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EU Climate Change Litigations: Dream or Reality?

Individuals' possibilities to challenge the legality of EU climate actions within the system of legal remedies in EU law

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Contents

Summary

In August 2018, the legality of EU acts implementing the 2030 emissions reduction target was for the first time challenged by individuals before the General Court. Their claim is that the target is insufficient in order to prevent infringements of fundamental rights caused by climate change. The purpose of the thesis is to examine and analyse to what extent individuals can challenge the legality of such EU climate actions within the system of legal remedies in EU law, in light of the norms applicable and the relationship between direct and indirect judicial review. In order to achieve this, a legal dogmatic method has been used in combination with an EU legal method.

The thesis has shown that the substantive and procedural difficulties with EU climate change litigations relate not only to the nature and effect of climate change, but rather to how the system of legal remedies is shaped. The lack of strong legislation dealing with climate change is another important factor contributing to individuals' difficulties with enforcing the policy objective to combat climate change. The EU ETS case law is of most significance in relation to judicial review of EU climate actions, as it is one of the few concrete EU climate law instruments. However, the focus has remained on assuring that the EU's regulatory powers exercised respect the rule of law and not on the legality of the climate change laws *per se*. Furthermore, the CJEU's interpretation of the standing requirements for natural or legal persons under Article 263(4) TFEU has prevented individuals from bringing actions before the CJEU. This has not been without criticism, in relation to the EU's obligations under the Aarhus Convention and in relation to the right to an effective judicial protection. Where there is individual harm in rights-based claims, the chain of causation is also problematic, which affects individuals' capability to bring damages actions.

The thesis questions the "completeness" of the system of legal remedies available for climate change litigants, as initiating national proceedings in order to provoke a preliminary ruling from the CJEU might not be a realistic alternative. The system is constructed as to ensure an effective judicial protection before the national courts and tribunals, which presupposes a well working interplay between the CJEU and national courts and tribunals. However, the individual interest to challenge the legality of the EU environmental norms themselves, without invoking individual rights, seems to fall outside that system. Because of this potential "gap" in the system of legal remedies, there is in my opinion a need to strengthen the EU legislation granting individuals procedural rights in environmental matters. It may in turn contribute to a more effective EU policy and legal framework dealing with climate change as well as a more effective judicial protection for individuals suffering harm caused by climate change.

Sammanfattning

I augusti 2018 väcktes för första gången en ogiltighetstalan vid Europeiska unionens tribunal av enskilda som hävdar att EU:s klimatmål för 2030 inte är tillräckliga för att förhindra kränkningar av grundläggande rättigheter orsakade av klimatförändringar. Denna uppsats syftar till att undersöka och analysera i vilken utsträckning enskilda kan väcka talan mot EU:s klimatåtgärder inom systemet för rättslig prövning, i ljuset av tillämpliga normer samt förhållandet mellan direkt och indirekt talan. Jag har använt mig av rättsdogmatisk metod i kombination med EU-rättslig metod.

Framställningen har visat att de materiella och processuella svårigheterna med klimaträttegångar på EU-nivå inte endast beror på klimatförändringars natur och globala påverkan, utan snarare på hur systemet med rättsmedel är utformat. Avsaknaden av en stark klimatlagstiftning är en annan viktig faktor som bidrar till enskildas svårigheter med att genomdriva klimatpolitiska mål. EU-domstolens praxis kring EU:s utsläppshandelssystem är av störst betydelse i förhållande till rättslig prövning av EU:s klimatåtgärder, eftersom det hör till en av få konkreta klimatlagstiftningar inom EU-rätten. Fokus har dock legat på huruvida EU agerat utöver sina tilldelade befogenheter i enlighet med rättsstatsprincipen och inte på lagligheten av klimatlagstiftningen i sig. Vidare har EU-domstolens tolkning av enskildas talerätt i princip uteslutit enskilda från att föra ogiltighetstalan vid EU-domstolen. Detta kritiseras i uppsatsen i förhållande till EU:s åtaganden enligt Århuskonventionen och rätten till ett effektivt domstolsskydd. När enskilda åberopar skada orsakad av klimatförändringar är även kausaliteten problematisk att bevisa, vilket även påverkar möjligheterna att föra talan om EU:s utomobligatoriska ansvar.

Uppsatsen ifrågasätter ”fullständigheten” av det system med rättsmedel och förfaranden som är tillgängliga för enskilda som vill inleda klimaträttegångar på EU-nivå, eftersom väckandet av nationell talan i syfte att få nationell domstol att begära ett förhandsavgörande av EU-domstolen inte alltid är ett realistiskt alternativ. Systemet är uppbyggt för att försäkra ett effektivt domstolsskydd vid nationella domstolar, vilket förutsätter ett väl fungerande samspel mellan EU-domstolen och nationella domstolar. Enskildas intresse att få EU-rättsakter som rör klimatförändringar ogiltigförklarade utan att åberopa en medlemsstats åsidosättande av tillämpliga EU-rättsliga normer eller enskilda rättigheter som följer av EU-rätten, faller dock till synes utanför systemet. På grund av de brister i systemet med rättsmedel som lyfts fram i uppsatsen, finns det enligt min mening ett behov av att stärka EU:s lagstiftning kring enskildas tillgång till rättslig prövning i miljöfrågor. Det skulle i sin tur kunna bidra såväl till en effektivare klimatpolitik och klimatlagstiftning på EU-nivå som till ett effektivare domstolsskydd för enskilda som lidit skada orsakade av klimatförändringar.

Abbreviations

ACCC	Aarhus Convention Compliance Committee
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU ETS	European Union Emissions trading system
NGO	Non-governmental organisation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change

1 INTRODUCTION

1.1 Background

Climate change in a legal context is different from more traditional areas relating to the environment, such as water, waste or air quality. Greenhouse gas emissions are predominately related to the use of fossil fuels and are recorded to be perennially causing changes to the atmosphere, land and oceans. Although these changes are neither immediate nor visible, their impact is global. The consequences of an increasing global average temperature, caused by increasing greenhouse gas emissions, are rising sea levels, melting Arctic sea ice and extreme weather among other impacts. Compelling scientific evidence draws the need to reduce greenhouse gas emissions significantly and immediately.[1]

The global nature of the negative effects of climate change has led to efforts to create climate-related law and policies on a national, international and transnational level, for instance the climate actions taken by the European Union (EU). Globally, climate change litigations have become an important tool to apply pressure on policymakers in the global arena to develop and implement effective climate law instruments dealing with climate change mitigation. In particular, such litigations can serve the purpose of challenging the compatibility of particular actions or inactions with international agreements and laws or defending particular rights in a climate change context.[2] Climate change litigants are often understood as adopting a "gap-filling role", when law-making institutions fail to develop effective legal frameworks.[3] Nevertheless, climate change litigants still rely on the remedies provided by law in order to achieve societal changes.

[1] Delbeke, Jos & Vis, Peter, *EU Climate Policy Explained*, first edition, Routledge, European Union, 2015, pp. 5–6.
[2] Report of United Nations Environmental Programme, "The Status of Climate Change Litigation, A Global Review", 2017, pp. 8–9.
[3] Bogojević, Sanja, "EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture", *Law & Policy*, Vol. 35, No. 3, 2013, p. 186.

In an EU context, previous climate change-related cases before the Court of Justice of the European Union (CJEU) have mainly dealt with specific situations arising within the legal framework of the EU emissions trading system (EU ETS) and not the need to protect the environment or the impacts of climate change.[4] However, on 13 August 2018, an action for annulment was brought by 37 individuals against the Council of the European Union and the European Parliament. They are for the first time challenging the legality of the EU's 2030 greenhouse gas emissions reduction target, where they use climate science to prove that the target is inadequate and unlawful. Their main arguments are that the EU has a duty to avoid harm and to prevent infringements of fundamental rights protected by the Charter of Fundamental Rights in the European Union (hereinafter the Charter) caused by climate change and therefore must adopt a more ambitious climate target. The so-called *People's Climate* case is now pending before the General Court.[5]

Regardless whether the *People's Climate* case will be declared admissible by the General Court or not, it raises a number of issues relating to what duties and remedies in EU law can be relied on by EU climate change litigants. In other words, if there is a need to "fill a gap" by EU climate change litigations – how can it be filled, before which court and by whom? Is there a "gap" in the remedies available for climate change litigants? These questions have brought my interest to the subject.

1.2 Purpose and research questions

The purpose of the thesis is to examine and analyse to what extent climate change litigants can challenge the legality of EU climate actions within the system of legal remedies in EU law. The purpose encompasses the CJEU's competences in relation to judicial review of EU acts relating to climate change and the legal remedies available for individuals seeking to challenge the legality of such acts. Individuals' possibilities to do so depend on the

[4] Ibid, pp. 188–189.
[5] OJ C 285, Volume 61, p. 34.

obstacles they may encounter along the legal avenues available, the environmental norms and procedural rules applicable and the CJEU's interpretation of those rules. In order to achieve this purpose, the research is based on the following questions.

1) To what extent does the system of legal remedies in EU law allow individuals to challenge the legality of EU climate actions?
   a) What are the substantive difficulties when reviewing the legality of EU acts relating to climate change?
   b) What are the procedural difficulties for climate change litigants seeking to challenge the legality of such acts?

2) Is there a "gap" in the system of legal remedies available for climate change litigants?

1.3 Delimitations and definitions

Due to limited time and space, some delimitations on the scope and width of the subject have been necessary. The thesis focuses on analysing the possibilities for climate change litigants to challenge the legality of EU climate actions, the difficulties they may encounter when doing so and why. It is not an in-depth study of the environmental and procedural rules in EU law, but rather a study on how the interpretation and general application of relevant rules affect climate change litigants.

Climate change litigations are, in the sense they will be discussed here, legal actions brought before the courts relating to climate change law and policy and where climate change is used as an argument.[6] The definition of climate change litigants is limited to natural or legal persons seeking to challenge the legality of EU climate actions, in order to achieve more effective and/or more ambitious climate change laws. Litigations against Member States or other

[6] Hilson, Chris, "Climate change litigation: an explanatory approach", in: Fracchia, F. and Occhiena, M. (red.), *Climate change: la riposta del diritto. Editoriale Scientifica*, 2010, pp. 421–436.

natural or legal persons fall outside the scope of the thesis, although it may be highlighted as other important mechanisms in the enforcement of EU environmental law. Furthermore, actions brought by Member States against EU institutions in the EU ETS case law will only be discussed in relation to the CJEU's interpretation of the EU ETS directive.

The definition of climate change must also be delimited, since the concept is very broad and used in different contexts. The definition of climate change used here is the same as in the United Nations Framework Convention on Climate Change (UNFCCC), Article 1(2), namely the "change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods". The definition can be used in an EU context, given the fact that the EU is one of the signing parties to the UNFCCC.[7]

1.4 Method and materials

As the thesis focuses on the procedural and substantive difficulties within EU law for individuals seeking to challenge the legality of EU climate actions through the legal remedies available, most of the materials used are sources of EU law, such as the Lisbon Treaty, secondary legislation and EU legal doctrine. Relevant scholarship will also be used in discussing and analysing the valid law. Therefore, an EU legal method is used in combination with a legal dogmatic method. The legal dogmatic method is used to determine what is the valid law by systemising and interpreting relevant legislation, jurisprudence and doctrine, and to criticise it or to propose better solutions.[8] It is applied in the specific context of EU law, where an EU legal method is the approach adopted in relation to the specific nature of EU law and its

[7] United Nations Framework Convention on Climate Change (UNFCCC), Annex I.
[8] Korling, Fredric & Zamboni, Mauro (red.), *Juridisk metodlära*, first edition, Studentlitteratur, Lund, 2013, p. 21.

development, which exists on both an EU level and a national level in each Member State.[9]

The EU legal method assures not only the conditions laid down by EU law, but also the interplay between the EU legal order and the national legal orders that the CJEU and the national courts uphold.[10] In the hierarchy of EU norms, the EU's primary law is the superior level, which consists of the most fundamental provisions in the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Charter, Accession Treaties and protocols.[11] The Treaties are independent sources of law and in a case of a conflict between EU law and national law, EU law prevails over national law. The specific characteristics of EU law relate to its constitutional structure, which is reflected in the principle of conferral of powers, expressed in Articles 4(1) TEU and 5(1) and 5(2) TEU, as well as the institutional framework in Articles 13–19 TEU.[12] The competence conferred upon the EU by the Member States is governed by the principles of subsidiarity and proportionality, described in Article 5(3) and 5(4) TEU. In accordance with the principle of sincere cooperation under Article 4(3) TEU, the Member States are obliged to ensure the application of and respect for EU law and to take appropriate measures in order to fulfil their obligations under EU law. Therefore, the CJEU shall together with national courts and tribunals ensure the application of EU law in the Member States.[13] The CJEU's jurisprudence is central, since it shall ensure that EU law is observed, according to Article 19(1) TEU. It is the highest authority on the interpretation and application of EU law, as its legal doctrine has established general principles of EU law which complement the Treaties and contribute to shape the content of EU primary law.[14]

[9] Bergström, Carl Fredrik & Hettne, Jörgen, *Introduktion till EU-rätten*, first edition, Studentlitteratur, Lund, 2014, p. 14.
[10] Ibid., pp. 14–15.
[11] Ibid., pp. 28–29.
[12] Opinion of the Court (Full Court) of 18 December 2014, Opinion 2/13, paras. 164–166.
[13] Opinion of the Court (Full Court) of 8 March 2011, Opinion 1/09, para. 68 and Opinion 2/13, para. 173.
[14] Bergström & Hettne, p. 48.

