Complete EU Law: Text, Cases, and Materials (5th edn)
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7. Challenging EU action or inaction

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Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter discusses the role of the Court of Justice in ensuring that the rule of law in the EU is observed both by Member States and EU Institutions. The chapter examines infringement actions under Article 258 TFEU, and financial penalties for Member States under Article 260 TFEU. The discussion of judicial review considers acts that may be challenged; who can bring an action under Article 263 TFEU; permissible applicants under Article 263 TFEU; non-privileged applicants; reforming the criteria for *locus standi* for non-privileged applicants. The chapter also explains the grounds for annulment; the effect of annulment; the plea of illegality; failure to act; and the relationship between Article 263 TFEU and Article 265 TFEU.

Keywords: EU law, Article 258 TFEU, Article 260 TFEU, Article 263 TFEU, permissible applicants, non-privileged applicants, locus standi, annulment, failure to act, illegality

Key Points

By the end of this chapter, you should be able to:

- understand the procedural and judicial stage of enforcement actions;
- explain what acts may be challenged and by whom for a direct action;
- be thoroughly familiar with the test of ‘direct and individual concern’;
- explain the effect of a successful action under Article 263 TFEU or Article 265 TFEU;
- identify the circumstances in which an action under Article 265 TFEU is likely to be successful; and
- identify the circumstances in which a plea of illegality under Article 277 TFEU may be made.

Introduction

The most significant power conferred on the institutions under the Treaty on the Functioning of the European Union (TFEU) is the power to legislate. The Commission is tasked as the 'guardian of the Treaties' to ensure that EU law has been implemented properly; in the event that a Member State fails to do so an enforcement action may be instigated by the Commission. To ensure that the institutions do not act beyond their powers and obligations that have been conferred on them by the Treaties, mechanisms have been embedded within the Treaty to allow for judicial review of legislation or an action by one of the institutions. This process of judicial review provides a mechanism for accountability by which actions of the EU institutions are subject to scrutiny by the Court of Justice and this, in turn, provides for judicial control over the political institutions of the European Union (EU).

An EU measure can be challenged on different grounds depending on the nature of the act and the party bringing the proceedings. Article 263 TFEU specifically deals with the review of the legality of a regulatory measure, for example alleging that the EU has done something that it should not have done.

Parties who can bring an action under Article 263 TFEU to challenge the measure include individuals and companies (private applicants), as well as the institutions themselves and the Member States. Although individuals and companies are entitled to challenge measures under this Article, their capacity to do so has been hampered by the wording of Article 263 TFEU and its interpretation by the Court of Justice, which has meant that only persons immediately concerned by the measure may challenge it. This test of 'direct and individual concern' involves a number of elements that combine to create a considerable hurdle for private applicants under Article 263 TFEU. The applicant in an action for judicial review is seeking an annulment of the measure adopted by an institution.

The partner to Article 263 TFEU is Article 265 TFEU, which may be relied on where there has been a failure to act by one of the institutions. This is far less commonly relied on than Article 263 TFEU, and there has been a particular difficulty in establishing whether it, or Article 263 TFEU, should be used to challenge a positive refusal to act. The third possible challenge to EU law is the so-called plea of illegality under Article 277 TFEU, whereby the Member States or institutions, not subject to time limitations, can question the legality of a general act.

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7.1 The Commission's supervisory role

One of the Commission's core roles according to the Treaty on European Union (TEU) is to supervise Member States' compliance with EU law. The general EU infringement procedure constitutes the Commission's main tool of enforcement. It consists of two distinct procedures stipulated in Articles 258 and 260 TFEU (which are discussed at 7.2), each with its own subject matter. The procedure established under Article 258 TFEU is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and that the conduct will be terminated.

The procedure provided for under Article 260 TFEU is designed to induce a defaulting Member State to comply with a judgment establishing a breach of obligations (i.e. repetitive infringements) and it has a much narrower ambit than Article 258 TFEU. The procedural construction thus distinguishes between compliance with Treaty obligations ('first order compliance') and compliance with judgments of the Treaty regime's dispute settlement body ('second order compliance'). The two procedures have, however, the same purpose: to ensure the effective application of EU law.

7.1.1 Article 258 TFEU: enforcement actions by the Commission

The Commission has a supervisory role that involves ensuring the correct implementation of EU law by Member States and taking enforcement proceedings where appropriate. For example, if a Member State has not transposed an EU Directive or where national rules have been applied, the Commission can bring an enforcement action against a Member State under Article 258 TFEU.

Both the Commission and a Member State (although this is rare) can bring an action under Article 258 TFEU before the Court of Justice. For the Commission, by initiating an action under this provision, it is fulfilling its primary task of 'guardian of the Treaty'.

Article 258 TFEU

> If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Having considered the facts of a dispute, if the Commission is of the opinion that a Member State has failed to fulfil an obligation that arises under the Treaties, it must contact the Member State about the alleged breach of the Treaty and offer the Member State an opportunity to submit any observations that it may have. If the response provided by the Member State is deemed, by the Commission, not to be a satisfactory explanation, then the Commission must formally deliver a reasoned opinion to the Member State, which unequivocally
p. 274 requests that ↵ the Member State fulfils its obligations within a specified time—usually two months. In circumstances in which the Member State does not comply with the Commission's request, the Commission may refer the matter to the Court of Justice.

The Commission can set the time period because it may depend on the nature of the violation. This was acknowledged by the Court of Justice in Case 7/71 *Commission v France* [1971] ECR 1003, in which it stated that, 'by reason of its nature and its purpose, this procedure involves a power on the part of the Commission to

consider the most appropriate means and time-limits for the purposes of putting an end to any contravention of the Treaty'. Failure to comply with the reasoned opinion will result in the matter being brought before the Court of Justice.

The Commission retains discretion as to whether to refer the matter to the Court and, in reaching its decision, will consider the seriousness of the breach and whether any further remedial action on the part of the Member State would be sufficient.

In Case 7/71 *Commission v France* [1971] ECR 1003, Advocate General Roemer suggested the existence of a number of situations in which the Commission might choose not to proceed with an Article 258 TFEU action —namely:

- where an amicable settlement can be achieved if the formal procedure is not invoked;
- where the effects of the violation are minor;
- where the Article 258 TFEU action might aggravate a sensitive political situation and the violation concerns matters of secondary importance; and
- where the EU provision is likely to be altered in the near future.

The time limit specified by the Commission for compliance must have passed and the Member State must have failed to comply. The judicial stage permits the Commission to bring a defaulting Member State before the Court of Justice. Where the Member States have defended their position, the Court of Justice has not been sympathetic and so Member States have rarely succeeded with their defence.

Where one Member State holds the opinion that another Member State has failed to fulfil an obligation arising under the Treaty, it must first bring the matter before the Commission. The Commission will then follow a process that gives each State an opportunity to submit its own views on the dispute, including comments on the observations of the other Member State. The Commission must then deliver a reasoned opinion within three months from the date on which the matter was first formally brought to its attention. However, the absence of the reasoned opinion from the Commission may not prevent the complaining Member State from bringing the matter before the Court.

In circumstances in which one Member State commences an action against another Member State, it is important to note the requirements of Article 344 TFEU. This provides as follows.

Article 344 TFEU

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

p. 275 ↵ The reason for Article 344 TFEU is that it ensures a uniform application of the law by the Court of Justice and that all disputes concerning the application of the Treaty are determined solely by the Court of Justice.

The outstanding question that relates to the procedure within Article 258 TFEU is how the Commission can enforce a decision against a Member State when it fails to comply with a decision of the Court of Justice that a breach of EU law has been committed.

7.2 Article 260 TFEU: judicial remedies against the Member State

Article 258 TFEU is silent on the legal effect of the judgment of the Court. Article 260 TFEU provides further guidance.

Article 260 TFEU

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

   If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

   This procedure shall be without prejudice to Article 259.
3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

   If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

A finding by the Court of Justice under Article 260(1) TFEU is purely declaratory, but it gives rise to an independent obligation to rectify matters. This could involve a variety of actions, such as implementing a Directive and disapplying the national measure(s) that is incompatible with EU law. Where a Member State
p. 276 has failed to comply with the judgment of the ↵ Court, the Commission can bring further proceedings

under Article 260(2) TFEU and make a Recommendation relating to the financial sanction to be imposed on the Member State. Since this is a Recommendation, the Court of Justice can impose its own lump sum or penalty.

The sanction of a financial penalty against a Member State for failure to comply with a judgment of the Court was applied for the first time in July 2000 in Case C-387/97 *Commission v Greece* [2000] ECR I-5047. In this case, the Court of Justice held that Greece had failed to comply with a 1992 judgment in which the Court of Justice had held that Greece had failed to take the necessary measures for toxic and dangerous waste to be disposed of while ensuring that human health and the environment were protected, as required by two Directives of 1975 and 1978, which Greece should have applied from 1981. As a consequence of the failure of Greece to comply with the judgment, the Court of Justice imposed a penalty payment of €20,000 for each day the State delayed in complying with the 1992 judgment.

This judgment is significant because the purpose of the fine levied by the Court should not be considered only as a deterrent to other Member States, encouraging them to refrain from action that may call into question their obligations under the Treaties. The fine against a Member State is significant and should also be viewed as part of the overall principle of effective remedies against a Member State for any breach of EU law for which it may be responsible. This point has subsequently been developed by the Court through judgments in which it has focused on ensuring that an effective remedy is applied against a Member State. In doing so, the Court has the jurisdiction to impose a financial penalty that has not been suggested by the Commission.

The sanction under Article 260(2) TFEU provides for a lump sum *or* penalty, but, in consideration of the need for an *effective* remedy, the Court of Justice in Case C-304/02 *Commission v France* [2005] ECR I-6263 considered it could impose both a lump sum *and* a penalty.

Case C-304/02 *Commission v France* [2005] ECR I-6263

80. The procedure laid down in Article 228(2) EC [now Article 260(2) TFEU] has the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law [now EU law] is in fact applied. The measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective.

81. Application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it.

82. That being so, recourse to both types of penalty provided for in Article 228(2) EC is not precluded, in particular where the breach of obligations both has continued for a long period and is inclined to persist.

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83. This interpretation cannot be countered by reference to the use in Article 228(2) EC of the conjunction 'or' to link the financial penalties capable of being imposed. As the Commission and the Danish, Netherlands, Finnish and United Kingdom Governments have submitted, that conjunction may, linguistically, have an alternative or a cumulative sense and must therefore be read in the context in which it is used. In light of the objective pursued by Article 228 EC [now Article 260 TFEU], the conjunction 'or' in Article 228(2) EC must be understood as being used in a cumulative sense.

[...]

91. ... The procedure provided for in Article 228(2) EC is a special judicial procedure, peculiar to Community law, which cannot be equated with a civil procedure. The order imposing a penalty payment and/or a lump sum is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established. The financial penalties imposed must therefore be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct.

[...]

> 103. … while it is clear that a penalty payment is likely to encourage the defaulting Member State to put an end as soon as possible to the breach that has been established (Case C-278/01 *Commission v Spain* [[2003] ECR I-14141], paragraph 42), it should be remembered that the Commission's suggestions cannot bind the Court and are only a useful point of reference (Case C-387/97 *Commission v Greece* [[2000] ECR I-5047], paragraph 89). In exercising its discretion, it is for the Court to set the penalty payment so that it is appropriate to the circumstances and proportionate both to the breach that has been established and to the ability to pay of the Member State concerned (see, to this effect, Case C-387/97 *Commission v Greece*, paragraph 90, and Case C-278/01 *Commission v Spain*, paragraph 41).
>
> 104. In that light, and as the Commission has suggested in its communication of 28 February 1997, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations (Case C-387/97 *Commission v Greece*, paragraph 92).
>
> […]
>
> 113. … the French Republic should be ordered to pay to the Commission, into the account 'European Community own resources', a penalty payment of 182.5 × EUR 316 500, that is to say of EUR 57 761 250, for each period of six months from delivery of the present judgment at the end of which the judgment in Case C-64/88 *Commission v France* [[2005] ECR I-6263] has not yet been fully complied with.

