Gerhard Köbler v Austria* [2003] ECR I-10239, paras 33-36; Schermers and Waelbroeck, 2001, *supra* note 4, p. 454.

Therefore, the challenge of an act through the preliminary ruling procedure cannot fully substitute the direct action in Article 263 TFEU.[153]

As we have seen above there may still be instances where there is no national measure available to contest before the national courts and thus in those cases an individual will still be completely deprived of a remedy.[154] Having to rely on breaching the rules and relying on their invalidity as a defence in subsequent administrative or criminal proceedings is not an adequate way of ensuring effective judicial protection. In fact, in relation to national law this procedure as an only way to obtain review in light of Union law was expressly discarded by the Court in *Unibet*.[155] Nevertheless, the preliminary ruling procedure is an important alternative for individuals, due to the restricted standing in actions for annulment, with virtually no restrictions on private parties imposed by the Union. The scope of the acts to be challenged is also wider, giving individuals the possibility to challenge old acts and acts not available to contest under Article 263(4) TFEU.[156]

It may be mentioned that the ECtHR has had opportunity to express its view on the EU system of judicial review in the *Bosphorus* case.[157] It started by stating that the responsibility under the ECHR still lies on the Contracting Parties, regardless of whether the alleged infringement is a consequence of that state's obligations under other international agreements. However, if such an international organisation is deemed to ensure at least the protection afforded under the ECHR, the act or omission by a Member State undertaken pursuant to its participation in such an organisation is presumed to be in conformity with the ECHR. This holds true as long as the State is only implementing its obligations originating from that organisation. The presumption can be rebutted if the protection of rights covered by the ECHR is found manifestly deficient.[158] After these statements, the ECtHR went on to examine the protection afforded under the EU legal system. The Court reiterated the case law on human rights from the European Court of Justice and referred to the EUCFR. The ECtHR further examined the mechanisms through which the observance of fundamental rights was guaranteed in the Union.[159] The Court recognised the limited standing for individuals under Article 263(4) TFEU but accepted the alternative means of redress in actions for damages and the preliminary ruling procedure as sufficiently protecting their rights. It referred to the whole system of review in the EU as guaranteeing the compliance with Union rules, thus also the control exercised by actions brought by Member States and Institutions of the Union.[160] Consequently, the restriction on *locus standi* in Article 263(4) TFEU was not in itself found to be in breach of the ECHR, but a rebuttal of

[153] Schermers and Waelbroeck, 2001, *supra* note 4, p. 451; Chalmers et al, 2010, *supra* note 39, p. 151.
[154] See Chapter 3.1.3.
[155] *Unibet*, *supra* note 34, para 64.
[156] Usher, *EL Rev.*, 2003, *supra* note 116, pp. 586-587 and 599.
[157] *Bosphorus v. Ireland*, Application no. 45036/98, Judgment of 30 June 2005.
[158] *Ibidem*, paras 153-157.
[159] *Ibidem*, paras 159-160.
[160] *Ibidem*, paras 162-164.

the presumption could be possible if the protection would be deemed as 'manifestly deficient', which, however, was not the case in *Bosphorus*.[161]

Interestingly, the ECtHR stated 'The parties to the domestic proceedings have the right to put their case to the ECJ during the Article [267] process'; a right, which, as is clear from this work, is not absolute.[162] Rather than a misconception of the Union system, I believe that the ECtHR was careful in adjudicating on a legal order officially not under its jurisdiction, in order not to upset the balance between the two European courts. Arguably, with the forthcoming ratification of the ECHR a more comprehensive review is possible. This potential scrutiny of the ECtHR might make the European Court of Justice more inclined to adopt a wider interpretation of the standing rules in order to accommodate the individuals' right to effective judicial protection in cases where that protection is lacking.[163]

[161] *Ibidem*, para 166; Arnull, 2006, *supra* note 80, pp. 349-350.
[162] *Bosphorus v. Ireland*, *supra* note 157, para 164.
[163] See also the view of Chalmers et al, 2010, *supra* note 39, pp. 261-262.

4 National Courts' Possibility to Apply or Disapply EU Law

In this chapter, I will turn to the procedural duties and discretion on the national courts in cases where the validity of a Union act is at issue. I will examine national courts' mandate with regard to review of the legality of the contested measures and their power to disapply a possibly invalid act. Then, I will look at the issue of *ex officio* application of EU law in the national courts. The following account concerns areas in which the Court of Justice has imposed restrictions and obligations on the national courts, mainly justified by the need for uniformity and the full effectiveness of Union law, ultimately enhancing effective judicial protection. While these interventions are to a certain extent necessary for the functioning of the decentralised Union system, they have been criticised in the doctrine for imposing a too extensive intrusion on national sovereignty, with the effect of debilitating the principle of national procedural autonomy.

4.1 National Courts' Duties

While the Court of Justice has the final word with regard to the interpretation of EU law, the national courts are the ones de facto applying it. They are in that capacity courts *du droit commun* and are imperative for the enforcement of Union law and for the guarantee of effective judicial protection.[164]

According to the principle of sincere cooperation in Article 4(3) TEU, the Member States are obliged to take all appropriate measures in order to ensure the fulfilment of their Treaty obligations and facilitate the attainment of the Union's tasks. They are also required not to act in a way that would risk the 'attainment of the Union's objectives'.[165] Inherent in the duty of sincere cooperation is thus an obligation for national courts to interpret national law in the light of Union law and to resolve any issues of incompatibility with EU law prevailing. This duty was expressly enunciated in *Simmenthal* with inspiration from the principles of primacy and direct effect. Any rule hindering the national court from setting aside a national provision incompatible with Union law in itself constitutes a breach of EU law.[166]

However, as mentioned, the obligations of the national courts do not include the creation of new remedies unknown to the legal system in question. With reference to *Factortame I*, the duty rather involves making the most appropriate remedy, already applied within the state available for the

[164] Schermers and Waelbroeck, 2001, *supra* note 4, p. 236; Tridimas, 2006, *supra* note 10, p. 419; Jans et al, 2007, *supra* note 5, pp. 259-260.
[165] Jans et al, 2007, *supra* note 5, p. 37.
[166] *Simmenthal*, *supra* note 40, paras 21-22; See also above, Chapter 2.4.

individuals trying to protect their Union rights.[167] The Court has clarified the issue in the more recent case *Unibet*, where the national court wondered whether it was under an obligation to allow an action not available under national law in order to ensure individuals' effective judicial protection. This was not necessary if, after examination of the national legal system, other means of protecting Union rights were accessible for the applicant. Even indirect means of redress, such as an action for damages, would be sufficient for the protection of the individual.[168] It is more important that there is actually a remedy available, not that it necessarily is the one preferred by the applicant. The judgment shows the limits of the intrusion of Union law in national procedural autonomy showing that the Member States do not have to overturn their national legal systems completely in order to comply with the extensive duties laid upon them through the Court's judgments in *UPA* and *Jégo-Quéré*.[169]

The duties imposed on national courts in the sphere of Union law are nevertheless still extensive. They encompass *inter alia* the following:

- to apply Union law and to protect rights deriving from it.
- to make sure that national law is compatible with Union law and that its rulings are so too. This may include the setting aside of incompatible national rules.
- to provide effective remedies for breach of EU law and for the protection of Union rights.
- to protect fundamental rights.
- to refer questions of validity and raise questions of EU law of their own motion where it is possible.[170]

It is in the light of these obligations that the following parts should be read. Apart from the obligations to set aside conflicting national law and allow access to review of EU law on domestic level, which have been discussed above, the duties might entail additional tasks for national courts.[171] They may have to provide for interim protection while obtaining the answer to a question of validity of EU law or they may be required to raise and examine issues of Union law on their own motion.

[167] *Factortame I*, *supra* note 67.
[168] *Unibet*, *supra* note 34, paras 56-61.
[169] See above Chapter 3.1.2.
[170] For a more comprehensive list, see Claes, 2006, *supra* note 34, pp. 67-68, with reference to different publications of Temple Lang and others. The list summarised here is by no means complete and I have only included duties that are of interest for this work.
[171] See above Chapters 2.4 and 3.2.2.