Climate change-related cases brought by natural or legal persons before the CJEU have so far been inadmissible, with the exception of the *People's Climate* case as it is still pending before the General Court. The system of legal remedies affecting climate change litigants' possibilities to bring direct and indirect actions is criticised in light of its objectives. Therefore, a case study has been made of the CJEU's jurisprudence in relation to Articles 263(4) and 267 TFEU and EU climate law instruments, in particular the EU ETS directive.

1.5 Research status

Climate change litigations have increased significantly in number on a global level, which has been reviewed by the United Nations Environmental Programme in the report "The Status of Climate Change Litigation, A Global Review". In 2017, the number of climate change-related cases before the CJEU were 40.[15] This relatively low number can partly be explained by the CJEU's interpretation of the standing rules applicable for which natural and legal persons, for which there are many materials analysing and criticising the jurisprudence. Another factor is the fast development of EU policy and laws relating to climate change, which also has been studied to a great extent in the literature on EU environmental law.[16] As the *People's Climate* case is the first case where individuals are claiming that the EU's 2030 emissions reduction target is insufficient and in breach of fundamental rights, little research has been made concerning the legal remedies available for such applicants.

Sanja Bogojević has previously discussed the specific topic of EU climate change litigations in two published articles, in which she examines the

[15] Report of United Nations Environmental Programme, "The Status of Climate Change Litigation, A Global Review", 2017, p. 11. For detailed information, see also, the database of non-U.S. Litigation Chart, available at: http://wordpress2.ei.columbia.edu/climate-change-litigation/non-us-jurisdiction/eu/.

[16] For instance, Ludwig Krämer provides a detailed insight of the environmental area in his book *EU Environmental Law*, 8. ed., Sweet & Maxwell, London, 2015. Furthermore, Delbeke & Vis provides an exclusive study on EU climate policy from an inside perspective in their publication *EU Climate Policy Explained.*

EU ETS case law.[17] Furthermore, *Environmental Rights in Europe and Beyond*, edited by Sanja Bogojević and Rosemary Gail Rayfuse, contains several chapters relating to the effect and enforcement of rights in relation to EU environmental law. However, previous research does not relate to challenges of EU climate actions brought by individuals in a more general sense. As the area is relatively unexplored, there is a need for more research on climate change litigations in an EU context, which the thesis intends to contribute to.

1.6 Structure of the thesis

The thesis is divided into six chapters in order to answer its research questions. After this introduction, the second chapter "sets the scene" by giving an overview of the EU's policy and the legal framework dealing with climate change. The third chapter concerns the system of legal remedies in EU law, the different legal avenues available and their objective elements in order to review the legality of EU acts. The fourth chapter in particular examines and analyses the substantive difficulties when reviewing the legality of EU climate actions. Here, the issues in climate change litigations are discussed in relation to the CJEU's interpretation of relevant EU environmental norms, fundamental rights as a ground of review and claims for damages caused by climate change. In the fifth chapter, the procedural difficulties that EU climate change litigants face when pursuing direct or indirect actions are analysed and criticised, especially in relation to the CJEU's interpretation of Article 263(4) TFEU, the Aarhus Convention and the right to an effective judicial protection. The chapter ends with a discussion on whether there is a "gap" in the system of legal remedies for climate change litigants. Finally, the last chapter puts the discussion in a broader context and presents some speculations about the future of EU climate change litigations in a concluding analysis.

[17] See, Bogojević, Sanja, "EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture", *Law & Policy*, Vol. 35, No. 3, 2013, and Bogojević, Sanja, "EU Climate Change Litigation: All Quiet on the Luxembourgian Front?", in: van Calster, Geert, Vandenberghe, Wim & Reins, Leonie, *Research Handbook on Climate Mitigation Law*, Edward Elgar Publishing, 2015.

2 THE EU AND CLIMATE CHANGE: POLICY AND LEGAL FRAMEWORK

Climate change is considered to be one of the biggest challenges in EU environmental law.[18] As it has become a growing and complex problem, requiring a change in production and consumption patterns and a reduction of greenhouse gas emissions, EU climate policy has been developed step by step. It is a complex issue as different policy instruments are needed in different economic sectors, where a lot of conflicting interests are at stake.[19] This chapter intends to examine to what extent the EU has a duty to take actions against climate change and what norms ought to be respected in the legal area, affecting the legality of such actions.

2.1 Legal basis for taking EU climate actions

Article 11 TFEU forms together with the Articles 191–193 TFEU the legal basis for EU environmental policy. The shared competence in the environmental area, as enshrined in Article 4(2)(e) TFEU, implies that both the EU and its Member States are competent to regulate climate change. Where the EU takes action, the powers of the Member States to do the same no longer applies to the particular subject governed by EU law in so far it has already been regulated.[20]

2.1.1 Environmental objectives

One of the objectives of the EU set out in Article 3(3) TEU is to work for sustainable development with a high level of protection and improvement of the quality of the environment. The objective to reach a high level of

[18] Krämer, Ludwig, *EU Environmental Law*, 8. ed., Sweet & Maxwell, London, 2015, p. 489.
[19] Delbeke & Vis, pp. 1–2.
[20] Krämer, p. 98.

environmental protection requires the measures to aim at improving the existing situation, which does not mean that it aims for the highest level of protection possible.[21] Furthermore, Article 11 TFEU states that environmental protection requirements "must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". While the Articles 3(3) TEU and 11 TFEU are overarching provisions as they encompass all areas of EU activity, Article 191 TFEU sets out the scope of the EU's unlawful action in the environmental area of shared competence.[22]

The specific objectives in Article 191 TFEU which the EU's climate actions must pursue are to preserve, protect and improve the quality of the environment, to protect human health, a prudent use of natural resources and to promote measures at the international level to deal with worldwide environmental problems, and *in particular combating climate change*.[23] The objective of combating climate change was inserted by the Lisbon Treaty in 2009. As the objectives are broad, the EU's competence to take climate actions covers practically any area of environmental policy.[24] In preparing its policy, Article 191 TFEU requires the EU to take account of, in available scientific and technical data, environmental conditions in the various regions of the EU, the potential benefits and costs of action or lack of action and the economic and social development of the EU as a whole and the balanced development of its regions. Based on Article 192(1) TFEU, it is the European Parliament and the Council that decide what action is to be taken by the EU in order to achieve the environmental objectives. Regardless what the EU might do or not, Article 193 TFEU leaves each Member State free to maintain or introduce more stringent protective measures than those adopted by the EU institutions, so long as they are compatible with the Treaties and notified to the Commission.[25]

[21] Krämer, pp. 12–13.
[22] Bogojević, Sanja & Rayfuse, Rosemary Gail (red.), *Environmental rights in Europe and beyond*, Hart Publishing, Oxford, 2018, p. 138.
[23] Emphasis added.
[24] Krämer, p. 5.
[25] Ibid., pp. 98–115.

2.1.2 Basic environmental principles

The EU environmental objectives in Article 191 TFEU are based on the precautionary principle and on the principles in Article 191(2) TFEU that preventive action should be taken; environmental damage should, as a priority, be rectified at source, and that the polluter should pay. The meaning of these environmental principles will be discussed briefly.

The precautionary principle aims at ensuring a high level of environmental protection. It may be invoked when there is a scientific uncertainty, as a risk management tool for assessing a policy or action that may have potentially harmful effects for human health or the environment.[26] Although the Treaty provisions and the CJEU's references to the principle are limited, it has been defined as a general principle of EU law stemming from the Treaty. The scope of the principle is broader than only environmental policy.[27] In the climate change context, the precautionary principle has been established by Article 3(3) UNFCCC as binding for the EU and other signing Parties, stating that precautionary measures shall be taken "to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects". Thus, threats of serious or irreversible damage do not require full scientific certainty for taking precautionary measures. According to the same Article, those measures should be cost effective by taking into account socio-economic contexts, all relevant sources of greenhouse gases and all economic sectors.

The precautionary principle and the prevention principle can be used synonymously, since they are used together in practice. The principles, when applied, mean that EU measures – for example banning or restricting the circulation of substances or products – can be taken without having full

[26] The European Commission, *Communication from the Commission on the precautionary principle*, 2 February 2000, COM(2000) 1 final.
[27] Judgment of 26 November 2002, *Artegodan GmbH and Others v Commission of the European Communities* T-74/00, 76/00, 83–85/00, 132/00, 137/00 and 141/00, paras. 181–185. See also, to that end, Craig, Paul & de Búrca, Gráinne, *EU law – Text, Cases and Materials*, sixth edition, Oxford University Press, 2015, p. 113.

evidence of a risk assessment. Even in the case of climate change, the lack of consistent and conclusive scientific evidence of man-made global warming to some extent does not preclude the adoption of precautionary measures to prevent serious or irreversible damage. Regarding the principle of rectifying the damage at source, its application in the climate change context would have huge implications on production, employment and investments, such as reducing the use of vehicles and restricting the use of fossil fuels. However, the principles only *allow* such EU provisions and are not enforceable, unless they are turned into legal rules.[28]

The "polluter pays" principle is not defined in the Treaties. First of all, it is an economic principle, as it concerns the costs of environmental impairment and damage that should not be paid by society, for instance in forms of taxes, but by the person who caused the pollution. The principle has hardly been transposed into legally binding EU acts and has never yet been invoked. Although the Directive 2004/35 on environmental liability aims to implement the principle, its enforcement is undermined by the fact that it obliges Member States to restore environmental impairment in the case where the polluter cannot be identified or is unable to pay. Furthermore, the CJEU has declared that Article 191 TFEU referring to the polluter pays principle cannot be relied on without any secondary legislation putting the principle into concrete application. Rather, the principle allows EU institutions to adopt such measures than oblige them.[29] In a climate change context, the polluter pays principle might not be so compatible. The principle of common but differentiated responsibility is the principle generally applied in international law on climate change, which refers to the responsibilities of states and not of the polluters. Climate change is also caused partly by earlier generations, making the principle of common but differentiated responsibility better suited than the polluter pays principle in that context.[30]

[28] Krämer, pp. 25–27.
[29] Ibid., pp. 28–29. See also, judgment of 4 March 2015, *Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others v Fipa Group srl and Others* C-534/13.
[30] Caney, Simon, "Cosmopolitan Justice, Responsibility, and Global Climate Change", *Leiden Journal of International Law*, 18, 2005, pp. 773–774.

2.1.3 Limitations on the EU's competence

The Treaty provisions limit the EU's competence to take actions against climate change by the principles of conferral, subsidiarity and proportionality. The EU is limited to act only within the competence conferred upon it by the Member States, under the principle of conferral in Article 5(2) TEU. Furthermore, the principles of subsidiarity and proportionality in Article 5(1) TEU must be respected when exercising those competences. Their main objectives are to clarify the scope of EU competence and the containment of EU power in order to avoid misuse of powers.[31] In particular, the principle of subsidiarity must be observed by the EU legislator. As expressed in Article 5(3) TEU, the EU shall only act "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level". Furthermore, the content and form of EU actions shall not exceed what is necessary to achieve the objectives of the Treaties, in accordance with the principle of proportionality in Article 5(4) TEU. A guideline is to choose the simplest form of action possible where, for instance, directives are preferred to regulations and framework directives are preferred to detailed measures; the choice of legal measures must be justified in light of both principles. Their application leaves a greater space for national action and moves away from hierarchical governance.[32]

Climate change is an environmental issue that cannot seriously be tackled at national level alone. One Member State's actions and another's passivity would only relocate emissions from one country to another with lower standards, still affecting all countries. Therefore, environmental objectives are better achieved on an EU level than on a national level. The meaning of "better" however, depends on each case and could mean more democratic, more effective or more uniform, while still aiming for improved quality of

[31] Craig & de Búrca, p. 102.
[32] Ibid., p. 173.

the environment for the whole EU.[33] In fact, the initial adoption of environmental protection rules on an EU level instead of on a national level was considered to be preferable for economic reasons, namely to avoid competition distortions within the EU's internal market.[34]

2.2 International agreements on climate change

Globally, the EU has often had a leading role in the discussions on climate change.[35] It adhered to the UNFCCC in 1994[36] and has pursued a climate change policy since then.[37] The objective of UNFCCC is to achieve "…stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[38] More recently, the EU became one of the parties to the first legally binding climate deal when it formally ratified the Paris Agreement on 5 October 2016, which builds upon the UNFCCC.[39]

The parties in the Paris Agreement have agreed to hold the increase in the global average temperature "well below" 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1,5 °C.[40] It requires a significant reduction in the emissions of greenhouse gases, where carbon dioxide (CO_2) represents more than 80 % of total emissions.[41] The EU is the world's third largest emitter of CO_2, after China and the United States, and in

[33] Krämer, p. 19.
[34] Delbeke & Vis, pp. 11–12.
[35] Krämer, p. 487.
[36] Council Decision of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (94/69/EC), OJ L 33, 7.2.1994, pp. 11–12.
[37] Krämer, p. 330.
[38] UNFCCC, Article 1.
[39] The Paris Agreement entered into force on 4 November 2016. See, the Depositary Notification of the United Nations, 12 December 2015, reference C.N.735.2016.TREATIES-XXVII.7.d.
[40] The Paris Agreement, Article 1.
[41] Delbeke & Vis, p. 16.

