

THE EU COURTS STAND THEIR GROUND: WHY ARE THE STANDING RULES FOR DIRECT ACTIONS STILL SO RESTRICTIVE?

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The restrictive nature of EU standing rules has long been controversial. They were reformed in Art 263(4) of the Treaty on the Functioning of the European Union, which added another head of standing to the existing two heads. Despite this addition, standing continues to be a considerable hurdle to direct challenges. This article seeks to explain why. It does so on two levels. First, it explains how the courts' interpretation of the third head makes it very difficult for most claimants to satisfy. In so doing, it highlights both the flaws in this interpretation, as well as the possibility of adopting more liberal interpretations fully consistent with the text of Art 263(4). Second, it examines, more fundamentally, why the courts support narrow admissibility criteria, even after the opportunity they were given in the Lisbon Treaty to potentially relax those criteria. These justifications in favour of the present approach are exposed as unsatisfactory, and falling short of the court's own promises of effective judicial protection.

Keywords: Standing, Direct Challenges, Art 263(4) TFEU, Art 230(4) EC, Implementing Measures, Regulatory Act, Direct Concern, Individual Concern, Effective Judicial Protection, Lisbon Treaty, Lisbon Reforms.

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I. INTRODUCTION

Here's a knocking indeed! If a man were porter of hell-gate, he should have old turning the key.¹

The porter in Macbeth would have feared less for his age if he were at the gates of the EU courts. Virtually all private litigants who come knocking at its doors to challenge EU norms directly are turned away for lack of standing.

Under Article 230(4) of the Treaty Establishing the European Community ('EC Treaty'), the porter would have only had to turn the key for those parties that were *addressed in the measure* they were contesting, and those *directly concerned* and *individually concerned* by it. Few parties satisfied either head of standing, and the restrictiveness of these rules was almost universally criticised in the literature.²

¹ William Shakespeare, *Macbeth* (1605), Act 2 Scene 3.

² See, for example, Grainne De Burca, 'Fundamental Rights and Citizenship', in Bruno De Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (EUI, 2003); Anthony Arnall, 'Private Applicants and the Action for Annulment Under Art 173 of

Enter Article 263(4) Treaty on the Functioning of the European Union ('TFEU' or 'Lisbon Treaty'), which retained the two pre-Lisbon heads of standing, but added a third. Under this new head, the porter must now open the doors to substantive challenge for litigants who are *directly concerned* by a *regulatory act* that *does not entail implementing measures*. The porter, however, is not perceptibly busier. Only four cases have been admissible under the third head as of yet.³ Most cases remain locked out as inadmissible direct challenges.

This article seeks to do two things. First, it explains why it is still so difficult to have standing. Second, it criticizes this restrictive position. In that vein, the purpose of this article is *diagnostic* as well as *critical*. It is worth setting out the structure of the article at the same time that the substance of the article is explained.

the EEC Treaty' (1995) CMLR 32; Paul Craig, 'Standing, Rights and the Structure of Legal Argument' (2003) European Public Law 493; Ewa Biernat, 'The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community' Jean Monnet Working Paper 12/03; Cornelia Koch, 'Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individual's right to an effective remedy' (2005) European Law Review 511.

- ³ Case T-262/10, ECLI:EU:T:2011:623, *Microban and another v Commission*; Case T-296/12, ECLI:EU:T:2015:375, *Health Food Manufacturers Association and Others v Commission*; Case T-367/10, ECLI:EU:T:2013:97, *Bloufin Touna Ellas Naftiki Etaireia and Others v Commission*; Case T-93/10, ECLI:EU:T:2013:106, *Bilbaína de Alquitranes and Others v ECHA*.

I note *Bilbaína* deals with the challenge to a tar derivative as a substance of 'very high concern'. Other cases either deal with other tar derivatives (Case T-96/10, ECLI:EU:2013:109, *Rütgers and Others*; Case T-94/10, ECLI:EU:2013:107, *Rütgers and Others*; Case T-95/10, ECLI:EU:2013:108, *Cindu and Others*) or other chemicals (T-268/10, ECLI:EU:T:2015:698, *PPG and SNF*; T-135/13, ECLI:EU:2015:253, *Hitachi and Others*; T-134/13, ECLI:EU:2015:254, *Polynt and Sintre*). Their factual and legal situation, however, was identical to that in *Bilbaína*, to which the cases make extensive reference. Given these similarities, reference is made to *Bilbaína* only and I consider only four cases to have succeeded on the third head. See discussion in Part III) 1) b), fn 38-45. This is, to the best of my research, accurate as of 24th July 2016.

It starts, in part II, with a very brief section that sketches out the pre-Lisbon position standing jurisprudence, and then offers a more detailed section that introduces the third head in Art 263(4) TFEU.

Part III and part IV are *diagnostic*. They attempt to find and explain the reasons why, even after the addition of the third head, standing remains such a considerable hurdle to bringing direct challenges. Two reasons are explored here, one textual the other doctrinal. For clarity, the textual explanations are examined in part III, and the latter explanations are found in Part IV. Textually, standing remains restrictive because the EU courts have foisted narrow meanings on the criteria in the third head. Simply put, few direct challenges are admissible because the third head is a high hurdle to clear. However, the interpretation of the third head is highly unsatisfactory – and, in some cases, the third head is even more difficult to satisfy than the pre-Lisbon heads. Moreover, as is pointed out, the courts could easily have seized upon the Lisbon reforms to chart a new and more liberal course for the standing jurisprudence. Why the courts refused to do so is explored in part IV, which traces and explains the doctrinal justifications in favour of the courts' restrictive interpretation despite the existence of other more liberal ones. It shows how they have consistently repudiated arguments in favour of relaxing the standing rules and unfailingly explained away the negative consequences flowing from this position. The courts, it shall be seen, thus start from a fundamentally restrictive view of the standing rules, a position which naturally fetters the prospects of greater admissibility for direct challenges.

In short, the textual explanation gives us immediate reasons why so many direct actions fail – namely, the narrow meanings conferred on the standing criteria – and the doctrinal explanation brings the broader reasons why this is so into focus – namely, the courts' fundamentally restrictive interpretation of the standing rules. There are, of course, other reasons for this restrictive approach, but considerations of space preclude engaging to any satisfactory level of detail with the interesting social, political and historical factors that might be behind it.

The article takes a critical turn in part V where it points out the flaws of this restrictive approach. It recognises that the standing rules can serve legitimate

ends as a filter on the disputes that are considered by the EU courts, but stresses that these ends are only attained if the standing rules are calibrated to maintain the right balance between admitting some direct actions and rejecting others for lack of standing. It argues that the present approach is far removed from this balanced scheme, and that the courts' justifications that prop up this problematic position are flawed. In so doing, it dispels the fundamentally restrictive starting point of the courts, and demonstrates that the arguments offered, time and time again, by the courts in favour of this approach should be rejected. They are mutually inconsistent, internally contradictory and undesirable as a matter of principle. A range of arguments in favour of broader standing rules is then briefly offered.

The final part concludes with a reflective summary of the argument explored in the preceding parts.

II. THE THREE HEADS OF STANDING

1. Pre-Lisbon: The First and Second Heads

Only a brief discussion is offered here in the interests of space and of avoiding repetition of existing literature. The interested reader is directed to the wealth of academic comment that deals with the pre-Lisbon situation, especially in relation to the interpretation of 'individual concern'.⁴

Prior to the Lisbon Treaty, natural or legal persons could only have standing to challenge a measure directly on two heads. The first head was satisfied if the applicant was addressed in the contested provision, and the second required the applicant to be directly and individually concerned by the same. To that effect, Article 230(4) EC provided:

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

⁴ See fn 2.

A. First Head: Addressed by the Contested Measure

The first head would be satisfied, for example, where a party was found guilty of anti-competitive practices.⁵ In such a situation, the Commission Decision would specifically list the offending parties, and, possibly, fine them. This head was, however, of limited relevance. Third party competitors, who might otherwise have had an interest in the (non)-imposition of the fine, would not be able to rely on it. Nor would it be of use to a party affected by a Commission Decision addressed to Member States. This was often the case in State aid Decisions. Beneficiaries of the aid and other parties seeking to challenge the Decision would have to satisfy the second head of standing instead.⁶ It is thus only in a small number of cases that a party will actually be addressed by a contested act.

B. Second Head: Directly and Individually Concerned by the Contested Measure

The second head contains two criteria.

Direct concern requires two cumulative sub-criteria to be met.⁷ First, the measure must directly affect the legal situation of the person concerned. This means that the measure in question must have some legal effect on the person seeking to contest it. Overall, this is not particularly difficult to satisfy. Second, the implementation of that measure must be purely automatic, resulting from Union norms without the application of other intermediate rules.⁸ Anti-dumping duties are a good example. These duties are imposed on the imports designated in the Commission or Council Regulation and at the rate specified therein. There is no scope for discretion on behalf of domestic

⁵ Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law*, (OUP, 2014), 7.86.

⁶ *ibid*, 7.86 and 7.118; See also K. Jurimäe, 'Standing in State Aid Cases: What's the State of Play?' (2010) *European State Aid Law Quarterly* 303.

⁷ Case C-142/15, ECLI:EU:C:2016:163, *Solar World v Commission*, [22]; *Northern Ireland Department of Agriculture and Rural Development v Commission*, C-248/12 P, EU:C:2014:137, [21].

⁸ *Joined Cases C-445/07 and C-455/07*, ECLI:EU:C:2009:529, *Commission v Ente per le Ville Vesuviane*, [45]; Case C-404/96 P, ECLI:EU:C:1998:196, *Glencore Grain v Commission*, [41]; Case C-486/01 P, ECLI:EU:C:2004:394, *National Front v Parliament*, [34].

authorities or the need for domestic rules to enforce the duty.⁹ Their application – automatic and in pursuance of EU norms alone – is thus of direct concern to those importers seeking to challenge those duties.¹⁰

Individual concern means, since the seminal *Plaumann* case, that a party must be affected 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.¹¹

Although decided in 1963, this case is still cited, verbatim, today.¹² The essence of the test is that a party needs to show that it has features or characteristics such that the contested measure affects them as if they were addressed by it. Thus, *Plaumann* were not able to directly challenge the hike in customs duties on clementines imported from third countries, as they could not show that they were affected in a way that distinguished them from all other undertakings that also imported such fruits. The term took on different meanings in different contexts, with individual concern being generally easier to satisfy in relation to State aid, for example.¹³ However, overall, the formulation was a high hurdle. Although some examples can be

⁹ T-155/94, ECLI:EU:T:1996:118, *Climax Paper Converters v Council*, [53]; C-118/77, ECLI:EU:C:1979:92, *ISO v Council*, [26]; Case 121/77 ECLI:EU:C:1979:95 *Fujikoshi and Others v Council*, [11]; Opinion of Advocate General Jacobs in Case C-239/99, ECLI:EU:C:2000:639, *Nachi v Council*, [73].

¹⁰ See, in particular, *ISO*, *ibid*, [26].

¹¹ Case C-25/62, ECLI:EU:C:1963:17, *Plaumann v Commission*.

¹² Case C-456/13 P, ECLI:EU:C:2015:284, *T & L Sugars Ltd and Others v Commission*, [63]; C-583/11 P, EU:C:2013:625, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, [72]; C-274/12 P, *Telefónica v Commission*, EU:C:2013:852, [46].

¹³ See fn 2; Lenaerts and Others, fn 5; Michael Rhimes, 'Nothing ado about much? Challenges to Anti-Dumping Measures After the Lisbon Reforms to Art 263(4) TFEU' (2016) *European Journal of Risk Regulation* 374.

found where this criterion was satisfied,¹⁴ it was notoriously difficult to show individual concern.¹⁵

Together, these highly restrictive criteria made it very difficult for an individual to directly challenge provisions of EU law – a point almost universally criticised in the academic literature.¹⁶

2. *Post-Lisbon: The Third Head*

A third head of standing was included in Art 263(4) of the Lisbon Treaty, with the overall aim of relaxing the restrictive standing provisions and facilitating direct challenges to EU law.¹⁷ The relevant provision now reads as follows:

Any natural or legal person may, (...) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

¹⁴ Case C-309/89, ECLI:EU:C:1994:197 *Codorniu v Commission*, see fn 141; See Ewa Biernat, 'The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community' Jean Monnet Working Paper 12/03, p. 15 (Describing these rare exceptions as 'few and casuistic')

¹⁵ See Paul Craig, 'Standing, Rights and the Structure of Legal Argument' (2003) *European Public Law* 493 (describing the test of individual concern as rendering it 'literally impossible' for an applicant to succeed, at 494); See also Albertina Albors-Lorens, 'Sealing the fate of private parties in annulment proceedings? The General Court and the New Standing test in Article 263(4)', (2012) *CLJ* 52, 53, individual concern as a 'formidable standing barrier that very few private applicants could surmount'; See also fn 141 – 143.

¹⁶ See fn 2. For post-Lisbon critiques, see Steve Peers and Marios Costa, 'Judicial Review of EU Acts after the Treaty of Lisbon' (2012) *European Constitutional Law Review* 82; Pieter-Augustijn Van Malleghem and Nils Baeten, 'Before the law stands a gatekeeper – or what is a 'regulatory act' in Article 263(4)' (2014) *CMLR* 1187, especially at fn 6; Albertina Albors-Lorens, 'Remedies against the EU institutions after Lisbon: an era of opportunity?' (2012) *CLJ* 507, 513.

¹⁷ *Inuit* fn 12, at [57]; See Cornelia Koch, 'Locus Standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy' (2005) *ELR* 511. See fuller discussion below.

A party may now bring a direct challenge where they are directly concerned by a regulatory act without implementing measures. Naturally, the extent to which it expands the scope for bringing direct challenges hinges on how those three criteria are defined. It is worth briefly fleshing out these definitions, by reference to *Microban*¹⁸, to give an overall understanding of the third head and the gap in the standing rules that gave rise to the reforms.

A. General Definitions, *Microban* and the Dilemma

The notion of *direct concern* remains the same after the Lisbon amendments.¹⁹ The definition of a *regulatory act* was first addressed by the General Court in *Inuit*²⁰ The General Court held that a regulatory act should be understood as encompassing 'all acts of general application' that are not 'legislative acts'.²¹ This imports two sub-criteria. First, the act in question must be one that applies to 'objectively determined situations and produces legal effects in regard to categories of persons envisaged generally and in the abstract'. Second, it must not be adopted in accordance with either the ordinary legislative procedure or the special legislative procedure within the meaning of paragraphs 1 to 3 of Art. 289 TFEU. This two-part definition was approved on appeal.²²

The requirement that the challenged provision may *not entail implementing measures*, in short, requires that the contested measure have legal effects *vis-à-vis* the complainant as a matter of automaticity, without the need for action at national level. In other words, the contested provision must in and of itself give rise to the legal effects that the applicant seeks to challenge.

A good, brief, example of a case that satisfies all these criteria is *Microban*.²³ The applicants sought to challenge a Commission Decision that refused to

¹⁸ Case T-262/10, ECLI:EU:T:2011:623, *Microban and another v Commission*.

¹⁹ See case law and discussion in the first section of part III. 2.

²⁰ Case T-18/10, ECLI:EU:T:2011:419 *Inuit Tapiriit Kanatami and Others v European Parliament and Council*,

²¹ *ibid*, [45], [56]

²² *Inuit*, fn 12, [51] – [61]

²³ *Microban* fn 18.

include triclosan in the harmonised list of permissible chemicals that could come into contact with foodstuffs.

The criterion of *direct concern* was satisfied. First, their legal situation was affected in that Microban used the chemical in products designed to come into contact with foodstuffs, and, second, no discretion was left to the Member States as to banning triclosan. The Decision was a *regulatory act*, the legal basis being Art 11(3) of Regulation No 1935/2004, on materials and articles intended to come into contact with food. It was not a legislative measure, and, given that the court found that it was of general application, it was therefore a regulatory measure within the third head.²⁴

The final criterion of *not entailing implementing measures* was also satisfied. This was because the non-inclusion of the substance in the relevant list had the immediate consequence that it was no longer permissible to put the substance into materials that would come into contact with foodstuffs. The non-inclusion was thus automatic, with immediate effect, and no action was required on behalf of the Member States. The applicants' action was admissible, and the General Court struck down the ban as having been adopted *ultra vires*.

It is useful to introduce what shall be referred to as the 'dilemma' at this juncture. Under Art 230(4) EC, it is very unlikely that Microban would have been able to show individual concern, that is, that they, in particular, out of all the other undertakings who used triclosan in products intended to come into contact with food, were affected by the ban as if it addressed them. Their challenge would have mostly likely been inadmissible.²⁵ However, as it has been seen, the legal effects of the ban arose automatically from the non-inclusion of triclosan in the relevant list. There would have been no norms at the national level that could be challenged, and no possibility of challenging the measure directly at EU level for lack of standing. Microban would have been put in an invidious position; they would have either had to comply with

²⁴ *ibid*, at [22].

²⁵ Compare with, for example, the pre-Lisbon cases: Joined Cases T-236/04 and T-241/04, ECLI:EU:T:2005:426, *European Environmental Bureau*; Case T-45/02, ECLI:EU:T:2003:127, *Dow AgroScience*.

the unlawful norm, with potentially ruinous consequences, or flout it in the hopes that it would be invalidated some years later if the domestic enforcement proceedings were referred to the CJEU under Art 267. This dilemma, which arose in respect of so-called 'self-executing measures'²⁶, was a clear 'gap' in the EU standing rules. It played, and continues to play for reasons that shall be seen, a crucial part in the standing jurisprudence.