4.2 Illegality of a Union Act Raised Before the National Court

4.2.1 Review of Legality

The review of legality of Union acts may be undertaken in different proceedings on Union level and is expressly within the competence of the Court of Justice of the European Union. However, the difficulty for private litigants to instigate proceedings directly before the Union Courts has made the role of national courts in these types of cases very important. The duty of national courts to uphold Union rights entails not only protecting those rights in relation to State action but also in relation to Union action. In addition, the principle of primacy and the need for uniformity imposes restrictions on the national courts when a Union measure is the subject of review.[172]

The basic requirements of reviewability of an act entail *inter alia* that it is binding, produces legal effects *vis-à-vis* third parties, is definitive and was taken by an EC Institution in the exercise of its competences.[173] In any case, the starting point when an EU act is at issue before the national court is a presumption of legality of every regulation. This follows from on the one hand, Articles 263, 264 and 277 TFEU, which reserve the competence of determining the validity of Union measures to the Union Courts. On the other hand, Article 267 TFEU lays down that the Court of Justice has the power at last instance to rule on the validity where such an action is pending before a national court.[174]

Even though the possibility for national courts to rule on the validity of EU law is not expressly precluded by Article 267 TFEU, they are, according to *Foto-Frost*, not allowed to declare Union acts invalid.[175] The Court argued that otherwise, the main aim of the preliminary ruling procedure; the uniform application of EU law would be threatened. This would entail the risk of the whole EU legal order being undermined and legal certainty impaired. Since Article 263 TFEU confers exclusive jurisdiction on the European Court of Justice to declare a Union act void, the coherence of the Treaty system would necessitate that the power to rule on the validity of an act in a preliminary ruling procedure should be exclusively reserved to the same judiciary. That Court is also arguably in the best position to rule on the issue, since statements and written observations are submitted to it. The same conclusion is warranted with regard to the effect of its ruling; if a national court was able to rule on the validity of a Union act, its judgment would only have legal effects within that Member State, whereas the rulings

[172] Tridimas, 2006, *supra* note 10, p. 470.
[173] Case T-184/97 *BP Chemicals Ltd v Commission* [2000] ECR II-3145, para 34; Schermers and Waelbroeck, 2001, *supra* note 4, p. 313.
[174] Case 101/78 *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, paras 4-5.
[175] *Foto-Frost*, *supra* note 36, para 15.

of the Union Courts are binding on all national courts in all Member States. Consequently, an act declared invalid is not to be applied by any court within the Union, without the need for each of them, respectively, to make a preliminary reference.[176]

The case still left open the possibility for the national courts to temporarily disapply EU law through the grant of interim relief, further developed in *Factortame I*, *Zuckerfabrik* and *Atlanta* below.[177]

Nevertheless, it may be argued that the national courts are, in fact, entitled to a certain degree of review of the legality of Union acts. This is, however, only to reach a negative result, i.e. only to find the basis for the challenge of validity unfounded. Therefore, a national court is competent to declare a Union act *valid*, and this gives national courts some mandate to review the validity of EU acts.[178] Yet, a test similar to that of *acte clair* is not allowed in these cases. In the *Schul* case, the Court of Justice declared that even though an analogous measure already had been declared invalid by it, a national court could not deduce from this the invalidity of the measure before it.[179] This is logical, since the national court in such a case would have a 'serious doubt as to the validity' of that measure. It seems as though the Court doubts the national courts' ability to draw analogies from its case law, and earlier only supreme courts (or their equivalents) have been entrusted with a similar task.[180] Nonetheless, the interest of uniformity is important enough to result in such a conclusion, not to mention the fact that a declaration of invalidity in one Member State would not have effects in the rest of the Union. The route to review of validity through the national courts has still been criticised. Indeed, it is somewhat paradoxical to rely heavily on national courts to handle cases of invalidity when they are, in fact, not competent to give a ruling on the matter.[181]

It is also important to clarify that any review of a Union act is not allowed to be based on national law. In the case *Internationale Handelsgesellschaft*, the Court of Justice stated that 'The validity of a [Union] measure or its effects within a Member State cannot be affected by […] the constitution of that State or the principles of the national constitutional structure'. [182] Thus, national courts may not review the constitutionality of the Treaties or any

[176] *ICC*, *supra* note 119, para 18; *Foto-Frost*, *supra* note 36, paras 15-18; Tridimas, 2006, *supra* note 10, p. 469.
[177] *Foto-Frost*, *supra* note 36, para 19; For a discussion on interim relief, see below, Chapter 4.2.2.
[178] *Foto-Frost*, *supra* note 36, paras 14-15; Case C-27/95 *Woodspring District Council v Bakers of Nailsea Ltd* [1997] ECR I-1847, paras 19-20*;* Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association (IATA) v Department for Transport* [2006] ECR I-403, paras 29-32.
[179] Case C-461/03 *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I-10513, paras 19 and 25.
[180] See Case 77/83 *Srl CILFIT and others and Lanificio di Gavardo SpA v Ministero della sanità* [1984] ECR 1257.
[181] Claes, 2006, *supra* note 34, p. 568.
[182] *Internationale Handelsgesellschaft*, *supra* note 21, para 3.

other EU legislation, not even if their national jurisdiction would confer such a power upon them, e.g. in their capacity of constitutional courts. [183]

The only basis for review of the validity of EU law is Union law itself - the Treaties and higher Union law, such as the general principles of Union law and, finally, international law.[184] Fundamental rights have arguably acquired a stronger position with the creation of the EUCFR, which is of the same dignity as the Treaties, and the ratification of the ECHR.[185] The Court of Justice's approach in this context has consequently evolved towards a higher reliance on the EUCFR and the ECHR. This is indicated by the recent judgment in *DEB.*[186] The case concerned effective judicial protection and the Court, after stating the usual bases for the principle, went on to undertake a detailed examination of Article 47 of EUCFR and the case law of the ECtHR.[187] Accordingly, this case points towards an extensive and express reliance on the case law of the Human Rights Court, reaffirming the close connection of the EUCFR with the ECHR.

4.2.2 Interim Measures

The effectiveness of the alternative route for challenging the validity of an EU act through the preliminary ruling procedure is dependent on the national courts' powers to grant interim protection for the individuals' right while awaiting the answer from the Court of Justice. This is especially so with regard to the principle 'where there is an EU right there should be a corresponding EU remedy'.[188] Moreover, the Court also referred to the importance of ensuring the full effectiveness of Union law and the effective judicial protection of individuals' rights under Union law.[189] In other words, also the possibility of provisionally suspending the application of a contested Union act must be awarded the applicants.

The granting of interim relief in national courts is essentially a matter for the national procedural law to determine. However, the Court has intervened in cases where it thought the judicial protection of individuals' rights to an effective remedy was at stake. The following cases are of importance in this respect.

The first case on the issue was *Factortame I,* in which the national courts were found to have an obligation to grant interim measures in relation to a potentially incompatible national act. The Court based this duty on the need

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[183] Claes, 2006, *supra* note 34, p. 497.
[184] *Ibidem*, p. 560; Türk, 2009, *supra* note 106, p. 126.
[185] Prechal, 2010, *supra* note 24, p. 7.
[186] Case 279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] n.y.r.
[187] *Ibidem*, para 60.
[188] Chalmers et al, 2010, *supra* note 39, p. 280.
[189] *Factortame I*, *supra* note 66, para 21; Case C-226/99 *Siples Srl, in liquidation v Ministero delle Finanze and Servizio della Riscossione dei Tributi - Concessione Provincia di Genova - San Paolo Riscossioni Genova SpA* [2001] ECR I-277, paras 17-20; Claes, 2006, *supra* note 34, p. 138.

for the protection of rights derived from Union law, even though the national procedural rules would have excluded such an action by the national judge.[190]

In *Zuckerfabrik* the question regarded the provisional suspension of national measures implementing Union law.[191] Such an action would in practice suspend the application of EU law itself, but, as mentioned earlier, the possibility for that was not excluded by the Court in *Foto-Frost*. The Court found that the right to effective judicial protection necessitated the availability of interim protection for individuals. If individuals could not get suspension of enforcement of the rule while awaiting the reply by the Court of Justice, the right to challenge the validity of Union law through the preliminary ruling procedure would be compromised. Since the basis of the case was Union law, the coherence of the system of interim protection warranted a result compatible with the judgment in *Factortame I*.[192]

In *Atlanta*, the national courts' powers to grant interim relief were widened.[193] In this case, the interim measure sought was the grant of import licences additional to quotas prescribed by an allegedly illegal EEC Regulation. The interim relief would in essence have the effect of rendering a Union measure inapplicable while its validity was examined by the Court of Justice.[194] The Court stated that the interim protection available in national courts has to be the same, irrespective if the applicants seek suspension of a national measure based on a Union act or 'settling or regulating the disputed legal positions or relationships for their benefit'.[195]