2016, the EU's 28 Member States were responsible for approximately 10 % of world total CO_2 emissions.[42]

The Paris Agreement reflects the principles of equity and common but differentiated responsibilities and respective capabilities.[43] Generally, this means that more developed countries should take the lead in dealing with climate change.[44] However, a rather obvious, major deficiency with the agreement is that it relies on transparency and does not compel the parties to set any targets and to increase their ambition levels significantly.[45] In practice, international law instruments do not play a significant role until their content is transposed into EU law, such as a regulation or directive that can be enforced by the Member States.[46] The climate actions taken by the EU to fulfil its international commitments will therefore be examined next.

2.3 The 2030 climate and energy framework

The EU's 2030 greenhouse gas emissions target is part of making a fair and ambitious contribution to the Paris Agreement.[47] The policy framework for climate and energy during the years 2020–2030 aims to ensure the objectives in EU climate policy through climate targets and measures. The policy framework builds on the 2020 targets for greenhouse gas emissions, renewable energy and energy savings. By 2030, the target is to reduce domestic greenhouse gas emissions by at least 40 % compared to 1990. The target is binding for the EU and its Member States to deliver in the most cost-effective manner possible. Each Member States shall participate, balancing considerations of fairness and solidarity.[48]

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[42] Report of PBL Netherlands Environmental Assessment Agency, "Trends in global CO_2 emissions", 2017, p. 42.
[43] The Paris Agreement, Article 2(2).
[44] UNFCCC, Article 3(1).
[45] Bogojević, Sanja, "Climate Change and Policy in the European Union", in: Carlarne, Cinnamon Piñon., Gray, Kevin R. & Tarasofsky, Richard (red.), *The Oxford handbook of international climate change law*, Oxford University Press, Oxford, 2016 p. 689.
[46] Krämer, p. 7.
[47] Intended Nationally Determined Contribution of the EU and its Member States, Submission by Latvia and the European Commission on behalf of the European Union and its Member States, Riga, 6 March 2015.
[48] European Council (2014) Conclusions of 23/24 October 2014, EUCO 169/14, p. 1.

Targets for emissions reductions are fixed in various EU legal acts addressing different categories of emission sources. Given the economic roots of the EU, it might not be surprising that the EU has to a large extent based its climate change policy on cost-effective considerations and market-based instruments.[49] An example of such a market-based instrument is the EU ETS, established by the Directive 2003/87. The scheme for greenhouse gas emission allowance trading within the EU was adopted after the EU's and its Member States signed the Kyoto Protocol to the UNFCCC. The EU ETS has created a price on greenhouse gas emissions through its so-called cap-and-trade system. In short, it sets a limit on the total amount on carbon emissions that companies can make and allowances that are allocated to companies, which they can trade with each other.[50]

Around half of greenhouse gas emissions are constituted outside the scope of the EU ETS sector. The non-ETS sectors are governed by the Effort Sharing Decision.[51] It implies that emission reductions are distributed between the Member States through differentiated national targets, reflecting the principle of fairness and burden-sharing considerations in EU climate policy. Therefore, the emissions reductions are based on each Member State's Gross Domestic Product (GDP) *per capita*.[52] Most recently, the Regulation (EU) 2018/841 has also included greenhouse gas emissions from land use and land use change and forestry in the 2030 climate and energy framework, building on the Effort Sharing Decision.[53]

[49] Delbeke & Vis, p. 25.
[50] Ibid., p. 29.
[51] Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC, OJ L 165, pp. 13–40.
[52] Delbeke & Vis, p. 93.
[53] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, OJ L 156, 19.6.2018, p. 1–25. See also, Delbeke & Vis, p. 103.

Most of the Member States' climate policies are largely based on the EU's climate policy.[54] National laws must be compatible with EU law, but in a case where EU legislation itself is not compatible with the Treaties or other EU legal norms, such a breach of the EU's duties can be reviewed by the CJEU. The aforementioned acts implementing the EU 2030 target are precisely the ones being challenged by the applicants in the *People's Climate* case, claiming the EU acts are inadequate and unlawful based on the EU's duty to avoid harm and to prevent infringements of fundamental rights protected by the Charter. The relevance of the Charter will be examined next.

2.4 Climate change and the EU Charter of Fundamental Rights

The EU's duties to protect the environment on the one hand, and fundamental rights on the other, are intertwined to some extent, since environmental harm and the effects of climate change may threat or infringe fundamental rights in different ways depending on each individual case. The Charter is relevant in relation to climate change in two general aspects, one of them being the protection of fundamental rights, which shall be respected by the EU and its Member States when they are implementing EU law in accordance with Article 51(1) Charter. Fundamental rights shall also be respected by the EU as they are general principles of EU law under Article 6(2) TEU.

Furthermore, the EU and its Member States must observe Article 37 on environmental protection, which states that "environmental protection shall be ensured within EU law in accordance with the principle of sustainable development". Although Article 37 is a Charter provision, it articulates a principle rather than a right.[55] Article 52(5) Charter clarifies that the Charter principles, including Article 37, only *may* be implemented by legislative and executive acts taken by the EU, or by acts of Member States when they are

[54] Bogojević, "Climate Change and Policy in the European Union", in: *The Oxford Handbook of International Climate Change Law*, p. 691.
[55] Explanations relating to the Charter of Fundamental Rights, 14 December 2007, OJ C 303/02, pp. 17–35.

implementing EU law. The Charter itself was not designed to create new legal obligations in EU law nor did it intend to create new EU fundamental rights when it entered into force in 2009, but rather to make them more visible, as enshrined in its preamble. It has the same legal value as the Treaties, according to Article 6(1) TEU.

Article 37 is to a large extent based on the Articles 3(3) TEU, 11 TFEU and 191 TFEU. Compared to Article 11 TFEU, Article 37 Charter concerns the limitations on the EU's competence in shaping its policies, when linking integration of environmental protection in EU law with the principle of sustainable development. However, their legal nature and status are more complex. The link between integration and sustainable development in both Articles raises a number of interpretations of the possibilities concerning their interconnection. The provisions are different in the sense that Article 11 TFEU refers to environmental protection requirements, linking EU legal provisions to the wording of the provision. Conversely, Article 37 Charter does not leave room for interpretations in reference to the environmental objectives, principles and Treaty provisions, since it refers to a high level of protection instead of environmental requirements.[56] Moreover, the concept of sustainable development mentioned in Article 37 of the Charter is far from clear. It has been defined in EU law as "the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations". However, it remains difficult to know which economic development is sustainable and even the meaning of the words "sustainable" and "development" separately, since they are subjectively used in many different contexts.[57]

[56] Eloise Scotford, "Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights", in: Bogojević & Rayfuse, pp. 135–137. See also, to that end, Article 51(2) Charter.
[57] Krämer, pp. 9–11.

In order to challenge the legality of the EU legal norms described in this chapter, there are different legal avenues available for climate change litigants where the CJEU can review the legality of EU climate actions under certain circumstances. The next chapter will examine and discuss the mechanisms within EU law providing legal remedies when there is a breach of the EU's duties, in order to analyse the procedural and substantive difficulties within that system for EU climate change litigants.

3 THE SYSTEM OF LEGAL REMEDIES IN EU LAW

The CJEU, consisting of the Court of Justice and the General Court, shall ensure that the law is observed in the interpretation and application of the Treaties, according to Article 19(1) TEU. The CJEU has the exclusive competence to declare EU acts to be void in accordance with Article 264 TFEU. The legality of EU acts can be challenged directly before the CJEU through actions for annulment under Article 263 TFEU or indirectly before national courts and tribunals through the preliminary reference procedure under Article 267 TFEU. When the illegality of an EU act has caused losses or damages for individuals, the CJEU also has jurisdictions in damages actions brought under Article 340 TFEU. This chapter intends to outline these legal avenues available to remedy a breach of the EU's duties, such as those presented in the previous chapter.

3.1 Direct judicial review: Actions for annulment

The principle way to challenge an EU norm before the CJEU is through Article 263 TFEU, namely action for annulment. In order to declare an EU act void, the action must be well founded. The relevant body must be amenable to judicial review; the act must be challengeable; the applicant before the CJEU must have standing; one of the grounds of review must be applicable, and the action must be brought before the CJEU within two months from the publication of the act or when the applicant knew about the act.[58]

Notwithstanding the expiry of the time limit, any party may under Article 277 TFEU, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead

[58] Craig & de Búrca, p. 509.

the grounds of review in Article 263(2) TFEU in order to invoke the inapplicability of that act before the CJEU. Article 277 TFEU is therefore supplementary to Article 263 TFEU. It gives the right to any party to proceedings to challenge indirectly the validity of an EU act which forms the legal basis of a decision against which it can bring an action.[59] However, there must be a link between the contested decision and the general measure claimed to be illegal, and that general measure must be applicable to the issue with which the action is concerned.[60] Furthermore, the main proceeding must be admissible for the plea of illegality to be admissible as well, as an action under Article 277 TFEU can be used only in an incidental manner and cannot be brought independently.[61]

3.1.1 Bodies and acts subject to review

By the wording of Article 263(1) TFEU, the CJEU can review legislative acts and acts adopted by the Council, Commission and European Central Bank. Such acts can be regulations, directives and decisions, but not recommendations or opinions. Other acts subject to review are acts of the Parliament and the Council or other EU bodies, offices or agencies, which are binding and intend to produce legal effects vis-à-vis third parties.[62] It is the substance of the act that is important, not its form, and the measure must be final and not preparatory.[63] The Articles 275–276 TFEU exclude provisions relating to the common foreign and security policy and the area of freedom, security and justice from the CJEU's jurisdiction. The exceptions are if the

[59] Judgment of 25 April 2013, *Inuit Tapiriit Kanatami and others v. Commission* T-526/10, para. 24 and case law cited.
[60] Judgment of 19 June 2015, *Italian Republic v European Commission* T-358/11, para. 181.
[61] Decision of 20 November 2012, *Shahid Beheshti University v. Council* T-120/12, unpublished, para. 24.
[62] Judgments of 20 March 1997, *French Republic v Commission of the European Communities* C-57/95, and of 1 October 2009, *Commission of the European Communities v Council of the European Union* C-370/07. See also, Craig & de Búrca, pp. 510–511.
[63] Judgment of 11 November 1981, *International Business Machines Corporation v Commission of the European Communities*, 60/81, paras. 9–12.

provisions do not comply with other policies and EU competences, or decisions providing restrictions against natural or legal persons.[64]

3.1.2 Standing requirements

The "privileged" applicants that always have standing under Article 263(2) TFEU are the Member States, the Council, the Commission and the Parliament. The "semi-privileged" applicants in the third paragraph that have standing in actions where the protection of their prerogatives is at stake are the Court of Auditors, the European Central Bank and the Committee of the Regions. The fourth paragraph applies to "non-privileged" applicants, namely natural or legal persons, which have standing only under certain conditions. Climate change litigants will be referred to in this thesis as those who fall within the latter category. Actions brought by natural or legal persons fall within the jurisdiction of the General Court.[65] Its decisions may be subject to a right of appeal to the Court of Justice, according to Article 256(1) TFEU, which is competent to set aside a judgment if the appeal is admissible, made within two months and is well founded.[66]

When the EU act at stake is directly addressed to the applicant, for instance in a case where the applicant's name is listed in the acts, the applicant does not need to show individual and direct concern.[67] The standing requirements apply to others than the addressee and will now be further examined.