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Imposition of a lump sum

> 114. In a situation such as that which is the subject of the present judgment, in light of the fact that the breach of obligations has persisted for a long period since the judgment which initially established it and of the public and private interests at issue, it is essential to order payment of a lump sum (see paragraph 81 of the present judgment).
>
> 115. The specific circumstances of the case are fairly assessed by setting the amount of the lump sum which the French Republic will have to pay at EUR 20 000 000.

The Court held that it is therefore possible to impose both types of penalty (periodic payment and lump sum) at the same time, in particular where the breach of obligations has both continued for a long period and is inclined to persist.

In its judgment, the Court of Justice found that the persistence of the infringement by France (in the form of the practice of offering undersized fish for sale below the minimum size laid down in EU legislation) and the absence of effective action by the national authorities were such as to seriously prejudice the EU objectives of conserving and managing fishery resources. According to the Court, the French authorities neglected to carry out controls that were effective, proportionate, and dissuasive, as required by EU rules, and were not carrying out a sufficient number of proceedings, leading to penalties that were effective, proportionate, and dissuasive.

In *Commission v Poland* (Case C-204/21 R) EU:C:2021:878, the Vice President of the CJEU ordered Poland to pay a daily penalty payment of EUR 1 million for failing to comply with interim measures ordered by the CJEU on 14 July 2021 in Case C-204/21 *Commission v Poland* ECLI:EU:C:2021:834, which relates to judicial independence. The Vice President considered that compliance with the interim measures order is necessary to avoid serious and irreparable harm to the legal order of the European Union and to the values on which the EU is founded, especially the rule of law.

The sum of EUR 1 million per day was considered necessary by the Vice President to strengthen the effectiveness of the interim measures imposed by the order of 14 July 2021 by providing for the imposition of a periodic penalty payment on Poland in order to deter that Member State from delaying bringing its conduct into line with that order. With respect to the amount of that periodic penalty payment, the Vice President emphasized, first of all, that the order of 14 July 2021, which Poland had refused to comply with, concerns interim measures, the compliance with which is necessary in order to avoid serious and irreparable harm to the legal order of the European Union. Moreover, failure by Poland to comply with the interim order, infringes the rights which individuals derive from EU law and the values, set out in Article 2 TEU, on which that Union is founded. In particular, the Vice President stated that this means compliance, by all Member States, with the rule of law.

Commission v Poland (Case C-204/21 R) EU:C:2021:878

> 33. In those circumstances, the Commission argues that it is necessary, in order to ensure the full effectiveness of the order of 14 July 2021, the effective application of EU law and compliance with the principles of the rule of law and the integrity of the EU legal order, to order the Republic of Poland to pay a daily penalty payment in an amount likely to encourage that Member State to give full effect as soon as possible to the interim measures set out in that order.

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7.2.1 Interim measures: Articles 278 and 279 TFEU

As part of the enforcement process, Article 278 TFEU allows the Court of Justice, in exceptional circumstances, to suspend an act that is contested in the case before it. In addition, Article 279 TFEU enables the Court to grant interim measures where this is considered necessary and where, under the Court's Rules of Procedure, this is considered necessary on grounds of urgency.

Article 278 TFEU provides as follows.

Article 278 TFEU

> Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

This is supplemented by Article 279 TFEU, which provides as follows.

Article 279 TFEU

> The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

The procedures within Articles 278 and 279 TFEU are rarely used. Intervention by the Court to grant an interim measure under Article 279 TFEU requires, following the judgment in Case C-76/08 *Commission v Malta* [2009] ECR I-8213, that there be a serious threat of harm to the applicant's interests and that these interests can be protected only through an interim measure. Thus the Court will need to be satisfied that there is a significant risk to the application of EU law before it can intervene.

7.3 Direct action: Article 263 TFEU

Article 263 TFEU

> The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.
>
> It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement
> p. 280 of ↵ an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.
>
> The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.
>
> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.
>
> Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.
>
> The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

There are a variety of factors that need to be addressed for a successful direct action challenge to a regulatory act that does not involve implementing measures, including:

- identifying the regulatory act that may be challenged;
- the *locus standi* (standing) of the applicant; and
- time limits.

7.4 Which acts may be challenged?

7.4.1 Acts of the legislative institutions

Article 263 TFEU permits challenges to be made to acts of:

- the Council, the Commission, and the European Central Bank (ECB), other than Recommendations and Opinions;
- the European Council and the European Parliament, insofar as those acts are intended to produce legal effects vis-à-vis third parties; and
- EU bodies, offices, or agencies of the EU intended to produce legal effects vis-à-vis third parties.

7.4.2 Acts with binding legal effects

p. 281 The only acts that are reviewable by the Court of Justice are those that have been adopted by the EU institutions and EU bodies, offices, or agencies of the EU. The wording of Article 263 ↵ TFEU provides guidance on the types of legislative act that are subject to judicial review; these include Regulations, Directives, or Decisions, because they are explicitly intended to have legal effects. Not all acts by the legislative institutions can be challenged, however, and Article 263 TFEU expressly excludes from judicial review Recommendations and Opinions because they do not produce legal effects.

In Case 60/81 *IBM Corporation v Commission* [1981] ECR 2639, the Court of Justice considered what constitutes a legal act for the purposes of judicial review. The Commission notified IBM that it had commenced competition proceedings against the company on the basis that it was potentially abusing its dominant position in the market. IBM was offered the opportunity to submit its response to the Commission's statement of objections. IBM sought to challenge the statement of objections and the decision to initiate the Commission Decision on the basis that, in IBM's opinion, the Commission's procedure was defective. IBM had requested clarification from the Commission on the details of the basis for the Decision to initiate its statement of objections.

The Court of Justice held as follows.

Case 60/81 *IBM Corporation v Commission* [1981] ECR 2639

> 9. In order to ascertain whether the measures in question are acts within the meaning of Article 173 [now Article 263 TFEU] it is necessary, therefore, to look to their substance. According to the consistent case-law of the court any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article.
>
> 10. In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.
>
> [...]
>
> 20. An application for a declaration that the initiation of a procedure and a statement of objections are void might make it necessary for the Court to arrive at a decision on questions on which the Commission has not yet had an opportunity to state its position and would as a result anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial. It would thus be incompatible with the system of the division of powers between the Commission and the Court and of the remedies laid down by the Treaty, as well as the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed in the Commission.

p. 282 ↵ The Court of Justice applied the test of whether the act is intended to have legal effects. The letter from the Commission was only a preparatory measure notifying IBM of the Commission's position and not the Commission's definitive position. As a preliminary act, it was not subject to judicial review. The act to be challenged must be a final statement of an institution's position and not merely an interim position.

7.5 Who can bring an action under Article 263 TFEU?

All of the institutions of the EU referred to in Article 263 TFEU can seek an annulment of an EU measure, although there are restrictions as to the acts that may be challenged and these are dependent on the status of the applicant.

7.6 *Locus standi*: permissible applicants under Article 263 TFEU

What is meant by the term *locus standi*? It means the applicant's standing, or legal ability, to bring an action. The *locus standi* of each type of applicant considered at 7.5 is different, and we shall consider the position of each in turn (see Table 7.1).

Table 7.1 The type of applicant and which acts may be challenged

Applicant	Acts that may be challenged
Privileged applicants (Member States, European Parliament, Council, Commission)	Any act that constitutes the final statement of an institution's position and produces legal effects
'Semi-privileged' applicants (Court of Auditors, European Central Bank, Committee of the Regions)	Can protect only their own prerogatives
Non-privileged applicants (Companies, individuals)	Act which is addressed to the applicant. Legislative acts where they can establish that they are directly and individually concerned. Where the non-privileged applicant is directly concerned by a regulatory act that does not entail implementing measures

7.6.1 Privileged applicants

Privileged applicants include the institutions of the EU—namely, the Commission, the Council, the European Parliament, and Member States. They have *locus standi* to review any act under Article 263 TFEU.

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7.6.2 'Semi-privileged' applicants

Semi-privileged applicants include the Court of Auditors, the ECB, and the Committee of the Regions (CoR). These bodies may challenge any act, but that challenge is restricted to the protection of their prerogatives.

The European Parliament, prior to the Treaty of Nice, was a semi-privileged applicant and could bring a direct action only as a means of protecting its prerogatives. One of the European Parliament's prerogatives, acknowledged in Case C-70/88 *Parliament v Council* [1970] ECR I-2041, was the right to influence the legislative process to the extent provided for in the EC Treaty. This prerogative would have been infringed if the European Parliament had been accorded less influence than it was entitled to because of the use of the wrong legislative base, and therefore the wrong legislative procedure, in passing a measure. In order for the European Parliament to bring an action on this ground, it had to identify the legal base that was used and then show that this was an incorrect base for the particular legislation. The legal base would normally have been a Treaty provision, but may have been secondary legislation.

7.6.3 Non-privileged applicants

The category of non-privileged applicants covers 'any natural or legal person'—in other words, individuals and other private parties, such as companies.

Following the entry into force of the Lisbon Treaty, Article 263 TFEU restricts the *locus standi* of non-privileged applicants to three specific actions:

- an act addressed to the applicant; or
- an act addressed to a third party that is of direct and individual concern to the applicant; or
- a regulatory act that is of direct concern to the applicant and which does not entail implementing measures.

The first category is fairly straightforward and existed prior to the Lisbon Treaty. Where an act is directly addressed to the applicant, they will have automatic standing to challenge the measure before the Court of Justice. This category is broad, and the acts that will come within it include Regulations, Directives, and Decisions.

> *Cross-Reference*
>
> For further discussion on non-privileged applicants, see 7.9.

Problems have arisen in the context of the second category and have been predominantly over the meaning of 'direct and individual concern', which will be considered further in the following sections. This category is sufficiently broad to include Regulations, Directives, and Decisions that are final reviewable acts. Under the former Article 230 EC, the scope of acts for review was considerably narrower in this category and limited to Decisions addressed to the applicant. A vast amount of case law developed in which the Court had to examine Decisions that were disguised as Regulations, and no doubt these cases will remain helpful in the future.

The final category was introduced by the Treaty of Lisbon and is in part somewhat vague in its actual scope. A challenge brought under this category applies only to an applicant who can demonstrate 'direct concern', as
p. 284 opposed to 'direct and individual concern', which is a ↵ condition in the previous category. The term 'direct concern' has been considered by the Court of Justice on numerous occasions and will be discussed further in 7.7. The term 'regulatory act' has not been defined either in Article 263 TFEU or elsewhere in the Treaties. It is thought that this provision was introduced as a means of addressing a potential lacuna in the law that the Court identified in Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] 3 CMLR 1.

7.7 Non-privileged applicants: direct concern

For a non-privileged applicant to bring a direct action under Article 263 TFEU, they must come within the scope of one of the categories listed earlier. Where the act is not directly addressed to the applicant, the applicant must establish that they are directly concerned by the act for which they are seeking annulment. This applies in the following circumstances: first, where the act complained of is of direct and individual concern to the applicant; or, second, where a regulatory act does not entail implementing measures and is of direct concern to the applicant.

Cross-Reference

See 7.6.3 for an explanation of non-privileged applicants.

The analysis of whether the applicant is directly concerned involves determining whether the act complained of has a direct causal link with the applicant. If there is an intervening act, this would break that causal link between the act and the applicant, and so eradicate the applicant's *locus standi* for judicial review.