Deduced from the case law above, there are two types of cases where interim protection may be awarded. The first type is when a national rule is challenged, on the basis of its alleged incompatibility with Union law (*Factortame I*) and the second type concerns cases where the validity of a Union act is at issue (*Zuckerfabrik/Atlanta*).[196] The Court of Justice did not give any lead on what conditions should be applied in the first type of case, only in the second. It was also for some time believed that the same conditions were applicable also to the first type of case.[197] However, with the ruling in *Unibet*, it is now clear that the Court distinguishes between the two types of situations and that in cases where a national rule's

[190] *Factortame I*, *supra* note 67, paras 21-22; Tridimas, 2006, *supra* note 10, p. 467.
[191] Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR I-415.
[192] *Ibidem*, paras 16-20.
[193] Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.
[194] See also Tridimas, 2006, *supra* note 10, p. 473.
[195] *Atlanta*, *supra* note 193, para 28.
[196] Apter, *EJCL*, 2003, *supra* note 67, Ch. 1.
[197] Anthony Arnull, 'The pinciple of effective judicial protection in EU law: an unruly horse?', *EL Rev.*, vol. 36(1), 2011, pp. 51-70, at p. 56.

compatibility with EU law is at issue, the conditions for granting interim relief are governed by national law.[198]

Before a description of the conditions for the *Zuckerfabrik/Atlanta*-type situation, it should be mentioned that the availability of interim measures is dependent on a reference for a preliminary ruling being made. It is prohibited to grant interim relief if no question is sent to the Court of Justice.[199]

It is of great importance for the sake of the coherence of Union law that the granting of relief suspending an allegedly illegal EU rule is subject to uniform conditions in all the Member States. The conditions for obtaining interim measures in such cases were set out in *Zuckerfabrik* and further clarified in *Atlanta*. The main concern of the Court was to ensure the uniform application of EU law by making these requirements correspond to the ones governing the Court's own possibilities of granting such relief in direct actions before it.[200] The conditions to be applied by the national courts are the following:

(1) The national court must have serious doubts as to the validity of the Union regulation and must state the reasons for why it should be found illegal.[201]
(2) The national court must refer the question of validity of the Union regulation at issue to the Court of Justice if the question is not already before it. If the Court has ruled in relation to the regulation at hand, this case law has to be respected, and already disqualified grounds for invalidity may not be relied upon again.[202]
(3) Urgency; is the interim relief necessary in order to avoid serious and irreparable damage to the applicant?[203]
(4) Due account must be taken of the Union's interests and also of the discretion enjoyed by the Union institutions who were responsible for the regulation.[204]

The damage must be liable to materialise before the Court has been able to rule on the validity of the contested Union measure, and there would be no possibility open for the applicant to make good the damage if the measure was to be declared invalid.[205] The application of regulations must also not be suspended without proper guarantees, both with regards to the full effectiveness of Union law and the Union's economic interests.[206] Furthermore, the cumulative effect of a larger number of national courts granting interim measures and the special features of the applicant's

[198] *Unibet*, *supra* note 34, paras 78-81.
[199] Tridimas, 2006, *supra* note 10, p. 472.
[200] *Zuckerfabrik*, *supra* note 191, para 27; *Atlanta*, *supra* note 193, para 39.
[201] *Ibidem*, paras 23-24 and paras 35-36 respectively.
[202] *Ibidem*, para 24 and paras 38, 46 respectively.
[203] *Ibidem*, para 28 and para 40 respectively.
[204] *Atlanta*, *supra* note 193, para 37.
[205] *Zuckerfabrik*, *supra* note 191, para 29; *Atlanta*, *supra* note 193, para 41.
[206] *Ibidem*, paras 30, 32 and paras 42, 45 respectively.

situation must be taken into account to assess the potential damage to the regime established by the regulation.[207]

It is of great importance that the national courts are cautious in granting interim relief. The allowing of such a measure in one Member State does not hinder the application of the contested regulation in the rest of the Member States. There is thus a possible threat to the uniform application of Union law and risk of distortion of competition. Therefore, national courts should only grant interim relief if the effective protection of the individuals' rights cannot be attained at a Union level.[208] It is moreover important that the interim protection afforded does not undermine the suspended EU rules' effect completely.[209]

Some of the conditions have proved to be a cause for critique, since it would be very expensive and time-consuming to seek interim relief in all the Member States of the Union. The protection afforded at Union level through Article 278-279 TFEU is much more effective and safeguards the interests of the individual more adequately.[210] Some of the conditions enumerated above have also been deemed to be difficult to meet, since opinions about the Union-wide effects and the determination of the Union interests may be an immense task for the national court to embark upon.[211] The difficulties in foreseeing and estimating such consequences might even result in mere speculation.

4.3 *Ex Officio* Application of EU Law

The procedural law of the different Member States is decisive of the national judges' tasks and role in the judicial process, including their power to raise issues of their own motion. This power can also vary between different types of judicial proceedings. The judges' freedom to raise issues of their own motion is usually more restricted in cases concerning civil matters.[212] In civil suits, the court is to a larger extent bound by the parties' pleadings, especially since claims often may be based on different and alternative grounds. If a case of civil nature can be settled on basis of grounds that are not dependent on EU law, there is no need for a preliminary reference for the national court to give a ruling.[213]

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[207] *Atlanta*, *supra* note 193, para 44.
[208] Tridimas, 2006, *supra* note 10, p. 471; Jans et al, 2007, *supra* note 5, p. 279.
[209] *Zuckerfabrik*, *supra* note 191, para 31.
[210] AG Jacobs in *UPA*, *supra* note 91, para 46; Dougan, 2001, *supra* note 16, p. 332.
[211] Eleanor Sharpston, '*Interim Relief in the National Courts*', in Julian Lonbay and Andrea Biondi (eds), *Remedies for Breach of EC Law*, Chichester: John Wiley & Sons Ltd, 1997, pp. 47-54, at p. 54.
[212] Jans et al, 2007, *supra* note 5, p. 308.
[213] Xavier Groussot, Christoffer Wong, Andreas Inghammar and Anette Bruzelius, *Empowering National Courts in EU Law*, Stockholm: SIEPS, 2009, p. 38; Johanna Engström, 'National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing new Respect for Party Autonomy and National Procedural Autonomy?', *REAL*, vol. 1(1), 2008, 67-89, at p. 72; Martin Ebers, 'Mandatory Consumer Law, *Ex Officio*

However, the impact of EU law on this field is noticeable, especially since the Court of Justice in some cases has extended the power of national courts to raise issues of their own motion in order, *inter alia*, to ensure the legal protection of Union rights. The following cases show the development of this duty on national courts.

Verholen stated that the national courts are allowed to raise issues of Union law of their own motion, provided that they have the right to do so in relation to national law.[214] In *Salonia*, the Court made clear that the national court is always allowed to consider arguments for invalidity of an EU act, and, on basis of this, send a question for preliminary ruling to the Court of Justice, even though none of the parties has asked for it.[215] In *van Schijndel* the ECJ was asked whether a national court was under the obligation to raise an issue of Union law in civil proceedings before it.[216] The Court referred to the national judges' freedom under the domestic rules to raise issues of national law in the same situation. If such an obligation exists in relation to binding national rules, the same applies to binding Union law.[217] However, the Court did not stop there. It stated that where the national law only grants a *discretion* upon the judges to apply national law on their own motion, this discretion turns into an obligation *vis-à-vis* Union law, or, in the words of Jans et al: 'a national discretion implies a [Union] duty'.[218] The basis for this obligation was found in Article 4(3) TEU and the requirement of ensuring the protection granted individuals pursuant to directly effective Union law.[219] The Court then went on to examine the national rule at issue and found that it was compatible with EU law. In the balancing test carried out the principle of judicial passivity as the underlying aim of the national regulation was upheld, since the national courts were not required to 'abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party […] bases his claim'.[220]

Peterbroeck concerned the right to take into account arguments based on Union law *ex officio* when their use by the applicants was precluded due to being raised too late.[221] The Court of Justice found the rule incompatible with Union law, under the test of effectiveness, due to the special features of the rule. Firstly, the Cour d'Appel was the first court in the procedure competent to make a preliminary reference. Secondly, the period for raising

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Application of European Union Law and *Res Judicata*: From *Océano* to *Asturcom*', *ERPL*, 2010, available at http://ssrn.com/abstract=1709347, Ch. 2.1.