3.1.2.1 Individual and direct concern

Natural and legal persons have standing before the CJEU when they are directly and individually concerned by the measure in question. These standing requirements are cumulative and have been interpreted in a very restrictive manner by the CJEU. The main reason for this is the interpretation

[64] Article 40 TEU and judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P.
[65] Article 51 in the Statute of the Court of Justice of the European Union.
[66] See also, Articles 56–62b of the Statute of the Court of Justice of the European Union.
[67] The joined cases *Kadi* C-402/05 P and C-415/05 P are examples of when the applicant is the addressee of the contested act.

of individual concern established in the *Plaumann* case[68]. The *Plaumann*-criteria established that "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".[69] In cases where applicants have been considered to be individually concerned, the applicants have often argued that the EU institutions had a duty to take their specific circumstances into account when adopting an act. One factor to consider could be that the applicant intervened in the legislative process. Another example is when the applicant is mentioned by name in the contested act, without being the addressee, or when a situation specific to that person is directly governed by the act. Hence, the number of applicants that have been individually concerned are very limited.[70]

For direct concern, the contested EU measure must, first, directly affect the legal situation of the individual. Secondly, it must leave no discretion to the addressees of that measure – often a Member State, entrusted with the task of implementing it – that implementation has been purely automatic and resulting from EU rules alone, without the application of other intermediate rules.[71] When non-privileged applicants are directly concerned by a "regulatory act which does not entail implementing measures", they only need to show direct concern and not individual concern. The final

[68] Judgment of 15 July 1963, *Plaumann & Co. v Commission of the European Economic Community*, case 25/62.
[69] *Plaumann* case 25/62, p. 107. The CJEU has confirmed these criteria in for example the judgments of 18 October 2018, *ArcelorMittal Tubular Products Ostrava a.s. v. Commission* T-364/16, para. 46, and of 3 October 2013, *Inuit Tapiriit Kanatami* C-583/11 P, para. 72.
[70] Study conducted by the European Parliament, Directorate General for Internal Policies, Policy Departement C: Citizens' Rights and Constitutional Affairs, Legal Affairs, "Standing up for your right(s) in Europe, A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts", 2012, pp. 43–44.
[71] Judgments of 29 June 2004, *Front national v European Parliament* C-486/01 P, para. 34 and case law cited, of 7 July 2015, *Federazione nazionale delle cooperative della pesca (Federcoopesca) and Others v European Commission* T 312/14, para. 42, and of 15 September 2016, *Pietro Ferracci v European Commission* T-219/13, para. 40.

half-sentence of Article 263(4) is the last amendment of the provision.[72] The meaning of this criteria has been clarified to some extent by the CJEU and will be analysed next.

3.1.2.2 Regulatory acts not entailing implementing measures

The amendment of Article 263(4) TFEU is intended to relax the conditions for standing for non-privileged applicants by excluding the requirement of individual concern when the contested act is a "regulatory act which does not entail implementing measures". The idea was to prevent individuals from ending up in a situation where they cannot challenge the legality of an EU act without first breaking the law.[73] When challenging such regulatory acts, the meaning of direct concern is the same.[74]

In its interpretation of the new wording of the provision, the CJEU has stated that the meaning of the word "regulatory" covers acts of general application, but not *all* acts of general application.[75] Legislative acts which are adopted following legislative procedures set out in the Treaties are excluded, as they entail implementing measures which can be challenged by individuals on a national level instead.[76] This limits the number of acts being regulatory ones significantly. However, the nature of the measures being legislative acts cannot be altered merely by the choice of their form.[77] The criteria were applied when a decision of general application was adopted by the Commission in the exercise of its implementing powers. The decision was applicable to objectively determined situations and produced legal effects with respect to categories of persons envisaged in general, and in the abstract, without entailing any implementing measures.[78]

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[72] Final report of the discussion circle on the Court of Justice, Brussels, 25 March 2003, CONV 636/03.
[73] CONV 636/03, para. 21. See also, *Inuit Tapiriit Kanatami and others v. Parliament & Council* C-583/11 P, paras. 59–60, and judgment of 25 October 2011, *Microban International Ltd and Microban (Europe) Ltd v European Commission* T-262/10, para. 27.
[74] *Microban* T-262/10, para. 30.
[75] *Inuit Tapiriit Kanatami* T-526/10, paras. 42–43.
[76] *Inuit Tapiriit Kanatami* C-583/11 P, paras. 60–61 and 93.
[77] *Inuit Tapiriit Kanatami* T-526/10, para. 64.
[78] *Microban* T-262/10, paras. 22–25.

What constitutes "implementing measures" has been interpreted in a wide sense by the CJEU, restricting the scope of application of the provision even more. For example, the CJEU has found a national decision rejecting an application for grant of a tax advantage provided by EU law to be such an implementing measure.[79] Such a decision could be challenged in a national court, which under certain circumstances may ask the CJEU for a preliminary ruling on the matter. To summarise, individuals still do not have direct access to justice in most cases before the CJEU to challenge the legality of EU acts, despite the intention to relax the standing requirements, which has also been criticised in the literature.[80]

3.1.3 Grounds of review

The four grounds of review of legality of EU acts are lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, and misuse of powers. Based on the first ground of review, an act can be declared void for lack of competence if an EU institution has exceeded the power it is authorised to exercise by the Treaties. This ground of review has rarely been used, as the CJEU has often interpreted the powers broadly in light of the Treaty objectives. In the environmental legal area, the lack of competence could be that the EU exercised its exclusive competence when it should have proceeded via shared competence.[81] An example of when this ground has been applicable is when a directive was adopted on an inappropriate legal basis.[82]

The second ground of review is infringement of an essential procedural requirement. Such an "essential" procedural requirement might be the right to be heard, consultation and participation or the duty to give reasons. The

[79] *Telefónica* C-274/12 P, para. 36.
[80] Craig & de Búrca, p. 532.
[81] Ibid., p. 545.
[82] Judgment of 5 October 2000, *Federal Republic of Germany v European Parliament and Council of the European Union* C-376/98, paras. 115–118.

right to be heard is a fundamental right that cannot be disregarded by any legislative provision. However, the rights to be consulted and to participate in decision-making have not been accepted by the CJEU unless they are explicitly provided by an EU legal norm.[83]

The third ground of review is when an EU act is infringing the Treaties or any rule of law relating to their application. What constitutes "any rule of law relating to the application of the Treaty" has been developed by the CJEU. The wording of the provision gave the CJEU a window of opportunity to develop and impose general principles of EU law. They can annul not only EU acts but also national measures that fall within the scope of EU law. Damages actions can be based on a breach of a general principle as well.[84] Ultimately, any breach of EU law can fit into this ground of review, as it can be a breach of the Treaties, a provision regulating the competence of EU institutions or the objectives of their competence, or – if they have not applied or wrongly applied – a substantive provision of EU law.[85]

The last ground of review is misuse of powers. It covers EU institutions adopting measures with the purpose of achieving another end than the one stated or evading a procedure prescribed by the Treaty for dealing with the circumstances of the case. Compared to the proportionality principle as a ground of review, which relates to a legitimate objective achieved in a proportionate manner, misuse of powers implies the objective itself is improper.[86]

[83] Craig & de Búrca, pp. 545–548.
[84] Ibid., pp. 550–551.
[85] Bergström & Hettne, p. 346.
[86] Craig & de Búrca, p. 576. See also, judgments of 13 July 1995. *European Parliament v Commission of the European Communities* C-156/93, para. 31, and of 12 November 1996, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, case C-84/94, para. 69.

3.2 Damages actions for non-contractual liability

Article 268 TFEU gives the CJEU jurisdiction in damages actions under Article 340 TFEU, where an EU institution or a Member State can be held liable and be obliged to give compensation. The key issue is whether losses or damages were caused by illegal EU acts.[87] In the case of non-contractual liability in Article 340(2) TFEU, damages actions provide a remedy which can be claimed independently of all other remedies in EU law.[88]

According to settled case-law, certain conditions must be fulfilled under Article 340 TFEU. The rule infringed must be intended to confer rights upon individuals, the breach must be sufficiently serious and there must be a direct causal link between the breach and the damage. The test for finding a breach to be sufficiently serious depends on whether the EU institution concerned manifestly and gravely disregarded the limits on its discretion.[89] It also depends on the relative clarity of the rule, whether the error of law was excusable or not and whether the breach was intentional or voluntary.[90] In the case of non-discretionary acts, when the EU institution has very little or no discretion, the mere infringement of EU law may constitute such a breach.[91]

3.3 Indirect judicial review: References for preliminary rulings

In order to ensure a uniform application of EU law and the judicial protection of individual rights stemming from EU law, the preliminary ruling procedure

[87] Craig & de Búrca, p. 582.
[88] Judgments of 28 April 1971, *Alfons Lütticke GmbH v Commission of the European Communities*, case 4-69, of 2 December 1971, *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities*, case 5-71, and of 23 March 2004, *European Ombudsman v Frank Lamberts* C-234/02 P.
[89] Judgments of 4 July 2000, *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities* C-352/98 P, paras. 42–43.
[90] Judgment of 18 May 1993, *Commission of the European Communities v Stahlwerke Peine-Salzgitter AG* C-220/91 P.
[91] *Bergaderm* C-352/98 P, paras. 42–44. See also, Craig & de Búrca, p. 591.

under Article 267 TFEU is a keystone in the judicial system.[92] Indirect judicial review, as opposed to direct judicial review, gives the CJEU competence, as stated in Article 19(3) TEU, to give preliminary rulings, at the request of courts or tribunals of the Member States. It is often the only legal avenue for individuals seeking to challenge the legality of EU norms, because of the standing requirements or because the time limit has expired under Article 263 TFEU.[93]

3.3.1 Questions which can be referred

Article 267 TFEU allows the CJEU jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties and (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. As secondary EU legislation – such as regulations, directives and decisions – is primarily applied by the Member States, the purpose is that national administrative authorities' application of EU acts can be challenged before national courts and tribunals, which can refer questions on their validity.[94] Even non-binding acts can be reviewed under Article 267 TFEU, such as opinions and recommendations, but not under Article 263 TFEU.[95] However, the CJEU only has jurisdiction to review acts of EU law. Thus, Article 267 TFEU excludes questions on the validity of acts of national law, international law and agreements under private law that fall outside the scope of EU law or questions on the specific application of EU law in national proceedings.[96]

The validity of international agreements which are part of EU law and therefore must fulfil the requirement for a uniform application can be reviewed by the CJEU under certain circumstances.[97] Regarding mixed agreements, to which both the EU and the Member States are competent to

[92] Opinion 2/13, para. 176.
[93] Craig & de Búrca, p. 533.
[94] Broberg & Fenger, pp. 135–136.
[95] Judgment of 13 December 1989, *Salvatore Grimaldi v Fonds des maladies professionnelles* C-322/88. See also, Broberg & Fenger, p. 116.
[96] Broberg & Fenger, pp. 136–137.
[97] Ibid., pp. 120–121.

enter, the CJEU's jurisdiction depends on the specific provision at stake. If the EU has legislated within the area, the uniform interpretation lies in the EU's interest regardless whether the provisions apply in situations governed by national law or EU law. The Paris Agreement could be such a mixed agreement. In situations where the EU has not legislated, however, the Member States have a discretion to determine the effect of the provision arising from the mixed agreement within their national legal orders.[98]

3.3.2 When national courts and tribunals may or must refer

The court or tribunal *may* refer, according to 267(2) TFEU, when a question concerning EU law is raised before that court or tribunal, if it considers that a decision on the question is necessary in order to give a judgment in the national proceeding.[99] For a reference to be admissible, it must relate to the actual circumstances in an existing dispute before the national court. A reference cannot be made only when it *might* be relevant for future cases.[100] Furthermore, the question must be clear and relevant to the resolution of the dispute in the national court.[101] The answer to the question must be relevant to the decision in the main proceeding and cannot be hypothetical.[102] The fact that the questions cannot be hypothetical does not, however, prevent the national courts from referring several questions based on different hypothetical views of the facts in the case, as the national court has not decided which view to take.[103]

A national court or tribunal *must* refer a question on the validity of an EU act, if there is no judicial remedy against the decisions of that court or tribunal under national law, under Article 267(3) TFEU. However, the obligation is

[98] Broberg & Fenger, pp. 122–126.
[99] *Inuit Tapiriit Kanatami* C-583/11 P, para. 96 and the case-law cited.
[100] Broberg & Fenger, p. 171.
[101] Craig & de Búrca, pp. 490–491.
[102] Judgment of 16 December 1981, *Pasquale Foglia v Mariella Novello*, case 244/80, paras. 16 and 20.
[103] Broberg & Fenger, p. 177.

not absolute. The CJEU has clarified, in the *CILFIT* case, that the exceptions are when the question is irrelevant, if the EU provision in question has already been interpreted by the CJEU or if the correct application of EU law is so obvious that it leaves no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. The last criterion has been developed by the CJEU in the *acte clair* doctrine: the national court or tribunal must be convinced about the correct application of EU law and, additionally, be convinced that the matter is equally obvious to the courts of the *other* Member States *and* to the CJEU. Whether the *acte clair* doctrine provides an actual exception to the obligation to refer is therefore questionable, as it is virtually impossible to be certain about how the other national and European judges interpret the EU provision at stake.[104]

Furthermore, a national court or tribunal must make a reference when they have serious doubts concerning the validity of an EU measure, in order to ensure a uniform application of EU law.[105] Only the CJEU can declare an EU act as invalid, but national courts and tribunals can nonetheless hold an EU act valid by choosing not to make a reference. The CJEU has stated that national courts can reject claims on invalidity of a party in a national proceeding, if they lack any legal basis.[106] However, the consequences of a national court's mistaken view that an EU act is invalid or mistaken interpretation of EU law can be far-reaching in both situations.[107]

3.4 The interrelationship between direct and indirect judicial review

The CJEU has stated that the Articles 263 and 277 TFEU on the one hand, and Article 267 TFEU on the other, establish a "complete" system of legal remedies and procedures designed to ensure judicial review of the legality of

[104] Ibid., p. 238.
[105] Judgment of 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost* C-314/85.
[106] Broberg & Fenger, pp. 260–261.
[107] Ibid., p. 264.