Intervening acts may occur where a Member State has some discretion in the application of a measure. This can be illustrated by Case 123/77 *UNICME and others v Council* [1978] ECR 845. A Council Regulation made the importing of Japanese motorcycles subject to the issue of a licence from the Italian government. The applicants, Italian importers of such motorcycles, together with their trade association, UNICME, attempted to challenge the Regulation. As it was not an act addressed to them, the applicants had to show that they were directly and individually concerned by the Regulation. The Court of Justice held that the applicants were not directly concerned because the Italian government had discretion over the grant of import licences. It was not the Regulation that directly concerned the applicants, but any subsequent refusal by the Italian government to issue import licences to them.

Review Question

> Can you think of an alternative action that the applicant importers might have been able to bring in *UNICME*?
>
> *Answer*: The Court of Justice stated that if the Italian government did indeed refuse licences to the importers, they could bring an action in the national courts. A national court could then, if necessary, refer the question of the validity of the Regulation to the Court of Justice under Article 267 TFEU.

The applicant must ensure that the EU measure directly concerns them. In Case 62/70 *Bock v Commission*
p. 285 [1971] ECR 897, Bock had applied for a licence to import Chinese mushrooms. ↵ The German authorities had responded to this request by stating that they would refuse to grant the licence as soon as they were authorized by the Commission to do so. The Commission issued a Decision allowing Germany to refuse to issue import licences for Chinese mushrooms. Bock challenged the Decision. The Court of Justice held that Bock was directly concerned by the Decision. In this case, there was no intervening discretion, because the German authorities had already exercised their discretion when they expressly notified Bock of their intention to refuse his application as soon as they were able to do so. It was the Decision itself that actually affected Bock, who therefore had *locus standi* to challenge it. The Decision was annulled insofar as it applied to importers with licence applications pending at the time the Decision came into force. In contrast, in *UNICME*, the Regulation did not directly concern UNICME because the Member State involved had yet to exercise its discretion at the time the Regulation was issued.

In Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207, which was similar to *Bock*, the Commission Decision authorized France to impose quotas on imports of yarn from Greece. There was no obligation for France to implement this quota system—it was discretionary as to whether it would exercise its power under this Decision. However, at the time, France operated a very restrictive system of licences for imports. The Greek importers sought to challenge this Decision. The Court of Justice stated as follows.

Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207

> 6. With regard to the question of direct concern, the Commission and the Government of the French Republic argue that the applicants are not directly affected by the decision at issue since that decision merely authorizes the French Republic to institute a quota system on imports of cotton yarn from Greece, and thus leaves the Member State which requested the authorization free to make use of it or not. The decision therefore does not itself establish a system limiting imports but, in order to have practical effect, requires implementing measures on the part of the French authorities.
> 7. It is true that without implementing measures adopted at the national level the Commission decision could not have affected the applicants. In this case, however, that fact does not in itself prevent the decision from being of direct concern to the applicants if other factors justify the conclusion that they have a direct interest in bringing the action.
> 8. In that respect it should be pointed out that, as the Commission itself admitted during the written procedure, even before being authorized to do so by the Commission the French Republic applied a very restrictive system of licences for imports of cotton yarn of Greek origin. It should moreover be observed that the request for protective measures not only came from the French authorities but sought to obtain the Commission's authorization for a system of import quotas more strict than that which was finally granted.
> 9. In those circumstances the possibility that the French Republic might decide not to make use of the authorization granted to it by the Commission decision was entirely theoretical, since there could be no doubt as to the intention of the French authorities to apply the decision.

p. 286 ↵ The Court of Justice ruled that Greek importers with prior contracts had *locus standi* to challenge the Decision. The Decision would be annulled insofar as it applied to contracts entered into before the date of its notification and to be performed during the period of its application. The crucial distinction between this case and *UNICME* is that, on the facts, the possibility of an exercise of intervening discretion by the French government could be disregarded. France already severely restricted such imports and, in fact, had requested a quota that was stricter than that given, so the chance that it would not utilize the permission to impose quotas was 'entirely theoretical'.

By contrast, in *Bock* the German authorities had actually stated that the Decision would be applied directly to the applicant, whereas in *Piraiki-Patraiki* it was simply the opinion of the Court of Justice that the French authorities would apply the Decision directly to the applicants. The test would therefore seem to be whether the Member State has given a sufficiently clear indication of how it will use its discretion. In *Bock* and *Piraiki-Patraiki* the Court of Justice considered that the respective governments had given such an indication, whereas in *UNICME* it was clear that the Italian government had not.

The question of whether an EU measure has direct concern on a third-country applicant has been considered by the Court of Justice in the context of sanctions imposed by the EU against Venezuela. Article 263 TFEU does not include third countries as 'privileged applicants' and third countries have, hitherto, not been considered as 'non-privileged applicants' either.

The Council of the European Union adopted Regulation (EU) 2017/2063 in November 2017, concerning sanctions in view of the political and economic situation in Venezuela. In February 2018, the Republic of Venezuela brought an action before the General Court for annulment against the Regulation, insofar as its provisions concern it (C-872/19 P, *Venezuela v Council* EU:C:2021:507). The General Court considered that Venezuela had not demonstrated that it was directly concerned by the measures finding that Venezuela lacked the necessary standing to maintain its annulment action.

Venezuela appealed in November 2019 against the judgment of the General Court. An Opinion of the Advocate General was released on 20 January 2021, stating that a third State may have legal standing in an action for annulment of restrictive measures adopted by the Council against the State.

The central legal question in *Venezuela v Council* is whether the application made by Venezuela may be considered admissible before EU Courts. The central legal provision to consider is Article 263(4) TFEU, which lays down the conditions for natural and legal persons (the so-called 'non-privileged applicants') to bring an action before the Court. Article 263 provides for standing for legal or natural persons to challenge EU measures directly in the EU Courts, provided either that the EU measure is addressed to them, or that they have direct and individual concern, or that they are challenging a non-regulatory act, have direct concern, and that act does not entail implementing measures. This appeal to the Court of Justice ultimately turned on the interpretation of the final possibility.

In its judgment, the Court of Justice, overturned the previous judgment and ruled that the General Court erred in law. Following the Opinion of Advocate General Hogan, the Court held that the application of Article 263(4) TFEU is not limited to private actors or individuals. On the contrary, the obligation to ensure compliance with
p. 287 the principles of effective judicial ↵ review and the rule of law requires the EU to allow Venezuela to challenge the restrictive measures adopted by the Council that are prejudicial to that State. In doing so the Court of Justice recognized the importance of an effective remedy which is not only a general principle of EU law but is protected by Article 47 of the EU Charter of Fundamental Rights.

C-872/19 P, *Venezuela v Council* EU:C:2021:507

> 50. In those circumstances, an interpretation of the fourth paragraph of Article 263 TFEU in the light of the principles of effective judicial review and the rule of law militates in favour of finding that a third State should have standing to bring proceedings, as a 'legal person', within the meaning of the fourth paragraph of Article 263 TFEU, where the other conditions laid down in that provision are satisfied. Such a legal person governed by public international law is equally likely as any another person or entity to have its rights or interests adversely affected by an act of the European Union and must therefore be able, in compliance with those conditions, to seek the annulment of that act.

One potential consequence of this judgment in the context of Brexit is that it leaves open the possibility of the UK commencing an action before the Court of Justice under Article 263 TFEU to challenge an EU measure taken against it. This could occur, for example, if the UK were to consider that the EU had adopted an act which infringed its obligations under the EU–UK Withdrawal Agreement or if the EU were to impose sanctions against the UK for in infringement of the EU–UK Withdrawal Agreement which the UK considers disproportionate or unjustified.

7.8 Non-privileged applicants: individual concern

The requirement for determining individual concern forms the second condition for the applicant to satisfy where they are seeking an annulment of an act that is of 'direct and individual concern' under Article 263 TFEU. Prior to the Lisbon Treaty, *locus standi* for judicial review was limited to Decisions addressed to a third party or a decision in the form of a Regulation (i.e. a disguised Decision), whereas Article 263 TFEU is broader in its scope and applies to an act that includes Regulations, Directives, and Decisions.

The concept of individual concern, like direct concern, has acted as a filtering mechanism to eliminate cases in which the act did not directly affect the applicant. The concept of 'individual concern' was considered in the pre-Lisbon case law on judicial review and it is assumed that the Court of Justice will continue to adopt the existing line of case law on this issue.

The classic statement of the law in this area comes from Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95. Plaumann was a German importer of clementines, who sought the annulment of a Commission Decision addressed to Germany, which refused permission to reduce the duty on imports of clementines. The Court of
p. 288 Justice held that Plaumann was ↵ not individually concerned by the Decision because it was a Decision that affected all German importers of clementines.

The *Plaumann* test provides as follows.

Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95, 107 (emphasis added)

> Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them *by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons* and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.

The text emphasized in the extract indicates the key parts of the test for individual concern. An applicant must show that they:

- were affected by reason of certain attributes or circumstances; and
- are differentiated from all others; and
- can be distinguished individually.

In applying this test to the facts, the Court held that Plaumann was not individually concerned by the Decision. The Decision applied to all importers of clementines and it could not be said that Plaumann was in any way differentiated from the others, or in a fixed or identifiable group, and therefore Plaumann did not have *locus standi*.

To summarize, individual concern requires that the applicant be singled out in some way by the measure. The applicant seeking an annulment must be a member of a closed class—that is, a fixed or identifiable group—as opposed to an open class. The open class would suggest that it is neither fixed nor a clearly identifiable group of persons. This means that it will be more difficult to prove individual concern where the measure challenged is a Regulation than where it is a Decision.

Thinking Point

> Why do you think this is so? If you have difficulty answering this question, look back at the difference between these types of legislative measure.

Unfortunately, for all concerned, the Court of Justice has not developed a consistent approach to the question of whether an applicant is sufficiently singled out by a measure. A number of approaches have been discernible for some years. First, the ‘closed class’ test often provides a starting point for establishing *locus*

standi. Second, where an applicant fails to satisfy this test when strictly applied, the Court of Justice may
p. 289 consider whether it fulfils a more generous ↵ test based on the facts. Finally, where the measure in question has been issued as a result of proceedings, has been issued by the applicant, or is an anti-dumping measure, the Court has developed a special test.

7.8.1 The ‘closed class’ test

The ‘closed class’ test involves consideration of whether it was possible to identify all of the potential applicants at the time the measure allegedly affecting them was passed. In order to do this, the membership of the class must have been fixed at that time and it must have been possible to ascertain the identity of those members. Where is the burden of proof? It is for an applicant to show that it is a member of such a class (possibly the only member).

The test is a strict one, as can be seen from Case 231/82 *Spijker Kwasten BV v Commission* [1983] ECR 259. Spijker, a Dutch importer of Chinese brushes, applied for an import licence, which the Dutch authorities stated they would refuse if the Commission were to authorize them to do so. The Commission Decision authorized the Dutch government, for a period of six months, to ban imports of Chinese brushes. Not only had the Dutch request for such a Decision been made in response to Spijker’s imports, but also Spijker was the only importer of such goods into the Netherlands at the time. Despite these facts, the Court of Justice concluded that Spijker was not individually concerned by the measure.

Case 231/82 *Spijker Kwasten BV v Commission* [1983] ECR 259

5. The Commission objects that the contested decision is addressed to the Benelux States alone and that it is neither of direct nor of individual concern to the applicant within the meaning of the second paragraph of Article 173 of the Treaty.