[214] *Verholen*, *supra* note 64, para 16.

[215] Case 126/80 *Maria Salonia v Giorgio poidomani and Franca Baglierim née Giglio* [1981] ECR 1563, para 7.

[216] *Van Schijndel*, *supra* note 54.

[217] *Ibidem*, para 13; Confirmed in *Kraaijeveld*, *supra* note 54, para 57.

[218] *Van Schijndel*, *supra* note 54, para 14; Jans et al, 2007, *supra* note 5, p. 309.

[219] *Van Schijndel*, *supra* note 54, para 14.

[220] *Ibidem*, paras 19-22.

[221] Case C-312/93 *Peterbroeck, van Campenhout & Cie SCS v Belgian State* [1995] ECR I-4599.

new arguments had already run out previous to the hearing before this court. Finally, there appeared to be no other court in different stages of the proceedings that would be capable of *ex officio* taking into account the compatibility of the contested national measure with Union law. [222]

Although *van Schijndel and Peterbroeck* seem similar, the outcome was not the same. The conciliation of the two cases has been debated in the literature, with different results.[223] However, it seems as though *Peterbroeck* made the situation unclear as regards to which factors should be considered decisive of the *ex officio* obligation. Apart from the special circumstances of the case also the restriction on the preliminary ruling procedure by the national rules at hand seem to have been of importance.[224] Indeed, in *van Schijndel*, the Court recalled the inapplicability of national rules hindering the preliminary ruling procedure. In that case Mr van Schijndel and Mr van Veen had actually had the opportunity to raise their arguments in two courts.[225]

Van der Weerd and others seems to have clarified some of the questions raised above.[226] The Court clearly distinguished *Peterbroeck* from other case law on the merit of its circumstances and the result of those precluding the possibility to rely upon a plea based on EU law. Accordingly, the main rule in *van Schijndel* applies: the party autonomy principle, the protection of legal certainty and the proper conduct of proceedings may be a valid limit in the effectiveness balance as long as the party relying on Union law has had a real possibility to raise the issue before the national court.[227] The obligation of *ex officio* application is consequently only required where there are special circumstances, as we shall see below.

The Court found the only difference between *van der Weerd* and *van Schijndel* to be the level of the national courts in the national judicial hierarchy in the former case, namely its position as court of first and last instance. No distinction was made with regard to the fact that *van Schijndel* concerned civil proceedings and *van der Weerd* administrative proceedings.[228]

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[222] *Ibidem*, paras 16-20; Arnull, 2006, *supra* note 80, p. 307.

[223] Mark Hoskins, 'Tilting the balance: primacy and national procedural rules', *EL Rev.*, vol. 21(5), 1996, pp. 365-377, at pp. 374-375; Sacha Prechal, 'Community Law in National Courts: the Lessons from van Schijndel', *CML Rev.*, vol. 35, 1998, pp. 681-706, at p. 683; Van Gerven, *CML Rev.*, 2000, *supra* note 38, p. 532; Engström, *REAL*, 2008, *supra* note 213, pp. 77-78; Dougan, 2004, *supra* note 16, p. 49; Arnull, 2006, *supra* note 80, p. 307.

[224] Sacha Prechal and Natalya Shelkoplyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond', *ERPL*, vol. 5, 2004, pp. 589-611, at pp. 598-599; Dougan, 2004, *supra* note 16, p. 49; Arnull, 2006, *supra* note 80, p. 307.

[225] Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Rheinmühlen II)* [1974] ECR 33, paras 2-4; *Van Schijndel*, *supra* note 54, para 18; Arnull, 2006, *supra* note 80, p. 307; Prechal, *CML Rev.*, 1998, *supra* note 223, pp. 693-694.

[226] Joined Cases C-222/05 to C-225/05 *J. Van der Weerd and Others v Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-4233, para 40.

[227] Engström, *REAL*, 2008, *supra* note 213, p. 87.

[228] *Ibidem*, p. 86.

Balancing national procedural autonomy with the principles of effectiveness and equivalence is a very important task, and the case law on the *ex officio* application of EU law by national courts shows the approach adopted by the Court of Justice. The reconciliation of the two opposing interests of procedural autonomy and effective protection of Union rights has been done through the procedural rule of reason test. This test is carried out by weighing the restriction of a particular EU right against the aim behind the national rule claimed to be legitimate.[229] The examination is not to be made in a vacuum, but with the specific factual circumstances of the case taken into consideration. The Court formulates it in the following manner:

> 'each case which raises the question whether a national procedural provision renders application of [Union] law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct or procedure, must, where appropriate, be taken into consideration.'[230]

The test under the principle of equivalence is also made with regard to the national rules' role and underlying aim in that system. This has been confirmed by the Court of Justice in its recent case *Bulicke*.[231]

The test has been criticised by some authors.[232] They argue that the approach is difficult to understand, and lead to unclearness and uncertainty, due to the case-to-case approach adopted by the Court. This would subsequently lead to national courts sending more preliminary references. Some authors further state that the Court of Justice is not well suited to carry out the balancing in individual cases due to the fact that it is difficult for it to evaluate the role of the national rules in the context of the Member State's legal order as a whole.[233] In Dougan's view, the test is not as intrusive and revolutionary as it might seem. He holds that the Court had always tried to balance opposing Union and Member State interests in relation to the principle of effective judicial protection, by assessing the domestic rules' objectives and functions also in regard to national remedies

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[229] Prechal, *CML Rev.*, 1998, *supra* note 223, p. 690-691.
[230] *Peterbroeck*, *supra* note 221, para 14; *Van Schijndel*, *supra* note 54, para 19; *Van der Weerd*, *supra* note 226, para 33; Confirmed in Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-957, para 39; Case C-246/09 *Susanne Bulicke v Deutsche Büro Service GmbH* [2010] n.y.r., para 29.
[231] *Bulicke*, *supra* note 230, para 35; See also *Van der Weerd*, *supra* note 226, para 29; *Asturcom*, *supra* note 230, para 50.
[232] Hoskins, *EL Rev.*, 1996, *supra* note 223; Prechal, *CML Rev.*, 1998, *supra* note 223; Prechal and Shelkoplyas, *ERPL*, 2004, *supra* note 224, p. 593; Engström, *REAL*, 2008, *supra* note 213, p. 86.
[233] *Ibidem*.

and procedural rules. Legal certainty was accepted as a legitimate aim already in *Rewe*.[234]

Nevertheless, the Court has taken on a more strict approach on the obligation on national courts to raise issues of EU law in certain areas. It argues that some situations clearly warrant a departure from the *van Schijndel* principle.[235] With regard to consumer protection law, in the *Océano Grupo* case, the Court held that the national court must be able to raise points of EU law in relation to unfair contract terms so that the aims of Directive 93/13 on unfair terms in consumer contracts can be guaranteed, ensuring the objective of protecting a weaker party in unbalanced relations.[236] The Court qualified this requirement further in *Cofidis*, where national courts were obliged to apply Union law *ex officio* also at later stages of the proceedings, when the plaintiff already had had the opportunity to raise EC law but failed to do so due to unawareness or deterrence.[237]

Another area, which stands out in the Court's case law is EU competition regulation. In the *Eco Swiss* case, concerning the review of arbitration awards, the Court found that an application for annulment of the award must be granted if it is contrary to Article 101 TFEU, where such an obligation exists for the national court in relation to domestic rules of public policy.[238] Two aspects of the case may be distinguished. Firstly, the Court found Article 101 TFEU to be of equivalent status to the national rules of public policy, by reason of its significance for the achievement of the Union's aims and particularly for the functioning of the internal market. The Article's importance was also found to be underlined by its effect of automatic nullity in case of infringement. The second issue of importance for the Court's decision was the limited possibility to obtain review in light of Union law pertaining to the fact that arbitration tribunals cannot send preliminary references to the Court of Justice. Thus, the only way to protect individuals' Union rights in relation to arbitration awards is through a subsequent review of the award before the national court.[239]

Eco Swiss instigated a discussion on the role of public policy rules in the Union legal order. It was wondered whether certain EU provisions should be considered matters of public policy and if so, which ones. Furthermore, the question arose whether a special form or European public policy had been created.[240]

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[234] Dougan, 2004, *supra* note 16, p. 31.
[235] *Van der Weerd*, *supra* note 226, para 40.
[236] Joined Cases C-240/98 to C-244/98 *Océano Grupo* [2000] ECR I-4941, para 26.
[237] Case C-473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875, para 34.
[238] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, para 41.
[239] *Ibidem*, paras 34, 36-37 and 40; Prechal and Shelkopylas, *ERPL*, 2004, *supra* note 224, pp. 597-598.
[240] Hanna Schebesta, 'Does the National Court Know European Law? A Note on *Ex Officio* Application after *Asturcom*', *ERPL*, vol. 4, 2010, pp. 847-880, at p. 866; Jans et al, 2007, *supra* note 5, p. 310; For a different view, see Prechal and Shelkopylas, *ERPL*, 2004, *supra* note 224, pp. 599-600.