EU acts.[108] The CJEU is, together with the national courts, the guardian of the EU legal order and shall ensure an effective and uniform application of EU law and guarantee an effective judicial protection in the fields covered by EU law.[109] This is expressed in the second subparagraph in Article 19(1) TEU, which codifies the case law relating to effective judicial protection.[110] The principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States.[111] Access to the courts is one of the most essential elements of the EU, as it is based on the rule of law. It reflects the principle of sincere cooperation in Article 4(3) TEU and is reaffirmed by the rights to effective remedies and a fair trial in Articles 6 and 13 of the European Convention of Human Rights (ECHR).[112] The right to an effective remedy for individuals whose Charter rights are violated is also protected by Article 47 Charter.

The connection between the right to an effective judicial protection and the preliminary reference procedure on validity is that the latter constitutes a remedy which ensures the former.[113] So long as there are implementing measures affecting the legal situation of an individual that could be challenged on a national level, an effective judicial protection is ensured by the possibility for national courts to make a reference for a preliminary ruling. The interrelationship between the Articles 263 and 277 TFEU on the one hand, and Article 267 TFEU on the other, are therefore essential to ensure an effective judicial protection.[114]

[108] Judgments of 19 December 2013, *Telefónica SA v European Commission* C-274/12 P, paras. 27–29, and of 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union* C-50/00 P, para. 40.
[109] Opinion 1/09, paras. 66 and 69.
[110] Lacchi, Clelia, "Multilevel Judicial Protection in the EU and Preliminary References", *Common Market Law Review*, 53, 2016, p. 685.
[111] Judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* C-64/16, para 35, and of 13 March 2007, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* C-432/05, para. 37.
[112] *Unibet* C-432/05, para. 36.
[113] Lacchi, p. 688.
[114] Judgments of 19 December 2013, *Telefónica SA v European Commission* C-274/12 P, paras. 27–29, and of 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union* C-50/00 P, para. 40.

4 JUDICIAL REVIEW OF EU CLIMATE ACTIONS

When reviewing the legality of EU climate actions in the different actions provided by the system of legal remedies examined in the previous chapter, the nature and effects of climate change may give rise to substantive difficulties in EU climate change litigations. They will be subsequently discussed in light of the enforcement of environmental norms, the EU's regulatory boundaries in the legal area, individual harm caused by climate change and the threat it may impose to the future protection of fundamental rights.

4.1 General issues with the enforcement of EU environmental norms

As the findings of the second chapter of this thesis show, the EU's duties to deal with climate change are based on environmental norms consisting of mainly objectives, principles and climate targets rather than concrete legislation, such as secondary legislation, which is also the reason why they can be criticised for being ineffective. The enforcement of EU policies and laws relating to climate change is problematic as their form is giving little weight to their content, which also affects individuals' possibilities to challenge those laws.

4.1.1 Environmental objectives and climate targets

There are different views on whether the environmental objectives in Article 191 TFEU can be enforced based on the EU institutions' omission to take specific measures for environmental protection or their actions' incompatibility with the objectives. According to some it could only be enforced by the CJEU in very extreme cases, where the principles applicable in the policy area are systemically disregarded, given the wide discretion of the EU institutions. Others argue that the environmental principles in Article

191 TFEU are binding and shall be respected in each individual measure taken by the EU in order to achieve the policy objectives.[115] However, the objectives do not lead to concrete requirements for legislative action, such as deducing a right to limit land use based on the requirement of a prudent use of natural resources. Therefore, when EU institutions fail to act in accordance with the environmental objectives, the possibility to bring an action against them under Article 265 TFEU is rather theoretical than enforceable, in practice.[116]

Climate targets are common in EU climate change policy but are in practice not enforced without concrete legislation implementing them. They might be more of political rather than legal importance, as the Member States are in general not keen to enforce targets set for EU institutions in courts and the Commission is not keen either to initiate infringement procedures against Member States for their climate change policies.[117] What are the consequences then, if the climate targets are not implemented in an adequate way, in respect to other EU norms? Notably, there are concerns pointing out that the EU's 2030 target may not be adequate in relation to the 2°C objective of the Paris Agreement. Especially considering the EU's contribution to global decarbonisation as the third largest emitter, chances are little that the 2°C objective will be realised based on the EU's current 2030 target.[118] However, the target has been implemented by concrete legislation in order to fulfil the EU's commitments under the Paris Agreement, as described in section 2.3 of the thesis. An action challenging the legality of those acts, for example the EU ETS Directive and the Effort Sharing Decision, can indirectly challenge the legality of the climate target they intend to implement. This is exemplified by the application in the *People's Climate* case, where those acts are challenged by individuals claiming that the 2030 target is inadequate and unlawful.[119]

[115] Krämer, pp. 15–16.
[116] Ibid., p. 9.
[117] Ibid., p. 71.
[118] Bogojević, "Climate Change and Policy in the European Union", in: *The Oxford Handbook of International Climate Change Law*, pp. 690–691.
[119] OJ C 285, 13 August 2018, Volume 61, p. 34.

4.1.2 The legal impact of environmental principles

Article 37 Charter on environmental protection, referring to the principle of sustainable development, has high ideals and its introduction in the Charter led to high hopes on its legal impact in the environmental area. Article 52(5) Charter clarifies that the principles under the Charter are judicially cognisable only once they are implemented by the EU institutions and the Member States when exercising their respective powers. As it is a principle rather than a right, its legal role can be compared with the role of environmental principles. They have generally been used by the CJEU to justify legal reasonings in cases where EU competence has already been exercised. [120] Furthermore, the Charter can be seen as a source of authority in order to develop general principles of EU law. Although the Charter did not intend to create new rights or principles, it can nonetheless be relied on by individuals seeking to challenge the validity of secondary EU measures.[121] In contrast with rights, principles can be weighed against each other and are developed by the courts, whereas rights either exist or do not.

The precautionary principle has been used by the CJEU in its legal reasoning. For example, it was used in the case *Pfizer* to uphold the Commission's decision to withdraw authorisation for an antibiotic. The Commission's decision entailed serious economic consequences for the applicant challenging its legality, claiming the reason for withdrawing the authorisation could not be proven by scientific evidence. In its judicial review, the CJEU informed already established legal tests, such as proportionality and manifest error of assessment, but also elevated the precautionary principle in relation to the adequate scientific evidence available when assessing the discretion that the Commission enjoyed.[122]

[120] Eloise Scotford, "Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights", in: Bogojević & Rayfuse, pp. 141–146.
[121] Lenaerts, Koen, "Exploring the Limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review* (UK), 2012, p. 376.
[122] Judgment of the 11 September 2002, *Pfizer Animal Health SA v Council of the European Union* T-13/99.

The principle of sustainable development, which is mentioned in Article 37 of the Charter, is perhaps the least developed in EU legal doctrine. Its general use makes it challenging for courts to frame and understand the principle when developing legal doctrine. Nonetheless, since it can be used in many difference ways, it can play an interesting role in connection to Article 37 of the Charter and the integration principle in Article 11 TFEU. Even though its legal effect is limited, its significance in EU law is reinforced by the Charter provision. The legal meaning of Article 37 of the Charter must be developed by the CJEU to ascertain the justiciability of the principle. The case law to date is limited in illustrating the legal effect of the provision, but it nevertheless has a potential for innovative reasoning in developing EU legal doctrines relating to environmental protection, in future.[123]

Although neither Article 37 of the Charter nor the environmental principles present an independent ground of review of EU action, they can nonetheless be used as an argument when challenging the legality of EU climate actions. Only the precautionary principle can be an independent ground of review, as it is a general principle of EU law.[124]

4.2 Judicial review of the EU ETS

The examples from the EU ETS case law are the most relevant in the context of CJEU's case law relating to climate change, since the EU ETS is the most significant concrete legislation in EU climate policy.[125] The actions brought before the CJEU have shown that the EU ETS case law, despite the EU ETS objective to reduce greenhouse gas emissions, has been an issue of the Commission's exercised powers rather than an issue of climate change. This will be illustrated by cases contesting the Commission's decisions relating to

[123] Eloise Scotford, "Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights", in: Bogojević & Rayfuse, pp. 147–148 and 153.
[124] See section 2.1.2.
[125] Bogojević, "EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture", p. 192.

the national allocation plans of the Member States' emissions allowance caps.[126]

4.2.1 The Commission's powers

In the case *Estonia v Commission*, the General Court on the one hand recognised the importance of the EU ETS in the EU's fight against climate change, being "one of the greatest social, economic and environmental threats which the world currently faces"[127]. On the other hand, it assured that the regulatory powers being in line with the legislator's intentions are even more important, as the EU is governed by the rule of law.[128] The rule of law is indeed one of the foundations of EU law in Article 2 TEU. The CJEU's focus therefore remains on the constitutional aspect of the exercised EU competences. The fact that the Commission's actions would have contributed to achieve the objective of reducing greenhouse gas emissions more efficiently does not alter the allocation of powers as provided for in the EU ETS directive.[129]

The judgment in the case *Poland v Commission* was delivered on the same date as the one in the case *Estonia v Commission*, where the factual circumstances were very similar. The General Court developed its reasoning and stated that the aim of the EU ETS directive to reduce greenhouse gas emissions must be achieved, while at the same time respecting the needs of the European economy.[130] The contested decision of the Commission aimed at reducing the total annual quantity of emission allowances in the national allocation plan of Poland. This was in line with the aim of the directive but, once again, in breach of the its distribution of powers between the Commission and the Member States. The General Court confirmed that the

[126] Bogojević, "EU Climate Change Litigation: All Quiet on the Luxembourgian Front?", pp. 8–9.
[127] Judgment of 23 September 2009, *Republic of Estonia v Commission of the European Communities* T-263/07, para. 49.
[128] *Estonia v Commission* T-263/07, paras. 49–50.
[129] Bogojević, "EU Climate Change Litigation: All Quiet on the Luxembourgian Front?", p. 9.
[130] Judgment of 23 September 2009, *Republic of Poland v Commission of the European Communities* T-183/07, para. 113.

Member States have a wide discretion when implementing a directive, since they are best suited to choose the measures in doing so. Thus, the Commission exceeding its powers could not be justified in this case either, as the decision was contrary to the rule of law.[131]

Even though the Court often adopts a teleological interpretative approach in its judgments, it cannot interpret the Commission's actions only in light of the aim of the EU ETS directive, if it is at the expense of the rule of law. It would be contrary to the provisions of the directive and to EU constitutional norms. Nevertheless, the EU ETS case law shows that climate change remains, to some extent, the "elephant in the (court)room". Where the regulatory boundaries leave a discretion on the Member States, which it to a great extent does in EU law relating to climate change, the CJEU has left the issue on how climate change should be framed and understood up to the EU legislator. Another approach – enforcing regulatory activity to ensue EU climate policy, or setting aside the rule of law – might question the legitimacy of the CJEU and the separation of powers.

4.2.2 The Aviation Directive

The EU ETS expanded to include emissions from flights between European airports through the directive 2008/101 (hereinafter the Aviation Directive), amending the EU ETS directive to include aviation activities in the scheme for greenhouse gas emission allowance trading within the EU. The CJEU has confirmed that the Aviation Directive was compatible with international law, when its validity was reviewed against international law in the case *ATAA*.[132]

The *ATAA* case concerned the international agreements between the United States and the EU on sovereign rights to determine the conditions for admission to, or departure from, their territories. The validity of the Directive

[131] *Poland v Commission* T-183/07, paras. 129–130. The Court also confirmed these limitations of the Commission's powers in the judgment of 22 March 2011, *Republic of Latvia v European Commission* T-369/07.
[132] Judgment of 21 December 2011, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* C-366/10.

was challenged by operating airlines based in the United States and an association of airlines in the United States in a national proceeding in the United Kingdom, where the national court made a reference for a preliminary ruling from the CJEU. In its judgment, the CJEU confirmed that the provisions had no extraterritorial effect, since no obligations were imposed on other States than the Member States. Therefore, no international law principles were considered to be infringed by the Aviation Directive, even though it covers flights outside the EU.[133] Although the CJEU's judgment reinforced the protection of the EU legal order and its fundamental values from being affected by international agreements and principles, the Court does not comment upon its own role in promoting global environmental standards. It only points out that the EU legislature may impose conditions on aircraft operators outside the EU, which have an aerodrome situated in the territory of a Member State. Such conditions have been established by EU environmental policy in order to fulfil the environmental protection objectives which the EU "has set out for itself" as part of fulfilling international agreements, such as the Kyoto Protocol to the UNFCCC.[134]

4.3 Rights-based climate change cases

Globally, climate change litigations which pursue rights claims are growing rapidly. Creative lawyering has sometimes successfully used rights-based argumentation in climate change cases. Most importantly, even the "losing" cases have shown to have a snowball-effect in shaping public dialogue and climate governance. Thus, they can play an important role in the climate debate, giving climate disasters a "human face".[135] Similarly, on an EU level, the applicants in the *People's Climate* case, pending before the CJEU, are invoking Charter rights in their action for annulment of EU acts implementing the EU 2030 climate target.[136]

[133] The ruling in the *ATAA* C-366/10 judgment.
[134] *ATAA* C-366/10, paras. 127–128.
[135] Peel, Jaqueline, & Osofsky, Hari M., "A Rights Turn in Climate Change Litigation?", *Transnational Environmental Law*, Cambridge University Press, 2017, pp. 66–67.
[136] OJ C 285 Volume 61, pp. 34–35. The applicants are alleging climate change poses a serious threat to the right to life (Article 2 of the Charter), the right to physical integrity (Article 3), the rights of children (Article 24), the right to engage in a work and to pursue a

4.3.1 Linking environmental protection and fundamental rights

Climate change litigants seeking to challenge the legality of EU climate actions may base their claim on the EU's obligation to protect the environment or to protect fundamental rights, which have been breached as a consequence of insufficient and/or inadequate climate actions. In both cases, a judgment in favour of climate change litigants could then result in increased environmental protection in order to comply with EU norms.