B. The Purpose of the Third Head

Beyond the overall aim of facilitating direct challenges, the exact intended scope of the third head is not all that easy to identify.²⁷ This is not the place to revisit the copious literature on the adoption of the Lisbon Treaty. Three sources of uncertainty, however, are worthy of note. First, textually, the extension of standing is predicated on two terms – regulatory act and implementing measures – that were left entirely undefined. Second, historically, the third head was lifted verbatim from the failed Constitution for Europe. This document had a bold project of restructuring the sources of Community law, most notably by creating a new hierarchy of secondary norms.²⁸ The Constitution was abandoned after the French and Dutch voters rejected it, and the Lisbon Treaty proceeds on a different basis to the Constitution for Europe.²⁹ The somewhat farraginous source of the text adds another layer of complexity to the interpretation of the third head. Finally, it seems probable that the third head was more the product of political compromise rather than considered reflection on the exact extent to which

²⁶ See Koen Lenaerts and Nathan Cambien 'Regions and the European Court: Giving Shape to the Regional Dimension of the Member States' (2010) EL Rev 609 for a short overview. See also discussion in part IV and V.

²⁷ See the discussion and the sources cited in Jürgen Bast, 'Legal Instruments and Judicial Protection' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law*, 2nd Ed (2009, Hart Publishing), 396.

²⁸ See, generally, Jean-Claude Piris, *The Constitution for Europe: A Legal Analysis*, (2006, CUP). See also Pieter-Augustijn Van Malleghem and Nils Baeten, 'Before the law stands a gatekeeper – or what is a 'regulatory act' in Article 263(4)' (2014) Common Market Law Review 1187, 1204 – 1212; Cornelia Koch, 'Locus Standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy' (2005) ELR 511, 516-527.

²⁹ See Van Malleghem and Baeten, *ibid*; Bast, *ibid*.

the standing rules should be liberalised.³⁰ Taken together, the intentions being Art 263(4) are rather foggy, and its interpretation far from self-evident.

That said, it is possible to exaggerate the extent to which this is a setback.

At a general level, it left the courts ample room to chart their own course through the murky waters of Art 263(4). In effect, the Lisbon reform gave the courts a *carte blanche* to liberalise the standing provisions. The courts could have seized on the ambiguity shrouding Art 263(4) to break from their notoriously problematic interpretations³¹ and relax the admissibility criteria for direct challenge. Yet, as shall be seen, they did not. It is thus even more pressing to explain why, despite a clear opportunity to do so, the courts have remained ensconced in their restrictive interpretation.

On a more specific level, while difficult to pinpoint the exact intentions of the framers of the Treaty, at the very least, the third head intended to remedy the dilemma whereby a party would have to break a provision of EU law in order to challenge it. It does so by dispensing with the need to show individual concern in relation to regulatory acts that do not entail implementing measures.³² It should, however, be borne in mind that it was not the *only* argument in favour of the reforms. So much can be gleaned from the working papers of the Constitution for Europe, a key passage of which reads:

Members of the circle who were in favour of amending the fourth paragraph of Article 230 stressed *in particular* the fact that, in certain exceptional cases, an individual could be directly concerned by an act of general application without it entailing an internal implementing measure. In such cases, the individual concerned would currently have to infringe the law to have access to the court.³³

³⁰ See Bast, *ibid*, 905.

³¹ See fn 2.

³² Case C-132/12 P, ECLI:EU:C:2014:100, *Stichting Woonpunt and Others v European Commission*, [43]; *Inuit*, fn 12, [57]; Case C-456/13, ECLI:EU:C:2014:2283, *T and L Sugars and Another v Commission*, Opinion of Advocate General Cruz Villalón, [24].

³³ Cover note from the Praesidium to the Convention on the Court of Justice and the High Court, CONV 734/03, at p. 20.

As shall be seen in part V, there was a wide range of arguments put in favour of the relaxation of standing rules – both from sources within the courts and in academic writings. It may well have been that, whilst particularly concerned about parties caught on the horns of dilemma, the third head was intended to achieve an overall liberalisation of the standing rules in order to address the wide-ranging concerns. Indeed, as shall be seen, in and of itself, there is nothing in the text of the third head that confines it to solving the dilemma presented above. This, again, adds greater importance to identifying why the courts chose to maintain their restrictive approach.

III. WHY ARE SO FEW DIRECT CHALLENGES ADMISSIBLE UNDER THE THIRD HEAD?

1. Implementing Measures

The courts have given this criterion a formalistic meaning. The mere fact that such measures exist renders a claim inadmissible under the third head (section A). This, in itself, goes some way in explaining why the third head of standing is difficult to satisfy. However, the formalistic interpretation has broader consequences which create nearly insuperable barriers to satisfying the third head (section B). Nonetheless, it is entirely possible, and indeed plausible, to adopt a more liberal approach by considering the substance – and not just the existence – of those measures (section C).

A. The Formalistic Interpretation of Implementing Measures

A case demonstrating the formalism that pervades the interpretation of this criterion is *T and L*, involving a challenge to exceptional import tariffs on sugar.³⁴ Under this scheme, national authorities received applications for import licences, ensured that the conditions of admissibility were satisfied, and notified the Commission of any quantities allowed to be imported. Crucially, this scheme left no discretion to the national authorities. Even though the parties were required to submit import license applications to the national authorities, the latter's involvement was limited to a supervisory function. In the words of Advocate General Cruz Villalón, actions carried

³⁴ *T and L*, fn 12.

out by the national authorities were 'taken strictly in the exercise of circumscribed powers'.³⁵

As such, the claimants maintained that the actions the national authorities were required to carry out under the scheme were not sufficient to amount to implementing measures. The national authorities' role as administrators of the licensing scheme was vestigial; they simply acted as 'mailboxes' for the scheme that was, down to minute detail, the exclusive design of the Commission.

The CJEU rejected these submissions. It held that the legal effects of the scheme arose only through acts taken by national authorities after the undertakings had submitted applications for import licenses. Critically, it was irrelevant that these implementing measures were of a 'mechanical' nature, or that the national authorities were robotically carrying out the detail of the Commission's scheme.³⁶ On the CJEU's analysis, the *nature* of the implementing measures – however technical, ancillary, vestigial, minimal or of whatever desired epithet – is irrelevant. This is a mercilessly formalistic interpretation, the mere fact they *exist* precludes reliance on the third head.

Thus, in order to rely on the third head, it is necessary to show that the contested measure *in and of itself* gives rise to the legal effects that are complained of. The italicised phrase is key.³⁷ If these effects arise only through the medium of national actions – regardless of the extent to which national authorities are bound to carry out such actions – then a measure does not qualify as one which does not entail implementing measures. This gives

³⁵ Opinion of Advocate General Cruz Villalón, fn 32 [46].

³⁶ *ibid*, [41].

³⁷ Case C-552/14 P, ECLI:EU:C:2015:804, *Canon Europa v Commission* [48] 'in order to determine whether the contested regulation entails implementing measures, it is necessary to ascertain whether that regulation, in particular the part of its annex concerned by the appellant's imports, *determines itself* the tariff classification of the [printers] imported by Canon Europa' (emphasis added).

Case T-312/14, ECLI:EU:T:2015:472, *Federcoopesca and Others v Commission*, [28] 'the third limb of the fourth paragraph of Article 263 TFEU is designed to apply only when the disputed act, *in itself*, in other words irrespective of any implementing measures, *alters the legal situation of the applicant*.'

rise to a range of consequences that drastically restrict the scope of the third head. Three may be explored in the following section, namely, the limited kinds of acts that can be challenged under the third head; the exclusion of certain large swathes of EU norms from challenge under the third head; and the fact that standing under the third head, in some cases, is even more difficult to satisfy than the pre-Lisbon position.

B. The Consequences of Adopting a Formalistic Interpretation

First, this interpretation *drastically restricts the kind of acts that can be challenged under the third head*. This does not only refer to the fact that almost all contested acts will entail implementing measures, as defined by the courts. It also refers to the fact that the very kind of measures that can be challenged under the third head are of a very limited nature. In practice, so far, only two kinds of acts can be found. Naturally, these are not closed categories; they may well overlap, and they most likely will be subject to refinement in future jurisprudence. At present, however, the two categories presented here best capture the existing jurisprudence.

The first are prohibitions. The contested measure says 'Do not do X', and, as a result, undertakings in the Member states cannot do X. A good example is *Bloufin*, where the Commission Regulation prohibited the fishing of Bluefin tuna in a given geographical area.³⁸ That Regulation gave rise automatically to the prohibition of such fishing, without the need for national authorities to raise a finger. The claim was admissible.

The second kind are lists, where the very inclusion or non-inclusion on that list gives rise to the legal effects complained of. *Microban* is one example. *Health Foods*, on the marketing of food supplements, provides another.³⁹ The Commission established a list of health claims that the European Food and Safety Authority had determined were scientifically sound and could be used

³⁸ Case T-367/10 ECLI:EU:T:2013:97, *Bloufin and Others v Commission*.

³⁹ Case T-296/12, ECLI:EU:T:2015:375, *Health Food Manufacturers Association and Others v Commission*.

in adverts to market food supplements.⁴⁰ The mere fact that a given health claim was included, or not included, in this list had the automatic consequence of determining whether it could be used for marketing purposes. As such, the provision did not entail implementing measures, and the claim was admissible.

It is unlikely that the Greek and French purse seiners in *Bloufin*, or that the vitamin manufacturers in *Health Foods*, would satisfy the requirement of individual concern. Prior to Lisbon, under Art 230(4) EC, their claims would have been inadmissible. To that extent, it is tempting to see these cases as post-Lisbon success stories. This would be misleading. A closer examination of the first kind of act reveals that only relatively simple acts can be challenged, and the second kind of act involves an element of fortuity as to whether it entails implementing measures.

The measures at issue in the first category, must, by their very nature, be simple. The contested measure in *Bloufin* consisted of no more than two articles. The measure in *Microban* was a straightforward declaration that triclosan was to be immediately removed from a list of chemicals, coupled with a transitional measure to end marketing of triclosan products before a given date. Anything beyond such straightforward prohibitions dictated and enforced at the EU level alone will most likely entail implementing measures of some form. If the measure at issue, for example, envisages a more complex scheme rather than a mere prohibition, it will most likely require action to be carried out at the national level. As in *T and L*, it will be insulated from challenge on the third head.⁴¹ It is therefore only in limited cases that the third head will be of practical use.

As to the second category of measures, it is to be borne in mind that the list must in and of itself give rise to legal effects complained of. However, it may well be fortuitous that the inclusion on a list gives rise to a legal effect without

⁴⁰ See Regulation No 432/2012, establishing a list of permitted health claims made on foods other than those referring to the reduction of disease risk and to children's development and health, OJ L 136, 25.5.2012, p. 1–40.

⁴¹ See also, in the next section, the impossibility of challenging customs duties and State aid Decisions, both of which have been held to entail implementing measures.

implementing measures. *Bilbaina*, the fourth and final case that succeeded under the third head, is a good example. It requires some presentation.

Bilbaina deals with the so-called REACH Regulation.⁴² REACH lays out a comprehensive classification scheme for chemicals, and created the European Chemicals Agency (ECHA) to administer it. A crucial part of this scheme is to ensure that actors in the chemical supply chains are aware of the hazards that certain chemicals may pose. Therefore, producers must provide certain information to those actors. The scope of those duties, and the information to be provided, depends on the classification of the chemical in question. On the facts of *Bilbaina*, the ECHA held that a tar derivative, CTPHT, was a substance of very high concern within the definition of Art 57 of REACH.⁴³ Following Art 59 of the Regulation, provision was made for all substances of very high concern within Art 57, like CTPHT, to be included in a list ('Art 59 list').

The claimants sought to challenge the inclusion of CTPHT on this list. Following Art 31, the inclusion in the Art 59 list required them to update the information in the safety data sheets provided to actors in the supply chain. This updating obligation arose out of the mere fact that the chemical was a substance of very high concern. As stipulated in Art 31 (1)(c):

The supplier of a substance or a preparation shall provide the recipient of the substance or preparation with a safety data sheet compiled in accordance with Annex II (...) where a substance is included in the list established *in accordance with Article 59(1)*⁴⁴

⁴² Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396, 30.12.2006, p.1 – 520

⁴³ Case T-93/10, ECLI:EU:T:2012:106, *Bilbaina and Others v ECHA*.

⁴⁴ See also Art 31(3)(b) and Art 33(1) and (2) which also refer to Art 59.

In other words, the updating obligation in Art 31 was in and of itself triggered by the mere fact of being included in the Art 59 list. As such, the contested ECHA decision produced legal effects in the form of updating obligations without the need for implementing measures.

In reality, the litigants' challenge had nothing to do with the updating obligations. They sought, rather, to challenge the classification of CTPHT substance of very high concern. The updating obligations were simply convenient springboards that allowed for direct challenge. It was to some extent fortuitous that they could be separated from subsequent stages in the authorisation procedure, and as such, entailed no implementing measures.⁴⁵ In this light, the litigants were simply fortunate that the idiosyncrasies of the Regulation allowed them to 'sever' these obligations from the rest of the REACH framework.⁴⁶

Second, the formalistic reasoning in this area means that *entire areas of EU law are sealed off from the potential liberalising effects of the third head*. Two good examples are challenges to customs duties and State aid Decisions.

⁴⁵ See, for example, *Bilbaina*, fn 43, [64] 'the next stage of the authorisation procedure, which consists of the inclusion in order of priority of the candidate substances in Annex XIV to Regulation No 1907/2006, that is to say, in the list of substances subject to authorisation, is not a measure implementing the contested decision. The conclusion of the identification procedure triggers its own information obligations which do not depend on the subsequent stages of the authorisation procedure.'

⁴⁶ Contrast, for example, T-310/15, ECLI:EU:T:2016:265, *European Union Copper Task Force v Commission*, [57]. The facts are too complex to visit in entirety. In essence, the claimant sought the inclusion of copper-based chemicals on a list that would have allowed them to be used in plant protection products. The contested norm, which placed such chemicals on a list of chemicals for substitution, entailed implementing measures because its inclusion on this list, for reasons explained at [57] and elsewhere in the judgment, had no bearing on the conduct of the approval renewal procedure which lead to the adoption of a regulation by the Commission. The challenge was inadmissible. One cannot but note that this turns on the idiosyncrasies of the complex web of Regulations, Council Directives, Commission Directives, and Commission Implementing Directives in this area.

In *Canon*, the litigants sought to challenge certain changes to the Common Customs Tariff bearing on customs duties on multi-purpose printers.⁴⁷ The CJEU stressed that, as far as Canon was concerned, the obligation to pay the duties in question arose only after national customs authorities had calculated and communicated the sums due. The Common Customs Tariff – the contested measure – did not in and of itself give rise to the legal consequences complained of. Canon's challenge, as a result, was inadmissible. Identical analyses can be found in the context of anti-dumping duties.⁴⁸ *Canon* is representative of most of the other decisions in this area, which have also failed for lack of standing.⁴⁹ Indeed, it now seems a foregone conclusion that direct challenges to customs duties on the third head will be inadmissible. A number of decisions hold that implementing measures are *always* necessary for a tariff classification to produce legal effects.⁵⁰ A good example is the following extract from the CJEU in *Canon*:⁵¹

The customs system, as instituted by the Customs Code and of which the contested regulation forms part, provides that the receipt of duties fixed by the latter regulation is carried out, *in all cases*, on the basis of measures adopted by the national authorities.

Similar consequences can be seen in the context of State aid. In *Telefónica*, the claimants were the beneficiaries of a scheme that offered Spanish companies certain tax benefits when they acquired foreign shareholdings. The claimant sought to contest Commission's finding that found the scheme was unlawful.⁵² The challenge was inadmissible. The Decision was addressed to

⁴⁷ Case C-552/14 P, ECLI:EU:C:2015:804, *Canon Europa v Commission*.

⁴⁸ Case T-596/11, ECLI:EU:T:2014:53, *Bricmate AB v Council*, [68] – [71].

⁴⁹ Anti-dumping: Case T-596/11, ECLI:EU:T:2014:53, *Bricmate AB v Council*; Case T-134/10, ECLI:EU:T:2014:143, *FESI v Council*; Case T-551/11, ECLI:EU:T:2013:60, *Brugola Service International v Council*; Case T-507/13, ECLI:EU:T:2015:23, *SolarWorld AG and Others v Commission*.

Customs challenges: Case C-553/14 P, *Kyocera*, ECLI:EU:C:2015:805; Case T-380/11, ECLI:EU:T:2013:420; Case T-380/11, ECLI:EU:T:2013:420, *Anonymi Viotechniki*; Case C-84/14 P, ECLI:EU:C:2015:517, *Forgital*.

⁵⁰ *Anonymi Viotechniki*, *ibid*, [32]; Case T-34/11, ECLI:EU:T:2014:797, *Canon Europa*, [38].

⁵¹ *Canon Europa*, fn 47, [50].

⁵² *Telefónica*, fn 12.