With the judgment in *Mostaza Claro*, the Court brought up consumer protection law in relation to public policy in an action for annulment of an arbitration award.[241] The case concerned the Unfair Terms Directive dealt with in *Océano Grupo* and *Cofidis*. The Court mentioned both the principle of effectiveness and the principle of equivalence, but the application of those principles was not expressly described. The Court referred to its judgments in the previous consumer cases, which had been decided under an effectiveness approach, but not by expressly relying on the effectiveness/equivalence test.[242] The Court then confirmed the public policy character of the Directive by using the reasoning in *Eco Swiss*. The characteristics of EU consumer protection were examined in the same way as competition law had been in that case. The public policy character of consumer protection law followed from its fundamental role for the attainment of Union objectives, specifically the aim of improving the standard of living and the quality of life in its territory. Accordingly, the national court was required to raise and examine the issue of unfairness of the contract term.[243]

The recent case *Asturcom* dealt with the same Directive.[244] The Court once again affirmed consumer protection as having public policy character, but this time through the express application of the principle of equivalence.[245] This case also concerned proceedings in relation to an arbitration award. *Asturcom* was, however, distinguished from *Mostaza Claro* by the fact that the consumer had not participated in the arbitration proceedings, nor challenged the arbitration award in court.[246] It seems as though the *ex officio* raising of consumer protection concerns in this case could not be imposed by mere reference to earlier case law on the area. It is also possible that the Court made an attempt to streamline its consumer protection case law with its general case law concerning *ex officio* application of EU law.[247] Anyhow, the Court carried through a complete effectiveness and equivalence reasoning. The consumer's passivity was considered in relation to the review under the principle of effectiveness, but the Court did not discover any issues of concern with the national time limits and accepted the importance of the principle of *res judicata*.[248] The case was, as mentioned, decided in relation to the equivalence principle. The Court affirmed the duty on national courts to apply EU law of its own motion where national procedural rules would impose such a duty or discretion in relation to national public policy.[249] It would seem as though the public policy concept

[241] Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421.
[242] *Ibidem*, paras 24-29; See also Case C-243/08 *Pannon GSM Zrt. v Erzsébet Suskiné Győrfi* [2009] ECR I-4713, para 31-32; Schebesta, *ERPL*, 2010, *supra* note 240, p. 860.
[243] *Mostaza Claro*, *supra* note 241, paras 34-38.
[244] *Asturcom*, *supra* note 230.
[245] *Ibidem*, paras 49-52; Schebesta, *ERPL*, 2010, *supra* note 240, p. 848.
[246] *Ibidem*, para 33.
[247] Schebesta, *ERPL*, 2010, *supra* note 240, p. 854.
[248] *Asturcom*, *supra* note 230, paras 35-36 and 39-47.
[249] *Ibidem*, para 53.

only applies in the context of arbitration proceedings. However, in *Manfredi* the Court referred to the public policy character of Articles 101 and 102 TFEU with reference to *Eco Swiss* in context of a national damages action.[250]

The question of the extent of public policy and which rules should be included still remains. There is no consensus amongst the Member States as to the content of this concept.[251] Only a limited number of rules have been attributed such character by the Court of Justice and, in my view, it seems too early to distinguish them to a separate and new concept yet. Further, the determination of a Union rule's public policy status is done within the ambit of the principle of equivalence; hence, a prerequisite is that there actually is a concept of public policy in the national legal system at hand.[252] Additionally, it is not completely clear which requirements have to be fulfilled for a Union rule to be considered a public policy matter. Suffice to say, is has to at least be of fundamental nature and hold a position of importance for the Union legal order and the achievement of its aims.[253]

Finally, it may be mentioned that the obligation to examine the unfairness of a contractual term was qualified by the Court in *Pannon*, where it held that such an undertaking is to be carried out where the national court 'has available to it the legal and factual elements necessary for that task'.[254] Further, the Court does not have to exclude the term of its own motion if the applicant, after being informed of it, does not wish to invoke the unfairness of the term.[255]

The case law presented above shows a development of a new approach towards the limits of national procedural autonomy. This is indicating a higher sensitivity to the domestic rules' place in the national legal order since the rules are reviewed in light of their aims and role in that system. *Van der Weerd* is a good example of an attempt to clarify and reaffirm the principles governing national courts' duty to apply Union law *ex officio*. As regards the principle of effectiveness, the procedural rule of reason in *Peterbroeck* and *van Schijndel* is used when determining whether a national rules' impact makes individuals' exercise of Union rights excessively difficult or virtually impossible. A rule, which is justifiable by reference to for example the principle of party autonomy, is accepted so long as the parties have been 'given a genuine opportunity to raise a plea based on

[250] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA* [2006] ECR I-6619, para 31.
[251] Prechal, *CML Rev.*, 1998, *supra* note 223, pp. 703-704; Prechal and Shelkopylas, *ERPL*, 2004, *supra* note 224, pp. 600-601; Ebers, *ERPL*, 2010, *supra* note 213, Ch. 4.2.
[252] Ebers, *ERPL*, 2010, *supra* note 213, Ch. 4.2 and 4.5.
[253] Prechal and Shelkopylas, *ERPL*, 2004, *supra* note 224, pp. 602-603; Ebers, *ERPL*, 2010, *supra* note 213, Ch. 4.5.
[254] *Pannon*, *supra* note 242; Se also AG Trstenjak in *Ferenc Schneider*, *supra* note 152, paras 112-113.
[255] *Ibidem*, para 33.

[Union] law before a national court'.[256] The application of the principle of equivalence has also been subject to some developments. The strict approach of this principle takes its starting-point in the EU law claim at hand, comparing it to an equivalent situation governed by national law. The standard set in this case is that of EU law. The case law above concerning public policy is departing somewhat from these presuppositions, since this approach begins by setting out the national notion of public policy. Subsequently, the EU rule is tested against this notion to determine whether it possesses a similar importance. In terms of *ex officio* application of Union law, the Court thus first determines the conditions governing this at the national level and then examines whether the Union rules at issue enjoy comparable dignity. Consequently, the national rule is the standard applied. Hence, in my view, public policy is not a self-standing requirement, but a part of the test under the principle of equivalence.[257] This is also confirmed by the judgment in *Asturcom* on the area of consumer protection law. The status as public policy was justified with reference to that principle. Accordingly, it seems as though consumer protection no longer is a separate line of cases but is subject to the procedural rule of reason test in the same way as other areas of EU law.

Conclusively, the Court of Justice has extended the duties of national courts to help protect individuals' rights under Union law by requiring them to raise issues of EU law of their own motion. The focus of the procedural rule of reason test of the rules adopted pursuant to national procedural autonomy is also the protection of the right to obtain review of Union law. The national rules are failing the test if they do not provide a chance for individuals to raise a plea of EU law in the domestic proceedings. The duty to raise such issues *ex officio* provides for a way to remedy such a possible national limitation. In some cases, the rules on Union level are of such dignity to make them equal to national public policy. Whilst national procedural autonomy is the starting point, the principles of effectiveness and equivalence need to be fulfilled in order to ensure the effective judicial protection of Union rights. The Court of Justice has made the application of these principles more flexible by taking into account all circumstances in order to ensure that the application of EU law is effective.

[256] *Van Schijndel*, *supra* note 54, para 18; *Eco Swiss*, *supra* note 238, paras 34 and 40; *Van der Weerd*, *supra* note 226, para 41.
[257] See also the view of Richard H. Lauwaars, 'The Application of Community Law by National Courts Ex officio', *Fordham International Law Journal*, vol. 31, 2008, pp. 1161-1173.