The threat climate change imposes to the full enjoyment of human rights has been recognised in the process of creating the Paris Agreement.[137] However, the link between fundamental rights and environmental protection can be problematic considering that the rights originally do not include environmental concerns. Notably, the difficulties relate to establishing a causal link between greenhouse gas emissions or failures in adaptation policies and the impact of climate change in specific situations, affecting human rights. Furthermore, predictions of future climate change impacts are difficult to use as rights-based claims are normally brought after actual harm has occurred.[138]

On an EU level, it can be argued that human rights are not suitable norms when the purpose is to secure policy objectives, such as those on environmental protection. When a Member State's actions are breaching fundamental rights by causing or failing to protect them from environmental harm, the EU has no competence to intervene in the national legal orders to secure the protection of these fundamental rights *per se*.[139] In contrast with

freely chosen or accepted occupation (Article 15), the right to conduct a business (Article 16) and the right to property (Article 17).

[137] Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/31/52, 1 February 2016, para. 22.

[138] Peel & Osofsky, p. 46.

[139] Gill-Pedro, Eduardo, "EU Environmental Rights as Human Rights: Some Methodological Difficulties Facing European Courts", in: Bogojević & Rayfuse, p. 225.

the environment, seen as a collective good, human rights are legal norms designed to protect individuals from being treated as less equal or less worthy than others. It limits the powers of the political community in relation to individuals when pursuing what the community claims to be in the public interest. Furthermore, a healthy environment is a public interest, which can justify interferences with individual human rights. Because the environment can be seen as a collective asset, which relates to policies rather than legal rights, it is difficult for courts to determine the common interest of a political community. Instead, they ensure that political decisions respect the rights and duties already assigned to community members.[140] Nevertheless, EU human rights standards entail rights and duties for the EU and its Member States, which the CJEU has elaborated upon in its judicial review.

4.3.2 Human rights-based judicial review of EU acts

Human rights-based judicial review of EU acts has become more common, especially since the Charter entered into force in 2009.[141] EU human rights standards are binding on the EU and its Member States when they are acting within the scope of application of EU law under Article 52 Charter.[142] The protection of fundamental rights is also included in the general principles of EU law.[143] Hence, the Member States must respect the Charter rights when they are implementing EU law as a minimum standard. However, national constitutional standards providing a higher level of protection of rights cannot undermine the level of protection of the Charter rights provided by EU law and the primacy, unity and effectiveness of EU law.[144]

In the cases *Kadi I* and *Kadi II*, the CJEU stated that all EU acts must respect fundamental rights, as it is a constitutional principle of the Treaty and that it is a condition of their lawfulness, which it is for the Court to review in the

[140] Ibid., pp. 219–221.
[141] Craig & de Búrca, p. 400.
[142] Ibid., p. 381.
[143] Judgment of 12 November 1969, *Erich Stauder v City of Ulm – Sozialamt*, case 29/69.
[144] Judgment of 26 February 2013, *Stefano Melloni v Ministerio Fiscal* C-399/11.

framework of the system on legal remedies in EU law.[145] In the *Kadi* cases, the contested acts imposed restrictive UN and EU measures directed against certain persons, which violated their fundamental rights relating to the European Convention on Human Rights (ECHR) and the Charter, such as the rights of defence and the right to property.[146] What was striking in the *Kadi* judgments though, was that the CJEU was less deferential to the EU institutions and even to international institutions such as the UN Security Council.[147]

The illegality of EU acts violating Charter rights can also be invoked in national proceedings, which can lead to the annulment of such acts through a preliminary ruling from the CJEU. An example of this is the *Digital Rights Ireland* case,[148] where the CJEU annulled the contested Data Retention Directive, which interfered with the rights to private and family life and the protection of personal data in the Articles 7–8 of the Charter.[149] The interference of rights was not justified and the directive was annulled on the ground that it disproportionately restricted the data protection and privacy guaranteed by the Charter.[150]

4.4 Damages caused by climate change

Evidence of damages actions put before the CJEU is often an issue. For non-contractual liability under Article 340 TFEU, the applicant must show that the chain of causation has not been broken by the Member States and thus that only the EU's actions caused the loss.[151] A damage claim can be declared inadmissible, if the damages are not sufficiently described and clear in the

[145] *Kadi I*, joined cases C-402/05 P and C-415/05 P, para. 285.
[146] See, the judgments in *Kadi I*, joined Cases C-402/05 P and C-415/05 P, and *Kadi II*, judgment of 18 July 2013, *European Commission and Others v Yassin Abdullah Kadi*, joined cases C-584/10 P, C-593/10 P and C-595/10 P.
[147] Craig & de Búrca, p. 405.
[148] Judgment of 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, joined cases C-293/12 and C-594/12.
[149] *Digital Rights Ireland* joined cases C-293/12 and C-594/12, paras. 34–37.
[150] *Digital Rights Ireland* joined cases C-293/12 and C-594/12, paras. 65–71.
[151] Judgment of 19 May 1982, *P. Dumortier Frères SA and Others v Council of the European Communities*, joined cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79.

application. Furthermore, the chain of causation between the EU's actions and the damage occurred cannot be merely hypothetical.[152]

4.4.1 The causal link

The applicant's burden of demonstrating causation within the context of climate change can be considered a global tragedy of the commons. The tragedy is caused by the cumulative effect of the actions of many small users, which go beyond the general competence of the courts. The applicant needs to show that the defendant has caused public nuisance, such as particular weather events being attributable to anthropogenic greenhouse gas emissions. While the emissions may not be responsible for all harmful weather events, they increase the risk or likelihood for such events occurring in the future. However, the link between the emissions and particularly weather events may not be necessary to prove when the applicant is not seeking to repair existing damages, but only to stop harmful activities causing the emissions. The key would then be to determine whether the source of emissions contributes to global concentrations of greenhouse gas emissions, in order to use injunctive reliefs as a remedy for the potential harm caused by the emissions.[153]

The underlying reason for the problems of proof in climate change litigations is often scientific uncertainties, but the problem might be easier to overcome as climate science is becoming more certain and convincing. From the perspective of the courts, climate change must be seen as an environmental problem with both local and global impacts. In this regard, emissions reduction targets can create a basis for the court to assess the significance of certain activities' or entities' contribution to climate change. In accordance with the precautionary principle, scientific uncertainties can also be overridden to prevent potentially harmful effects.[154]

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[152] Bergström & Hettne, pp. 362–363.
[153] Engel, Kirsten H., "Harmonizing regulatory and litigation approaches to climate change mitigation: Incorporating tradable emissions offsets into common law remedies", Arizona Legal Studies Discussion Paper No. 07–10, *University of Pennsylvania Law Review*, Vol. 155, 2007, pp. 1584–1591.
[154] Peel, Jaqueline, "Issues in Climate Change Litigation", *Carbon & Climate Law Review*, Vol. 5, Issue 1, 2011, pp. 15–19.

4.4.2 The EU's discretion and future damages

Two other major challenges when bringing actions for damages caused by climate change on the EU level are, on the one hand, proving that the EU has manifestly and gravely disregarded the limits of its discretion and, on the other hand, proving that illegal EU actions may cause potential future damages as well. In damages actions claiming the illegality of the EU ETS Directive, the CJEU confirmed the wide discretion that the EU legislature enjoys when exercising their environmental powers. Because of the wide discretion, it has proven to be difficult for the applicant to show that it had manifestly and gravely disregarded the limits of its discretion for constituting a "sufficiently serious breach".[155]

Given the fact that climate change is slow-onset, damages actions might also be pursued in order to prevent greater damage. Concerning future damage, the CJEU has stated that it is possible to bring an action "for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed".[156] However, in a climate change context, proving the chain of causation step-by-step might not be feasible and such a demand would therefore be unreasonable and even contrary to the precautionary principle. Therefore, the principle has a potential to be applied in a climate change context by courts, since it can help overcome the scientific gaps in order to achieve the purpose of preventing serious or irreversible environmental damage from climate change or global warming.[157]

The substantive difficulties in climate change litigations, which have been examined and analysed in this chapter, present several hurdles for individuals challenging the legality of EU acts relating to climate change. In addition, there are procedural difficulties relating to the system of legal remedies in EU

[155] Judgment of 2 March 2010, *Arcelor SA v. European Parliament & Council of the European Union* T-16/04, paras. 201–206.
[156] Judgment of 2 June 1976, *Firma Kurt Kampffmeyer Mühlenvereinigung KG v. European Economic Community*, joined cases 56 to 60/74, para. 6.
[157] Peel, pp. 19–20.

law. To a large extent, those difficulties apply to all individuals seeking to challenge the legality of EU actions but have certain consequences for climate change litigants specifically and will therefore be examined next.

5 A "COMPLETE" SYSTEM OF LEGAL REMEDIES FOR CLIMATE CHANGE LITIGANTS?

Generally, EU climate change litigation is an issue of *who regulates* the legislation at stake, *who brings the action* and before *which court*. These questions are driven by judicial subsidiarity, where the objective is often to reduce possible interventions by the CJEU when the alternative is to go to national court.[158] The procedural difficulties this entails for individuals seeking to challenge the legality of EU climate actions will therefore be discussed and criticised, questioning the "completeness" of the system of legal remedies in EU law in relation to climate change litigations. The criticism is based on the restrictive interpretation of Article 263(4) TFEU, the potential non-compliance with the Aarhus Convention and the challenges with ensuring an effective judicial protection for climate change litigants.

5.1 Actions for annulment

The CJEU has yet never discussed whether an EU act should be annulled because it did not take environmental requirements into consideration.[159] The reason for this has a lot to do with the CJEU's interpretation of Article 263(4) TFEU, which will be discussed in light of the principle of an effective judicial protection.

[158] Bogojević, "EU Climate Change Litigation: All Quiet on the Luxembourgian Front?", p. 2.
[159] Krämer, p. 23. See also, for updated statistics on climate change litigations, the database of non-U.S. Litigation Chart, available at: http://wordpress2.ei.columbia.edu/climate-change-litigation/non-us-jurisdiction/eu/.

5.1.1 Consequences of the CJEU's interpretation of individual concern

With the *Plaumann*-criteria,[160] the larger the effect of an environmental law, the more restrictive access to justice for climate change litigants. Since climate change is affecting everyone, although in different ways, the EU acts dealing with climate change concern individuals in a general way. Therefore, it is extremely difficult to prove individual concern of such acts. The CJEU's main argument for its restrictive approach when interpreting the criteria of individual concern is the availability of other legal remedies in EU law, namely the preliminary reference procedures.[161] The CJEU underlined the applicants' possibility to go to national courts and tribunals in the case *Stichting Greenpeace Council (Greenpeace International) and others v. Commission*. The environmental organisation Greenpeace was not individually concerned by the measure in question, since the environmental act concerned them in a general and abstract way, and they were not considered to be in a specific situation when adopting the act, either.[162] The underpinning environmental interests of the action did not change this, since there were no directly affected environmental rights arising from EU law. Furthermore, according to the CJEU, the effective judicial protection of such rights is safeguarded by the possibility to challenge national measures deriving from EU law in a national court or tribunal.[163]

The CJEU made the same point in the more recent case *Iberdrola*,[164] where an individual challenged a national provision implementing the EU ETS directive. The Court pointed out that nothing prevented the applicant to take the matter before a national court, which the applicant later did and got a preliminary reference from the CJEU. However, according to the preliminary

[160] See section 3.1.2.1.
[161] Bergström & Hettne, pp. 348–351.
[162] Judgment of 2 April 1998, *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission of the European Communities* C-321/95 P, paras. 28–29.
[163] *Greenpeace v Commission* C-321/95 P, paras. 30–32.
[164] Judgment of 17 October 2013, *Iberdrola, SA and Others v. Administración del Estado and Others* C-566/11.

ruling, the Member States enjoyed a wide discretion when implementing the EU ETS directive, so long as the objectives of the EU ETS were not neutralised. Thus, judicial subsidiarity is the main focus for the CJEU and not the goal to reduce greenhouse gas emissions or provide a political platform for climate change litigants raising climate change-related concerns. In the EU ETS case law, the non-privileged applicants have so far not been admissible since they did not have any rights incurred from the contested acts. It has often been industries complaining of the Commission's decision to reject national allocation plans. The CJEU clarified that the Commission's role was not to create rights, but to provide legal certainty for the Member States when allocating national emissions allowances. The applicants were not concerned by the decisions, as they had effect by virtue of an objective legal or factual situation and were addressed to the Member States.[165]