Spain, and imposed no obligation on the claimant beneficiaries. The actual effect on a given beneficiary would be determined by a tax notice issued by the relevant fiscal authorities. This notice was held to constitute an implementing measure within Art 263(4).

So much is confirmed by *Altadis*, where the parties sought to challenge the obligation to recover the unlawful State aid.⁵³ Again, it was found that the Decision did not spell out the amounts of aid to be recovered from a given undertaking; these would rather be fleshed out in domestic measures tailored to individual beneficiaries. Given the plight of others in this area,⁵⁴ and the statement in *Iberdrola* that 'all the measures for implementing the incompatibility decision' constitute implementing measures,⁵⁵ it seems that challenges to State aid Decisions on the third head are inadmissible. As a result, two entire areas of EU law are isolated from challenge on the third head.

Third, the criteria implementing measures has been interpreted so restrictively that it is often more difficult to satisfy than individual concern. In this light, the third head is sometimes a step back from the position under Art 230(4) EC. For example, in *Crown Equipment*, the claimants sought to challenge anti-dumping measures in respect of truck parts manufactured in China and Thailand.⁵⁶ As we saw in *Canon*, the calculation and communication of the amounts owed by the national authorities in *Crown*

⁵³ Case T-400/11, ECLI:EU:T:2013:490, *Altadis, SA*.

⁵⁴ See Case T-221/10, ECLI:EU:T:2012:112, *Iberdrola*; Case T-601/11, ECLI:EU:T:2014:839, *Dansk Automat Brancheforening*; Case T-287/11, ECLI:EU:T:2016:60, *Heitkamp BauHolding GmbH*; Case T-620/11, ECLI:EU:T:2016:59, *GFKL Financial Services AG*; Case T-694/14, ECLI:EU:T:2015:915, *European Renewable Energies Federation*; Case T-670/14, ECLI:EU:T:2015:906, *Milchindustrie-Verband*; Case T-174/11, ECLI:EU:T:2012:143, *Modelo Continente Hipermercados*; Case T-488/11, ECLI:EU:T:2014:497, *Scheepsbouwkundig Advies- en Rekencentrum* (Note, this party had standing on the basis of procedural rights and could challenge the decision only to the extent that it infringed those rights. It did not succeed in showing standing within the heads of Art 263(4), allowing it to challenge the merits of that decision); Case T-118/13, ECLI:EU:T:2016:365, *Whirlpool Europe v Commission*.

⁵⁵ Case T-221/10, ECLI:EU:T:2012:112, *Iberdrola v Commission*, [46] – [47].

⁵⁶ Case T-643/11, ECLI:EU:T:2014:1076, *Crown Equipment*.

Equipment would constitute implementing measures. As such, the claimants would not have been able to rely on the third head.

Although they did not satisfy the third head, the General Court found that the second head was satisfied. They were directly concerned, first, given that the contested regulation affected their legal situation by imposing duties on the products they sought to import, and, second, given that the Member States had no discretion as regards the imposition and extent of the duty.⁵⁷ They were also individually concerned in that they were identified in the contested measure and were involved in the preliminary investigations.

It is noteworthy that, as in other cases⁵⁸, the General Court did not even consider the third head. It is, surely, indicative of the restrictiveness of the third head that the notoriously narrow second head is used as the courts' first port of call.

This is not an isolated case that turned on the quirks of the challenge in *Crown Equipment*. It is a widespread phenomenon, with many litigants satisfying the second head of standing but not the third.⁵⁹ Lest it be objected that individual

⁵⁷ See fn 9 and 10.

⁵⁸ Case T-287/11, ECLI:EU:T:2016:60, *Heitkamp BauHolding v Commission*, [59] ('Since the applicant's direct concern is established, it is appropriate to check whether the applicant is also individually concerned by the contested decision, without it being necessary, if so, to check whether the contested decision is a regulatory act that does not entail implementing measures.');

Case T-620/11, ECLI:EU:T:2016:59, *GFKL Financial Services AG*, [53]; Case T-483/11, ECLI:EU:T:2013:407, *Seapro v Commission*, [31].

⁵⁹ See also Case T-614/13, ECLI:EU:T:2014:835, *Romonta v Commission*; Case T-512/12, ECLI:EU:T:2015:953, *Front Polisario v Council*; Case T-643/11, ECLI:EU:T:2014:1076, *Crown Equipment*; Case T-17/12, ECLI:EU:T:2014:234, *Hagenmeyer and Hahn v Commission*; Case T-385/11, ECLI:EU:T:2014:7, *BP Products v Commission*; Case T-57/11, ECLI:EU:T:2014:1021, *Castelnou v Commission*; Case T-620/11, ECLI:EU:T:2016:59, *GFKL Financial Services AG*; Case T-287/11, ECLI:EU:T:2016:60, *Heitkamp BauHolding*; Case T-462/13, ECLI:EU:T:2015:902, *Comunidad Autónoma del País Vasco*; T-276/13, ECLI:EU:T:2016:340, *Growth Energy, and Renewable Fuels Association v Council*; Case T-277/13, ECLI:EU:T:2016:343, *Marquis Energy v Council*; Case C-132/12 P, ECLI:EU:C:2014:100, *Stichting Woonpunt*

concern is generally taken as being generally easier to satisfy in the context of anti-dumping, other examples can readily be found ranging from challenges to the greenhouse gas emissions allocation system⁶⁰ to challenges to liberalisation measures on agricultural products with third party countries.⁶¹ As a result, despite the seeming success of *Microban* and its lucky sisters *Bloufin*, *Bilbaina* and *Health Foods*, the third head is to some extent even more restrictive than the pre-Lisbon position.

C. The Substantive Interpretation of Implementing Measures

However, 'implementing measures' does not need to be given such a restrictive interpretation. The courts could easily engage in a more substantive analysis to determine whether a contested norm entails implementing measures.

The text of Art 263(4), in some linguistic versions, seems to imply a higher threshold than there merely 'being' implementing measures. The notion of a norm 'entailing' implementing measures imports a logical or causal link between the contested norm and the implementing measures. Simply pointing to the fact that such norms exist would not necessarily satisfy this requirement. Other language versions, like the German and Hungarian, seem to also require this superadded element.⁶² Granted, other linguistic versions simply require the contested norm to 'include' implementing measures.⁶³ That said, the ambiguity between these two versions could be used as a springboard toward a more substantive inquiry.

and Others v European Commission for examples of satisfying the second head but not the third.

⁶⁰ Romonta, fn 59.

⁶¹ Polisario, fn 59.

⁶² See, in German, 'Rechtsakte mit Verordnungscharakter, die sie unmittelbar betreffen und keine Durchführungsmaßnahmen *nach sich ziehen*, Klage erheben', and, in Hungarian 'közvetlenül érintő olyan rendeleti jellegű jogi aktusok ellen, amelyek nem vonnak maguk után végrehajtási intézkedéseket'. I am grateful to Julia Bihary, Julia Weber and Katharina Zwins for discussion on this matter.

⁶³ See, in Spanish, 'los actos reglamentarios que la afecten directamente y que no incluyan medidas de ejecución', or in French, 'les actes réglementaires qui la concernent directement et qui ne comportent pas de mesures d'exécution.'.

Advocate General Cruz Villalón in *T and L* offered a framework for such a substantive inquiry. He opined that 'non-substantive or ancillary measures'⁶⁴ should not constitute implementing measures. The courts should rather consider whether the contested norm is 'fully and autonomously *operational*' in light of its purpose, content and effects on the applicant's legal situation.⁶⁵ If so, the criterion of implementing measures is satisfied.

Thus, on the facts of *T and L*, the Advocate General concluded that the contested measure did not entail implementing measures. His argument can be best understood as turning on a separation between a 'high level' or 'general' challenge to the scheme itself and a 'low level' or 'specific' challenge to its administration. The claimants argued that the scheme itself placed them at a competitive disadvantage as compared with national sugar beet producers, and was contrary to the principles of non-discrimination, legitimate expectations and proportionality. From this perspective, the fact that the *administration* of the scheme required the exercise of implementing powers was immaterial. Functionally, the challenged measure – the scheme *itself* – was autonomous and operational without the need for further State measures.

I note finally that this analysis seems entirely consistent, if not required, by the courts' frequent assertions that 'reference should be made exclusively to the subject-matter of the action' when determining whether the contested norm entails implementing measures.⁶⁶

This analysis can usefully be applied to the two areas examined above that are, at present, excluded from the liberalising effects of the third head.

In the field of custom duties, it would be entirely possible to consider that the calculation and the communication of the duties are purely ancillary or accessory measures to the contested norm. They are the immediate consequences of the change to the Common Customs Tariff. Member States

⁶⁴ Advocate General Cruz Villalón, fn 32, at [32].

⁶⁵ *ibid*, at [32].

⁶⁶ *Telefónica*, fn 12, [31]; *DanskAutomat*, fn 54, [57]; *Woonpunt*, fn 31, [38]; *European Union Copper Task Force*, fn 46, [37].

have no discretion in the calculation or imposition of those duties; their national customs authorities act, in effect, as agents of the EU. The national measures are not implementing measures of substance. They are formal measures that simply give effect to the Common Customs Tariff designed by the EU institutions.

Similar conclusions can be reached in respect of State aid Decisions.⁶⁷ As has been observed, the actions carried out by the Member States to recover the unlawful aid amount to implementing measures. Yet these actions – the recovery of the aid – are the logical consequences of the finding that the aid is unlawful.⁶⁸ Short of absolute impossibility, the Member State must imperatively recover the full value of the aid. In that sense, the Commission's decision is autonomous; the natural legal corollary of the finding that the aid is unlawful is its recovery by national authorities. In this light, the actions carried out by the national authorities are ancillary to the declaration that the aid was unlawful. They are formal acts guided entirely by the terms of the contested Decision, not substantive measures necessary to implement some broader design of the EU institutions.

2. *Direct Concern*

Direct concern means what it did prior to the Lisbon reforms.⁶⁹ This seems correct as a matter of interpretation. The framers kept the notion of 'direct concern', even though they would have been aware of other, more liberal, formulations.⁷⁰ As above, the intention seems to have been to liberalise

⁶⁷ Case C-132/12 P, ECLI:EU:C:2013:335, *Stichting Woonpunt and Others v Commission*, Opinion of Advocate General Wathelet, [77].

⁶⁸ For example, Case C-331/09, ECLI:EU:C:2011:250, *Commission v Poland*, [54].

⁶⁹ Case T-694/14, ECLI:EU:T:2015:915, *EREF v Commission*, [17]; Case T-312/14, ECLI:EU:T:2015:472, *Federcoopescas; Microban*, fn 18 at [32]; *T and L*, fn 12 [37]; Case T-673/13, ECR, EU:T:2015:167, *European Coalition to End Animal Experiments v ECHA*, [67]. Case C-583/11 P, ECLI:EU:C:2013:21, *Inuit Tapiriit Kanatami v Parliament and Council*, Opinion of Advocate General Kokott [68] – [69] and Case C-274/12 P, ECLI:EU:C:2013:204, *Telefónica SA v European Commission* at [59]; Advocate General Wathelet in *Woonpunt*, fn 67, [66].

⁷⁰ See, for example, Case C-50/00, ECLI:EU:C:2002:197, *Unión de Pequeños Agricultores v Council*, Opinion of Advocate General Jacobs; Case T-177/01, *Jégo-Quéré v Commission*.

standing rules by dispensing with the need to show individual concern rather than diluting the notion of direct concern.⁷¹

As far as the scope of the third head goes, the issue with direct concern is not that the courts have failed to depart from their pre-Lisbon definitions. Rather, the issue is that they have insisted on a watertight separation between the second sub-criterion of direct concern⁷² and the criterion of 'not entailing implementing measures'. As shall be explained, the courts adamantly maintain that the contested measure must produce effects without the need for *intermediate rules* – part of the second sub-criterion for direct concern – and must also be free of *implementing measures*. They refuse to engage, on any meaningful level, with the possibility of there being some interplay, let alone some overlap, between these two notions.

This accounts for the ineffectiveness of the third head in two ways. First, the courts, in fleshing out the factors that distinguish the two notions, confirm its literal interpretation of 'implementing measures'. Second, the distinction forces parties to overcome two separate obstacles – both the second sub-criterion of direct concern and the criterion of not 'entailing implementing measures'. However, this distinction is less convincing than it initially might appear. It is not a given that they represent two separate standing hurdles. When examined closer, they shade into each other on a number of levels: practical, analytical and conceptual. The courts' refusal to engage with this interplay reduces the possibility of direct challenges under the third head.

A. The Rigid Distinction Between 'Not Entailing Implementing Measures' and 'Direct Concern'

The courts' hermetic separation between the two notions is readily demonstrated by the CJEU's decision in *Forgital*.⁷³ At issue was a challenge to customs duties on titanium-based products. The claim failed in the General

⁷¹ See Advocate General Cruz Villalón, fn 32, [26]; *Federcoopesca*, fn 37, [26]; *Inuit*, fn 12 [57]; see fn 32.

⁷² I recall that this means that the implementation of that measure must be purely automatic, resulting from Union norms without the application of other intermediate rules, see part II.

⁷³ *Forgital*, fn 49.

Court because, as above, the calculation and communication of those duties by the national authorities amounted to implementing measures.⁷⁴

On appeal, it was argued that the General Court erred in finding that 'not entailing implementing measures' was a separate criterion to that of 'direct concern'.⁷⁵ The CJEU tersely dismissed the argument and simply asserted that the two criteria are indeed distinct and separate questions. The sole differentiating factor given in that case was that the absence of discretion is 'not relevant to the question of whether the measure entails implementing acts or not'.⁷⁶ This enigmatic statement fails to address the substance of the distinction between the two notions, or the relationship between the two admissibility criteria.

Some digging reveals four arguments that the courts use on a routine basis in order to delineate direct concern from implementing measures, including the justification offered in *Forgital*.

First, perhaps most obviously, the courts rely on the wording. The framers introduced two different phrases. The framers of Art 263(4) would not have used the term 'implementing measures' if it were not an additional criterion to the need to show direct concern.⁷⁷ However, the semantic difference between the two concepts is misleading. Linguistically, the formulations of the second sub-criterion (in terms of absence of 'intermediate measures') and the requirement that the contested norm not entail implementing measures

⁷⁴ T-438/10, ECLI:EU:T:2013:648, *Forgital v Commission*.

⁷⁵ *Forgital*, fn 49, [39].

⁷⁶ *ibid*, [43] and [44] (In French only, but the author's translation would be as follows) 'Contrary to the applicant's submissions, the condition pertaining to the absence of implementing measures is separate to that of direct concern. (...) the question of whether the contested measure confers an element of discretion on national authorities responsible for the implementing measures it not relevant to the question of whether the measure entails implementing measures or not'; see also Case T-381/11, ECLI:EU:T:2012:273, *Eurofer v Commission*, [59]; Case T-551/11, ECLI:EU:T:2013:60, *BSI v Council*; Case T-400/11, ECLI:EU:T:2013:490, *Altadis v Commission*, [50].

⁷⁷ See, for example, *Bricmate* fn 49, [74]; *Federcoopescas*, fn 37, [31].

bear striking similarity.⁷⁸ Moreover, as shall be seen, the textual difference between the two notions is far less convincing in light of the practical, analytical and conceptual proximity between the two.

Beyond the wording itself, the courts insist on the rigid separation between the two notions by stating that what is relevant to the question of direct concern is irrelevant to the question of whether the contested norm entails implementing measures. Thus,

1. 'The allegedly *mechanical nature* [emphasis added] of the measures taken at national level ... is irrelevant in ascertaining whether those regulations entail implementing measures'⁷⁹
2. 'The question of whether or not the addressee of the contested decision has *discretion* [emphasis added] in implementing the disputed act has no bearing on the existence of implementing measures, such existence being sufficient to render the third limb of the fourth paragraph of Article 263 TFEU inapplicable'⁸⁰
3. '[The fact that the contested measure] is *directly applicable* [emphasis added] in the Member States and that, as a consequence, it directly affects [the claimant's] legal position in that it alters it without the need for national implementing measures or measures adopted by the EU institutions (...) is relevant only as regards the circumstances in which an applicant can be said to be directly concerned, and must therefore be disregarded [in relation to the consideration of implementing measures]'⁸¹

Thus, the *mechanical nature* of the implementing measures, the margin of *discretion* left to national authorities, the *direct applicability* of the contested measure are all irrelevant to whether a norm entails implementing measures. These questions of mechanics, discretion and direct applicability rather bear

⁷⁸ See other language versions. German 'ohne dass weitere *Durchführungsvorschriften* angewandt werden' and 'keine *Durchführungsmaßnahmen* nach sich ziehen'; Maltese 'mingħajr applikazzjoni ta' *regoli obra intermedjarji*' and 'li ma jinvolvi *mizuri ta' implimentazzjoni*'.

⁷⁹ *T & L Sugars*, fn 12, [41] – [42]; *Canon*, fn 47, [47]; *Kyocera*, fn 49, [46]; Case T-507/13, ECLI:EU:T:2015:23, *SolarWorld AG*, [36] and [60]. See section three of this Part.

⁸⁰ *Federcoopesca*, fn 37, [41].