5 Reform Proposals

As is clear from the account above, there are still problematic issues left in the protection of individuals seeking to obtain review of Union acts. The need for effective judicial protection of private litigants warrants a complete and effective system of remedies available to them. Thus, in this chapter, I will examine some propositions inspired by doctrine and case law for improving the effective judicial protection of individuals. My intention is not an exhaustive enumeration of possible ways to deal with the issue; instead, I have chosen solutions connected to the topics discussed above. I will put forward three propositions. First, I recommend a widening of the strictly interpreted standing rules in Article 263(4) TFEU through broad interpretation of those conditions. Second, I propose a widening of the national courts' mandate in relation to EU law, in connection with a more extensive application of the *ex officio* requirement. National courts should also be allowed to embark upon the review of EU law by giving proposals for solutions of the questions referred for a preliminary ruling. The final suggestion concerns harmonisation of procedural rules in cases before the national courts dealing with Union law, similar to the route taken in relation to the granting of interim relief. I will present arguments both in favour and against all three solutions. Some of the argumentation may have been mentioned elsewhere in this work but for the completeness of the following statements, those arguments will be mentioned again where relevant. The work will be concluded with some final remarks.

In the interest of legal certainty and judicial protection, it is important that issues of ambiguity are cleared up and reviewed. There should be no question about the route to take in order to obtain the most effective remedy, whether it regards the interpretation of standing or the review of validity of Union law at national level. The rules governing standing before the General Court should be sufficiently clear for the sake of legal certainty and predictability. Questions referred to the Court of Justice should be answered in a manner as clear and coherent as possible without the need for the national court of further clarification.[258] However, for the system to be as effective as possible the focus should rather lie on a smooth cooperation than on the 'infringements' by the Union Courts in national procedural autonomy. The exchange of information encourages mutual learning and promotes the equal and effective application of EU rights which in the end benefits the European citizens.

5.1 Widen Standing Rules

The first change proposed is to widen the standing rules in Article 263(4) TFEU. The simplest way, in theory, would be for the Court of Justice to

[258] Opinion of Advocate General Jacobs delivered on 21 March 2002 in Case C-136/00 *Rolf Dieter Danner* [2002] ECR I-8147, para 38.

reinterpret the standing requirements for individuals, i.e. the condition of individual concern, in line with the interpretations proposed by AG Jacobs or the CFI. A wide interpretation of the term 'regulatory act' introduced by the Lisbon Treaty would, in this regard, also be desirable. If this new concept is interpreted restrictively, the reliance on the *Plaumann*-criteria will still be determinative of whether the effective judicial protection of individuals is ensured. In my view, two approaches may be adopted with regard to the concept of regulatory acts. The Court may either emphasise the content of the act and its application, or its form; in other words, the distinction between legislative or non-legislative acts. I recommend the first approach. It would be very unsatisfactory in relation to the right to effective judicial protection if the reviewability of an act would depend on its form or under the procedure of its adoption. The Court has itself rather looked at how a measure was applied. For instance, in relation to regulations, the requirement is that it 'applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner'.[259] In fact, the Court is still using this standard to determine general applicability.[260] Hopefully, the Court will stay with this approach also in relation to regulatory acts.

5.1.1 Arguments in Favour

The main argument for widening the interpretation of the standing requirement is to ensure effective judicial protection for the applicants in cases where they would otherwise be deprived of any remedy whatsoever. This may occur in relation to acts deemed non-regulatory, but which do not entail implementing measures. What must be underlined in this context is that a wide enough interpretation of the standing rules in Article 263(4) TFEU should be adopted so that any situation entailing complete lack of remedy for individuals is avoided. This is the practically simplest measure to undertake and would fully ensure the fundamental right to effective judicial protection. The expression of this right in Articles 6 and 13 ECHR, Article 47 of the EUCFR and the Court's case law shows the importance of this principle. An inherent part of it consists of the right to have a competent court to rule on the validity of the Union act, and, according to *Foto-Frost*, the only court allowed to do that is the Court of Justice. The logical conclusion would be that the Court opens up its admissibility conditions in relation to private litigants.[261] The right to an effective remedy for individuals would thus only be accommodated if they have access to the competent court for reviewing the validity of EU acts.

As discussed above, the wording of Article 263(4) TFEU does not preclude a wider interpretation of the concepts therein. The conditions of individual concern and regulatory act are and will be defined by the Court of Justice. The Court has, moreover, earlier interpreted that Article widely, even *contra*

[259] *Calpak*, *supra* note 109, para 9.
[260] Case C-221/09 *AJD Tuna v Direttur tal-Agrikoltura u s-Sajd and Avukat Generali* [2011] n.y.r., para 51.
[261] Schermers and Waelbroeck, 2001, *supra* note 4, p. 495.

legem, in the cases *Les Verts* and *Chernobyl*. Indeed, the Article merely states the framework for its application; the substantive content is determined by the Court itself.

The Court has consistently held that the current system of remedies is complete, and that when the action in Article 263 TFEU is unavailable, the private parties may go through the procedure in Article 267 TFEU. However, the direct action before the Court of Justice is also from a procedural point of view much better suited for the review of EU acts than the preliminary ruling procedure. Firstly, access to the Court of Justice for the applicants in a domestic procedure is not guaranteed. It is solely for the national court to decide upon the need for a reference, and even if one is sent, the content might deter from what the applicants in the main proceedings have argued. The access to the remedy of review of validity is thus dependent on the national courts' willingness to cooperate. It is not satisfactory from the viewpoint of effective judicial protection that the applicant should have to appeal, maybe all the way to the national court of last resort only to obtain review of the disputed act. This is both costly and time consuming, and may prove to be quite uncertain. Even though the proceedings before the General Court might be more time consuming than the process before the Court of Justice in the preliminary ruling procedure, the costs in the former case are confined to one process and are more predictable for the private applicant. The procedure in an action for annulment further involves a full exchange of pleadings and participation of all parties concerned. In addition, interim relief granted by the General Court is effective in the whole territory of the Union and not only in the Member State where the action is brought.

Legal certainty also warrants preference for the action for annulment. The time limit for bringing such an action is two months, whereas an individual may contest the validity of a Union act before the national court at any point in time. In is not in the interest of legal certainty that an act might be declared invalid long after its adoption when the Member States, the Institutions of the Union and private parties have acted upon its presumed legality. This results in instability of the legal system and may be costly not only for the individual affected. Moreover, it may take some time before the Member State implements Union rules, resulting in a further delay before they can be challenged.[262]

In my view, a more distinct division should be made for when to use which procedure. The preliminary ruling procedure is a successful and effective means of ensuring uniform application of EU law in relation to its interpretation. On the other hand, the review of the validity of EU acts should be confined to the jurisdiction at Union level, which possesses the competence and knowledge required for the task. The case law of the Court holds the key to the interpretation of the standing rules and for the sake of clarity and predictability; the conditions for access should be unambiguous.

[262] Schermers and Waelbroeck, 2001, *supra* note 4, p. 453.

According to AG Jacobs, the case law of the court needs clarification and specification. Instead of spending time on determining admissibility, the Court could deal with the substance matter of the cases.[263]

A reason for limiting the access to the General Court is the risk for an overwhelming caseload. While this concern may be genuine, it is in no way a legitimate reason for depriving private litigants from their right to an effective remedy.[264]

Conclusively, the need for effective judicial protection of individuals warrants a relaxation of standing requirements before the General Court. There is no reason to assume a lower standard of protection on EU level than in the national judiciaries in this regard, rather the opposite. The Union does not derive its legitimacy in the same direct way from its citizens as the national parliaments, and thus, pursuant to the rule of law, requires a higher degree of scrutiny for its acts. Direct access to the Union Court would further promote the closeness of the EU with its citizens. In the view of Arnull, the effectiveness of a mechanism for judicial review is dependent on how easily it may be used by private applicants. He argues that

> 'Not only does a more relaxed approach protect the public interest in observance of the law by the administration, it may also be said to promote the proper functioning of the democratic process by facilitating public participation in decision making. From this perspective, standing might be seen as an aspect of citizenship. These considerations seem particularly relevant in the context of the EU as it seeks to become less remote from ordinary people.'[265]

5.1.2 Arguments Against

The Court of Justice is referring to the system of protection provided for by the Treaties as complete. Indeed, there are a number of ways for individuals to obtain relief in cases where they are negatively affected by an act of the European Union. Apart from the action for annulment, the main alternative is recourse to the national courts, which subsequently get a ruling on the measure from the Court of Justice. Arguably, the national legal system is more familiar and convenient for the individual than the Court in Luxembourg. In some aspects, it may also be appropriate to turn to a court, which is in fact responsible for enforcing the rules. The national courts further have extensive duties enshrined in the Treaty for protecting individuals' right to an effective remedy. They are under an obligation to allow private litigants access and possibility to challenge the legality of Union acts, and in case of well-founded argumentation, they have to refer the question to the Court of Justice for a preliminary ruling.