Standing is an issue of *when* the CJEU can exercise it competences. The issue of *how* the CJEU can review the legality of EU laws on climate change is one of substance, which has been discussed in the previous chapter. When actions are declared inadmissible, the CJEU cannot give a judgment on the substance. In exemplification of this, an action for annulment was brought against an EU regulation giving fishing fleets access to the waters around the Azores without discussing the impact on the local ecosystems. The EU act in question *might have* constituted a breach of Article 11 TFEU or other EU environmental norms as a ground for annulment, but the CJEU could not examine the matter on the ground that the applicant did not have standing.[166]

5.1.2 Effective judicial protection and the *Plaumann*-criteria

The CJEU's application of the principle of effective judicial protection in relation to Article 263 TFEU is a rather delicate issue, given the controversial and extremely restrictive interpretation of individual concern. The CJEU's

[165] Bogojević, "EU Climate Change Litigation: All Quiet on the Luxembourgian Front?", pp. 11–14.
[166] Krämer, p. 23.

reasoning in the cases *UPA*[167] and *Inuit Tapiriit Kanatami*[168] concerning Article 263 TFEU and effective judicial protection has been criticised for being unconvincing. Notably, on the one hand, it stated that the right to effective judicial protection could influence the application of individual concern, but on the other hand, that it could not set aside the condition of individual concern, which can only be done by amending the Treaty provision.[169] More specifically, the CJEU has stated that the *Plaumann*-criteria have not proven to be overruled by the principle as it is a condition "expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the [Union] courts".[170]

The CJEU's interpretation in the above-mentioned cases and its reference to the principle of conferral can be questioned on a number of points. Firstly, the *Plaumann*-criteria cannot be deduced only by the wording of "individual concern" expressly laid down by Article 263(4) TFEU. Secondly, the wording of a Treaty provision is in any case not likely to prevail over a general principle of EU law, that is the principle of effective judicial protection.[171] At the least, it could be interpreted in conformity with general principles of EU law in order to ensure them. Thirdly, the *Plaumann*-criteria were created in 1964 by the CJEU, around 20 years *before* the CJEU established effective judicial protection as a general principle of EU law; they do not take into account the development of EU law since then. As will be discussed below, the compliance of the criteria with Article 9 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention) is doubtful. Finally, a change of the CJEU's interpretation of individual concern would not necessarily go beyond its competences in relation to the principle of conferral. After all, the CJEU itself is responsible for the restrictive interpretation given in the first place.

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[167] *UPA* C-50/00 P.
[168] *Inuit Tapiriit Kanatami* C-583/11 P.
[169] *UPA* C-50/00 P, para. 44, and *Inuit Tapiriit Kanatami* C-583/11 P, para. 98.
[170] *UPA* C-50/00 P, para. 44. See also, *Jégo-Quéré* C-263/02 P, para. 36.
[171] Arnull, Anthony, "The Principle of Effective Judicial Protection in EU law: An Unruly Horse?", *European Law Review*, Issue 1, 2011, p. 69.

There may be valid reasons to limit individuals' access to justice, where the Court can influence the number of actions brought before it through the standard of review applied. The standing rules limit access to justice to those who have suffered substantial adverse impacts of legal actions, which is justified in a legal system based on the rule of law. The aforementioned criticism lies in that an unduly, narrow interpretation of those rules results in more people being affected by a provision, with less chance to challenge that provision, which is more difficult to justify.[172]

5.2 Compliance with the Aarhus Convention

In the area of environmental protection, the EU's procedural rules in environmental matters have been amended after the implementation of the Aarhus Convention.[173] The Convention is binding for both the EU and its Member States, as they are part of the signing parties.[174]

5.2.1 The ACCC's recommendations concerning Article 9(3) and 9(4)

The Aarhus Convention has been implemented by the EU mainly by adopting the Regulation 1367/2006 (hereinafter the Aarhus Regulation). Compared with the UNFCCC, the provisions of the Convention provide procedural rights that can be enforced in courts. When there is breach of the rights to information and public participation in environmental matters, Article 9 gives individuals a right to go to court.[175] In the field of climate change, legal conflicts may occur when citizens request information about potential climate risks or when participating in decision-making on adaptation measures with

[172] Craig & de Búrca, p. 536.
[173] Arnull, p. 66.
[174] Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (2005/370/EC), OJ L 124, pp. 1–3.
[175] Peeters, Marjan, and Nóbrega, Sandra, "Climate Change-related Aarhus Conflicts: How Successful are Procedural Rights in EU Climate Law?", *Review of European Community & International Environmental Law*, 23 (3), 2014, pp. 355–356.

harmful consequences for the environment. As the development of climate policy is often an issue of "learning by doing", it is important that civil society has real opportunities to have a say in order to achieve environmental democracy.[176]

Once the EU has exercised its legislative competences, the possibility to challenge the legality of EU acts becomes relevant. The Aarhus Regulation regulates individuals' access to justice in environmental matters provided by Article 9(3) and 9(4) of the Aarhus Convention. Article 9(3) ensures access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of environmental law. Furthermore, the procedures shall under Article 9(4) "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive".

However, the Aarhus Convention Compliance Committee (ACCC) has found that the Aarhus Regulation and the CJEU's jurisprudence on the standing requirements does not comply with the requirements in Article 9 of the Convention. The non-compliance lies in environmental organisations and citizens being practically barred from the CJEU.[177] The ACCC also criticises the CJEU's interpretation of the criteria of direct and individual concern in relation to the principle of effective judicial protection.[178] Only the provisions on access to information have been enforced before the CJEU, since the decisions denying access to information are directly addressed to the applicant who, hence, does not need to show individual and direct concern.[179] Furthermore, the Aarhus Regulation contains a restrictive definition of challengeable administrative acts, which are limited to measures "of individual scope under environmental law".[180] For these reasons, the ACCC

[176] Ibid., p. 366.
[177] "Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) Concerning Compliance by the European Union", adopted by the Compliance Committee on 17 March 2017, paras. 94 and 122–123.
[178] Ibid., paras. 81–84.
[179] Krämer, pp. 157–159.
[180] See Article 2(1)(g) in the Aarhus Regulation.

has urged the EU to take the steps necessary to provide access to justice in environmental matters in accordance with Article 9(3) and 9(4) of the Aarhus Convention. The ACCC has recommended the EU to amend the Aarhus Regulation or to draft a new legislation in accordance with the Convention. Additionally, since there are no signs of a change of direction in the CJEU's jurisprudence in this regard, the ACCC has also recommended that the CJEU changes its jurisprudence in light of the obligations under the Aarhus Convention, and to interpret EU law consistent with the objectives of the latter.[181]

The criticism in the literature has been in line with the ACCC's recommendations, as access to justice for environmental non-governmental organisations (NGOs) and individuals remains *de facto* impossible in environmental matters.[182] Despite the general procedural difficulties for climate change litigants to have access to justice before the CJEU, the role of environmental NGOs has become significant to pressurise the EU to comply with its obligations. In fact, the ACCC's findings were initiated by an environmental NGO (ClientEarth) alleging a failure by the EU to comply with its Aarhus obligations under the Convention.[183] This has later led to a study, conducted by the Commission on the Council's request, on the EU's options for addressing the findings of the ACCC and, if appropriate, a proposal for an amendment of the Aarhus Regulation. The findings of the study will be presented in the year of 2019.[184]

5.2.2 The position of the CJEU

Yet, the CJEU has not taken the ACCC's recommendations into consideration. In the *Mellifera* case, an association on preservation of bees challenged the Commission's decision to reject their request to review a

[181] "Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) Concerning Compliance by the European Union", adopted by the Compliance Committee on 17 March 2017, paras. 124–126.
[182] Krämer, p. 482.
[183] ACCC/C/2008/32 (Part II), para. 1.
[184] Council Decision (EU) 2018/881 of 18 June 2018.

regulation on controversial weed-killers. The decision was rejected on the ground that the decision was not a challengeable administrative EU act under the Aarhus Regulation. In the proceeding before the General Court, *Mellifera* invoked the ACCC's findings, arguing that the requirement of the measure in question being of "individual scope" was not fully compliant with international law, namely the Aarhus Convention.[185]

In its judgment, the General Court confirmed the previous jurisprudence on the Aarhus Regulation and individual and direct concern. Furthermore, an interpretation of the EU provisions applicable which conformed with the Aarhus Convention was not possible as it would have been *contra legem* (against the law).[186] The ACCC recommendations are not binding and were published after the EU measure in question was adopted. Although the applicants failed to enforce their procedural Aarhus rights, the "Aarhus fight" seems to be far from over.[187] *Mellifera* has already submitted a new similar application in June 2018.[188]

5.3 Preliminary reference procedures

In its case law, the CJEU has emphasised the possibility to get a preliminary reference in national proceedings, as an alternative to bring an action directly before the CJEU.[189] The hope for a preliminary reference through national proceedings may be a more realistic choice of remedy for individuals, but to what extent it ensures an effective judicial protection will be examined next.

[185] Judgment of 27 September 2018, *Mellifera eV, Vereinigung für wesensgemäße Bienenhaltung v European Commission* T-12/17, paras. 78–79.
[186] *Mellifera* T-12/17, paras. 85–87.
[187] Peers, Steve, "The "Mellifera" case and access to environmental justice under the Aarhus Regulation: new findings, old story", EU Law Analysis, posted on 19 October 2018, available at: http://eulawanalysis.blogspot.com/2018/10/the-mellifera-case-and-access-to.html.
[188] OJ C 294, 20 August 2018, p. 57.
[189] *Telefónica* C-274/12 P, para. 29, och *Inuit Tapiriit Kanatami* C-583/11 P, para. 94.

5.3.1 Effective judicial protection in national courts

Preliminary references play an important role in promoting effective judicial protection, as they guarantee the effectiveness of EU law and provide access indirectly to the CJEU.[190] In relation to Article 47 Charter on the rights to an effective remedy and a fair trial, the level of protection is determined by the CJEU and that "EU standard" must be guaranteed within the national legal orders. The intensity of review and availability of remedies guaranteed by national courts might also compensate for the limitations of the remedies available before the CJEU.[191]

The national courts' obligation to ensure the principle of effective judicial protection is conditioned by the principles of equivalence and effectiveness. The principle of equivalence means that national procedural rules shall be equivalent in domestic and EU-related cases. Member States shall not introduce less favourable procedural rules governing actions where EU rights are at stake than those governing domestic ones. The principle of effectiveness means that the procedural conditions in national law cannot make the exercise of EU rights excessively difficult or practically impossible.[192] These principles put national procedural autonomy into question, since the autonomy is in a way conditioned by the principles. On the one hand, each national legal system has its own set of rules reflecting its own legal culture, but on the other hand, the Member States can be obliged to introduce procedural rules or new national remedies if they cannot otherwise ensure an effective judicial protection. Thus, the CJEU's interpretative role can have huge effects for national courts and even for legislators in the EU.[193] When adjudicating on the limits of EU competence in relation to the Member States, the CJEU has also developed principles of a constitutional nature as a binding part of EU law through the use of Article 19(1) TEU.[194] The CJEU's

[190] Lacchi, p. 691.
[191] Safjan, Marek, & Düsterhaus, Dominik, "A Union of Effective Judicial Protection, Addressing a multi-level challenge through the lens of Article 47 CFREU", *Yearbook of European Law*, Volume 33, issue 1, 2014, p. 3.
[192] *Unibet* C-432/05, para 43.
[193] Arnull, pp. 52 and 55–56.
[194] Craig & de Búrca, pp. 62–63.

development of the direct effect doctrine illustrates how the powers exercised by the CJEU have enabled individuals to invoke EU rights before national courts to promote the effectiveness of EU law, in particular, directives.[195] The principle of direct effect was first elaborated upon in the case *Van Gend en Loos*.[196] It is relevant as it is complementary to the possibilities to invoke individual rights before the CJEU.[197] Moreover, the principle of state liability to pay compensation under certain conditions for breach of EU law has been developed by the CJEU, presenting an alternative remedy for individuals suffering damages caused by a breach.[198] The principle of an effective judicial protection can be described as the "flesh to the skeleton of primacy, direct effect and state liability".[199] Through its teleological or purposive interpretative approach, the CJEU has defined the very nature of EU law by developing these principles and promoting the effectiveness and uniform application of EU law.[200]

In an environmental context, the environmental provisions in the Treaties have not been constructed in a way that they confer rights on individuals which can be invoked before courts.[201] The CJEU has only declared that individuals concerned by measures aiming to protect human health and the environment must be in a position to rely on those measures by challenging the Member State's failure to comply with EU environmental norms before national courts.[202] Furthermore, environmental provisions creating rights or obligations for individuals can be invoked by the direct effect doctrine if they are sufficiently concrete, precise and unconditional.[203] National courts must

[195] Ibid., pp. 222–223.
[196] Judgment of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, case 26/62.
[197] Bogojević, "EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture", p. 190.
[198] Judgment of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, joined cases C-6/90 and C-9/90. See also, Craig & de Búrca, pp. 252–253.
[199] Arnull, p. 51.
[200] Craig & de Búrca, pp. 63–65.
[201] Krämer, p. 50.
[202] Judgment of the Court (Second Chamber) of 25 July 2008, *Dieter Janecek v Freistaat Bayern* C-237/07, paras. 38–39.
[203] Judgment of 23 February 1994, *Comitato di Coordinamento per la Difesa della Cava and others v Regione Lombardia and others* C-236/92, paras. 4 and 8. See also, Krämer, p. 444.

then guarantee the effective judicial protection of procedural rights granting individuals standing before national courts to challenge administrative decision-making or to challenge the legality of national legislation incompatible with EU norms. However, focus remains on enforcing existing EU norms in relation to national legislation, and not the EU norms themselves.[204] Furthermore, the CJEU has stated that Article 9(3) of the Aarhus Convention, providing individuals' access to justice in environmental matters, has no direct effect in the EU legal order.[205]

5.3.2 The refusal to make a reference to the CJEU

The possibility to get a preliminary ruling from the CJEU in national proceedings does not necessarily mean that individuals have a *right* to access to justice before national courts, nor that national courts have a duty to make a reference to the CJEU *solely* on the request of the parties in the national proceeding.[206] The effectiveness of preliminary references in the system of legal remedies can therefore be problematic.