⁸¹ *Kyocera*, fn 49, [49]; Case T-134/10, ECLI:EU:T:2014:143, *FESI*, fn 49, [28] – [29]; Case T-380/11, ECLI:EU:T:2013:420, *Anonymi Viotechniki*, [44].

on whether the contested norm is of direct concern to the applicant. The listing of such factors which are relevant to direct concern but not to implementing measures provides the basis for the courts' repeated assertions that the two notions are distinct, cumulative standing criteria.⁸²

This reasoning does not just facilitate formalistic interpretation of implementing measures; it positively requires such an interpretation. It precludes any substantive analysis of whether the measures in question are mechanical, or constitute actions over which the national authorities had no discretion. The inquiry is thus limited to the purely formal question of whether such measures exist. 'Implementing measures' is given an overly broad interpretation, which not only reinforces the reasoning examined in the previous section, but, more broadly, contributes to the limited effectiveness of the third head.

In and of itself, this is not an impermissible interpretation. I do not cavil, from a purely textual point of view, the possibility of endorsing such reasoning. But it must be recognised that this is not the only interpretation. Nor is it necessarily a desirable. Indeed, it is entirely coherent to adopt a more nuanced understanding of the relationship between direct concern and implementing measures. So much is evidenced by considering the *practical*, *analytical* and *conceptual* overlap between the two notions, as shall be demonstrated in the following section.

B. The Questionable Distinction Between 'Not Entailing Implementing Measures' and 'Direct Concern'

The *practical similarity* is best demonstrated by reference to the *Woonpunt* case.⁸³ Here, the litigants were able to satisfy the second head of standing, but not the third. At issue was an existing aid scheme for 'Wocos' – Dutch non-profit property organisations carrying out a mix of commercial activities and social housing programmes. The Commission recommended a number of appropriate measures to the Netherlands in order for to bring the scheme

⁸² See, for example, *SolarWorld*, fn 79, [36]; *Eurofer*, fn 76, [59]; *Altadis*, fn 76, [47]; *BSI v Council*, fn 49, [56].

⁸³ Case C-132/12 P, ECLI:EU:C:2014:100, *Stichting Woonpunt and Others v Commission*.

into line with the prohibition on unlawful State aid. In response, the Netherlands made a commitment to promulgate an updated scheme – in the form of a ministerial decree and a new Housing Law – that would address the Commission's concerns. The Commission accepted the proposed amendments in a Decision which the applicants sought to contest. This contested Decision, it should be noted, had the effect of requiring the Dutch state to bring the said amendments into being.⁸⁴

As to the third head, the contested Decision noted that the updated scheme would be implemented by way of a new ministerial decree and a new Housing Law.⁸⁵ The CJEU understood this to mean that the legal consequences complained of would materialize not through the contested Decision itself, but through these Dutch measures. Accordingly, the contested Decision entailed implementing measures.

However, the applicants could avail themselves of the second head.⁸⁶ The court reiterated that the second sub-criterion of direct concern requires the legal effects complained of to be 'purely automatic' and 'without the application of other intermediate rules'. They were satisfied. Once the Commission accepted the Dutch proposals for the updated scheme, they were bound to bring it into force. The fact that they had no discretion in this regard meant the applicant Wocos were directly concerned.

Thus, the CJEU accepted, in the same case, that the enactment of the housing policy resulted from Union rules without the need for intermediate

⁸⁴ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1–9, Art 19(1) on 'legal consequences of a proposal for appropriate measures', reads 'The Member State shall be bound by its acceptance to implement the appropriate measures'.

⁸⁵ Art 41 of the contested Decision read 'The Netherlands authorities have made commitments to amend the functioning of wocos and the measures favouring them (...) The new rules will be *implemented by way of a new ministerial decree from 1 January 2010 and a new housing Law from 1 January 2011*. (...)'.

⁸⁶ They were also individually concerned because they were part of a closed and countable class of Wocos, established by Royal Decree, in contradistinction to the many future Wocos that might come into existence in the future and not enjoy the more liberal former scheme. See fn 213.

rules⁸⁷, and that very same housing policy amounted to an implementing measure. In other words, it was satisfied that there were no 'intermediate rules' but that there were nonetheless 'implementing measures'. This seems illogical. By the same token, it would have been entirely possible to consider that the contested Decision, in accepting the Dutch undertakings, required no implementing measures to produce the legal effects complained of given that the Dutch state was obliged to bring the updated scheme into force. Practically, therefore, it is difficult to see a rigid distinction between implementing measures and direct concern.⁸⁸

The two notions also shade into each other on an *analytical level*. In short, the analysis that the courts perform in relation to the question of whether a measure entails implementing measures is virtually identical as to whether a party satisfies the second sub-criterion of direct concern.

In *Microban*, the General Court reasoned that direct concern was satisfied because the prohibition was 'automatic and mandatory'. Moreover, the fact that there was a transitional period for the Member States to require the cessation of marketing triclosan did not alter this. Although the Member States were free to choose when to prohibit the marketing of triclosan within that period, they nonetheless had no discretion as to bringing that ban into effect. To that extent, reasons the court, this transitional period was 'ancillary' to the contested prohibition, and direct concern was satisfied.⁸⁹ It then repeats a near-identical analysis in relation to the whether the provision entailed implementing measures. The court holds, first, that the ban had the 'immediate consequence' of not being able to use triclosan in products coming into contact with foodstuffs and, second, that the transitional period provided for the contested measure was introduced as an 'ancillary measure'

⁸⁷ See fn 8.

⁸⁸ Indeed, see also Case C-142/15 P, ECLI:EU:C:2016:163, *SolarWorld*, [35] where the CJEU was unable to ascertain whether the appellant was criticizing the General Court's consideration of implementing measures or direct concern. '(...) it is difficult to determine with certainty whether, by the first limb of the single ground of appeal, the appellant wishes to contest the General Court's assessment of the criterion of lack of discretion or its assessment of the lack of implementing measures'.

⁸⁹ *Microban*, fn 18, [29].

to the ban. The key considerations in relation to both criteria – 'automatic'/'immediate' and 'ancillary' – are very similar.

Many other examples could be given, one of which is *Les Verts*.⁹⁰ This case was decided in 1986, well before the advent of the third head in the Lisbon Treaty. A fuller presentation of the facts is given subsequently, and, for now, we may limit ourselves to the court's analysis of whether the claimant French Green Party was directly concerned. The court stated that the contested norms were 'a complete set of rules which are sufficient in themselves and which require no implementing provisions'. It also stressed that the rules were 'automatic and leave no room for any discretion'.⁹¹ As such, the claimants were directly concerned by the contested norms.

How, one might ask, is this 'direct concern' analysis different from the analysis that the courts would now perform in relation to whether a measure entails implementing measures? The reference to 'implementing provisions' harks forward to the post-Lisbon criterion of 'implementing measures'. Moreover, the fact that *Les Verts* the references to the 'automatic' nature of the contested provisions and that they were 'sufficient in themselves' to give rise to legal effects is also an indication that, in post-Lisbon parlance, the provisions did not entail implementing measures. These are conspicuous indications that the analysis of what constitutes direct concern is very similar to the analysis of whether a contested norm entails implementing measures. If we compare the pre-Lisbon and post-Lisbon consideration of whether a party is directly concerned, it is nearly identical to the consideration of whether the contested norm entails implementing measures – the analysis of whether a contested norm directly concerns a given claimant can very easily pass as an 'implementing measures' analysis. Analytically, therefore, the rigid distinction between the two is more difficult accept than initially appears.

Finally, on a *conceptual level*, it is entirely possible to accept that there is some degree of overlap between the two notions. The exact scope of this overlap is a question of degree.

⁹⁰ Case C-294/83, ECLI:EU:C:1986:166, *Les Verts v Parliament*.

⁹¹ *ibid*, [31].

On the one hand, it is possible to consider the two notions as identical. Advocate General Wathelet was of this opinion in the *Woonpunt* case. He considered that not entailing implementing measures was not a separate condition but an explanation of direct concern.⁹² He was concerned that the very purpose of relaxing the standing rules would be frustrated if 'simple formalities' like publications, notifications and confirmations could preclude a party's reliance on the third head of standing.⁹³ Thus, measures adopted by national authorities in the absence of discretion should not constitute implementing measures, but that the very notion of absence State discretion satisfies both the second criteria of direct concern and means that there are no implementing measures.⁹⁴

On the other, it is possible to endorse a more modest view of the overlap between the two notions. Thus, Advocate General Kokott in *Telefónica* was of the opinion that the two are distinct criteria, but, it seems, also of the opinion that direct concern would be satisfied as a matter of principle when a measure did not entail implementing measures. Her reasoning was that acts that fulfil the second criteria of direct concern 'always operate automatically and their legal effect ensues from EU rules only'.⁹⁵ The reasoning was not endorsed in *Telefónica*, which did not address the question of whether the claimants were directly concerned. However, parts of *Federcoopesca* follow a line of reasoning similar to Kokott's Opinion. The General Court stated that where the contested norm gave rise in and of itself to the legal effects, which means that it entails no implementing measures, the criterion of direct concern would necessarily be satisfied.⁹⁶ The case does not seem to have been followed further on this point, and, to that extent, seems to be somewhat of an outlier in the post-Lisbon jurisprudence.

⁹² Opinion of Advocate General Wathelet, fn 67, [69].

⁹³ *ibid*, [72].

⁹⁴ *ibid*, [75].

⁹⁵ Case C-274/12 P, ECLI:EU:C:2013:204, *Telefónica v Commission*, Opinion of Advocate General Kokott, [60] 'The second condition is based on the assumption that the contested legal act still requires implementation. However, that is specifically not so in the case of an act which does not entail implementing measures. Such acts always operate automatically and their legal effects ensue from EU rules only'.

⁹⁶ *Federcoopesca*, fn 37, [34] and [37].

Again, as was the case in relation to the interpretation of 'implementing measures', the courts could easily have adopted a more fluid understanding of the relationship between direct concern and implementing measures. Yet they chose not to. Rather than insisting on a rigid separation between the two they could have embraced the possibility of the two criteria overlapping. Their refusal to do so forces them to adopt a purely formal conception of implementing measures. The courts' zealous attempts to distinguish the two requires them to insist that considerations of mechanics, discretion and direct applicability are solely relevant to direct concern and not implementing measures. This cements their view that the mere existence of implementing measures – regardless of their purpose effect or content – precludes reliance on the third head. In turn, this limits the extent to which the third head has facilitated direct challenges.

3. Regulatory Act

As above, there are two elements to the notion of a regulatory act: the measure must be non-legislative, and it must be of general application. As the criteria raise different issues, it is worth separating the analysis along those lines.

A. General Application

It is not clear what 'general application' means. The case law often disposes of the third head of standing on other grounds.⁹⁷ As a result, we do not have a wide range of cases that consider and apply this criterion and it is difficult, at present, to ascertain exactly what it might mean. On a broader level, the cases that do address the matter do not offer much guidance. So much can be seen in the jurisprudence on challenges in the field of anti-dumping duties. The Regulations that impose such duties have been held to constitute regulatory

⁹⁷ Case C-274/12 P, ECLI:EU:C:2013:852, *Telefónica v Commission*, [38]; Case T-24/11, ECLI:EU:T:2013:403, *Bank Refah Kargaran v Council*, [41]; *Iberdrola*, fn 54, [48] 'It follows that the contested decision entails implementing measures and that therefore, without it being necessary to rule on whether that decision is a regulatory act, the Court must reject the applicant's argument submitted in the alternative, based on the last part of the fourth paragraph of Article 263 TFEU'

acts.⁹⁸ The reasoning is scant. The courts simply reiterate the *Inuit* definition to the effect that an act is of general application 'in that it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in general and in the abstract', and state that the Regulation in question meets this definition.⁹⁹

It is a shame that the courts do not address the matter in greater detail. The classification of such Regulations is, in fact, more complex than the courts seem to admit. For example, anti-dumping duties impose both broad duties on a given type of products manufactured in a non-EU country, as well as, possibly, more tailored duties on individual exporters. As a result, it is not given that every obligation under the Regulation necessarily partakes of this 'general' character.¹⁰⁰ Indeed, the Commission's acceptance of undertakings from exporters, which confers an exemption from the duties, has been found to represent a series of dealings with individual operators, and, by that token, does not qualify as an act of general application.¹⁰¹ A fuller discussion of what exactly, qualifies a measure as general is thus awaited.

That said, some guidance on the meaning of 'general application' can be scoured from the case law, mostly in the field of State aid.¹⁰² In *Mory*, the applicant sought to contest the Commission's finding that France did not

⁹⁸ Case T-596/11, EU:T:2014:53, *Bricmate v Council*, [65]; Case T-134/10, EU:T:2014:143, *FESI v Council*, [24]. Note both failed to satisfy the third head because of the presence of implementing measures.

⁹⁹ *Bricmate*, fn 49, [65]; *BSI*, fn 49, [43]; *FESI*, fn 49, [24]; *SolarWorld AG*, fn 79, [64].

¹⁰⁰ Michael Rhimes, 'Nothing ado about much? Challenges to Anti-Dumping Measures After the Lisbon Reforms to Art 263(4) TFEU' (2016) *European Journal of Risk Regulation* 374; Alexander Kornezov, 'Shaping the new architecture of the EU system of judicial remedies; comment on *Inuit*', (2014) *European Law Review* 251, 256-7; Albertina Albors-Lorens, 'Remedies against the EU institutions after Lisbon: an era of opportunity?' (2012) *CLJ* 507, 525-526; Ivo Van Bael and Jean-François Bellis, *EU Anti-dumping and Other Trade Defence Instruments*, 5th Ed., (Kluwer, 2011), 606.

¹⁰¹ *SolarWorld AG*, fn 79, [64]. Upheld on appeal in C-142/15 P, ECLI:EU:C:2016:163.

¹⁰² There are also some interesting insights to be garnered from the case law on challenges to the inclusion in various blacklists relating to the financing of terrorism and nuclear proliferation. However, space precludes the discussion of these factually and technically complicated cases. The reader is directed to Case T-67/12, ECLI:EU:T:2014:348, *Sina Bank* and the case law cited there.

need to recover State aid granted to its competitor, Sernam, after Sernam was purchased, in administration, by third company.¹⁰³ The pertinent reasoning is contained in this short passage:

As the decision at issue, which was addressed to the French Republic, does not constitute a regulatory act under the fourth paragraph of Article 263 TFEU, since it is not an act of general application, it is necessary to determine whether the appellants are directly and individually concerned by that decision, within the meaning of that provision.¹⁰⁴

The natural reading of the paragraph suggests that the measure was not of general application because it was only addressed to the French Republic. This defines very tightly the notion of 'regulatory act', as it seems to imply that a measure cannot be 'general' if addressed to only one Member State. This would be an alarming result, and the reasoning should not be followed.

There are indications that it will not be. Advocate General Mengozzi in his Opinion simply states that 'the decision at issue is not a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU because it is not of general application'.¹⁰⁵ His Opinion makes no reference to the Decision being addressed to the French Republic alone. As such, his Opinion does not support the narrowness of the CJEU's approach. It allows us to explain the result in *Mory* on the basis that the Decision in issue was confined to two individual companies. That Decision was limited to a finding that there was insufficient economic continuity between Sernam and the third company that purchased it to require the recovery of aid granted to Sernam. This is a

¹⁰³ Case C-33/14 P, ECLI:EU:C:2015:609, *Mory v Commission*.

¹⁰⁴ *ibid*, [92] There is a citation in this paragraph to *Inuit* fn 12, [56] which has been omitted for readability. This reference is baffling. Paragraph 56 of *Inuit* stated that the concept of acts in Art 263 TFEU, in general, refers to 'any European Union act which produces binding legal effects', and that this term 'covers acts of general application, legislative or otherwise, and individual acts.'. This is of very limited, if any, relevance to interpretation of *regulatory* act in Art 263(4). The Opinion of Advocate General Mengozzi makes reference to [51], [60], [61] of *Inuit*, which correctly identifies the parts of the judgment that hold that legislative acts are excluded from regulatory acts.

¹⁰⁵ Case C-33/14 P, ECLI:EU:C:2015:409, *Mory*, Opinion of Advocate General Mengozzi, [167].

much more satisfactory explanation of the case. It coherently explains why the Decision was not of general application. More importantly, it does not preclude reliance on the third head simply because only one State is addressed in a contested Decision.

Moving beyond the facts of *Mory*, it is possible to consider the 'standard' State aid Decisions which require a Member State to reclaim aid unlawfully granted as being of general application. Advocate General Kokott in her Opinion for *Telefónica* drew a distinction between an act being *binding* on one Member State alone, and an act having *general application*.¹⁰⁶ On this basis, the fact that the contested Decision bound only one Member State did not mean that it was not a regulatory act. On the contrary, it was binding on all organs of that State and had the effect of shaping the national legal order.¹⁰⁷ It was therefore capable of being of general application, and she concluded that the Commission Decision constituted a regulatory act.

It is difficult to see whether the courts have adopted this approach. The cases do not speak with one voice. On the one hand, *Castelnou*¹⁰⁸ seems to suggest that a regulatory act must refer to a class defined by general characteristics. On the other, *EGBA*¹⁰⁹ offers a more indulgent approach.

In *Castelnou*, the Spanish state facilitated the consumption of Spanish coal by designating ten companies in a Royal Decree to produce energy from such fuels. The Commission issued a Decision confirming the lawfulness of this scheme. The challenge, brought by a company who was not designated in that Royal Decree, was inadmissible because that Decision was not of general application. The beneficiaries of the aid were those designated by the Decree, and not defined generally (e.g. all energy plants of certain specifications). This suggests a rigid approach whereby any act that does not refer to a class defined by general characteristics cannot be a regulatory act.