6. On the other hand the applicant contends in support of the admissibility of the action that the said decision is of direct and individual concern to it with regard to its legal position since it is the only trader-importer established in the Benelux States [Belgium, the Netherlands, and Luxembourg] which regularly imports into the Netherlands brushes originating in the People's Republic of China and since, moreover, the contested decision was adopted on account of the importation with which the present case is concerned.

7. Under the second paragraph of Article 173 of the Treaty the admissibility of an action for a declaration that a decision is void brought by a natural or legal person to whom the decision was not addressed is subject to the requirements that the decision must be of direct and individual concern to the applicant. In this case since Spijker Kwasten BV is not one of the persons to whom the contested decision was addressed it is necessary to consider whether the decision is of direct or individual concern to it.

8. The Court has already stated in its judgment of 15 July 1963 in Case 25/62 *Plaumann* [1963] ECR 95 that persons other than those to whom a decision is addressed may claim to be individually concerned by that decision only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and if by virtue of those factors it distinguishes them individually just as in the case of the person addressed.

p. 290

9. That is not the case in the present proceedings. The contested decision concerns the applicant merely by virtue of its objective capacity as an importer of the goods in question in the same manner as any other trader who is, or might be in the future, in the same situation. In fact the purpose of the decision is to authorize the Benelux States not to apply Community treatment for a fixed period to all imports of brushes originating in the People's Republic of China and in free circulation in another Member State. With regard to the importers of such products it is therefore a measure of general application covering situations which are determined objectively and it entails legal effects for categories of persons envisaged in a general and abstract manner. Thus the contested decision is not of individual concern to the applicant.

10. That conclusion is not invalidated by the fact that the applicant, according to its statement which was not disputed by the Commission, is the only trader-importer established in the Benelux States regularly importing into the Netherlands brushes originating in the People's Republic of China and that it was one of its imports which led to the adoption of the contested decision. As the Court stated in its judgment of 6 October 1982 in Case 307/81 *Alusuisse* [1982] ECR 3463, a measure does not cease to be

> a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in relation to its purpose.

The Court of Justice ruled that the class of those potentially affected was not closed (and therefore not ascertainable) at the time of the Decision because other importers might materialize during the six-month period, who would then be adversely affected by the Decision and form part of the class of potential applicants.

The next set of cases, Joined Cases 41–44/70 *International Fruit Co and Others v Commission* [1971] ECR 411, involved consideration of whether there was an identifiable closed class affected by two Regulations. The first Regulation provided that Member States were required to notify the Commission, on a weekly basis, of the quantity of apples for which import licences had been requested. This enabled the Commission to determine the percentage of licences that should be granted. The second Regulation provided that only 80 per cent of licence applications submitted by the applicants in the preceding week should be granted. Their applications were amongst those refused and they challenged the second Regulation. The Court of Justice held that the Regulation must be regarded as a conglomeration of individual decisions that individually concerned the applicant. It applied to a fixed and ascertainable class—that is, applicants in a particular week—and although it took account only of the total quantity of applications, the decision then had to be applied to each individual application. This necessarily involved a decision on each application. Despite the fact that the Commission named the measure a Regulation and it appeared to be a general measure, the Court acknowledged that in fact it was a set of disguised Decisions.

A similar approach was taken in one of the many '*Isoglucose* cases', a series of cases in the late 1970s and early 1980s involving the introduction of quotas and levies, and the abolition of subsidies, on the production of isoglucose, a liquid sugar substitute. In Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, a Regulation had established quotas for the production of isoglucose and listed in an annex the companies to which these
p. 291 quotas applied. Roquette ↵ Frères, one of the companies listed, challenged the validity of the Regulation. The Court of Justice ruled that the Regulation was of individual concern to the applicants and other producers listed in the annex because specific quotas were allotted to them by name; therefore the Regulation was susceptible to challenge.

In 2010, the General Court in Case T-16/04 *Arcelor SA v Parliament and Council* [2010] Env LR D7 rejected an action for an annulment of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community ..., OJ 2003 L275/32. Arcelor, which is the largest steel manufacturer in the world, claimed that the application of the Directive infringed several principles of EU law—in particular, the right of property, the freedom to pursue an economic activity, the principle of proportionality, the principle of equal treatment, freedom of establishment, and the principle of legal certainty. The General Court dismissed the action for annulment as inadmissible because Arcelor was neither individually nor directly concerned by the Directive. The General Court concluded

that the legislation applies, in a general and abstract manner, to all of the operators listed in the annex to the Directive, including those in the steel production sector, and is therefore not capable of characterizing as different the factual and legal situation of Arcelor in comparison with those other operators.

7.8.2 A ‘test’ based on the facts and circumstances

In many cases, the Court of Justice has found that the contested measure potentially applies to a group of applicants that is neither fixed nor ascertainable, but has then gone on to accept that the applicant in the case before it is nonetheless individually concerned. This involves a careful examination of the particular facts of the case and an assessment as to whether the applicant is affected by the measure in a way that no other potential applicant is affected. There are a number of examples of this approach in the case law of the Court of Justice.

Cross-Reference

See 8.4.2.

In Joined Cases 106 & 107/63 *Toepfer Getreide-Import Gesellschaft v Commission* [1965] ECR 405, the Court of Justice had to consider the facts and circumstances of the case to ascertain whether the applicant was in a ‘closed class’. A zero levy was imposed on maize imports into Germany from 1 October 1963. A Commission Decision of 1 October then raised the levy with effect from 2 October, and a second Commission Decision, of 4 October, authorized Germany to refuse applications for import licences made between 1 and 4 October. Toepfer, a German maize importer who had made an application on 1 October, challenged the second Decision under Article 263 TFEU.

Joined Cases 106 & 107/63 *Toepfer Getreide-Import Gesellschaft v Commission* [1965] ECR 405, 410–12

Admissibility of the applications

> As the contested decision was not addressed to the applicants the defendant argues that it was not of direct and individual concern to them within the meaning of Article 173 of the Treaty [now Article 263 TFEU]; it only concerns the applicants through the effect of the protective measure in question, and thus indirectly.
>
> p. 292 ↵ The defendant further argues that, since the protective measure was drawn up in general terms applicable to all importers in a position to ask for an import licence during the period between 1 and 4 October 1963, neither this measure nor the decision which upheld it is of individual concern to the applicants.
>
> [...]

The expression 'of ... individual concern'

> It is clear from the fact that on 1 October 1963 the Commission took a decision fixing new free at-frontier prices for maize imported into the Federal Republic as from 2 October, that the danger which the protective measures retained by the Commission were to guard against no longer existed as from this latter date.
>
> Therefore the only persons concerned by the said measures were importers who had applied for an import licence during the course of the day of 1 October 1963. The number and identity of these importers had already become fixed and ascertainable before 4 October, when the contested decision was made. The Commission was in a position to know that its decision affected the interests and the position of the said importers alone.
>
> The factual situation thus created differentiates the said importers, including the applicants, from all other persons and distinguishes them individually just as in the case of the person addressed.
>
> Therefore the objection of inadmissibility which has been raised is unfounded and the applications are admissible.

The Court of Justice held that Toepfer and other importers who had made applications on 1 October were individually concerned by the second Decision. The effect of the first Decision was that the 0 per cent levy was available only on 1 October and so only those importers which had applied for a licence on that day were adversely affected by the second Decision authorizing the refusal of their licences. Applications made on 2–4 October that were refused could be resubmitted thereafter without loss to the applicants, since the applicable

levy would be the same. The class of potential applicants was therefore 'fixed and ascertainable' at the time the Decision was taken, and the factual situation differentiated them from all others in the same way that a Decision addressed to them would have done.

Review Question

> Try to apply this 'factual' test to these facts. Do you think that Toepfer was individually concerned by this Decision?
>
> *Answer*: In effect, Toepfer and the other 1 October applicants created a closed class within a larger class of 1–4 October applicants. This larger class was not closed at the date of the Decision because the Decision was issued on 4 October.

In *Bock* and *Piraiki-Patraiki*, the classes of potential applicant (all importers of Chinese mushrooms and all importers of Greek yarn into France, respectively) were not closed. However, the Court of Justice held that the
p. 293 applicant importers were individually concerned. In these cases, ↵ the Court of Justice adopted a similar test to that in *Toepfer* to find that the applicants were differentiated on the facts from all other potential applicants.

Cross-Reference

See 7.7 for the facts in *Bock*.

In *Bock*, Bock did not challenge the Decision in its entirety, but only insofar as it applied to importers who had already applied for import licences. The Court of Justice considered that Bock was individually concerned by this part of the Decision because such importers constituted a fixed and ascertainable class. It therefore annulled the Decision insofar as it applied to existing licence applications.

Cross-Reference

See 7.7 for the facts in *Piraiki-Patraiki*.

The reasoning in *Piraiki-Patraiki* was similar. The Decision applied to all potential importers of Greek yarn into France, but the Court of Justice accepted that importers already bound by contractual arrangements (and who would therefore be particularly prejudiced by the Decision when it was passed) could be distinguished from importers who were not so bound. The class of such importers was therefore fixed at the date of the Decision.

The Commission could scarcely argue that it was not possible to identify the members of this class, since it was required to carry out precisely that task as part of the inquiry that the Greek Act of Accession to the EU obliged it to conduct into the effects of any proposed protective measure.

The Court of Justice adopted a similar line of reasoning in Case C-309/89 *Codorniu SA v Council* [1994] ECR I-1853. Significantly, the Court took a more liberal approach in its interpretation of individual concern by taking into account the impact and ability of the applicant to conduct its economic activity. Codorniu, a Spanish producer of quality sparkling wine, applied for an annulment of a Regulation that restricted the use of the word *crémant* to quality sparkling wines originating in France and Luxembourg. Codorniu had owned the registered trade mark 'Gran Cremant' since 1924 as an indication of the origin of its quality sparkling wines. The Court considered whether Codorniu had *locus standi*.

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

14. In support of its objection of inadmissibility the Council states that it did not adopt the contested provision on the basis of the circumstances peculiar to certain producers but on the basis of a choice of wine-marketing policy in relation to a particular product. The contested provision reserves the use of the term 'crémant' to quality sparkling wines psr ['produced in a specific region'] manufactured under specific conditions in certain Member States. It thus constitutes a measure applicable to an objectively determined situation which has legal effects in respect of categories of persons considered in a general and abstract manner.

15. According to the Council, Codorniu is concerned by the contested provision only in its capacity as a producer of quality sparkling wines psr using the term 'crémant', like any other producer in an identical situation. Even if when that provision was adopted the number or identity of producers of sparkling wines using the term 'crémant' could theoretically be determined, the measure in question remains essentially a regulation inasmuch as it applies on the basis of an objective situation of law or fact defined by the measure in relation to its objective.

16. Codorniu alleges that the contested provision is in reality a decision adopted in the guise of a regulation. It has no general scope but affects a well-determined class of producers which cannot be altered. Such producers are those who on 1 September
p. 294 1989 traditionally designated their sparkling wines with the term 'crémant'. For that class the contested provision has no general scope. Furthermore, the direct result of the contested provision will be to prevent Codorniu from using the term 'Gran Cremant' which will involve a loss of 38 per cent of its turnover. The effect of that damage is to distinguish it, within the meaning of the second paragraph of Article 173 of the Treaty [now Article 263 TFEU], from any other trader. Codorniu alleges that the Court has already recognized the admissibility of an action for annulment brought by a natural or legal person against a regulation in such circumstances (see the judgment in Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501).

17. Under the second paragraph of Article 173 of the Treaty the institution of proceedings by a natural or legal person for a declaration that a regulation is void is subject to the condition that the provisions of the regulation at issue in the proceedings constitute in reality a decision of direct and individual concern to that person.

18. As the Court has already held, the general applicability, and thus the legislative nature, of a measure is not called in question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, as long as it is established that it applies to them

by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (see most recently the judgment in Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605, paragraph 17).