The refusal to make a reference affects the right to an effective judicial protection, as preliminary references on validity seek to ensure that right. Furthermore, national courts must provide effective remedies and a fair trial in respect of Article 47 Charter, which shall be compatible with the margin of appreciation they enjoy in deciding whether to make a reference or not. It requires the possibility for individuals to bring a dispute before a national court to remedy a breach of EU law.[207] However, it does not require that an individual should always be entitled to bring actions before national courts. Moreover, Article 19 TEU and the TFEU provisions did not intend to create new remedies before the national courts.[208] Nevertheless, national procedural rules cannot make the preliminary reference procedure impossible in

[204] Darpö, Jan, "Pulling the Trigger: ENGO Standing Rights and the Enforcement of Environmental Obligations in EU Law", in: Bogojević & Rayfuse, pp. 280–281.
[205] *Mellifera* T-12/17, para. 85.
[206] Broberg & Fenger, p. 156.
[207] Lacchi, pp. 687–690.
[208] *Inuit Tapiriit Kanatami* C-583/11 P, paras. 103–106.

practice.[209] The decision to refer or not must not only be based on Article 267 TFEU and on the principle of sincere cooperation, but also on the right to effective judicial protection, as preliminary reference procedures guarantee the effectiveness of EU law *and* ensure a uniform standard of effective protection.[210]

In relation to Article 6 ECHR, the European Court of Human Rights (ECtHR) has considered that a national court's refusal to make a reference to the CJEU may in certain circumstances infringe the right to a fair trial.[211] Bearing in mind that the ECtHR is a human rights court, its function is to deal with infringements of the rights and freedoms protected by the ECHR and not to deal with other errors committed by national courts, for example in relation to their obligations under EU law.[212] The ECtHR has thus only stated that Article 6 ECHR imposes an obligation to give reasons for a refusal to make a reference, but the ECtHR itself does not engage with examining whether such a refusal is wrongful or not.[213] However, the CJEU has stated that a failure to refer can entail state liability, if a national court's violation of rights conferred on individuals by EU law has caused damages. Consequently, a national court's decision not to refer, being contrary to EU law and causing harm, cannot deprive individuals from legal protection of their rights.[214]

A Member State was for the first time found to be in breach of Article 267(3) TFEU as a result of failure to make a reference to the CJEU in the case *Commission v France*.[215] The Commission brought an action against France under Article 258 TFEU for failure to fulfil Member States' obligations. The infringement procedure was initiated after complaints about French taxation

[209] Judgment of the Court of 14 December 1995, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, C-312/93. See also, Lacchi, p. 684.
[210] Ibid., p. 691.
[211] European Court of Human Rights, judgment of 20 September 2011 in the case of *Ullens de Shooten and Rezabek v. Belgium* (Applications nos. 3989/07 and 38353/07), para. 59.
[212] *Ullens de Shooten*, para. 54.
[213] Ibid., paras. 60–61.
[214] Judgment of 30 September 2003, *Gerhard Köbler v Republik Österreich* C-224/01, paras. 33–36. See also, Craig & de Búrca, p. 255.
[215] Judgment of 4 October 2018, *European Commission v French Republic* C-416/17.

rules on reimbursement conditions for advance payments.[216] The *CILFIT*-criterion stating that the correct application of EU law must not leave scope for any reasonable doubt was not fulfilled, as it could not be certain that the national court's reasoning would be equally obvious to the CJEU.[217] The judgment is an important step in strengthening the system of legal remedies in EU law, as it reinforces the obligation to refer.[218] However, there may still be situations where climate change litigants "fall through the cracks" in the system of legal remedies.

5.4 Is there a "gap" in the remedies available for climate change litigants?

Assuming that EU climate law instruments are suboptimal in relation to the policy objective of combating climate change, individuals' possibilities to challenge EU climate actions before national courts and tribunals are very limited. Would the illegality of an EU act relating to climate change be invoked in national proceedings, where a Member State's implementation or application of that act is challenged, the effectiveness of the preliminary reference procedures depends on the procedural rights allowing individuals to bring the matter before a national court and whether the latter consider a reference to the CJEU as necessary. In this regard, this thesis has drawn attention to the criticism against the CJEU's reliance on preliminary reference procedures in light of the principle of effective judicial protection. In relation to the legal protection of rights, a human rights-based judicial review in preliminary reference procedures before the CJEU may lead to the annulment of an EU act infringing fundamental rights. However, where a violation of rights exists and is claimed to be caused by climate change, it is difficult to establish a causal link between EU climate actions and the individual harm

[216] *Commission v France* C-416/17, paras. 14–17.
[217] Ibid., paras. 110–111.
[218] Delhomme, Vincent, & Larripa, Lucie, "C-416/17 Commission v France: Failure of a Member State to Fulfil Its Obligations under Article 267(3) TFEU", EU Law Analysis, posted on 22 November 2018, available at: http://europeanlawblog.eu/2018/11/22/c-416-17-commission-v-france-failure-of-a-member-state-to-fulfil-its-obligations-under-article-2673-tfeu/.

caused. Furthermore, in relation to the direct effect doctrine, neither the EU environmental provisions nor the Aarhus Convention have been found to create individual rights which have direct effect in the EU legal order.

Where there is no Member State action relating to EU law to challenge in a national court or tribunal, and an EU act relating to climate change is claimed to be unlawful, individuals cannot go to the CJEU unless they are individually and directly concerned, or – when challenging a regulatory act which does not entail implementing measures – directly concerned. As shown, these requirements are extremely difficult to fulfil. Furthermore, their compliance with the Aarhus Convention is doubtful. As the system of legal remedies in EU law presupposes a breach of EU law directly affecting the legal situation of individuals or a violation of individual rights stemming from EU law, the individual interest to enforce and strengthen EU climate law and policy seems to fall outside that system. This can even be in spite of a purpose to protect fundamental rights from future climate disasters, where climate change is seen as an imminent threat facing mankind.

Without sanctions and control mechanisms relating to the Paris Agreement, the 2ºC objective is unlikely to be met considering the measures adopted in implementing the EU 2030 climate target imply only a 1 % annual cut. From a political perspective, the Member States still have very different views on what environmental measures are needed.[219] Although the emissions have been reduced during recent years, it is difficult to draw the conclusion that this is the result of an effective EU climate policy, when economic restructuring and recession are other key factors at play. The effectiveness of EU climate policy is uncertain due to lack of monitoring and evaluative mechanisms.[220] Furthermore, even though the *means* by which climate change is to be combated is a political choice, the *objective* to force the EU to comply with its own obligations is not. However, individuals seeking to enforce, for instance EU climate targets or the EU's obligations under the

[219] Krämer, p. 352.
[220] Bogojević, "Climate Change and Policy in the European Union", p. 17.

Paris Agreement, without invoking any individual rights, might only be able to rely on other enforcing mechanisms outside the courts. Those generally involve pressurising the Commission or the Member States to take actions through the enforcement mechanisms available.[221]

The lack of alternative options for individuals seeking to challenge the legality of EU climate actions leaves the responsibility to enforce EU climate change policy on the EU institutions and the Member States, as they are privileged applicants under Article 263 TFEU. The possibility for the CJEU to rule in actions under Articles 258 and 259 TFEU is equally important in the enforcement of EU environmental law, where the Commission or a Member State may bring actions against another Member State for failure to fulfil an obligation under EU law. In practice, it is usually the Commission that initiate infringement procedures against a Member State, after the Member State has been given a chance to answer the allegations or to fulfil its obligations. However, the Commission is not obliged to initiate such infringement procedures before the CJEU.[222] The likelihood of either of them using these possibilities is low as there might be political interests at stake and they also often enjoy a wide discretion. Based on these considerations, individuals' possibilities to challenge the legality of EU climate actions play an important role in the enforcement of EU law relating to climate change. The limitations to do so might have far-reaching consequences as the effects of climate change worsen. Judicial intervention is certainly necessary when concerning the protection of rights, but a breach of the EU's obligations under EU law that does not constitute a breach of individual rights is nonetheless a breach in need of a remedy.

[221] For example, private enforcement of EU environmental law at an EU institutional level can consist of complaints procedures to the European Ombudsman, the right of petition to the European Parliament, the European Citizen's Initiative and the European Environmental Agency, to mention some of them.
[222] Judgment of 14 February 1989, *Star Fruit Company SA v Commission of the European Communities*, case 247/87.

6 CONCLUDING ANALYSIS

In this thesis, both the substantive and procedural difficulties with EU climate change litigation have been examined and analysed. However, in order to challenge EU climate actions with the purpose of enforcing the policy objective to combat climate change, whether it is done by invoking environmental norms or fundamental rights, individuals must first have access to justice. Hence, the substance of a case is in part conditioned by the procedural rights allowing individuals to bring such matters before the court in the first place. This thesis has brought to attention a potential "gap" in the remedies available for individuals seeking to challenge EU climate actions. As the individuals' chances to fulfil the standing requirements to bring actions before the CJEU are considerably limited, the CJEU has to date not been a forum in which climate change has been typically debated. Furthermore, the possibility to provoke a preliminary ruling from the CJEU in national proceedings presupposes a well working interplay between the CJEU and national courts and tribunals. Therefore, the difficulties with EU climate change litigations do not only relate to how to understand and frame climate change in the EU legal order, but also to how the system of legal remedies within EU law is shaped.

Based on these considerations, there is in my opinion a need to strengthen individuals' procedural rights in environmental matters in accordance with the EU's obligations under the Aarhus Convention, as pointed out in the ACCC's recommendations. It is the third pillar of the Aarhus Convention which allows individuals to have access to judicial procedures to challenge acts which contravene provisions of environmental law. However, the limited access to justice has not prevented the enforcement of the first and second pillars of the Convention, namely access to information and participation in environmental decision-making. For example, the CJEU's interpretation of access to information has led to greater transparency in decision-making

processes on an EU level.[223] Although it may not compensate for the limited access to justice, once the EU has exercised its legislative powers, greater participation and transparency in the legislative process are other ways which will contribute to environmental democracy.

To combat climate change, litigation is just one approach to the problem, whilst legislation and policy-making make a necessary foundation. However, the purpose of climate change litigation relates to the absence of strong legislation on climate change, which is a void the litigants attempt to fill. Therefore, more effective procedural rights may in turn contribute to a more effective EU policy and legal framework dealing with climate change as well as a more effective judicial protection for individuals suffering harm caused by climate change. The question in the title of the thesis – are EU climate change litigations dream or reality? – can be answered in two ways depending on the outcome of the *People's Climate* case pending before the General Court. If the case is declared admissible, it would imply a change of direction in the CJEU's jurisprudence on Article 263(4) TFEU and open up a new wave of jurisprudence relating to judicial review of EU climate actions. Not only would it recognise the important role that individuals could play in the enforcement of EU climate law and policy, but also give the CJEU the opportunity to take a leading role in its legal development. If the case will be declared inadmissible, which is a strong possibility considering the criteria of individual and direct concern, other similar applications are likely to be submitted to the CJEU in the future. The consequences of climate change are very likely to increase dramatically, according to a recent report[224] on global warming from the Intergovernmental Panel on Climate Change (IPCC), prompting the global number of climate change litigations to rise alongside this trend.[225]

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[223] See, to that end, judgment of 4 September 2018, *ClientEarth v European Commission* C-57/16 P.

[224] IPCC report "Global Warming of 1.5ºC, An IPCC Special Report on the impacts of global warming of 1.5ºC above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty", 2018.

[225] See, to that end, the report of United Nations Environmental Programme, "The Status of Climate Change Litigation, A Global Review", 2017, p. 40.

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