¹⁰⁶ Opinion of Advocate General Kokott, fn 95, [23].

¹⁰⁷ *ibid*, [25].

¹⁰⁸ Case T-57/11, ECLI:EU:T:2014:1021, *Castelnou Energía v Commission*; see also *Whirlpool*, fn 54, [41].

¹⁰⁹ Case T- 238/14, ECLI:EU:T:2016:259, *EGBA and RGA v Commission*.

By contrast, in *EGBA*, the French State imposed a parafiscal levy on the revenue from online horse-race betting, which the Commission found was justified in light of its benefit for the equine industry. The beneficiaries of this levy were the 51 companies that formed part of the economic interest group PMU. The General Court accepted that the beneficiaries of the aid were not defined generally and in the abstract; it was limited to the 51 specific companies that constituted PMU. However, the General Court stressed that the challenge was to the method of financing the aid, the parafiscal levy. It also accepted that because the levy could affect all online horse-race betting operators in France, and the levy was raised on each online horse race betting stake, it produced both general effects and applied to objectively determined situations.¹¹⁰ In short, the fact that the class of beneficiaries is not envisaged in general and in the abstract did not preclude the measure being regulatory.

The tension can be better appreciated by applying the *EGBA* reasoning to *Castelmou*. One might argue that, despite the fact that ten beneficiaries were limited by the Royal Decree, the effects of the Decision were of general application. One might point to the fact that the contested scheme affected a class of energy producers envisaged in the abstract – those fuel-oil, coal-fired plants and gas plants whose energy production was disadvantaged in comparison with energy produced from Spanish coal.¹¹¹ The detailed rules laid down in the subject of the Decision, like the parafiscal levy at issue in *EGBA*, could also mean that it applies to situations which are determined objectively.¹¹² The mere fact that the beneficiaries were defined by Royal Decree does not affect this conclusion. An act can have legal effects on a class of persons defined in general and in abstract, even though the beneficiaries of the aid are not so defined.

¹¹⁰ *ibid* [34] - [35].

¹¹¹ See Decision C (2010) 4499, State aid No N 178/2010 'Public service compensation linked to a preferential dispatch mechanism for indigenous coal power plants', [35] – [42] for a detailed description of the scheme: http://ec.europa.eu/competition/state_aid/cases/236267/236267_1150043_151_1.pdf

¹¹² See *Real Decreto* 1221/2010, Boletín Oficial del Estado, Number 239, Section I, page 83983.

In short, one reaches different conclusions as to the general nature of the act depending on whether one considers the *beneficiaries* of the aid or the *effects* of that aid. *Castelnuovo* confines itself to the former, and it concludes that the act in question is not regulatory. *EGBA* goes beyond the definition of the beneficiaries, and considers the effects themselves. Classifying a given act as 'general' or 'individual' is not as easy as it might initially seem. There seems to be a spectrum of generality, and not a binary opposition of 'general' and 'individual'. What, one might ask, is sufficiently general to constitute a regulatory act? To what extent must a norm 'shape a national legal order' in order to be of general application?¹¹³

Overall, the courts' standard reference to 'of general application' thus requires further refinement. At present, it does not explain what actually is of general application, and it fails to appreciate that the scope of application of a given norm cannot always be readily classified as 'general' or 'individual'. What may be considered individual – specific aid granted to 10 energy companies or 51 horse-betting companies – may well be general when seen in another light. Perhaps the notion of what is sufficiently general may be given different meanings in different contexts – rather like the varying shades of meaning attributed to individual concern in different areas of EU law.¹¹⁴ It is premature to make any firm conclusions at present, but one hopes that the courts will recognise the complexity of this notion, and will flesh out more helpful guidelines to determine whether a given act is general or not.

B. Non-legislative

Only non-legislative acts can be regulatory. It is not possible to offer full accounts of all the intricacies of what constitutes a non-legislative act, or all the possible interpretations of the term regulatory.¹¹⁵ However, an overall

¹¹³ See fn 107.

¹¹⁴ See Lenaerts and Others, fn 5.

¹¹⁵ The reader is referred to Jürgen Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law' (2012) CMLR 885; Carl Bergstrom, 'Defending restricted standing for individual to bring direct actions against 'legislative' measures', (2014) European Constitutional Law Review 481; Christoph Werkmeister and others, 'Regulatory Acts within Art 263(4) TFEU: A Dissonant Extension of *Locus Standi* for Private Applicants' (2011) CYELS 311; Koen Lenaerts and Nathan Cambien 'Regions and the European Court: Giving Shape to

examination of the bases of the courts' reasoning confirms a trend that has been observed before. The courts could adopt an interpretation that would allow for broader standing rules, but choose not to.

The CJEU provided three strands of reasoning in *Inuit* to support the contention that 'regulatory act' excludes legislative measures. *Teleologically*, the insertion of an additional paragraph in Art 19(1) TEU requiring Member States to provide access to the courts for indirect challenges *at national level* indicates that the third head of standing for challenges *at EU level* does not necessarily have to be given a wide meaning.¹¹⁶ *Contextually*, Art 263(1) refers to acts in general, of both legislative and non-legislative character. This suggests that the reference to 'regulatory acts' of Art 263(4) has a more narrow scope, and, therefore cannot refer to both legislative and non-legislative acts.¹¹⁷ As noted in the Opinion of Advocate General Kokott, so much would also be supported by the fact that legislative provisions should be more difficult to challenge than non-legislative provisions, given the democratic imprimatur associated with the former.¹¹⁸ *Historically*, the third head is lifted word for word from the Constitution for Europe. This document drew a categorical distinction between legislative and non-legislative acts, and, moreover, the mandate of the Intergovernmental Conference that negotiated the Treaty expressly sought to preserve this separation.¹¹⁹

However, all three strands of reasoning are less convincing than they may initially seem. A couple of arguments may be briefly sketched. It is just as plausible to suggest that, for example, *teleologically*, the purpose of relaxing standing rules could be achieved through both a widening of Art 263(4) TFEU

the Regional Dimension of the Member States' (2010) EL Rev 609; Sthephan Balthasar, 'Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: the new Article 263(4) TFEU' (2010) EL Rev 542; Pieter-Augustijn Van Malleghem and Nils Baeten, 'Before the law stands a gatekeeper – or what is a 'regulatory act' in Article 263(4)' (2014) Common Market Law Review 1187, René Barents, 'The Court of Justice after the Treaty of Lisbon' (2010) CMLR 709; See also the extensive references in Advocate General Kokott's *Inuit* Opinion, fn 69.

¹¹⁶ *Inuit*, fn 12, [89] – [107].

¹¹⁷ *ibid*, [58].

¹¹⁸ *ibid*, [38].

¹¹⁹ *ibid*, [59].

and the insertion of Art 19(1) TEU. Indeed, why bother reforming Art 263(4) at all if Art 19(1) TEU was the solution to the standing dilemma? The teleological interpretation of the third head, murky as its purpose is, is inconclusive. It certainly does not inexorably lead to the interpretation adopted by the courts.¹²⁰ Similarly, *contextually*, if the framers meant to exclude legislative acts from the third head they could have used the term 'non-legislative act' which was already established in the Treaty¹²¹. It is thus not a foregone conclusion that there can be no overlap in the acts referred to in Art 263(1) and Art 263(4).¹²² Finally, *historically* the reasoning of the court is questionable given that the textual source of the wording was the Constitution for Europe, which had an entirely different context, and given their selective readings of the *travaux préparatoires*.¹²³

It is not a given that legislative acts cannot be regulatory. That said, one should be cautious in one's critique in this area. In many national jurisdictions, legislative acts are more difficult, or even impossible, to challenge.¹²⁴ One cannot censure the courts for the *mere fact* of having excluded legislative measures from the third head. Nonetheless, anchoring the notion of 'regulatory' in whether the act was legislative or not is questionable in its own terms, and gives rise to some unpalatable consequences.

First, one must question why the distinction is relevant. Why should the legislative basis of the act require the litigant to pursue their challenge indirectly, in the nearly universal situation where they cannot satisfy individual concern? It is tempting to point to the 'qualitative difference'

¹²⁰ Alexander Kornezov, 'Shaping the new architecture of the EU system of judicial remedies; comment on Inuit' (2014) ELR 251, 261; Bast, fn 115, 907; Balthasar, fn 115, 545-546.

¹²¹ Lenaerts and Cambien, fn 115, 616-619; Berg, fn 115, 494; Kornezov, fn 120, 257.

¹²² Opinion of Advocate General Kokott, fn 69, [37]; Bast, fn 115, 990; Van Malleghem and Baeten, fn 115, 1205.

¹²³ Lenaerts and Cambien, fn 115, 617; Balthasar, fn 115, 544; Bergstrom, fn 115, 498, Van Malleghem and Baeten, fn 115, 1204-1213.

¹²⁴ Brian Libgober, 'Can the EU be a Constitutional System Without Universal Access to Judicial Review?' 2015 Michigan Journal of International Law 353; Kornezov, fn 120, 258; Albors-Lorens, fn 16, 519.

between the two in terms of democratic legitimacy.¹²⁵ This is not a satisfactory response. *It proves too little* because it is doubtful whether legislative process does indeed confer such a difference in the first place. It is not difficult to find legislative procedures that closely resemble those used to promulgate non-legislative acts.¹²⁶ Moreover, the Council, whose members are not democratically elected, carries as much weight as the Parliament in the ordinary legislative procedure.¹²⁷ But, more fundamentally, *it also proves too much*. If the 'qualitative difference' holds true, why is it just as easy to challenge a legislative provision of EU law indirectly under the Art 267 procedure as it would be in respect of a non-legislative measure?¹²⁸ Appeals to the democratic credentials of the act seem both questionable in their own terms, and illogical in relation to indirect enforcement. In any case, from a broader perspective, it is questionable to what extent one can transpose domestic constitutional justifications for the insulation of legislative acts from judicial challenge to the supranational EU order. Laws passed by national legislatures cannot necessarily be equated with the products of what the EU dubs a 'legislative' process in terms of form, procedure, or democratic legitimacy.¹²⁹

Second, it brings a distinctly formalistic touch to the third head, given that it relies on the purely formal criterion of whether a given measure was legislative or not.¹³⁰ A given policy change could easily be enacted on a legislative *or* a non-legislative basis. One might take an example from the area of Common Fisheries Policy, namely rules that govern the mesh sizes of fishing nets. In *Jégo-Quéré*, the size restriction was implemented on the basis of a Council Regulation that authorised the Commission to take emergency measures to safeguard the population of hake.¹³¹ This act was clearly not a legislative act, and, as such, it could now be challenged under the third head

¹²⁵ Opinion of Advocate General Kokott, fn 69, [38].

¹²⁶ Alan Dashwood and others, *Wyatt and Dashwood's European Union Law* (6th Ed, OUP, 2011), 85.

¹²⁷ Albers-Lorens, fn 223, 524; Bast, fn 115, 897.

¹²⁸ Dougan, fn 115, 678-9.

¹²⁹ Dougan fn 115; Koch, fn 17, 526; Bast, fn 115, 897 'Not all legislative acts benefit from a high level of parliamentary involvement in the making of the act'.

¹³⁰ Barents, fn 115, 725; Albers-Lorens, fn 223, 524; Bast, fn 115, 925.

¹³¹ Case C-262/03 P ECLI:EU:C:2004:210 *Commission v Jégo-Quéré*.

as long the claimants could show that the measure did not entail implementing measures.¹³² However, it would have been possible to implement similar restrictions on a legislative basis. Art 37(2) EC required acts in the field of the Common Agricultural Policy, which includes the Common Fisheries Policy¹³³, to be adopted on a legislative basis. Read together with the relevant provision in the Basic Regulation No 2371/2002, so-called 'measures regarding the structure of fishing gear' would have to be enacted on a legislative basis.¹³⁴ For example, Council Regulation No 1342/2008,¹³⁵ in Annex One, imposed a range of restrictions on the mesh sizes of fishing nets used to catch cod. This was a legislative act¹³⁶ and, as such, could not have been challenged under the third head. Given the difficulty of any undertaking showing that they were individually concerned by the measure, it is likely that any direct challenge would have been rejected as inadmissible. Whether an act is legislative or non-legislative has an element of fortuity; it does not necessarily have any bearing on the substance of what is challenged. This perpetuates the element of lottery in EU standing provisions, with the ability to bring direct challenges contingent on this seemingly arbitrary criterion.

¹³² See, Advocate General Kokott, fn 69, [59].

¹³³ See Art 32 EC.

¹³⁴ See Council Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p. 59–80, Art 4(2)(g)(i).

¹³⁵ Council Regulation (EC) No 1342/2008 of 18 December 2008 establishing a long-term plan for cod stocks and the fisheries exploiting those stocks and repealing Regulation (EC) No 423/2004, OJ L 348, 24.12.2008, p. 20–33.

¹³⁶ Joined Cases C-124/13 and C-125/13, ECLI:EU:C:2015:790, *Parliament and Commission v Council*, [21] 'The Commission considers that Regulation [No] 1342/2008 ... *which was adopted as a legislative act* ...' (emphasis added). Note this comparison has been deliberately confined to two pre-Lisbon measures as the inter-institutional responsibility for the Common Fisheries Policy was subject to considerable change in the Lisbon Treaty, with a preference for normative changes having to be adopted under legislative process as contemplated in Art 43(2) and not Art 42(3). For context, see Opinion of Advocate General Wahl in Cases C-124/13 and C-125/13, ECLI:EU:C:2015:337, *Parliament and Commission v Council*.

Third, the requirement that a regulatory act be non-legislative means that legislative acts are still as difficult to challenge. Two post-Lisbon cases, *Beul*¹³⁷ and *ABZ*¹³⁸, are good examples of this. For context, *Beul* concerned a measure designed to guarantee the independence of auditors with the effect that the claimant could no longer supervise the auditing of public-interest undertakings, and *ABZ* dealt with the sharing of genetic information by plant breeders.

Both of the contested provisions were legislative acts. As a result, the claimants could not rely on the third head.¹³⁹ As to the second head, the court noted that the contested acts produced legal effects in the abstract with respect to a general class of persons.¹⁴⁰ As is known, it is nearly impossible to show individual concern in relation to such an act. The notable exception to this would be *Codorníu*, where a regulation limiting the terms 'crémant' to sparkling wines of French and Luxemburgish origins was of individual concern to a Spanish producer who enjoyed a trademark in respect of their 'Gran Cremant'.¹⁴¹ However, this judgment was readily distinguished. In *Beul*, the court recalled that the trademark in *Codorníu* was an individualised entitlement and thus of a different nature to a general right to carry out a profession¹⁴², and in *ABZ* the applicant failed to show prejudice that other plant breeders in a similar situation would not also suffer¹⁴³.

Both *Beul* and *ABZ* are on appeal, and it may well be that the CJEU takes a more benign view.¹⁴⁴ However, even if they are successful, it is clear standing still turns on technical distinctions in the application of individual concern.

¹³⁷ Case T-640/14, ECLI:EU:T:2015:907, *Carsten Beul v Parliament and Council*.

¹³⁸ Case T-560/14, ECLI:EU:T:2015:314, *ABZ Aardbeien Uit Zaad v Parliament and Council*. Note that Case T-559/14, ECLI:EU:T:2015:315 *Ackermann Saatzucht GmbH & Co. KG* deals with an almost identical challenge, and reaches the same conclusion.

¹³⁹ *Beul*, fn 137, [18] – [20]; *ABZ*, fn 138, [24] – [26].

¹⁴⁰ *Beul*, fn 137, [32] – [37]; *ABZ*, fn 138, [33].

¹⁴¹ *Codorníu*, fn 14.

¹⁴² *Beul*, fn 137, [48].

¹⁴³ *ABZ*, fn 138, [39].

¹⁴⁴ Case C-53/16 P, *Carsten Beul v Parliament and Council* (not yet reported as of 28/06/2016); Case C-409/15 P, *ABZ Aardbeien Uit Zaad and Others v Parliament and Council* (not yet reported as of 28/06/2016).

Even if one accepts that legislative EU measures should be more difficult to challenge, it is difficult to justify the tombola of making standing contingent on whether it is possible to shoehorn one's case into a *Codorníu*-type situation.

IV. WHY DO THE COURTS INTERPRET STANDING RULES RESTRICTIVELY?

As has been stressed throughout Part III, it is entirely possible to conceive of a broader scope for the third head. Interpretations that are both textually faithful and teleologically coherent can readily be provided. The CJEU *could* easily endorse such interpretations. Yet it does not. In spite of a madrigal of dissent – from academia¹⁴⁵, Advocates General¹⁴⁶, and even within the courts¹⁴⁷ – it remains unflinching in its restrictive approach.

To fully appreciate why this is so, it is necessary to turn to the doctrinal justifications of the restrictive approach. It shall be seen that this doctrine rests on a fundamental assumption, supported by three buttressing justifications. Moreover, the analysis reveals that the pre-Lisbon doctrine has been carried over in its entirety to the post-Lisbon interpretation of the standing rules. The jurisprudence is thus tainted by its restrictive pre-Lisbon approach, and, as a result, the courts' approach to standing has not changed, to any perceptible level, after the Lisbon reforms.