[263] AG Jacobs in *UPA*, *supra* note 91, paras 41, 64-67.
[264] Claes, 2006, *supra* note 34, p. 568.
[265] Arnull, 2006, *supra* note 80, pp. 91-92.

Another concern for the Court of Justice is its workload. With the recent enlargement, there is a probability for an extensive increase in applications. This was one of the main reasons for the creation of the General Court and for changes in the Courts' procedure. It is not in the interest of judicial protection for the applicants to have access to a Court with a large backlog of cases, such as can be seen in other international courts, like the ECtHR.[266]

A further important factor possibly hindering a widening of the standing rules lies within the Court of Justice itself. It is clear from the judgments in *UPA* and *Jégo-Quéré* that it does not consider itself able or competent to change the interpretation of the requirement of individual concern. In the Court's view, such a change should be made through the process of Treaty amendments and thus by the Member States themselves. Now that Article 263 TFEU has been amended, the question is whether this amendment will be concerned as enough indication for a wish to relax the system or not.

5.2 Allow National Courts More Room to Apply or Disapply EU Law

The idea of transferring power to review the validity of Union acts to the national courts might sound risky, possibly undermining the uniformity and effectiveness of Union law. However, giving national courts some extension of mandate does not mean allocation of unlimited authority. The suggestion is not a complete transfer of powers, but a chance for national courts to get more involved in and acquire more knowledge of Union law.

The solution favoured here is a type of 'Green light procedure' as proposed by a recent Resolution of the European Parliament.[267] The idea is that the national courts would propose an answer to a question of, in this case, validity of a Union act, together with the question referred for a preliminary ruling. The Court of Justice could then either accept the solution advocated by the national court or decide to rule upon the issue itself. In this way, the procedure could become more effective.

Other ways to enhance the national courts role in the procedure could be to allow them to participate in the reformulation of the question referred to the Court of Justice or by applying Union law *ex officio* to a larger extent than today.[268] In this respect, a more elaborate European public policy could be developed, encompassing more areas of EU law, for example labour law or environmental law.

[266] See also Jans et al, 2007, *supra* note 5, p. 243.
[267] European Parliament Resolution of 9 July 2008: *The role of the national judge in the European judicial system* (2007/2027(INI)), P6_TA(2008)0352, para 31.
[268] Groussot et al, 2009, *supra* note 213, p. 21

These steps, combined with more training and better information systems would enhance the national courts' role in the application of EU law.[269]

5.2.1 Arguments in Favour

Initially, it should be pointed out that the standard of review would still be Union law and it would still be up to the EU to set the boundaries of the national courts' mandate. Thus, the principle of primacy would still be intact.[270] Furthermore, clear boundaries amount to a higher degree of legal certainty. It is, in my view, clear that the uniform application of EU law in 27 different Member States and legal cultures is not practically achievable. Uniformity for the sake of it is no legitimate aim.[271] In that instance, the focus should instead lie on effective application, delegation and decentralisation.[272]

The focus of this proposal is an enhancement of cooperation between the national courts and the Court of Justice, which is the very aim of the preliminary ruling procedure. In addition, the legal dialogue between the Member States and their legal experts would also expand. The ability of national courts to propose answers under Union law would require a high degree of knowledge of that area on their part. Initially, therefore this proposal might seem to extend, rather than lessen, the time of procedure, not to mention the costs involved in educating 27 Member States' judges. Nonetheless, the education of national judges is an ongoing process and is desired by a large number of national judges. They are, in fact, quite positive to the idea of dealing with Union law on a more frequent basis.[273] The domestic court is already obliged to assess and interpret its national laws in light of Union law in order to ensure its compliance with EU rules.[274] Nevertheless, the investment of time and effort in educating the legal practitioners of the Member States would in the long-term bear fruit. The national judges would become more acquainted with Union law and have more experience in applying it, ultimately contributing to its effectiveness in the national legal orders and a lightening of the caseload of the Union Courts. Groussot et al point out that the system's effectiveness would be dependent on the level of knowledge of EU law on behalf of the national judges, and question whether the lower national courts would be adequately equipped for the task or if it should be reserved for the highest courts.[275] Such a limitation has, however, been criticised in other

[269] Report by the Working Party on the Furture of the European Communities' Court System, January 2000 (Due Report), pp. 18-19.
[270] Dorota Leczykiewicz, '"Effective judicial protection" of human rights after Lisbon: should national courts be empowered to review EU secondary law?', *European Law Review*, vol. 35(3), 2010, pp. 326-348, at p. 343.
[271] *Ibidem*, p. 340.
[272] Groussot et al, 2009, *supra* note 213, p. 13.
[273] Report of the Committee on Legal Affairs, 2008, *supra* note 139, pp. 41 and 43.
[274] Tridimas, *supra* note 10, p. 238.
[275] Groussot et al, 2009, *supra* note 213, p. 26.

contexts.[276] In any case, this could be a good place to start, and perhaps extend the lower courts' mandate subsequently. Nonetheless, in my view, a more extensive knowledge in the field of EU law would increase the national courts' willingness to apply in domestically and adhere to the Court of Justice's rulings. In fact, several national judges called for more education in the field of EU law, indicating that it would promote the incentive for them to apply EU law.[277] In the same report, several national judges also wished to be more involved in the stages of the preliminary ruling procedure, such as the reformulation of the question and the oral procedure.[278] Hence, Union law would in practice become a real part of the national legal systems and this would counterbalance the strict *locus standi* for individuals at Union level, ensuring their right to effective judicial protection. Not until that time would the system of remedies created by the Treaties be truly complete.

5.2.2 Arguments Against

A primary objection to widening the national courts' mandate is that of uniform application of Union law. This was, in fact, the reasoning behind the decision to limit the competence to declare Union acts invalid to the Court of Justice in the first place. Legal certainty requires any action regarding the validity of an EU act to be undertaken on a central level, so that the obligations and rights are clear for all persons and institutions affected by it. The Court of Justice is further expressly regarded to be in the best position for this task.[279]

The practical implications of this solution are also unclear. The question is if it is practically and economically possible to impose such an extensive change and duty on the national judges. The national courts do not know EU law well enough, its ambiguities and complexity may even be difficult for EU legal experts to ascertain. The extensive training required would be expensive and would have to be continuous. It is questionable whether the means and expertise needed is available, and to what extent the effectiveness of Union law would really be enhanced by a wider reliance on the national courts.[280] The Union consists of 27 Member States with different legal systems developed on their own under long periods of time. It may be premature to expect them to embrace and apply a new legal system on their own. They would still need the guidance of the Court of Justice, and thus, it is not at all certain that this solution would remedy the existing problems of gaps in individuals' effective judicial protection. A

[276] Due Report, 2000, *supra* note 269, pp. 12-13, in relation to the possibility of lower national courts to refer questions for preliminary rulings.
[277] Report of the Committee on Legal Affairs, 2008, *supra* note 139, p. 42.
[278] *Ibidem*, pp. 26-27; This suggestions were adopted in the European Parliament Resolution, 2008, *supra* note 267, para 30.
[279] Schermers and Waelbroeck, 2001, *supra* note 4, p. 495.
[280] See also Groussot et al, 2009, *supra* note 213, p. 26; Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: Don't Do as I Say', *Cambridge Yearbook of European Legal Studies*, vol. 10, 2007-2008, available at http://ssrn.com/abstract=1157841; Engström, *REAL*, 2008, *supra* note 213, p. 89.

decentralised system is bound to bring about differences in the afforded protection between individuals in different Member States. The right to an effective remedy and other aspects of this protection should be the same, or, at least as similar as possible. With more duties imposed on the Member States' own legal systems, equal protection of EU citizens at domestic level would be at risk.

