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Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending

After years of debate, the Aarhus Regulation has finally been reformed. This article focuses on the amendments to the scope of application of the Regulation's internal review and access to justice provisions, and demonstrates that these are the most important changes introduced by the reform. Not only do these amendments mark an important development towards full compliance by the EU with its obligations under the Aarhus Convention; they also fill a vacuum, and solve the main problem which lay at the heart of the EU system of access to justice in environmental public interest cases. First, the article explores the obstacles faced by different stakeholders seeking access to the EU Courts by reference to specific categories of EU environmental law and risk regulation acts. This provides a systemic overview of different problematic aspects associated with different scenarios, unpacking all relevant implications. Secondly, it embraces a pragmatic perspective and draws a clear distinction between challenges to legislative and regulatory acts. Against the backdrop of this examination, the article identifies the main problem of the EU system: the application of the 'complete system of legal remedies' rationale to the specific case of regulatory acts. Further, it highlights that there is no 'interpretative' way out of the TFEU conundrum. Thirdly, the article analyses the Commission's disappointing proposal for a reform of the Aarhus Regulation and the final text of the 2021 amendments to the Regulation. The story has a (surprisingly) happy ending. The EU institutions have finally acknowledged the main problem in the system of access to the EU Courts in environmental matters, and recognised the need to solve it in the specific context of the Aarhus Regulation.

An analysis of the conditions under which EU environmental and public health law acts may be challenged by non-market actors in front of the EU Courts triggers a number of complex considerations. A comprehensive examination postulates a twofold focus on access to justice under the standing rules of Article 263(4) TFEU,[1] and the specific procedures enshrined in the Aarhus Regulation. In October 2021, after fifteen years of debate and controversy, the Aarhus Regulation was reformed by the EU institutions.[2] Much will be said and written about the decision to enable members of the public to request an internal review of EU administrative acts, as long as they can demonstrate sufficient public support or an impairment of their rights in comparison with the public

[1] The thorny issue of the application of the second and third limbs of Article 263(4) TFEU in environmental public interest cases has been thoroughly examined in the literature. For an encompassing overview on the standing criteria of Article 263(4) TFEU, see A Albors-Llorens, 'Remedies against the EU institutions after Lisbon: an era of opportunity?' (2012) 71 *Cambridge Law Journal* 507; A Albors-Llorens, 'Sealing the fate of private parties in annulment proceedings: the General Court and the new standing test in Article 263(4) TFEU' (2012) 71 *Cambridge Law Journal* 52. For recent accounts on standing in challenges to environmental and public health law acts, see M Van Wolferen and M Eliantonio, 'The EU's difficult road towards non-compliance with the Aarhus Convention' in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Elgar 2020); and GC Leonelli, 'A threefold blow to environmental public interest litigation: the urgent need to reform the Aarhus Regulation' (2020) 45 *European Law Review* 324.

[2] See Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies [2021] OJ L 356/1; and Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to community institutions and bodies [2006] OJ L 264/13.

at large.[3] Equally, it is reasonable to presume that the inclusion of any acts which have legal and external effects and contain provisions that 'may contravene environmental law'[4] will come under the spotlight. However, the crucial point in the reform is a different one.

This article focuses on the amendments to the scope of application of the Regulation's internal review and access to justice procedures. It demonstrates that the inclusion of *all non-legislative* acts, regardless of whether the relevant provisions entail *automatic* or *non-automatic* implementation at the *EU* or the *Member State* level, is by far the most important change introduced by the reform. Not only does the 'new' Aarhus Regulation mark an important development towards full compliance by the EU with its obligations under the Aarhus Convention;[5] it also fills a vacuum, and solves the main problem which lay at the heart of the EU system of access to justice in environmental public interest cases.

Section I provides an introductory overview of the relevant provisions in the Aarhus Convention and the 'old' Aarhus Regulation. It highlights the main problematic aspects associated with the Aarhus Regulation procedures, as they stood before 2021, and briefly analyses the Commission's 2020 proposal for reform.[6] This sets the stage for the article's in-depth examination and paves the way for the following assessment of the 2021 amendments to the Aarhus Regulation. Section II broadens the scope of the enquiry to encompass access to justice in environmental and public health matters under Article 263(4) TFEU. It explores the obstacles faced by different non-

[3] See Article 1 point (3)(a) of Regulation (EU) 2021/1767, adding paragraph 1(a) to Article 11 of Regulation (EC) No 1367/2006; Article 1 point (2)(a) of Regulation (EU) 2021/1767, amending Article 10(1) and 10(2) of Regulation (EC) No 1367/2006; Article 1 point (5) of Regulation (EU) 2021/1767, amending Article 12(2) of Regulation (EC) No 1367/2006; and Article 2 of Regulation (EU) 2021/1767. See also Recitals (17) to (21) in the Preamble to Regulation (EU) 2021/1767.

[4] See Article 1 point (1) of Regulation (EU) 2021/1767, amending Article 2(1)(g) and (2(1)(h) of Regulation (EC) No 1367/2006. See also Recitals (9) to (12) of Regulation (EU) 2021/1767.