1. The Pre-Lisbon Explanations

The fundamental assumption in the courts' restrictive approach lay in the architecture of the Treaties. At its heart was the interplay between the standing rules for direct challenge in Art 230(4) EC, on the one hand, and the possibility for a national court to refer a dispute to the CJEU under Art 234

¹⁴⁵ See fn 2 and fn 115.

¹⁴⁶ Advocate General Jacobs in Case C-50/00 P, ECLI:EU:C:2002:197 *Unión de Pequeños Agricultores v Council*, and in Case C-358/89, ECLI:EU:C:1991:144 *Extramet v Council*; Advocate General Geelhoed in Case C-491/01, ECLI:EU:C:2002:476, *British American Tobacco*; Advocate General Wathelet in *Woonpunt* fn 67; Advocate General Cruz Villalón in *T and L*, fn 32.

¹⁴⁷ Fuller explanation is given in this text at fn 153 and 154. See Case T-177/01, *Jégo-Quéré v Commission*, Case C-262/03 P ECLI:EU:C:2004:210 *Commission v Jégo-Quéré*, Christopher Brown and John Morijn, 'Case C-262/03 P Commission v Jégo-Quéré' (2004) *Common Market Law Review* 1639

EC, on the other. This allowed the EU courts to argue that the inability to bring direct actions before the EU courts was adequately compensated by the possibility of indirect challenge. On this view, the fact that a party did not have standing for direct challenge was not really a 'gap' in effective judicial protection. That party was free to challenge national measures taken in pursuance of the contested EU norm, and, in so doing, provoke a reference to the CJEU. Indeed, such indirect enforcement was found to represent the 'very essence' of judicial protection.¹⁴⁸

Unión de Pequeños Agricultores is an excellent pre-Lisbon example.¹⁴⁹ The litigants argued that the inability to challenge measures reorganising the olive oil market amounted to a violation of their right to effective judicial protection. The CJEU, recalling the admissibility criteria in Art 230(4) EC and the preliminary reference procedure under Art 234 EC, noted that where a complainant could not bring himself within the admissibility criteria of the former article, they were able to indirectly plead the invalidity of the contested norm before the national courts based on the latter article. Thus, concluded the CJEU, the Treaty provided a 'complete system of legal remedies'.¹⁵⁰ This time-honoured phrase was repeated, again and again, in the jurisprudence.¹⁵¹

This assumption, however, was not perfect. It assumed – and herein laid its Achilles' heel – that there were indeed domestic measures that could be contested in national courts. This was not the case in respect of 'self-executing measures', measures which in and of themselves gave rise to the legal effects complained of. As we have seen in our discussion of *Microban* in part II, such measures could only be challenged by contravening the EU norm in question, and then challenging the sanctions, first in national courts, and after in the CJEU if they were referred under the preliminary reference

¹⁴⁸ Case C-301/99 P, ECLI:EU:C:2001:72, *Area Cova SA*, [46].

¹⁴⁹ Case C-50/00, ECLI:EU:C:2002:197, *Unión de Pequeños Agricultores v Council*.

¹⁵⁰ *ibid*, [40].

¹⁵¹ *Les Verts*, fn 90, [23]; *Unión de Pequeños Agricultores*, fn 148, [40]; *Jégo-Quéré*, fn 131, [30]; Joined Cases T-236/04 and T-241/04, ECLI:EU:T:2005:426, *European Environmental Bureau*, [66]; Case T-108/03, ECLI:EU:T:2005:68, *Von Pezold*, [51] – [52]; Case T-167/02, ECLI:EU:2003:81, *Établissements Toulorge*, [65]

procedure. The dilemma arose in *Unión de Pequeños Agricultores* where the claimants noted that 'neither the Spanish State nor the autonomous communities of which it is composed have adopted measures to implement the contested regulation'.¹⁵²

The dilemma also arose in *Jégo-Quéré*, where the restriction on the fishnet mesh sizes required no implementing measures.¹⁵³ The natural response, one might think, would have been to expand the interpretation of the admissibility criteria in Art 230(4) in order to reduce the incidence of the dilemma. The Court of First Instance ('CFI', now the General Court) did exactly that. It 'reconsidered' the strict interpretation of individual concern, and found it satisfied where 'the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him'.¹⁵⁴

The CJEU was of a different view, and quashed the CFI's interpretation on appeal.¹⁵⁵ The logical approach of the CFI was stoutly resisted by the CJEU, on three grounds. These served as distinct buttressing arguments that, at least in the eyes of the courts, validated the restrictive approach to standing.

First, the courts *denied that the dilemma existed*. It was explained that the litigants in *Jégo-Quéré* could have contacted the relevant national authorities and sought a measure which could have itself been contested before the national courts, so that the individual could challenge the measure indirectly. Although the court simply referred to a 'measure', it seems that they were referring to some sort declaration from the national authorities that the contested regulation applied to the claimants, which, in turn, could be contested in the national courts.¹⁵⁶

¹⁵² T-173/98 ECLI:EU:T:1999:296, *Unión de Pequeños Agricultores*, [25].

¹⁵³ Compare with *Bloufin*, where a similar measure did not entail implementing measures, fn 38.

¹⁵⁴ *Jégo-Quéré*, fn 146.

¹⁵⁵ *Jégo Quéré*, fn 146.

¹⁵⁶ *Jégo-Quéré* fn 146, [35]; Compare with Opinion of Advocate General Kokott in *Inuit* at [120].

Second, the courts *disclaimed that they had the power to solve the dilemma*. There were two aspects to this. The first can be considered institutional in nature, the second jurisdictional. First, the courts maintained that they could not allow direct challenges where it was impossible for a claimant to mount an indirect challenge. This would require the courts to assess, in each case, whether the litigant in question would otherwise have had no choice but to contravene the contested provision. The courts, it was argued, were not competent to carry out such an assessment of the national procedural law of individual Member States.¹⁵⁷ Second, although the courts did recognise that having to flout the law in order to contest it fell foul of the principle of effective judicial protection,¹⁵⁸ fashioning a remedy in these situations would have ignored the admissibility criteria in Art 230(4) EC. This provision required a claimant to be directly and individually concerned; it did not contain a residual head of standing where effective judicial protection would be denied due to the impossibility of indirect challenge. Any contrary interpretation would have forced the courts out of the bounds of their jurisdiction.¹⁵⁹

Finally, the courts *deflected the responsibility for solving the dilemma*. It argued that the solution to the dilemma was not to facilitate access to the EU courts by expanding the heads of standing. Rather, it was to ensure that national courts interpreted and applied domestic procedural rules so as to allow the litigant to challenge the norm at the national level, and that Member States, in accordance with the principle of sincere cooperation under Art 10 EC, adopted measures guaranteed such access.¹⁶⁰ Responsibility, therefore, lay at the national level and not the EU level. Alternatively, it was up to the Member States to amend Art 230(4) EC in subsequent Treaties.¹⁶¹

¹⁵⁷ *Unión de Pequeños Agricultores*, fn 148, [43]; *Commission v Jégo-Quéré*, fn 146, [34]. Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores*, fn 148, [102(3)].

¹⁵⁸ See C-432/05, ECLI:EU:C:2007:163, *Unibet* [64] 'If, on the contrary, as mentioned at paragraph 62 above, it was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it such effective judicial protection.'

¹⁵⁹ *Unión de Pequeños Agricultores*, fn 148, [63].

¹⁶⁰ *Unión de Pequeños Agricultores*, fn 148, [42]; *Jégo-Quéré*, fn 146, [32].

¹⁶¹ *Unión de Pequeños Agricultores*, fn 148, [45].

The courts' response to the dilemma is wide-ranging, to put it mildly. They simultaneously maintain that the dilemma is not really a problem (buttressing argument 1), and that the courts cannot solve it in any case (buttressing argument 2); the courts recognise both that they cannot remedy the dilemma (buttressing argument 2), and that it is not the courts' problem to solve anyway (buttressing argument 3). The dilemma is attacked on all fronts, which, to some extent, confirms its status as a thorn in the completeness of the Treaties touted by the courts.

2. *The Post-Lisbon Explanations*

The courts have seized on the Lisbon reforms to strengthen this restrictive interpretation.

First, *the pre-Lisbon fundamental assumption prevails*. The courts have stoutly defended the notion that indirect challenges are adequate substitutes for direct challenges. Reiterating its time-honoured approach, the courts note, again and again, that Art 263(4) and Art 267 provide a 'complete system of legal remedies'.¹⁶² In the absence of implementing measures, contested norms could be challenged directly under the third head. If not, the litigants were free to bring proceedings in national courts, and, if well founded, have them referred to the CJEU.¹⁶³ To gainsay this, in the eyes of the court, amounts to a claim for an 'unconditional entitlement' – a hyperbole which is flatly rejected.¹⁶⁴

Thus, when *Telefónica* could not challenge the Commission's finding that the tax scheme they benefitted from was unlawful, the CJEU reminded them that they were free to challenge the implementing measures (in the form of tax notices issued by the relevant national authorities) in national courts.¹⁶⁵ The Treaties created a Union based on the rule of law, boasting a complete system

¹⁶² *T and L*, fn 11, [45]; *Inuit*, fn 12, [92]; *Telefónica*, fn 12, [57]; *European Union Copper Task Force*, fn 46, [54]; *Beul*, fn 136, [54]; Case T-541/10, ECLI:EU:T:2012:626, *ADEDY*, [89].

¹⁶³ *Inuit*, fn 11, [93] and [96].

¹⁶⁴ *ibid* [105].

¹⁶⁵ *ibid* [58], [59].

of legal remedies.¹⁶⁶ This is almost word-for-word lifted from the pre-Lisbon approach. The fundamentally restrictive approach of the courts has clearly not shifted.

Second, the three buttressing arguments against more liberal interpretations of the standing rules have been strengthened. The courts have cleverly found further validation in the Lisbon Treaty for the three buttressing arguments in favour of their restrictive approach. The courts now deny the dilemma, disclaim the power to solve it and deflect responsibility for its solution with almost greater force than they did prior to the Lisbon reforms.

The *denial of the dilemma* is facilitated by the insertion of the third head. The courts consider that the dilemma has been laid to rest by the possibility of parties challenging provisions that do not entail implementing measures. The gaps in the standing rules have been plugged, and indirect challenges are paraded as conferring universally effective judicial protection. The dilemma has breathed its last; long live indirect challenges. In the soothing words of Advocate General Kokott, there is 'no reason to fear a gap in the legal remedies available to individuals' due to the possibility of indirect challenge which has now been buttressed by the possibility of challenging provisions that do not entail implementing measures.¹⁶⁷ As shall be seen, this is wrong, yet it forms an important part of the post-Lisbon justifications for the restrictive position.

This is a considerably stronger argument than the pre-Lisbon attempt to dispose of the dilemma. The contention raised in *Jégo-Quéré* to the effect that a party could 'seek a measure' from the national authorities was a weak one.¹⁶⁸ Its formulation in broad and general terms gave little guidance as to how it

¹⁶⁶ *ibid* [56], [57].

¹⁶⁷ Opinion of Advocate General Kokott in *Inuit*, fn 69, [115]. However, for the avoidance of doubt, this passage is descriptive; I am not of the opinion that the dilemma has indeed been laid to rest. See Part V) 3) a).

¹⁶⁸ See discussion at fn 156.

might apply in practice.¹⁶⁹ It assumed that it was possible to obtain such a measure from the national authorities – whatever that might mean – and also assumed that such measures could indeed be contested in the domestic courts, regardless of the relevant national rules in a given Member State. The woolliness of this argument was readily apparent, and frequently contested.¹⁷⁰ Now, however, it is no longer necessary to resort to these somewhat desperate arguments. It is possible to point to the Treaty text, which now grants the standing to challenge measures that do not entail implementing measures, as the definitive solution to the dilemma.

As such, the courts do not need to *disclaim their ability to solve the dilemma*. The courts nonetheless do so. The CJEU has repeated that Art 263(4) does not grant a party standing to mount a direct challenge when that party cannot challenge the contested provision indirectly. To hold otherwise would flout the text of Art 263(4).¹⁷¹ In a similar vein, it also maintains that it could not carry out an assessment of national procedural law to verify whether a party is genuinely caught on the horns of dilemma.¹⁷² These arguments, as has been seen, were part and parcel of the pre-Lisbon jurisprudence. Likewise, the claims that this restrictive approach should be reconsidered in light of the principle of effective judicial protection are rejected. The courts' standard response is to assert, on occasion by reference to the Explanation to Art 47 of the Charter, that Art 47 cannot require derogation from the Treaty text. The courts cannot set aside the admissibility criteria in the text of Art 263(4).¹⁷³

¹⁶⁹ Note that Advocate General Kokott in her Opinion for *Inuit* invoked this argument, see fn 69, [120], with specific reference to *Jégo-Quéré*. It is conspicuous that the CJEU made no mention of it in its judgment.

¹⁷⁰ See, for example, Christopher Brown and John Morijn, 'Case C-262/03 P Commission v Jégo-Quéré' (2004) Common Market Law Review 1639.

¹⁷¹ See, worryingly, Case T-279/11, ECLI:EU:T:2013:299, *T & L Sugars and Sidul Açúcares v Commission*, [72] and discussion at Part V) 2) a).

¹⁷² *Telefónica*, fn 12, [55]; *European Union Copper Task Force*, fn 46, [53] 'The conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside those conditions, which are expressly laid down in the FEU Treaty'.

¹⁷³ *T and L*, fn 11, [43]; *Inuit*, fn 12, [97].

This further substantiates the courts' assertions that they are powerless to expand the scope of standing for direct challenges.

In terms of *deflecting responsibility*, the courts have found further validation of the responsibility of Member States for ensuring the effectiveness of indirect challenges in Art 19(1) TEU. The Lisbon Reforms added a second paragraph to this provision, such that the Article now reads as follows:

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The second half has been seized on as clear textual authority that the responsibility for ensuring that parties can challenge EU law lies at the national level. The intention of the framers was not, therefore, to expand the possibility of direct challenge at the *EU level*, save in respect of the dilemma which was solved through the addition of the third head.¹⁷⁴ Effective judicial protection is preserved as long as Member States discharge their obligations under Art 19(1) of the TEU. This guarantees the availability of indirect enforcement and the erstwhile dilemma, in the courts' reasoning, simply withers away. Thus, the responsibility for the dilemma is deflected from the supra-national sphere to the domestic sphere.

Finally, the courts deny that the third head was designed to secure an overall relaxation of the standing rules. This is a crucial point. As far as the courts are concerned, the objective of the third head was simply to solve the dilemma. As long as it achieves that effect, there is no need to expand the standing rules further.

¹⁷⁴ The point emerges clearly from Advocate General Kokott Opinion in *Inuit*, fn 69, [35] 'It can be inferred from the co-existence of the fourth paragraph of Article 263 TFEU and the second subparagraph of Article 19(1) TEU that the legal remedies available to individuals against European Union acts of general application do not necessarily always have to consist in a direct remedy before the European Union Courts.'

FESI, a challenge to anti-dumping duties which failed based on reasoning examined above in Part III, illustrates this particularly well. The General Court noted that the 'objective pursued' by Art 263(4) TFEU was to 'avoid a situation where [a claimant] would have to break the law in order to have justice'.¹⁷⁵ No mention is made of other justifications for liberalising the standing rules – justifications which the court would have been aware of.¹⁷⁶ The third head was intended to remedy the dilemma and, certainly, no more. Thus the fact that it was possible for *FESI* to challenge the implementing measures in national courts, as guaranteed by the Customs Code, meant that there was no need to extend the interpretation of Art 263(4) any further.¹⁷⁷ Other examples can readily be found.¹⁷⁸

¹⁷⁵ *FESI*, fn 54, [31].

¹⁷⁶ See, for example, Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores*, fn 69.

¹⁷⁷ *ibid* [39]

¹⁷⁸ Given the centrality of this point, I hope somewhat excessive citation may be indulged:

Case T-35/11, ECLI:EU:T:2014:795, *Kyocera*, [50] 'Nor is [the inadmissibility of the present action] called in question by the objective sought by the fourth paragraph of Article 263 TFEU. Admittedly, that objective is to avoid a situation in which a natural or legal person would have to break the law in order to have access to justice. However, (...) in the present case, the applicant may (...) challenge the national implementing measures of the contested regulation' (See also *Eurofer*, fn 76, [60]) *Telefónica*, fn 12, [27] – [28] '[the objective of Art 263(4)] consists in preventing an individual from being obliged to infringe the law in order to have access to a court. (...) Natural or legal persons who are unable (...) to challenge a regulatory act of the European Union directly before the European Union judicature are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails.'

Federcoopescas, fn 37, [28] – [29] '(...) the third limb of the fourth paragraph of Article 263 TFEU is designed to apply only when the disputed act, in itself, in other words irrespective of any implementing measures, alters the legal situation of the applicant (...) when an act does not, in itself, alter the applicant's legal situation, that situation is only altered if measures to implement the act are taken in respect of the applicant. The applicant can then challenge those measures and, in the context of that challenge, plead that the act implemented by them is unlawful, so that he cannot be regarded as having been denied effective judicial protection.'