It is unclear what this change in balance between the national courts and the Court of Justice would entail. Would the delicate balance in the cooperation between the two levels be disturbed to the detriment of the protection of private applicants? It is further possible that this proposition would be more suitable to resolving issues in relation to the interpretation of Union law rather than the review of validity. While, for example, the raising of issues relating to the invalidity of an act is an important means of ensuring protection in cases where the private litigant has failed to do so or where he is unaware of his rights, the ultimate ruling is still reserved for the Court of Justice.

5.3 Harmonised Procedural Rules

A third proposal would be to create a uniform system of procedural rules to be applied by the national courts throughout the Union, in relation cases dealing with Union law.

At present, there is no equal protection of individual since the remedies vary between Member States. With several different legal systems in the Union, it is only normal that there are divergences as regards limitation periods, costs, remedies available, the size of possible damages etc. However, as mentioned above, there have been some tendencies towards partial harmonisation of procedural rules in the Union, mainly justified by the need for effective enforcement and effective protection of individuals' rights under Union law. Duties have been imposed on the national courts obliging them to allow standing and challenge the validity of Union acts before them. The Court of Justice has developed uniform conditions for the application of interim relief in cases where the validity of an EU measure is at issue and EU law must in certain cases be raised *ex officio*. This partial harmonisation of certain conditions has been done by the Court on a case-by-case basis. There have also been some harmonisation of procedure in specific areas, such as for example public procurement.[281] The proposition here is that such a harmonisation be made by the Member States themselves in their role as Treaty drafters.

The precise content of the harmonisation is too extensive to be discussed here; however, some points may be made in relation to the account above. Firstly, it should encompass rules on standing in order to ensure that private litigants have access to a court in cases where they want to contest the validity of a Union act. Secondly, clear-cut rules on national courts' duties

[281] Dougan, 2004, *supra* note 16, pp. 101-102.

to raise issues of EU law on their own motion should be worked out. This could be done through the creation of a uniform European public policy which the national courts would always have to take into account of their own motion. Such Union standards could comprise of the most important Union rules, principles and fundamental rights. Other areas might also benefit from the imposition of uniform conditions in a similar way to the Court's effort in relation to the granting of interim relief in cases where the validity of an EU act is contested.

5.3.1 Arguments in Favour

In a Union with 27 different Member States and as many legal cultures and systems the need for effectiveness and uniformity is difficult to meet. Uniform application of Union law is essential for ensuring effective judicial protection for individuals. With harmonised procedural rules governing the procedural requirements before the national courts, the equal treatment and protection of Union citizens would be guaranteed.

Some authors argue that the conditions for competition in the Union would be counteracted by uniform procedural conditions and that abuse of the national judicial processes would be prevented.[282] Under the current system, some undertakings may benefit from the enforcement regime in certain Member States, giving them competitive advantages in relation to undertakings in other countries.

The principle of legal certainty would further profit from harmonised conditions in the Member States. Thus, it would not matter in which country an applicant resided, the obligations and protection afforded to him would be the same. Private litigants could also more easily move between different Member States, being able to foresee their rights and duties with respect to Union law and its enforcement. The national courts would also have clear rules as regards their duties under Union law, making the application of it easier and more effective.

It is more legitimate to create harmonised rules through legislation than through principles developed on a case-by-case basis. Not only would legitimacy be improved; law making would not be dependent on litigants bringing action and national courts referring questions.[283]

[282] *Ibidem*, p. 317; Marcel Storme (ed), *Rapprochement du Droit Judiciaire de l'Union européenne*: *Approximation of Judiciary Law in the European Union*, Dordrecht: Nijhoff, 1994, pp. 45-46; 'Mariolina Eliantonio, 'The Future of National Procedural Law in Europe: Harmonisation vs. Judge-made Standards in the Field of Administrative Justice', *EJCL*, vol. 13(3), 2009, available at http://www.ejcl.org/133/art133-4.pdf, Ch. 2.1.
[283] See also Eliantonio, *EJCL*, 2009, *supra* note 282, Ch. 2.1.

5.3.2 Arguments Against

The main problem with this proposal is the political resistance.[284] The Member States are not willing to give up more of their national sovereignty than expressly required. The infringements on national procedural autonomy implied by the suggested harmonisation would seem unacceptable and there could be further conflicts with other national interests peculiar to a certain state and indicate that EU-concerns would have express priority over national ones. It could also be liable disrupt the balance reached by years of development in the specific cultural and social context of each Member State.[285]

This could consequently lead to national courts being less willing to cooperate and this would be devastating for the enforcement of Union law, since it is dependent on the national authorities in this regard.[286] In that case, the whole aim of the harmonisation, namely uniformity, would be undermined and the rules superfluous. The result would only be a rift between the EU and its Member States, weakening the whole Union's system. It may here be pointed out that voluntary harmonisation to some extent already is happening within the Union. The setting of European standards in some areas has 'spilt over' on other domestic ones. Further, regulatory competition between Member States may have appositive impact on their adoption of rules with higher level of judicial protection.[287] Forcing rules upon the Member States would hinder the willingness to continue this process. Of course, such voluntary harmonisation is not in any way guaranteed, but the effectiveness of the Union legal system would be more accommodated by few rules adopted and applied with a positive attitude than a whole system of rules forced upon the national authorities, lessening their willingness to cooperate.

It may well be argued that the present system could ensure the effective judicial protection of individuals so long as the control of the enforcement system carried out by the Court of Justice is effective and national courts comply with its case law.[288] Uniformity as a goal in itself is not a sufficient justification for an intrusion this extensive into the procedural autonomy of the Member States. National procedural autonomy should still remain the starting point, since it is Union law that forms a part of the national legal order and not the other way around.[289]

[284] Dougan, 2004, *supra* note 16, p. 98; Eliantonio, *EJCL*, 2009, *supra* note 282, Ch. 2.1.
[285] *Ibidem*, p. 107 and Ch. 2.1 respectively.
[286] Storme, 1994, *supra* note 282, p. 54.
[287] Dougan, 2004, *supra* note 16, p. 99; Eliantonio, *EJCL*, 2009, *supra* note 282, Ch. 1.
[288] Eliantonio, *EJCL*, 2009, *supra* note 282, Ch.3.
[289] Jans et al, 2007, *supra* note 5, p. 59.

5.4 Concluding remarks

The involvement of Union law and the duties imposed on national systems amount to a careful balance to be carried out both legally and politically. Nonetheless, the ensuring of effective judicial protection is a fundamental right within the Union with primary law status. Thus, sacrifices have to be made in order to guarantee this right. The question is which side – the Union or the national – should adapt and to what extent. It is clear that there are still issues to address to remove gaps in protection of private litigants, but it is less clear which way to go. The intent is not to criticise one side or another, but to examine the problems to be solved and possible ways to remedy them. In my view, it is not an issue of choosing only one solution and disregarding the rest. The effective enforcement of individuals' rights would be best attained by a combination of all the proposals above. However, an essential determinant of the protection afforded in the future is the interpretation of the standing rules in Article 263(4) TFEU. In my view, the arguments in favour of a relaxation are overwhelming, and the alternatives not sufficient to make the system of remedies complete. There are, for example, other means of ensuring that the caseload at the Court of Justice does not grow out of proportion. The time limit in 263(6) TFEU and the requirement for direct concern are two. Hence, a partial relaxation of the standing requirements does not mean that there will be no standards or restrictions left.

There is, further, a need for clarity on the duties imposed on national courts, *inter alia* exactly to what extent and in relation to which Union rules the courts are obliged to apply Union law *ex officio*. The Court has clarified several issues in this regard; however, it might be up to the Member States to determine the road ahead. The introduction of Union-wide standards is, in my view, a good start. It is beneficial both for the ones protected by the rules and for those applying them to know what is desired of them. It would set out a frame within which the national courts and the European Court of Justice could work together to enhance protection for individuals throughout the Union. After all, the focus should be on cooperation and not one forcing the other. The Union is most efficient when the legal dialogue and education is promoted with the European Court of Justice being the centre, which binds all European courts together. A larger mandate for the national courts would give them more confidence and pride in exercising their tasks as Union Courts, thus enhancing the effectiveness of the whole system.

A lot has been done to promote the effective judicial protection of individuals in the Union. During the last 25 years the development has brought private parties closer to the EU, by recognising their rights and striving to protect them. The changes made through the Treaty of Lisbon have amounted to an important step on the way towards ensuring effective judicial protection on equal basis for all citizens of the European Union.

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