19. Although it is true that according to the criteria in the second paragraph of Article 173 of the Treaty the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them.

20. Natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (see the judgment in Case 25/62 *Plaumann v Commission* [1963] ECR 95).

21. Codorniu registered the graphic trade mark 'Gran Cremant de Codorniu' in Spain in 1924 and traditionally used that mark both before and after registration. By reserving the right to use the term 'crémant' to French and Luxembourg producers, the contested provision prevents Codorniu from using its graphic trade mark.

22. It follows that Codorniu has established the existence of a situation which from the point of view of the contested provision differentiates it from all other traders.

23. It follows that the objection of inadmissibility put forward by the Council must be dismissed.

The Court ruled that Codorniu was differentiated from other producers who might be affected by the Regulation because it had registered and used the word *crémant* as part of its trade mark since 1924. Crucially, at para 21, the Court of Justice indicates a reluctance to interfere with the applicant's right to exploit its intellectual property right and affirms that the Court has to balance competing interests. Underlying the reasoning in this case, at para 19, the Court maintains the importance of ascertaining whether the act—in this particular case, in the form of a Regulation—was of individual concern to the applicant.

p. 295 ↵ In Case C-152/88 *Sofrimport SARL v Commission* [1990] ECR I-2477, the Court of Justice took a relaxed approach towards individual concern where an EU institution is under a specific obligation to take into account specific circumstances when exercising its powers. Sofrimport had shipped apples from Chile prior to the issue of a Regulation that suspended import licences for Chilean apples. Sofrimport's subsequent application to the French authorities for an import licence was refused, and it then applied for annulment of the Regulation and damages under Article 340 TFEU.

The Court of Justice held that Sofrimport had *locus standi* to challenge the Regulation and that it should be annulled insofar as it applied to goods in transit. When taking protectionist measures, the Commission was required, under a previous Regulation, to take into account the position of importers with goods in transit, and since such importers constituted a fixed and ascertainable class, they could be said to be individually concerned. These importers therefore had *locus standi* to challenge the Regulation insofar as it applied to them.

The Court of First Instance (now the General Court) reached a different decision in Case T-489/93 *Unifruit Hellas v Commission* [1994] ECR II-1201—a case involving similar facts, but a different Regulation. Unifruit Hellas had shipped apples from Chile prior to the issue of a Regulation that imposed an import duty on Chilean apples. Unifruit Hellas applied for annulment of the Regulation and for damages. It was held that the action for annulment was inadmissible (but that the action under Article 340 TFEU was admissible). The Court of First Instance ruled that although importers whose goods were in transit to the EU when the Regulation introduced a charge on those goods constituted a fixed and identifiable class of persons, that was not sufficient. The Regulation in question did not require the Commission to take into account the special position of products in transit (unlike the Regulation in *Sofrimport*) and so there was no individual concern.

Thinking Point

> Do you agree with the reasoning of the Court of Justice in Unifruit Hellas?

7.8.3 Measures issued as a result of proceedings initiated by applicant

Where the measure complained of was adopted as a result of proceedings in which the applicant was involved, the Court of Justice has been prepared to rule that the applicant is individually concerned even though the act may not be specifically directed at the applicant. This is most likely to be the case where the measure concerns competition policy or is an anti-dumping measure (i.e. a measure designed to stop the import into the EU of goods priced below the normal price where this could cause economic harm within the EU).

For example, in Case 26/76 *Metro-SB-Grossmärkte GmbH & Co KG v Commission* [1977] ECR 1875, the applicant sought to challenge a Decision addressed to another company, SABA, regarding its distribution system. The Decision had been issued in response to a complaint made by the applicant to the Commission that SABA was
p. 296 in breach of EU competition policy. ↵ The Court ruled that since the applicant was entitled to request that the Commission investigate an infringement of competition rules, the applicant was equally entitled to institute annulment proceedings in order to protect its legitimate interests. The Court concluded that the applicant was individually concerned. Similarly, in Case 264/82 *Timex Corporation v Council* [1985] ECR 849, an applicant which had initiated the complaint and given evidence in the proceedings giving rise to the anti-dumping measure, and where the fixing of the anti-dumping duty was based on the effect of the dumping on the applicant, was held to be individually concerned by that measure.

7.8.4 Anti-dumping measures

As well as those who initiate the procedure leading to the adoption of an anti-dumping measure, the Court of Justice has also recognized that producers, exporters, or importers of the product at which the measure is directed may be individually concerned by it. This indicates a willingness on the part of the Court to take a more relaxed approach to individual concern in competition and anti-dumping cases.

In Joined Cases 239 & 275/82 *Allied Corporation v Commission* [1984] ECR 1005, the Court of Justice identified as relevant the fact that the producers and exporters had given undertakings pursuant to one of the contested Regulations, referred to in the other contested Regulation, and that their individual circumstances formed the subject matter of the two Regulations.

Where the applicant is not an exporter or a producer, but only an importer, it must prove that it is particularly singled out by the measure. For example, in Case C-358/89 *Extramet Industrie SA v Council* [1991] ECR I-2501, the Court of Justice ruled that an importer was individually concerned where it was the largest importer and end user of the product, its business was dependent to a large extent upon the product, and it was difficult to obtain supplies elsewhere.

7.9 Reforming *locus standi* for non-privileged applicants

7.9.1 A judicial debate

Prior to the Lisbon Treaty, the EU Courts considered several cases in which strong arguments were put forward for a relaxation of the rules of *locus standi*. In Case C-50/00 P *Unión de Pequeños Agricultores v Council, Commission intervening* (*UPA*) [2002] ECR I-6677, Advocate General Jacobs argued that a narrow interpretation of individual concern prevented the Court from fully protecting an applicant's fundamental rights—in particular, the right to obtain an effective remedy. The Court of First Instance (now the General Court) in Case T-177/01 *Jégo-Quéré SA v Commission* [2002] ECR II-2365 followed the reasoning of Advocate General Jacobs and found that, in the absence of an effective remedy in the national courts, an applicant could bring an action for annulment before the Court of Justice. The Court of First Instance ↵ concluded that there is no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC (now Article 263 TFEU), a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.

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Despite the Opinion of Advocate General Jacobs and the judgment of the Court of First Instance, the Court of Justice rejected any relaxation of the rules for *locus standi* within the Treaty, and held that any change to the Treaty was a matter for the Member States and that it was not for the Court to rewrite the Treaty. To this end, the Court of Justice, in *UPA*, reaffirmed that the understanding of individual concern in *Plaumann* remained the correct approach.

> *Cross-Reference*
>
> See 6.6 for a discussion on *UPA* and challenging the validity of EU law.

In Case C-50/00 P *UPA* [2002] ECR I-6677, UPA, a trade association representing small agricultural businesses in Spain, brought an action for the annulment of Council Regulation (EC) No 1638/98 of 20 July 1998 amending Regulation No 136/66/EEC on the establishment of a common organisation of the market in oils and fats, OJ 1998 L210/32. The Court of First Instance in Case T-173/98 *UPA v Council* [1999] ECR II-3357 held the action

inadmissible on the grounds that the Regulation was neither a Decision nor of individual concern to UPA so as to constitute a Decision insofar as it applied to it. UPA appealed to the Court of Justice. In his Opinion, Advocate General Jacobs argued that the case law on the *locus standi* of natural and legal persons needed to be changed in order to provide adequate judicial protection of persons affected by EU measures, and that a person should be regarded as individually concerned where 'by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests'. The Advocate General therefore concluded that the judgment of the Court of First Instance should be annulled.

Case C-50/00 P *Unión de Pequeños Agricultores v Council, Commission intervening* (*UPA*) [2002] ECR I-6677, Opinion of Advocate General Jacobs

Suggested solution: a new interpretation of the notion of individual concern

> 59. The key to the problem of judicial protection against unlawful Community [now Union] acts lies therefore, in my view, in the notion of individual concern laid down in the fourth paragraph of Article 230 EC [now Article 263 TFEU]. There are no compelling reasons to read into that notion a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. On that reading, the greater the number of persons affected by a measure the less likely it is that judicial review under the fourth paragraph of Article 230 EC will be made available. The fact that a measure adversely affects a large number of individuals, causing wide-spread rather than limited harm, provides however to my mind a positive reason for accepting a direct challenge by one or more of those individuals.
>
> 60. In my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.

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Advantages of the suggested interpretation of the notion of individual concern

> 61. A development along those lines of the case-law on the interpretation of Article 230 EC would have several very substantial advantages.
>
> 62. First ... it seems the only way to avoid what may in some cases be a total lack of judicial protection—a *déni de justice*.
>
> 63. Second, the suggested interpretation of the notion of individual concern would considerably improve judicial protection. By laying down a more generous test for standing for individual applicants than that adopted by the Court in the existing case-law, it would not only ensure that individual applicants who are directly and adversely affected by Community measures are never left without a judicial remedy; it would also allow issues of validity of general measures to be addressed in the context of the procedure which is best suited to resolving them, and in which effective interim relief is available.
>
> 64. Third, it would also have the great advantage of providing clarity to a body of case-law which has often, and rightly in my view, been criticised for its complexity and lack of coherence, and which may make it difficult for practitioners to advise in what court to take proceedings, or even lead them to take parallel proceedings in the national courts and the Court of First Instance.
>
> 65. Fourth, by ruling that individual applicants are individually concerned by general measures which affect them adversely, the Court of Justice would encourage the use of direct actions to resolve issues of validity, thus limiting the number of challenges raised via Article 234 EC [now Article 237 TFEU]. That would, as explained above, be beneficial for legal certainty and the uniform application of Community law [now EU law] ... Individuals who were adversely affected by general measures would therefore not be precluded by that case-law from challenging such measures before national courts. None the less, if the notion of individual concern were interpreted in the way I have suggested, and standing for individuals accordingly liberalised, it may be expected that many challenges would be brought by way of direct action before the Court of First Instance.
>
> 66. A point of equal, or even greater, importance is that the interpretation of Article 230 EC which I propose would shift the emphasis of judicial review from questions of admissibility to questions of substance. While it may be accepted that the Community legislative process should be protected against undue judicial intervention, such protection can be more properly achieved by the application of substantive standards of judicial review which allow the institutions an appropriate 'margin of appreciation' in the exercise of their powers than by the application of strict rules on admissibility which have the effect of 'blindly' excluding applicants without consideration of the merits of the arguments they put forward.

Cross-Reference

See 9.5.1 for a discussion on enforcement actions.

Subsequently, the Court of First Instance (now General Court) gave judgment in Case T-177/01 *Jégo-Quéré SA v Commission* [2002] ECR II-2365. Jégo-Quéré, a fishing company, applied for partial annulment of Commission Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in
p. 299 ICES sub-areas III, IV, V, VI, and ↵ VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels, OJ 2001 L159/4. The Regulation imposed minimizing mesh sizes on fishing vessels operating in certain areas and Jégo-Quéré alleged that its ability to carry on its business was adversely affected by the Regulation. In applying the *Plaumann* test, the Court of First Instance found that the applicant on the facts could not differentiate itself sufficiently to have individual concern. However, the Court was concerned that if Jégo-Quéré's action were to be held inadmissible, it would be denied any legal remedy enabling it to challenge the legality of the contested provisions. Access to the courts was an essential element of a union based on the rule of law, and was guaranteed by the establishment in the Treaties of a complete system of remedies and procedures enabling the Court to review the legality of acts of the institutions, as well as by the establishment by the Court of a right to an effective remedy. The latter had also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the EU.

Thinking Point

> What other actions might have provided a remedy?