The dilemma thus plays a crucial role in the courts' reasoning. It is presented as the *sole* reason for reforming the standing rules, rather than an opportunity to move towards a more liberal EU standing regime. This technique of limiting the scope of the third head to solving the dilemma, and then finding that the purpose of the third head has been upheld given the possibility of indirect challenge is a central theme in the post-Lisbon jurisprudence. It is also a highly effective two-pronged assault on the possibility of more liberal standing provisions. It attacks *the need* for a more expansive interpretation of standing rules by limiting the scope of the purpose behind the third head. It also belittles *the desirability* of such an interpretation by stressing that it is possible for the litigant to mount an indirect challenge. This, in turn, validates the courts' long-standing assertion that such indirect challenges are, from the perspective of effective judicial protection, adequate substitutes for direct challenges.

The dilemma – argument in favour of more liberal standing rules – has been cleverly turned on its head. The solution of the dilemma is a ceiling on the interpretation of the standing criteria, and not a floor. Despite the myriad of arguments against the restrictive position of the courts, if there is no dilemma there is no need for expansion. Of course, even if the dilemma did arise, the courts would be powerless to assist, and, naturally, would assert that it is not their responsibility to solve it. The courts attack the dilemma on all fronts. The restrictive interpretation has not shifted – the dilemma notwithstanding.

V. AN ASSESSMENT: ARE THE RESTRICTIVE RULES JUSTIFIED?

For balance and context, it is worth separating this final substantive Part in three sections. The first gives a bird's eye view of what legitimate purposes the admissibility criteria for direct actions could serve. This is an important discussion which is to some extent muted in the existing literature. The second dismisses the courts' restrictive position by refuting the fundamental assumption and points out the flaws in the buttressing justifications. The final fleshes out some of the benefits that more relaxed standing rules could bring.

I. A Bird's Eye View of the Justifications of the Admissibility Criteria for Direct Actions

One might get the impression that *any* limit on direct challenges – regardless of merit or the extent to which the claimant is affected by the contested measure – is to be censured as an affront to the principle of effective judicial review. That is not my contention. Critiques of the narrow standing rules, like the present one, cannot be blind to the existence of indirect enforcement provided for in the Treaty. Indirect challenges have been used to challenge, and, ultimately, invalidate unlawful EU norms.¹⁷⁹ The interplay between Art 263(4) and Art 267 is a crucial part of the legal architecture of the Union. The underlying purpose of setting certain thresholds to overcome in order to challenge a provision of EU law direct can, if balanced properly, serve legitimate and wholly commendable ends – both from the perspective of the CJEU and from the perspective of litigants.

From the perspective of the CJEU, standing may act as a useful triage mechanism. If a party is not sufficiently affected by a contested norm they will not be able to challenge it directly. They will, first, have to mount a challenge in domestic courts, and this dispute will only be referred to the CJEU under Art 267 if it sufficiently meritorious. The wheat is referred to the CJEU and the chaff remains on the threshing floors of national courts. Thus, Art 267 and Art 263(4), working together, can provide a guarantee that judicial time is not wasted on fruitless or otherwise meritless challenges. The practical benefits of this are evident, but it must not be forgotten that benefits also connect, more fundamentally, to the proper administration of justice.¹⁸⁰ *From the perspective of litigants* who are not sufficiently affected by a measure to mount a direct challenge, indirect enforcement nonetheless

¹⁷⁹ See, for example, Case C-362/14, ECLI:EU:C:2015:650, *Schrems v Data Protection Commissioner*; Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238, *Digital Rights Ireland v Minister for Communications*; Case C-333/07, ECLI:EU:C:2008:764, *Société Régie Networks v Direction de contrôle fiscal Rhône-Alpes Bourgogne*.

¹⁸⁰ Efficiency and proportionality have clear roles in the proper administration of justice. One might take the example of England and Wales. The Civil Procedure Rules, Statutory Instrument No. 3132 of 1998, state that dealing with a case justly includes, so far as is practicable, dealing with the case in ways which are proportionate to the importance of the case and to the complexity of the issues (Part 1.1(2)(c)(ii) and (iii)).

allows them to challenge the contested norm. Such parties, not meeting the criteria for direct challenge, are offered a second bite at the cherry in the form of indirect enforcement. The price they pay for this bite, justified by the need to ensure the merit of their challenge, is the need to bring proceedings in domestic courts.

Thus, indirect enforcement *can* ensure that a balance is preserved between, on the one hand, an individual's right of access to justice and, on the other, the proper administration of justice. On the one hand, litigants are not locked out simply because they are not sufficiently affected by a provision of EU law; they are granted a second opportunity in the form of indirect challenge. On the other, the court has the benefit of a guarantee that the issues for their consideration are, indeed, worth their consideration. Its time is not dissipated on unworthy disputes.

That said, this is a delicate system. The admissibility criteria must be calibrated to ensure a fair balance between these two desiderata. Too expansive, and the filtering mechanism in Art 267 may not function properly as a filter, as too many litigants will avoid the reference procedure and instead bring their claims directly. This could well result in an inundation of cases without the guarantees that they are worth the courts' time. This would be to the peril of the proper administration of justice. Too narrow, however, and national proceedings may become unprincipled burdens imposed on almost all of litigants – the argument that they are fair prices given that the litigants are not sufficiently affected by the contested norm no longer holds true. Too many claimants are forced to engage in lengthy and otherwise unjustified national proceedings, and their right to effective judicial protection is left without practical meaning.

Most importantly, it must be shown that the present position maintains this equilibrium. It cannot be assumed that it does. The courts' present approach, however, seems to point, again and again, to notions like the completeness of the system of legal remedies without actually showing how or why it is indeed complete. Most of the conclusions reached by the courts in relation to the right to effective judicial protection are simply expressed by reference to a common mantra, rather than properly reasoned and explained. However, the

completeness of the Treaties must be proved, not supposed; that parties are provided with effective judicial protection is to be substantiated and not simply stated; and the fundamental assumptions and the buttressing justifications are to be reasoned through and not simply reiterated.

On closer inspection, it is, in fact, clear that the admissibility criteria are far too restrictive to even come close to the balanced system fleshed out above. The criteria are overwhelmingly skewed in favour indirect enforcement. They reflect a blasé assumption that indirect enforcement, entangling the vast majority of claimants in wild goose chases before national courts, is an adequate substitute for direct actions. When this assumption – the fabric of the restrictive rules – is examined closer it is clear that it is untenable both in practice and in principle. Indirect challenges pose clear practical disadvantages in relation to direct challenges, and this would be readily perceived if the EU courts applied the same rigour in applying the principle of effectiveness it would expect of national courts. The three arguments that are woven into this are equally thin, and fray on closer inspection. They evade rather than justify the restrictiveness of the admissibility criteria. They are loose ends which, when tugged on, reveal a warped system of legal remedies, not a complete one. The acceptability of the present position, as well as the desirability of narrow standing rules in general, then quickly unravels.

2. Is the Present Position Justified?

For clarity, it is worth dividing this section to first assess the courts' fundamental assumption, and then proceed to comment on the three buttressing justifications.

A. The Fundamental Assumption

Indirect enforcement is not an adequate substitute for direct enforcement, either on a practical level or in terms of the principle of effective judicial protection.

a. Practical Equivalence?

First, there is no guarantee that a national court will refer a challenge to domestic provisions to the CJEU.¹⁸¹ Although the EU courts maintain that a reference is required whenever the challenge is well founded,¹⁸² this still involves an element of speculation as far as the individual litigant is concerned. Moreover, it is not clear that a party would have any straightforward or acceptable legal recourse should the national authorities fail to make a reference under Art 267.¹⁸³

Second, even if the national court does indeed refer the matter to the CJEU, it is neither guaranteed that *all* the challenges by the litigant will be referred, nor that they will be referred as the claimant framed those challenges.¹⁸⁴ In any case, the CJEU is free to reformulate the questions as it sees fit, and it not bound to answer the questions by reference to the tenor of national proceedings.¹⁸⁵ The overall effect is that the party cannot meaningfully be said to be challenging the provision in question; it surrenders its case to national courts and the vagaries of the Art 267 procedure.

Third, there are considerable drawbacks in both the domestic proceedings and the need to refer the case to the CJEU. Concerning the first, the party cannot achieve the desired result in national proceedings, given that national courts do not have the power to strike down the offending provision of EU

¹⁸¹ Morten Broberg and Niels Feuger, *Preliminary References to the European Court of Justice* (OUP, 2010), Chapter 6.

¹⁸² See, for example, *Inuit* fn 12, [96], citing Case C-344/04, ECLI:EU:C:2006:10, *IATA and ELFAA*, [27] - [30]; *T and L*, fn 12, [48]; *European Union Copper Task Force*, fn 46, [57].

¹⁸³ Roberto Mastroianni and Andrea Pezza, 'Striking the Right Balance: Limits on the Rights to Bring an Action under Article 263(4) of the Treaty on the Functioning of the European Union' (2015) *American University International Law Review* 743; Broberg and Feuger, fn 181, 265 – 272 (noting that state liability for failure to refer would only realistically be triggered when it could be shown the court acted in bad faith).

¹⁸⁴ Broberg and Feuger, fn 181, 295 ('a national court that contemplates making a preliminary reference is not required to consult the parties to the proceedings on the questions that it considers referring').

¹⁸⁵ Van Malleghem and Baeten, fn 115, 1215.

law.¹⁸⁶ Moreover, the party in question is limited to remedies only in respect of the Member State where they bring proceedings, which may offer insufficient protection in the many cases that involve an EU-wide geographic scope.¹⁸⁷ Concerning the need to refer the case to the CJEU, there are clear procedural disadvantages in referring the matter to the CJEU, and the party has to suffer the length – on average 15 months – and cost associated with such a referral.¹⁸⁸

Finally, at the level of principle, the reference procedure under Art 267 is radically different from annulment actions before EU courts. The latter offer a forum to hear an individual litigant's claims that a contested norm is unlawful and provides a remedy to address that complaint if it proves to be well founded. The former is, however, a mechanism designed to ensure the uniform application and interpretation of EU law. It is not possible to simply replace a remedial scheme with a co-operative mechanism whose purpose is to ensure the consistent interpretation of EU law.¹⁸⁹

b. Effective Judicial Protection?

It is difficult to square the EU courts' attitude to effective judicial protection in their own courts in relation to indirect challenges, on the one hand, with its application of the principle in national courts, on the other. The CJEU has masterfully relied on effective judicial protection as a keystone of the EU legal order to ensure the uniform enforcement of EU law. Many domestic

¹⁸⁶ Case C-314/85, ECLI:EU:C:1987:452, *Foto-Frost v Hauptzollamt Lübeck-Ost*; Van Malleghem and Baeten, *ibid*, 1214; Cornelia Koch, 'Locus Standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy' 2005 ELR 511, 515.

¹⁸⁷ Mastroianni and Pezza, fn 183.

¹⁸⁸ See CJEU Press Release, 'Statistics concerning judicial activity in 2014' (<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-03/cp150027en.pdf>, retrieved 12th April 2016); Van Malleghem and Baeten, fn 115, 1215; Mastroianni and Pezza, fn 183.

¹⁸⁹ Biernat, fn 14, 27-28; Craig, fn 15, 502; Broberg and Feuger, fn 181, 279 ('The preliminary reference procedure does not as such constitute a dispute resolution procedure; rather it is a non-contentious stage in the procedure before the national court. Article [267] does not provide a judicial remedy for the parties to the main proceedings.').

norms have met their end on the EU guillotine of effectiveness, whether they be constitutional understandings on the provision of legal aid¹⁹⁰, or customary limits on the granting of injunctions.¹⁹¹ But its blade seems far less sharp, and its executioners far more squeamish, when it comes to examining the effectiveness of indirect challenges.

When claimants argue that the restrictive standing provisions are inconsistent with the principle of judicial protection, the claims are tersely dismissed. In *Telefónica*, for example the court dedicates only three substantive paragraphs to the claim that their right to judicial protection was violated. The first notes that the Union is founded on the rule of law, the second states that the Treaties provide a complete system of remedies and the third points disappointed litigants in the direction of the Art 267 preliminary reference procedure.¹⁹² The analysis goes no further. The mere fact that indirect challenges *exist* seems to be in and of itself sufficient to satisfy the principle of effectiveness.

Compare this totemic consideration of effectiveness with the searching inquiry the CJEU would expect of national courts when they examine whether domestic remedies satisfy the requirement of effectiveness. *Levez* provides an excellent contrast.¹⁹³ At issue, amongst other things, was the application of a two-year limitation period for sex discrimination claims. The claimant, duped by her employer as to the salary of her male counterparts, fell outside this limitation period. Her right of action in the employment tribunal was thus time-barred, and she was left with the possibility of pursuing an action in fraud at common law in the County Court. The national court referred the issue to the CJEU, asking whether this satisfied the principle of effectiveness.

¹⁹⁰ Case C-279/09, ECLI:EU:C:2010:811, *DEB Deutsche Energiehandels v Bundesrepublik Deutschland*.

¹⁹¹ Case C-213/89, ECLI:EU:C:1990:25, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others*.

¹⁹² *Telefónica*, fn 12, [56], [57], [59].

¹⁹³ Case C-326/96, ECLI:EU:C:1998:577, *Levez v Jennings*.

The CJEU directed the national courts were required to consider whether the enforcement of her rights in the County Court would incur 'additional costs and delay' in comparison with the simpler procedure before the employment tribunal, and take account of 'special features of the procedure before national courts'.¹⁹⁴ Clearly, the mere fact that an alternative procedure in the County Court *existed* was not sufficient to satisfy the principle of judicial protection.

The CJEU's restrictive approach to standing rules would clearly not survive the scrutiny it required of the domestic courts in *Levez*. According to the CJEU's own standards, simply pointing to the existence of indirect actions is insufficient. It would have to consider the additional costs and delay of such actions. It would have to note their special features, like the inability to quash the contested norm in national courts, or the fact that those national courts could not grant EU-wide interim measures. Trotting out, time and time again, blithe references to the abstract completeness of the Treaties and the rule of law would fall far short of the searching inquiry the CJEU would expect of national courts. Against this background, it is very difficult to accept the courts' conclusion that the principle of effective judicial protection is satisfied by its restrictive interpretation of the standing rules.

B. Denying the Scope of the Dilemma

As has been seen, the courts have limited the purposes of the third head to plugging the dilemma, and has maintained that further extensions beyond this are not required in light of the obligations on domestic bodies. However, that the dilemma has not been laid to rest by the courts' interpretation of the third head. It continues to haunt the jurisprudence.

First, the dilemma still exists in respect of legislative acts, which cannot be challenged under the third head. This is of concern. For example, a measure restricting fish net mesh sizes could be of a legislative nature. It is also unlikely to require implementing measures.¹⁹⁵ In such a case, a litigant would have to breach the restriction to challenge it.

¹⁹⁴ *ibid*, [51] and [44].

¹⁹⁵ See, for example, *Jégo-Quéré*, fn 131.

Second, the dilemma still prevails where 'implementing measures' are, in the eyes of national jurisdictions, mere formalities that cannot be challenged in domestic courts. *T and L* is a good illustration. Unlike the field of customs duties where the EU Customs Code provides statutory routes of appeal, there was no EU-wide remedial scheme that would have granted redress in *T and L*. Moreover, it did not seem that the Portuguese legal system would have allowed them to challenge the granting of certificates unless the individual certificate was *ultra vires* the national authority's power. This was not the case.¹⁹⁶ As was accepted by the General Court, and the Commission, the claimants could not challenge any of the implementing measures before the national courts.¹⁹⁷ However, their claim was dismissed as inadmissible – the lack of effective judicial protection notwithstanding.

The courts would have to accept that this falls short of the principle of effective judicial protection.¹⁹⁸ Yet, of course, the courts would be quick to respond that Art 263(4) could not accommodate a residual head of standing in Art 263(4) for those litigants who could not challenge a norm in domestic courts. But this does not change the fact that the courts' interpretation of the third head – designed, according to its own jurisprudence, to plug the dilemma – neither plugs that dilemma nor guarantees effective judicial protection when that dilemma arises. The standing rules thus fall short not only of promises of effective judicial protection, but also assertions that the pre-Lisbon gap in the standing rules has been plugged by the third head.

The dilemma is alive and kicking. It still rears its ugly head. And the CJEU's unwillingness to broaden the standing rules in response is of considerable concern.

C. Disclaiming the Power to Solve the Dilemma

The courts' disclaimer is disingenuous. As to the institutional argument, there is, doubtlessly, force to the contention that the courts cannot conduct

¹⁹⁶ See also Opinion of Advocate General Cruz Villalón, fn 32 [13].

¹⁹⁷ Case T-279/11, ECLI:EU:T:2013:299, *T & L Sugars and Sidul Açúcares v Commission*, [63] and [65].

¹⁹⁸ See, *Unibet* fn 157; Opinion of Advocate General Kokott in *Inuit* fn 67, [119].

a systematic review of whether a party is caught on the horns of dilemma.¹⁹⁹ But this is not the only way to relax the rigour of the standing rules. As has been shown throughout the article, it would be entirely possible to mitigate the incidence of the dilemma by, for example, finding that regulatory acts could encompass acts of a legislative nature or adopting a more substantive analysis of what constitutes an implementing measure. This would save both litigants who would have fallen prey to the dilemma mentioned in the section above. Namely, Jégo-Quére could challenge the legislative measure as a regulatory act within the meaning of Art 263(4), and T and L could have argued that the contested scheme was sufficiently operational such that it did not entail implementing measures. All this could readily be accomplished without transgressing the bounds of the CJEU's institutional capacity.

The *ultra vires* argument is equally unconvincing. At a general level, this fastidious concern for textual legalism is out of character for the CJEU. The courts' landmark cases are a series of teleological interpretations designed to secure the effective and uniform application of EU law.²⁰⁰ Yet one does not need to revisit *Costa*²⁰¹ and *Francovich*²⁰² and the other cases in the CJEU's Hall of Fame to highlight this inconsistency. The CJEU has adopted broad readings of the very standing provision it now steadfastly refuses to expand.

In *Les Verts*, the French Green party sought to challenge a Parliament measure that governed claiming back funds expended on political campaigning. Art 173(1) CEE at the time provided for challenges to measures adopted by the Council and Commission, but not those of the Parliament, on a similar basis to Art 230(4) EC. Based on the text, therefore, the Greens did not have standing as the contested measure was adopted by Parliament, and not the Commission or the Council. However, the CJEU held the action

¹⁹⁹ See, for example, Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores*, fn 70.

²⁰⁰ See, amongst many sources, Peter Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) *Columbia Law Review* 628, 664 who refers to this approach as a 'maximalist interpretation' of the CJEU's powers.

²⁰¹ Case C-6/64, ECLI:EU:C:1964:66, *Costa v ENEL*.

²⁰² Case C-479/93, ECLI:EU:C:1995:372, *Francovich v Italy*.

admissible. The inability to challenge acts of Parliament was 'contrary both to the spirit of the Treaty (...) and to its system'. Consequently, the CJEU allowed the challenge to the measure adopted by the Parliament, in spite of the Treaty text. The Opinion of Advocate General Mancini, who reached the same conclusion as the CJEU, sheds light on this conclusion.²⁰³ He noted that, interpreted literally, Article 173 would render the action inadmissible, but nonetheless started from the position that interpretation granting the greatest measure of protection should be preferred.

Thus, the court was not constrained by the literal meaning of the text, but endorsed a far-reaching interpretation that assured the concept of legality in the Community system. The objections to admissibility melted away, despite the clear text of the article, in the furnace of teleological interpretation. Against this backdrop, it is difficult to have sympathy for the courts' pleas that they are powerless to expand the admissibility criteria in Art 263(4) – the teleological approach in *Les Verts* could easily allow for expansion of the present approach.

In any case it should be borne in mind that the result in *Les Verts* was even more drastic than what would be required to relax the rigour of the standing rules. In that case, the CJEU read in 'Parliament' into Art 173 EEC. In so doing, it deviated from *the Treaty text itself*. In the present context, all that is required is to adopt a more lenient *interpretation* of the Treaty text. The interpretation of the requirements in Art 263(4) is the product of case-law. It is not ineluctably ordained by the Treaties.²⁰⁴ It would be entirely possible for the CJEU to re-interpret those provisions in a more lax fashion without straying beyond the confines of the Lisbon Treaty.²⁰⁵ A lack of jurisdiction does not seem to be the issue – it seems to be rather a lack of will.

²⁰³ Case 294/83, ECLI:EU:C:1985:483, *Les Verts v Parliament*, Opinion of Advocate General Mancini.

²⁰⁴ Craig, fn 15, 505; Biernat, fn 14, p. 41; Kornezov, 120. Note that Advocate General Jacobs in his Opinion for the *Unión de Pequeños Agricultores* case, fn 70, did not jettison the text of Art 263(4), he considered that his expansive interpretation of direct and individual concern could be accommodated within its wording.

²⁰⁵ Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, Criminal proceedings against Bernard Keck and Daniel Mithouard, [16].

D. Deflecting Responsibility for Solving the Dilemma

The courts deflect responsibility for the dilemma by pointing to Art 19(1) TEU. The argument is perplexing in that it proves too much and too little.

The argument *proves too little* in that it not clear how the humble sentence added to Art 19(1) requires the Member States to shoulder the responsibility to solve the dilemma. First, that provision simply imposes a general obligation on Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. It is not clear how this general obligation on Member States designates them as the primary sources of the solution to the dilemma. Second, it is not clear how Art 19(1) assists national jurisdictions to solve the dilemma. If there are no national procedural rules that can be relied on to bring one's challenge to the national courts, it is unlikely that they could simply conjure up access to the courts on the basis of Art 19(1) alone. As was explained in *Inuit*, that article does not create any new remedies at the national level to ensure the observance of EU law.²⁰⁶ It could not be used to found a freestanding right of access to the courts. If there are indeed national procedural rules, but they explicitly preclude access to the courts on the facts of a given case, it is also questionable to what extent co-operative obligations in Art 19(1) could require domestic courts to disregard them.²⁰⁷ This would be supported by the court's approach to the principle of harmonious interpretation described from Art 4(3) TEU²⁰⁸, in which national judiciatures are required to interpret domestic law in accordance with EU law, but not to the extent of foisting a

²⁰⁶ See, *Inuit*, fn 12, [103] 'neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law';

²⁰⁷ Opinion of Advocate General Wathelet in Case C-132/12 P, ECLI:EU:C:2013:335, *Stichting Woonpunt and others v Commission* 'the duty of genuine cooperation cannot extend so far as to require the Member States to create access to national courts where no State measure is at issue'.

²⁰⁸ Indeed, as can be seen in *Jégo Quéré*, this deflection argument was initially founded on Art 10 EC, the predecessor to Art 4(3) TEU. See *Jégo Quéré*, fn 146, [32].

contra legem interpretation on it.²⁰⁹ Overall, it is surely a tall order to locate a universal solution, despite the idiosyncrasies of 28 domestic legal systems and the factual permutations of an individual case, in a single line of Art 19(1).

It also proves *too much*. If the solution to the standing conundrum can be found by pointing to access to national courts, there would not have been any need to amend Art 263(4) in the first place. The obligation to provide effective remedies for EU law, now enshrined in Art 19(1) TEU, clearly existed prior to the Lisbon Treaty.²¹⁰ Its insertion into the Lisbon Treaty was understood as being a codification of existing case law.²¹¹ If we are to take the courts' reliance on Art 19(1) at face value, we must also accept that there was no problem with the pre-Lisbon position – in blatant contrast to the impetus leading to the Lisbon reforms.

3. *The Desirability of Broader Admissibility Criteria*

Many arguments can be found in favour of broadening the EU standing rules. Three may be touched on here.

From the perspective of *legal certainty*, the narrowness of the third head means that many claimants must navigate the unpredictable waters of the second head.²¹² To wit, the claimants in the *Woonpunt* case failed in the

²⁰⁹ Case C-106/89, ECLI:EU:C:1990:395, *Marleasing v La Comercial Internacional de Alimentacion*; Case C-282/10, ECLI:EU:C:2012:33, *Dominguez v Centre informatique du Centre Ouest Atlantique and Others*.

²¹⁰ See, for example, Case C-222/84, ECLI:EU:C:1986:206, *Johnson v Chief Constable of the Royal Ulster Constabulary*.

²¹¹ René Barents, 'The Court of Justice after the Treaty of Lisbon' (2010) CMLR 709, 725.

²¹² On direct concern, see Case 11/82, ECLI:EU:C:1985:18, *Piraiki-Patraiki and Others v Commission* and Case C-386/96 P, ECLI:EU:C:1998:193, *Dreyfus v Commission* which were distinguished on their facts by the General Court in Case T-453/10, ECLI:EU:T:2012:106, *Northern Ireland Department of Agriculture and Rural Development v European Commission*, [60] to [65], and labelled 'exceptional' on appeal by the CJEU on appeal in Case C-248/12 P, ECLI:EU:C:2014:137, at [26]; compare, also, *Piraiki-Patraiki* (above) with Case C-222/83, ECLI:EU:C:1984:266, *Municipality of Differdange v Commission*; See also Albertina Albors-Lorens, 'Sealing the fate of private parties in annulment proceedings? The General Court and the New Standing

General Court yet succeeded on appeal because of the difference of views between the two courts on whether they fell within a 'closed group' of operators.²¹³ The claim *BP Products* was admissible because their data was used in the imposition of anti-dumping duties²¹⁴; the challenge in *Bricmate* failed because this was not the case.²¹⁵ As evidenced by *Beul* and *ABZ*, standing may still turn on whether one can claim one's position is sufficiently proximate to the lucky claimants in *Codorniu*.²¹⁶

This murky jurisprudence could easily be avoided if the courts were to allow for more liberal standing rules and dispose of cases on their merits. It could offer considerably more certainty than present position, avoid the need for recourse to *ad hoc* sleights-of-hand, and lead to a more coherent standing scheme in EU law.

Institutionally, there are concerns with the approach endorsed by the courts. Direct challenges are heard, first, before the General Court, with the possibility of appeal to the CJEU on a point of law only.²¹⁷ Preliminary references, however, are referred directly to the CJEU. Given that the CJEU claims it faces an unmanageable increase in caseload and that the General Court has recently been doubled in size, it makes sense for the standing rules to be liberalised.²¹⁸ More preliminarily references which would otherwise

test in Article 263(4)' (2012) CLJ 52, 53 'the closed category test was not consistently applied... a cluster of satellite interpretations [of individual concern] soon appeared'. On individual concern, compare *Codorniu*, fn 14 and the courts' attempts to distinguish it in subsequent cases e.g. Case T-640/14, ECLI:EU:T:2015:907, *Carsten Beul v Parliament and Council*; Case T-560/14, ECLI:EU:T:2015:314, *ABZ Aardbeien Uit Zaad v Parliament and Council*. Note that Case T-559/14, ECLI:EU:T:2015:315 *Ackermann Saatzaucht GmbH & Co. KG*, see fn 142-143.

²¹³ *Woonpunt* fn 32, [62]; T-203/10, ECLI:EU:T:2011:766, *Woonpunt and Others v Commission*, [38].

²¹⁴ *BP Products*, fn 59.

²¹⁵ *Bricmate*, fn 48.

²¹⁶ See fn 144.

²¹⁷ Art 256 TFEU; Protocol (No 3) on the Statute of the Court of Justice of The European Union, OJ C 83/210, Art 56.

²¹⁸ See, for context, and also criticism, Franklin Dehousse and Benedetta Marsicola, 'The Reform of the EU Courts: Abandoning the Management Approach by

have to be ruled on by the CJEU's consideration will be dealt with as direct challenges in front of the General Court. This avoids the situation where the CJEU is beleaguered by preliminary references, some of which may well be individualised disputes disguised as point of general importance of EU law²¹⁹, which would otherwise have been heard as direct challenges in front of the General Court. It would be far preferable for these to be challenged before the General Court, and then, if necessary, make their way to the CJEU for determination on a point of law. This could avoid the bottlenecking of disputes in the CJEU, and ensure that cases are dealt with by the court most appropriate to their importance.

Politically, the present position is unsatisfactory in that it undermines the democratic credentials of the Union.²²⁰ The ability of parties to subject norms to scrutiny by challenging them in the courts is an integral element of any democratic system.²²¹ The argument has been often traversed in the literature and will not be rehearsed here, but it is clear that these challenges are key to, amongst other values, accountability, by keeping those who promulgate the norms in check, legitimacy, by ensuring the proper application of EU law, and participation, by permitting the citizenry to

Doubling the General Court,' Egmont Paper 83, March 2016 retrieved here <http://egmontinstitute.be/wp-content/uploads/2016/03/ep83.pdf.pdf>, 28th June 2016.

²¹⁹ Craig, fn 15, 503-4; see, for an example of such a trivial case, C-338/95, ECLI:EU:C:1997:552, *Wiener* on whether a given garment intended for use at night, but with a cut such as to allow it to also be used for leisure wear, was a nightdress or a dress of synthetic textile fibres.

²²⁰ See Case T-541/10, ECLI:EU:T:2012:626, *ADEDY*, on challenges to certain aspects of the EU response to the Greek debt crisis where, at [96], the General Court states 'the applicants' allegation that the substance of the action must be examined, since the defects in the contested acts are so serious that they undermine public trust in European Union bodies must be rejected. The European Union courts cannot ignore the rules laid down in Article 263 TFEU for admissibility of actions for annulment.'

²²¹ Paul Craig, 'Accountability and Judicial Review in the UK and the EU: Central Precepts' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP, 2013); See also Harry Woolf and Others, *De Smith's Judicial Review*, 7th Ed (2015, Sweet and Maxwell) at 2-005; Opinion of Advocate General Kokott, in *Inuit*, fn 69, [21].

engage with the norms that bind them.²²² Liberalising standing could have positive consequences given the concerns of 'democratic deficit' in the Union.²²³

VI. CONCLUSION

So why is standing still so difficult to satisfy? On a purely textual level, the answer is that the courts have interpreted the admissibility criteria in the third head very restrictively. The notion of implementing measures is incredibly broad, and it is kept rigidly separate from the criterion of direct concern. This prevents a more substantive interpretation of implementing measures. As a result, it is often more difficult to satisfy this criterion than the notoriously high standard of 'individual concern'. It also limits the kinds of acts that can be challenged, and excludes entire areas from the potentially liberalising effects of the third head. Likewise, the criterion of 'regulatory measures' is given a narrow meaning. This adds yet another element of casuistry to the EU standing rules, and makes legislative acts just as difficult to challenge as they were prior to the Lisbon reforms – if not practically impossible.

On a doctrinal level, the courts assume that indirect challenges provide effective judicial protection such that it is not necessary to expand the standing rules in Art 263(4). When confronted with the plight of litigants who would have to break the law in order to challenge it, the courts deny the scope of this dilemma, disclaim they have the power to solve it, and deflect responsibility for its solution.

²²² Indeed, the importance of judicial review is recognised within the EU system itself. See, for example, *Les Verts*, fn 90, [25] on the role of standing in ensuring bodies remain within the confines of their powers.

²²³ Biernat, fn 14, 16, see also Anthony Arnall, *The European Union and its Court of Justice*, (OUP, 1999), p. 47; Carol Harlow, 'Toward a Theory of Access for the European Court of Justice' (1992) *Yearbook of European Law* 213, 248; Mariolina Eliantonio and Nelly Stratieva 'From Plaumann, through UPA and Jégo-Quééré, to the Lisbon Treaty: The Locus Standi of Private Applicants under Art 263(4) EC Through a Political Lens' *Maastricht Faculty of Law Paper* 2009/13; Albertina Albors-Lorens, 'Remedies against the EU institutions after Lisbon: an era of opportunity?' (2012) *CLJ* 507, 508.

This goes a long way in explaining why, when faced with the possibility of relaxing standing rules, the courts continue to tow a restrictive line. As far as they are concerned, the Treaties offer a complete system of legal remedies, any issues with this system are to be directed to the Member State level. It is up to national bodies to provide access to domestic courts to challenge EU norms. If they do so, the dilemma is to their mind solved and claimants would enjoy full vindication of their right to effective judicial protection.

Ultimately, however, the courts' fundamental assumption is flawed and its three supporting arguments are meagre. Indirect challenges are manifestly inadequate substitutes for direct challenges. There is no point *denying* the dilemma. It has not been plugged by the courts' interpretation of the third head. It continues to rear its ugly head in cases like *T and L*. It is a beast that still plagues this area, and one to which effective judicial protection continues to fall prey. It is disingenuous to *disclaim* responsibility for the dilemma. The courts' institutional arguments show an intransigent refusal to consider the ways in which they could permissibly relax the standing rules, and the jurisdictional arguments are smokescreens for lack of will to do so. It is inappropriate to *deflect* responsibility. It assumes, contrary to common sense and principle, that the solution to the deficiencies in this area lies at the national level. The courts simply pass the buck to Member States, and, in so doing, show contemptuous disregard of the exclusive role they play in the interpretation of admissibility criteria in Art 263(4). This judicial abdication continues to deny individuals their right to effective judicial protection, and, in turn, seriously undermines the legitimacy of the Union system of judicial review.

Consistency is evidently not a value to be deprecated, least of all in law. But in the context of standing which is not only recognised as incoherent from within the EU judicature, but which has also been the subject of Treaty amendment, it is clearly problematic. The addition of the third head, beyond the lucky plight of the four cases examined above, has not taken us considerably further from when Plaumann imported its clementines in the

early 1960s.²²⁴ It is not only the admissibility criteria for direct actions that remain difficult to satisfy; the courts have refused to shift, in any significant manner, their *approach* to standing. Despite the dissenting threnodies from Advocates General, the Court of First Instance and academic literature, the courts sadly peddle the same arguments advanced prior to the Lisbon reform. This continues to restrict the possibility of direct challenge before the EU judicature as narrowly as possible.

The courts have not budged. They have dug their heels in and stood their ground. Shakespeare's porter might rejoice, but those who expect the courts to make good on their promises of effective judicial protection; those who believe the rule of law must actually be applied and not just referenced in passing; and those who seek from the Treaties a truly complete system of legal remedies are left thoroughly disappointed.

²²⁴ Note that the argument was already being made before Lisbon reforms, see Anthony Arnall, *The Action for Annulment: A Case of Double Standards?*, in David O'Keefe (ed) *Judicial Review in European Union Law* (Wolters Kluwer, 2001), 189 'What may have been appropriate in the 1960s and 1970s is no longer so at the beginning of the new millennium', quoted Xavier Lewis 'Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should it be Fixed?' (2006) *Fordham International Law Journal* 1496, 1498.