There were two other routes by which an individual might obtain a declaration that an EU measure was unlawful: Article 267 TFEU and Article 340 TFEU. However, an Article 267 TFEU ruling was not possible in the present case because there were no acts of implementation capable of giving rise to an action in the national courts. Although Jégo-Quéré could breach the Regulation and then assert its illegality in proceedings against it, individuals could not be required to breach the law in order to gain access to justice. Neither could an Article 340 TFEU action provide a solution because it could not result in the annulment of an EU measure that was held to be unlawful.

Cross-Reference

See Chapter 8 for actions under Article 340 TFEU; for a discussion on Article 267 TFEU, see Chapter 6.

The Court devised a test for individual concern.

Case T-177/01 *Jégo-Quéré SA v Commission* [2002] ECR II-2365

> 51. In the light of the foregoing, and in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community [now Union] measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.

In Case C-50/00 P *UPA* [2002] ECR I-6677, the Court of Justice rejected the reasoning of the Court of First Instance in *Jégo-Quéré* and confirmed its judgment in Case C-321/95 P *Greenpeace* [1998] ECR I-1651 that a non-privileged applicant could challenge a Regulation only if it was, in fact, a Decision or if the applicant was individually concerned by it, so that it was a Decision in respect of that applicant. The Court of Justice made the following observation.

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Case C-50/00 P *Unión de Pequeños Agricultores v Council, Commission intervening* (*UPA*) [2002] ECR I-6677

38. The European Community [now Union] is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.

39. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ...

40. ... [T]he Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, *Les Verts v Parliament* [Case 294/83 *Parti Ecologiste 'les Verts' v European Parliament* [1986] ECR 1339], paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty [now Article 263 TFEU], directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts ... or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity.

41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.

42. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty [now repealed], national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.

43. As the Advocate General has pointed out in paragraphs 50 to 53 of his Opinion, it is not acceptable to adopt an interpretation of the system of remedies, such as that favoured by the appellant, to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow

> the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.
>
> 44. Finally, it should be added that, according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually (see, for example, Joined Cases 67/85, 68/85, and 70/85 *Van der Kooy v Commission* [1988] ECR 219, paragraph 14; *Extramet Industrie v Council* [Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501], paragraph 13; and *Codorniu v Council* [Case C-309/89 *Codorniu SA v Council* [1994] ECR I-1853], paragraph 19), such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.
>
> 45. While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary … to reform the system currently in force.

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The extract demonstrates a refusal on the part of the Court of Justice to follow the approach suggested in Advocate General Jacobs's Opinion in *UPA* or of the Court of First Instance (now General Court) in *Jégo-Quéré* to alter the orthodox criteria of the *Plaumann* test. The Court opined that it was more appropriate for a change in the Treaty to give effect to an alternative test and that inadequacies with the national procedural rules should be resolved by the Member States. The judgment of the Court of Justice in Case C-263/02 P *Jégo-Quéré* [2004] ECR I-3425 followed that in *UPA*.

Thinking Point

> Which of these arguments do you find most convincing?

Even if you find the arguments of the Court of First Instance (now the General Court) convincing, remember that it is the judgment of the Court of Justice that is authoritative. Note that the Court of Justice accepted that applicants had rights of access to the courts and to an effective remedy, but concluded that Articles 263, 267, and 277 TFEU provided 'a complete system of legal remedies'.

Cross-Reference

See 7.15 for a discussion on Article 277 TFEU.

7.10 Regulatory acts that do not entail implementing measures

In Case C-50/00 P *UPA v Council* [2002] ECR I-6677, at para 45, the Court of Justice considered that it would be possible to 'envisage a system of judicial review of the legality of Community [Union] measures of general application different from that established by the founding Treaty'. However, the Court concluded that any changes to the Treaty to broaden ↵ access to the Court for judicial review were a matter for the Member States and could be made only by a process of Treaty revision.

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Following on from the Opinion of Advocate General Jacobs and the debate that took place within the Constitutional Convention with regard to the future operation of Article 230 EC (now Article 263 TFEU) (Secretariat of the Convention, CONV 7354/03, 12 May 2003), the Member States, in the Treaty of Lisbon, agreed a revised version of Article 230 EC (now Article 263 TFEU) that appears to have widened the scope of judicial review by an individual of 'a regulatory act which is of direct concern to them and which does not entail implementing measures'. This would appear to remove the need for an applicant to demonstrate individual concern and therefore avoids the difficulties that applicants face in establishing that a measure affects them in some unique way, as per *Plaumann*. Thus, where a regulatory act produces a legal effect, Article 263 TFEU would appear to grant *locus standi*. However, Article 263 TFEU represents only a partial reform and the changes do not go as far as those proposed by Advocate General Jacobs in *UPA*, in which he argued that an applicant should be able to seek judicial review of an act of general application in circumstances in which it had an effect upon the applicant's legal position.

Where regulatory acts are concerned, it is correct to assume that these are acts that concern all persons equally and are therefore not aimed at any specific individual. As a result, they would not normally be challenged by an individual unless, as discussed earlier, it is possible to demonstrate that the act includes a provision that has an 'individual', rather than a 'general', application. It may be suggested that the developments in Article 263 TFEU from previous versions of this provision are in recognition of the need for an effective remedy where an individual's rights are adversely affected by an EU act. However, there is an inherent risk that, by seeking to guarantee an effective remedy, a more relaxed interpretation of the *locus standi* criteria, which do not require that individual concern, may lead to increased litigation before an already overloaded Court.

Although what constitutes a regulatory act has not been defined by the Treaty and is subject to clarification by the Court, it is evident from judgments such as Case T-262/10 *Microban v Commission* [2011] ECR II-7697 that the EU Courts are distinguishing clearly between general legislative acts, such as Regulations, Directives, and Decisions, and regulatory acts. The latter appear to cover acts of general application, rather than legislative acts. In *Microban*, a Commission Decision amended Commission Directive 2002/72/EC of 6 August 2002 relating to plastic materials and articles intended to come into contact with foodstuffs, OJ 2002 L220/18, which regulated those chemicals that could be used in the manufacture of plastics. As a result of the Commission Decision, which amended the annex to the Directive to remove a chemical called triclosan from the list of permitted chemicals that could be used, Microban could no longer produce plastics.

In *Microban*, the regulatory act was in the form of a Decision that affected producers generally and thus there was no individual concern. But the Court permitted the action for judicial review, identifying that this was a clear regulatory act that required no further implementing measures. The General Court concluded that Microban should be able to seek judicial review because this was precisely the sort of regulatory act that was intended to be covered by the Treaty of Lisbon. It was an administrative act of the Commission to amend an existing legislative act and it required no further measures by a Member State or EU institution.

p. 303 ↵ In Case T-18/10 *Inuit Tapiriit Kanatami ea v Parliament and Council* EU:T:2011:419, the General Court confirmed that a 'regulatory act' includes all acts of general application apart from legislative acts. The case concerned an action for judicial review brought by private traders of Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, OJ 2009 L286/36. In a very literal interpretation of 'regulatory act', the General Court held that this Regulation could not be considered as a 'regulatory act' because, as a Regulation, it was a general legislative measure. Furthermore, as it was a general legislative measure, the applicant would not be able to establish the necessary individual concern that would be required for judicial review, which therefore precluded the application from judicial review.

The judgment of the General Court was appealed to the Court of Justice in Case C-583/11 P *Inuit Tapiriit Kanatami v Parliament and Council* [2014] 1 CMLR 54, which followed the reasoning of the General Court. Advocate General Kokott endorsed the approach taken by the General Court regarding the notion of 'regulatory acts', as introduced by the Treaty of Lisbon. The Advocate General was therefore of the opinion that all 'regulatory acts' are acts of general application apart from legislative acts. Advocate General Kokott stated as follows.

Case C-583/11 P *Inuit Tapiriit Kanatami v Parliament and Council* [2014] 1 CMLR 54

> 38. The absence of easier direct legal remedies available to individuals against legislative acts can be explained principally by the particularly high democratic legitimation of parliamentary legislation. Accordingly, the distinction between legislative and non-legislative acts in respect of legal protection cannot be dismissed as merely formalistic; rather, it is attributable to a qualitative difference. In many national legal systems individuals have no direct legal remedies, or only limited remedies, against parliamentary laws.

In its judgment, the Court of Justice considered that, as a general rule and just as before the entry into force of the Treaty of Lisbon, any natural or legal person may institute proceedings against any EU act that produces binding legal effects where that act is addressed to that person or is of direct and individual concern to them. In that regard, the Court stated that those acts may be individual acts, such as a Decision addressed to a person, or acts of general application, which include both legislative acts, such as the basic Regulation, and regulatory acts.

The Court of Justice developed this point and held that, since the entry into force of the Treaty of Lisbon, some acts of general application *may* be challenged before the Court by natural and legal persons without their being obliged to satisfy the condition of individual concern. However, the Court was of the view that the Treaty states unequivocally that those less stringent admissibility rules apply only to a more restricted category of those acts—namely, regulatory acts. Thus, following the reasoning applied by the General Court, legislative acts, although they may also be of general application, are not covered by the concept of regulatory acts and therefore continue to be subject to more stringent admissibility rules.

Furthermore, the admissibility rules relating to actions brought against legislative acts, in particular the content of the condition of individual concern, were not altered by the Treaty ↵ of Lisbon. In that context, the General Court correctly ruled that the appellants involved did not satisfy at least one of the two conditions of admissibility applicable to them—namely, that of individual concern.

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In C-274/12 P *Telefonica v Commission* EU:C:2013:852, the Court of Justice continued to define (and minimize) the scope of Article 263(4) TFEU along similar lines to that in *Inuit* and particularly with respect to the provision that '[a]ny natural or legal person may [...] institute proceedings against [...] a regulatory act which is of direct concern to them and does not entail implementing measures'.

The restrictive approach adopted in the interpretation of this provision is largely based on the potential reliance on requests for a preliminary ruling under Article 267 TFEU against the measures not susceptible to a direct challenge by 'non-qualified' applicants. Therefore, the Court of Justice could be said to have completed the reinterpretation of the post-Lisbon mechanisms for judicial review where it seems clear that Article 263(4) TFEU—and particularly its last limb—is bound to have (or to continue to have) a marginal role.

In *Inuit*, the Court of Justice made it clear that legislative measures are not covered by the concept of 'regulatory act'. However, that negative approach to the definition of 'regulatory act' left some questions unanswered, such as whether the definition excludes only those legislative measures derived from the ordinary legislative procedure (OLP), as the General Court had found, or all legislative measures, independently of their ultimate legal basis. The question of what 'implementing measures' meant was also not considered. This has now been addressed in *Telefonica*.

In its judgment in Case C-456/13 P *T & L Sugars Ltd, Sidul Açúcares, Unipessoal Lda v European Commission* EU:C:2015:284, the Court of Justice gave authoritative interpretation of the concept of 'implementing measures' for the determination of whether private parties have standing to challenge the legality of EU 'regulatory acts' under Article 263 TFEU. Arguably, this judgment, which broadly endorses the *Telefonica* judgment, would appear to have confirmed the restrictive application of Article 263(4) TFEU where there are 'implementing measures'. On an appeal from the General Court, the Court of Justice held that EU regulatory acts that require any type of implementing measure (no matter how mechanistic) under national law cannot be challenged under the third limb of Article 263(4) by direct action in the EU General Court by private parties who are not the addressee of the relevant regulatory act. Consequently, private parties' standing to seek the annulment of such acts by the General Court will depend on the claimant meeting the exacting standard of being 'directly and individually concerned' by the regulatory act under challenge.

The judgment of the Court of Justice in *T&L Sugars*, which follows the reasoning of the General Court, provides clarity on the concept of 'implementing measures' in Article 263(4) TFEU, which is a worthwhile development given the controversy that has dogged the Lisbon Treaty amendments to that Article. The Court of Justice's endorsement of the General Court's findings that any implementing measure, however minor and no matter how little discretion it requires from a Member State, is enough to deny standing narrows the scope—and therefore the usefulness to would-be claimants—of the test added to Article 263(4) by the Lisbon Treaty. This arguably excludes a wide variety of regulatory acts from the scope of Article 263(4) TFEU, contrary to the Lisbon Treaty's objective of facilitating direct access to the General Court for private parties whose interests are affected by non-legislative acts adopted by the EU institutions.

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7.11 Directives

Directives have been subject to challenge by non-privileged applicants. It has been held that Directives are open to challenge if an applicant is directly and individually concerned by them (see e.g. Joined Cases T-172, 175, & 177/98 *Salamander AG v Parliament* [2000] ECR II-2487 and Case T-223/01 *Japan Tobacco Inc and JT International SA v Parliament and Council* [2002] ECR II-3259).

Review Question

> What problems do you think might be encountered in relation to direct concern and Directives?
>
> *Answer*: Since Directives leave some discretion to Member States and cannot produce direct legal effect until their implementation deadline has passed, it will be rare for a Directive to concern an applicant directly.

7.12 Grounds for annulment

Article 263 TFEU provides four grounds that may be relied upon by all applicants (subject to the fulfilment of the further requirements outlined earlier by non-privileged applicants and those in the intermediate category)—namely:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the Treaties or of any rule of law relating to its application; and
- misuse of powers.

The grounds overlap and an applicant may rely on one or more in its challenge. The decision of the General Court need not identify the ground on which the challenge is successful. These grounds apply not only to direct actions, but also to indirect challenges under Article 277 TFEU.

7.12.1 Lack of competence

If an institution acts beyond its powers, that act can be annulled. An example would be an act that had no legal base in the Treaty or in secondary legislation, and which the EU therefore had no power to take. This ground is rarely used because of the fallback power given by Articles 352–353 TFEU (see 3.2) and also because it can be difficult to establish that the institution adopting the measure in question lacked authority.

> *Cross-Reference*
>
> See 3.5 for a discussion on legal base.

In Case C-84/94 *UK v Council (Working Time Directive)* [1996] ECR I-5755, the UK requested the annulment of a Directive imposing a maximum working week of 48 hours on the ground, inter alia, that the Council had no competence to adopt the Directive. The UK argued that the measure did not relate to health and safety at work, and therefore should not ↵ have been adopted under Article 154 TFEU; instead, its legal base should either have been Article 115 TFEU (as an internal market measure) or Articles 352 and 353 TFEU (as a measure not covered by any specific Treaty Article). In either case, the Council Decision adopting the measure would have had to be unanimous and, since the UK would have opposed the Directive, the Council would not have had the competence to adopt the Regulation. The Court of Justice ruled that Article 154 TFEU was the appropriate legislative base for the Directive and therefore that the Council was competent to adopt it.

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In Joined Cases C-317 & 318/04 *Parliament v Council and Commission* [2006] ECR I-4721, the European Parliament challenged two measures concerning the transfer of air passenger data from the EU to the US authorities. On the basis of Article 114 TFEU, which empowers the Council to take measures to approximate national law to further the single market, the Community had adopted Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L281/31. The protection of this Directive was stated expressly not to apply to, inter alia, the processing of data in the course of an activity that fell outside EU law, including processing operations concerning public security or State activities in the area of criminal law. Where the protection of the Directive did apply, an exception was provided whereby data could be transferred to a third country if that country ensured an adequate level of data protection.

On the basis of Directive 95/46, the Commission adopted a Decision stating that the US authorities ensured an adequate level of protection for personal data contained in the passenger name records of air passengers arriving in the US ('the Decision on adequacy'). On the basis of Article 114 TFEU, the Council adopted a Decision approving an agreement between the Community and the United States allowing the US authorities to access the airlines' passenger name records for passengers travelling to the United States from the EU. The Parliament challenged both measures.

The Court of Justice held that the Decision on adequacy should be annulled because it concerned the processing of data for the purposes of national security and State activities in the area of criminal law—areas that were outside the scope of the Directive. It also ruled that the Decision on the agreement should be annulled because it concerned the processing of data for these purposes, rather than for the fulfilment of the single market, and was thus outside the scope of Article 114 TFEU.

7.12.2 Infringement of an essential procedural requirement

Although there are a number of possibilities here in relation to a breach of an essential procedural requirement, the most common infringements include a failure to give proper reasons for an act, as required by Article 296 TFEU, and use of the wrong legislative procedure (often because of use of the wrong legal base), in particular involving a failure to consult the Parliament.

The breach must relate to an 'essential' procedural requirement. The reason suggested by Hartley for a distinction between essential and non-essential requirements is as follows.

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TC Hartley, *The Foundations of European Community Law*, 7th edn (Oxford: Oxford University Press, 2010), p 422

> To invalidate an act for an insignificant procedural defect would unduly hamper administrative activity and would encourage excessive formalism and 'red tape', which in turn would stifle initiative and slow down the administrative process; on the other hand, not to annul for any formal defect at all would be detrimental to good administration and would prejudice the rights of individuals. The law therefore tries to achieve a compromise by restricting the rights of individuals. The law therefore tries to achieve a compromise by restricting the sanction of invalidity to those cases where an important provision has been violated.
>
> This compromise has many advantages; but it has the disadvantage of uncertainty: how does one tell whether a requirement is to be regarded as essential or not? Union provision laying down procedural requirements do not normally state whether their infringement will lead to invalidity. Therefore, one must look to the function of the provision and to the likely consequences if it is not observed. Thus, if failure to observe it could affect the final content of the act, one would be justified in concluding that it was an essential requirement.

The infringement may, as suggested in the extract, affect the final content of the act, and this includes a failure to consult. In Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, the measure challenged should have been adopted under the consultation procedure. The Council asked the Parliament for its opinion, but adopted the measure without waiting for that opinion to be given. The Court of Justice ruled that this amounted to an infringement of an essential procedural requirement, highlighting that the consultation procedure.

Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, 3334

> ... is the means which allows the Parliament to play an actual part in the legislative process of the Community [now Union]. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void.

7.12.3 Infringement of the Treaties or of any rule of law relating to their application

The ground of infringement of the Treaties or of any rule of law relating to their application is commonly relied upon in Article 263 TFEU actions. It is broad in its scope, since it applies to any Treaty provision and any rule of law relating to the application of the Treaties. Under ↵ this heading, the word 'Treaties' not only covers the Treaties per se, but also encompasses secondary legislation. Specifically, this refers to binding legislative acts of the institutions. In Case 60/81 *IBM v Commission* [1981] ECR 2639, it was held that acts are binding where they lead to a distinctive change in the legal position of a party that is subject to EU law.

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With respect to the phrase 'any rule of law relating to their application', this applies to the general principles of law that are common to all the Member States, for example the protection of fundamental rights and proportionality.

Review Question

> Try to list as many 'rules of law' as possible.
>
> *Answer*: You might have mentioned legal certainty, non-discrimination, proportionality, fundamental human rights, or any other general principle of law.

7.12.4 Misuse of powers

Where an institution has been given power to act, but only for a particular purpose or purposes, then if that power is used for an illegal end or in an illegal way, this may give grounds for a challenge. Review under this ground is very rare, but, in Case 92/78 *Simmenthal v Commission* [1979] ECR 777, the Court of Justice held that where the Commission had exceeded its powers, an individual applicant would have *locus standi* to challenge the act directly before the Court.

7.13 Time limits

Article 263 TFEU provides that proceedings by the applicant must be instituted within two months of:

- publication of the measure;
- notification of the measure to the applicant; or
- in the absence of notification of the measure to the applicant, the day on which the measure came to the applicant's knowledge.

There are strict rules on time limits that are provided for in Articles 49–52 of the Rules of Procedure of the Court of Justice. These must be adhered to, otherwise the application is deemed inadmissible.

7.14 Effect of annulment

If an Article 263 TFEU action is successful, the measure will be annulled, either in whole or in part.

p. 309 ↵ Article 264 TFEU provides as follows.

Article 264 TFEU

> If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.
>
> However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Accordingly, under this provision, the annulled measure (to the extent that it is annulled) is void—that is, has no legal effect. Paragraph 2 of this provision allows the Court to declare part of or the entirety of the act void and to state which parts of the act remain operative. This provides for legal certainty, for example in the application of the declaration whereby the Court may declare that the annulled act may remain operative until a new act has been adopted.

Article 266 TFEU states as follows.

Article 266 TFEU

> The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.
>
> This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

The measure may not be reviewed or enforced and, according to Article 266 TFEU, the defendant institution must take such steps as are necessary to comply with the judgment of the Court of Justice. The Court will determine the time from which the annulment takes effect, which may be from the date of judgment, from the future date on which the measure is replaced, or retrospectively from an earlier date. For example, in Joined Cases C-317 & 318/04 *Parliament v Council and Commission* [2006] ECR I-4721, the Court held that annulment of the Decision on adequacy would not take effect until 30 September 2006, four months after the date of judgment. This was because the Decision approved an agreement between the EU and the United States that could be terminated only on 90 days' notice, and also because a period was required to adopt measures to comply with the annulment judgment.

Cross-Reference

See 7.12.1 for further discussion of Joined Cases C-317 & 318/04 *Parliament v Council and Commission* [2006] ECR I-4721.

7.15 The plea of illegality

Article 277 TFEU provides that, in proceedings in which an act of general application is at issue, an applicant may rely on the grounds for an Article 263 TFEU action (lack of competence and so forth) in order to allege
p. 310 that the act is inapplicable in that case. This form of ↵ indirect challenge is known as the plea of illegality. The act of general application refers to EU Regulations as opposed to other acts that have legal effects.

Article 277 TFEU

> Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

Thinking Point

> Can the plea of illegality give rise to an independent cause of action?

7.16 Failure to act

Where an institution has failed to carry out an obligation to act provided for under a Treaty or other measure that has legal effect, Article 265 TFEU provides that the Court of Justice may declare an institution's failure to act to be an infringement of the Treaty.

Article 265 TFEU

> Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.
>
> The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.
>
> Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.
>
> This is an autonomous action, and not dependent on an action for annulment.

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7.16.1 *Locus standi* (standing)

7.16.1.1 Privileged applicants

Privileged applicants, for the purpose of Article 265 TFEU, include Member States and 'other institutions of the Union'. These privileged applicants can bring an action against the European Parliament, the European Council, the Council, the Commission, and the European Central Bank (ECB) where there has been a failure to act.

7.16.1.2 Non-privileged applicants

Non-privileged applicants have limited entitlement to complain. The wording of Article 265 TFEU provides that the non-privileged applicants can 'complain to the Court that an institution, body, office or agency of the Union has failed to address to that person …'. This means that the non-privileged applicant cannot complain about all failures to act, but only about a failure by the institution to act in relation to an act that would be addressed to the non-privileged applicant. Since a non-privileged applicant cannot be the addressee of a Regulation or a Directive, they may challenge only a failure to adopt a Decision, which would be addressed directly to them. Furthermore, Article 265 TFEU specifically excludes a challenge relating to a failure to adopt a Recommendation or Opinion.

The scope of this provision appears to be very restrictive and makes it difficult for a non-privileged applicant to bring an action under Article 265 TFEU. The Court of Justice has interpreted this in a broad manner, such that an action for a failure to act lies only where there has been a failure to adopt a measure that the applicant was 'legally entitled to claim' under EU law. Furthermore, it is apparent from the case law that claims under Article 265 TFEU will be treated in the same manner as actions under Article 263 TFEU, whereby the non-privileged applicant will have *locus standi* if they can show individual and direct concern.

Case 246/81 *Lord Bethell v Commission* [1982] ECR 2277 illustrates this point. The applicant had notified the Commission of alleged anti-competitive practices by European airlines, contrary to EU law, and had requested an inquiry and a decision on the matter. When the Commission failed to take such action, Lord Bethell challenged this failure to act under Article 265 TFEU. The Court of Justice stated as follows.

Case 246/81 *Lord Bethell v Commission* [1982] ECR 2277

12. According to the third paragraph of Article 175 [now Article 265 TFEU], any natural or legal person may, under the conditions laid down in that article, complain to the Court that an institution of the Community [now Union] 'has failed to address to that person any act other than a recommendation or an opinion'.

13. It appears from the provisions quoted that the applicant, for his application to be admissible, must be in a position to establish either that he is the addressee of a measure of the Commission having specific legal effects with regard to him, which is, as such, capable of being declared void, or that the Commission, having been duly called upon to act in pursuance of the second paragraph of Article 175, has failed to adopt in relation to him a measure which he was legally entitled to claim by virtue of the rules of Community law.

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14. In reply to a question from the Court the applicant stated that the measure to which he believed himself to be entitled was 'a response, an adequate answer to his complaint saying either that the Commission was going to act upon it or saying that it was not and, if not, giving reasons'.

    Alternatively the applicant took the view that the letter addressed to him on 17 July 1981 by the Director-General for Competition was to be described as an act against which proceedings may be instituted under the second paragraph of Article 173 [now Article 265 TFEU].

15. The principal question to be resolved in this case is whether the Commission had, under the rules of Community law [now EU law], the right and the duty to adopt in respect of the applicant a decision in the sense of the request made by the applicant to the Commission in his letter of 13 May 1981. It is apparent from the content of that letter and from the explanations given during the proceedings that the applicant is asking the Commission to undertake an investigation with regard to the airlines in the matter of the fixing of air fares with a view to a possible application to them of the provisions of the Treaty with regard to competition.

16. It is clear therefore that the applicant is asking the Commission, not to take a decision in respect of him, but to open an inquiry with regard to third parties and to take decisions in respect of them. No doubt the applicant, in his double capacity as a user of the airlines and a leading member of an organization of users of air passenger services, has an indirect interest, as other users may have, in such proceedings and their possible outcome, but he is nevertheless not in the precise legal position of the actual addressee of a decision which may be declared void under the second paragraph of Article 173 or in that of the potential addressee of a legal measure which the Commission has a duty to adopt with regard to him, as is the position under the third paragraph of Article 175.

> 17. It follows that the application is inadmissible from the point of view of both Article 175 and Article 173.

Review Question

> To whom do you think a Commission Decision in this case would have been addressed?
>
> *Answer*: In this case, the potential addressees of any Decision on the anti-competitive behaviour of the airlines would have been the airlines themselves and not Lord Bethell (who would also have been unlikely to have been able to prove that any such Decision would have directly and individually concerned him). It was held that Lord Bethell had no *locus standi* to challenge the Commission's alleged failure to act.

In Case T-95/96 *Gestevisión Telecinco SA v Commission* [1998] ECR II-3407, the Court of Justice ruled that an undertaking would be directly concerned by a decision on State aid where the national authorities clearly
p. 313 intended to grant the aid and would be individually concerned ↵ where the decision would have affected them by reason of attributes or circumstances that differentiated them from all others. Where the Commission took a decision that a measure did not constitute aid, or constituted aid, but was nonetheless compatible with the common market, without initiating the procedure under Article 104 TFEU on the investigation of State aids, the beneficiaries of that procedure (in particular, competing companies) could secure compliance with the procedure only by challenging the decision to grant aid before the Court of Justice. A competing company whose interests would be affected by the grant of that aid was therefore directly and individually concerned by the Commission's failure to act.

7.16.2 Challengeable grounds

A failure to act on the part of the European Parliament, the European Council, the Council, or the European Commission is open to challenge only on the ground that:

- the defaulting institution has been called upon to act (as it would be inequitable to sue an institution before notifying it of the complaint and calling upon it to take the action required by the complainant); and
- the institution has failed to act.

Thinking Point

> Write down what you think 'fail to act' should mean in this context. Check, and if necessary correct, your definition when you have read the next sections of text.

In Case 48/65 *Alfons Lütticke v Commission* [1966] ECR 19, the applicants alleged that a German tax on imports of dried milk was contrary to EU law. They made a formal application requiring the Commission to take infringement proceedings against Germany under Article 226 EC (now Article 258 TFEU). The Commission responded that the tax was not contrary to EU law and that therefore it would not take such proceedings. The Court of Justice ruled that proceedings for a failure to act could be brought only if the institution had failed to define its position. The Commission had defined its position by taking the decision not to initiate proceedings against Germany and therefore it had not 'failed to act'. By making a decision not to initiate proceedings, the Commission had defined its position and had notified the applicant within the prescribed period. The institution is not obliged to take the action required by the complainant in order to avoid an Article 265 TFEU action; it is simply obliged to define its position and that will bring an end to the defendant institution's failure to act under Article 265 TFEU. As a result of this interpretation of 'fail to act', actions under Article 265 TFEU are rarely successful.

7.16.3 Procedure

Article 265(2) TFEU provides guidance on the procedure to be followed for an action for failure to act. The
p. 314 applicant must first make a formal request to the relevant institution to act. If ↵ the institution fails to define its position within two months, the applicant may apply directly to the Court of Justice within a further period of two months.

7.16.4 Effect

If the Court of Justice finds that a failure to act infringes the Treaty, it will order the institution concerned to take any necessary steps to remedy the omission. These steps are not necessarily those requested by the applicant.

7.17 The relationship between Article 263 TFEU and Article 265 TFEU

If the institution has not defined its position, Article 265 TFEU is the appropriate provision; if the position has been defined, Article 263 TFEU should be used, since the definition in itself amounts to an act that can be challenged. The two actions are often pleaded in the alternative, but a particular measure must amount either to an act or to a failure to act, and so only one action can be correct. If the requirements of the appropriate action are not fulfilled, for example because a challenge to an act under Article 263 TFEU is made by an individual lacking direct and individual concern, it is not open to that individual to bring an action under Article 265 TFEU instead.

In Joined Cases 10 & 18/68 *Eridania and others v Commission* [1969] ECR 459, a Commission Decision granted aid to three Italian sugar refineries. A number of other sugar producers asked the Commission to annul this Decision, which it refused to do. The other producers then made both Article 263 TFEU and Article 265 TFEU applications to the Court of Justice. The Court held that the Article 265 TFEU action could not succeed because the Commission's positive refusal to annul the Decision amounted to an act, rather than a failure to act. The

Article 263 TFEU action could not succeed because there was no direct and individual concern. The Court of Justice stressed that Article 265 TFEU should not be used to circumvent the restrictions of Article 263 TFEU. If an institution refused to annul an act, recourse against that refusal was provided by the Treaty under Article 263 TFEU, and the refusal should not therefore be treated as a failure to act giving rise to an Article 265 TFEU action.

7.18 Conclusions

Although Articles 263, 265, and 277 TFEU permit actions taken by the EU to be challenged, these Articles will not provide a remedy in every case. Under Article 263 TFEU, both semi-privileged applicants and non-privileged applicants are extremely restricted, albeit in different ways, in their opportunities to challenge EU acts.

Under Article 265 TFEU, only total inaction may be challenged, rather than positive refusals to act, and non-
p. 315 privileged applicants must prove that the measure they are seeking would have ↵ been addressed to them. Given that Article 277 TFEU does not provide for an independent cause of action at all, it is evident that the EU is not overly anxious to encourage challenges to its measures. However, it should be remembered that the Member States are equally cautious about challenges to national law and that, under EU law (as discussed in Chapter 4), it is possible to claim damages in respect of an EU measure that has not been successfully challenged under Articles 263, 265, or 277 TFEU.

Summary

Article 258 TFEU

- The Commission, in its supervisory capacity, can bring enforcement proceedings against a Member State for a failure to comply with its obligations under the Treaties.

Article 260 TFEU

- The Commission can recommend to the Court of Justice a lump sum or penalty payment for the Member State's breach.
- The Court of Justice can impose both a lump sum and a penalty payment.

Article 263 TFEU

- Legislative acts that may be challenged include Regulations, Directives, and Decisions. Recommendations, Opinions, and acts of preparatory character are not subject to review.
- Article 263 TFEU provides for the judicial review of EU measures.

Locus standi

- Privileged applicants (the Member States and the major EU institutions) have standing to bring a challenge to any measure.
- Semi-privileged applicants (certain other EU institutions) may challenge a measure only for the purpose of protecting their prerogatives.
- Non-privileged applicants (individuals and companies) may challenge only measures that are addressed to them, or which are of direct and individual concern to them, or where they are directly concerned by a regulatory act that does not entail implementing measures.

Direct and individual concern

- A measure will be of direct concern to an applicant if its impact on the applicant is direct at the time of its adoption and does not depend on the exercise of discretion by a Member State (*Bock*).
- A measure will be of individual concern to an applicant if, at the date on which the measure is adopted, it is part of a closed class of those affected by the measure, or is part of a group that is more seriously affected by the measure than others affected (*International Fruit*; *Toepfer*).
- Once the applicant has established its standing to bring the challenge, it must prove that at least one of the grounds listed in Article 263 TFEU is satisfied—namely, lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of a rule of law relating to its application, or misuse of powers.

Article 277 TFEU

- Article 277 TFEU allows an applicant to rely on one of the Article 263 TFEU grounds to avoid the application of a Regulation in legal proceedings. If successful, the Regulation is declared inapplicable in the proceedings, rather than invalid.

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Article 265 TFEU

- Article 263 TFEU provides for the judicial review of the EU's failure to act. It is rarely used because any action by the EU, including a refusal to take measures, constitutes a positive act and is thus open to challenge under Article 263 TFEU rather than Article 265 TFEU.

Further Reading

Articles

A Arnull, 'Private Applicants and the Action for Annulment since *Codorniu*' (2001) 38 CML Rev 7

A comprehensive review of the developments in judicial review cases up to 2001.

S Balthasar, '*Locus Standi* Rules for Challenges to Regulatory Act by Private Applicants: The New Article 263(4) TFEU' (2010) 35 EL Rev 542

Contextual analysis of the changes made to Article 263 TFEU by the Treaty of Lisbon.

E Berry and S Boyes, 'Access to Justice in the Community Courts: A Limited Right?' (2005) 24 CJQ 224

Argues that the approach adopted by the Court of Justice to the standing of natural and legal persons under what is now Article 263 TFEU is both inconsistent and inappropriate.

A Cygan, 'Protecting the Interests of Civil Society in Community Decision-Making: The Limits of Article 230 EC' (2003) 52 ICLQ 995

Looks at the issue of the legal vacuum that exists when applicants do not fulfil the standing criteria.

J Usher, 'Direct and Individual Concern: An Effective Remedy or a Conventional Solution?' (2003) 28 EL Rev 575

Examines whether direct and individual concern provides an effective remedy for an applicant.

Question

Imagine that the EU operates a system of production licences, administered by the Member States, in respect of soft toys, in order to avoid the development of a soft toy mountain. The Council has recently issued a Regulation, which has immediate effect, permitting Member States to prohibit the grant of production licences in respect of cuddly toy penguins.

The two EU producers of cuddly toy penguins wish to challenge the Regulation. Do they have *locus standi* (standing) to do so?

Visit the online resources for an outline answer to this question *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-7-guidance-on-answering-assessment-questions?options=showName>*, **and additional self-test questions** *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-7-self-test-questions?options=showName>* **with feedback.**

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