[5] See the text of the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters 2161 UNTS 447, 38 ILM 517 (1999). On 18-21 October 2021 the seventh session of the Meeting of the Parties to the Aarhus Convention took place. In this context, the Parties adopted Decision VII/8f concerning compliance by the European Union with its obligations under the Convention, ECE/MP.PP/2021/CRP.6/Rev.1 (not yet published). According to paras 4 and 5 of the 2021 Decision, the Meeting of the Parties has found that, in accordance with the Committee's Report on the implementation of request ACCC/M/2017/3, the 2021 amendments to the Aarhus Regulation meet the requirements of para 123 of the Committee's Findings on Communication ACCC/C/2008/32 (Part II). In this specific respect, the EU has thus brought itself into compliance with the relevant provisions of the Aarhus Convention; for further information, see *infra* note 19 and section IV. However, other compliance issues are still open. As specifically regards EU compliance with the Committee's Findings and recommendations on Communication ACCC/C/2015/128 (European Union, ECE/MP.PP/C.1/2021/21), on state aid measures taken by the European Commission, the Meeting of the Parties '[…] exceptionally decided, by consensus, to postpone decision-making […] to the next ordinary session of the Meeting of the Parties to be held in 2025 […]'. See the Annex to Decision VII/8f concerning compliance by the European Union with its obligations under the Convention; and the List of key decisions and outcomes as adopted by the Meeting of the Parties at its seventh session, ECE/MP.PP/2021/CRP.9/Rev.1 (not yet published), page 8, point (b)(vi), and pages 14 and 15.

[6] European Commission, Proposal for a Regulation of the European Parliament and of the Council on amending Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to community institutions and bodies, COM(2020) 642 Final.

market actors seeking access to the EU Courts by reference to specific categories of EU acts, adopted across different areas of EU environmental law and EU risk regulation. This illustrates the difficulties that these stakeholders face in practice, rather than in theoretical terms. This examination provides a systemic vision of different problematic aspects associated with different scenarios in environmental public interest litigation.

Taking stock of this overview, the article embraces a pragmatic perspective. Section III thus distinguishes 'apples' from 'oranges', 'legislative' and 'regulatory' acts. It emphasises that the main problems arise in respect of regulatory acts; as the article illustrates, the main weakness of the TFEU system lies in the application of the 'complete system of legal remedies' rationale to the specific case of regulatory acts. A significant number of regulatory acts adopted in the field of environmental and public health protection law entail implementation; in the majority of cases, the relevant implementing measures are of a non-automatic nature. The interlocking of the second and third limbs of Article 263(4) TFEU thus deprives non-market stakeholders of any opportunity to challenge the *legally self-standing* and *self-contained* component of EU regulatory acts, prior to the adoption of the relevant implementing measures;[7] further, in the case of acts which entail implementation at the Member State level, these stakeholders will also be unable to get *direct access* to the EU Courts. Nor is there any 'interpretative' way out of the TFEU conundrum.

For this reason, the reform of the Aarhus Regulation internal review and access to justice procedures provided the only way forward to remedy this situation. Section IV reverts to the Commission's 2020 disappointing proposal for reform, analysing it against the backdrop of the encompassing overview of sections II and III. As this section illustrates, the Commission's proposal perpetuated the 'complete system of legal remedies' rationale and transposed the highly restrictive logic of the third limb of Article 263(4) to the Aarhus Regulation provisions. Nonetheless, this story has a happy ending. The final text of the 'new' Aarhus Regulation includes all non-legislative acts within the scope of application of the Regulation's internal review and access to justice procedures, regardless of whether the relevant provisions entail *automatic* or *non-automatic* implementation at the *EU* or the *Member State* level.[8] The EU institutions have finally acknowledged the main problem in the system of access to the EU Courts in environmental matters, and recognised the need to solve it in the specific context of the Aarhus Regulation.

I. Setting the Stage: the Aarhus Convention, the Weaknesses of the 'Old' Aarhus Regulation, and the 2020 Commission's Proposal

[7] See *infra*, section III. The EU Courts' interpretation of the standing criteria is often more generous in challenges brought by market actors, as opposed to actions brought by non-market stakeholders acting in the public interest; however, an analysis of this further aspect would go beyond the circumscribed scope of the present enquiry.

[8] For the first argument that the internal review and access to justice procedures of the Aarhus Regulation ought to include within their scope of application all regulatory acts, regardless of whether they entail further implementation at the EU or the Member State level, see the analysis in Leonelli, *supra* note 1.

The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters aims to 'contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'.[9] To this end, the Parties to the Convention have agreed to bestow specific rights of access to information, public participation and access to justice on members of the 'public' or members of the 'public concerned'.[10] Pursuant to Article 9(3), 'each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'.

At the EU level, the Convention has been implemented by Regulation (EC) No 1367/2006. This applies in respect of regulatory action by the EU institutions and bodies. As clarified in Recital (7), the Regulation excludes from its scope of application any acts or omissions attributed to the EU institutions when the latter are acting in a *judicial* or *legislative* capacity. This is consistent with the express wording of Article 2(2) of the Aarhus Convention. The limitations in the scope of application of Title IV ('Internal Review and Access to Justice') of the 'old' Aarhus Regulation, however, went well beyond the mere exclusion of legislative acts.

Pursuant to the 'old' version of Article 10(1) ('Request for Internal Review of Administrative Acts'), any environmental non-governmental organisation ('NGO') which met the criteria laid out in Article 11 of the Regulation was entitled to make a written request for internal review to the EU institution or body that had adopted an administrative act under EU environmental law or which had failed to adopt one, where an administrative omission was alleged. Article 10(2) provided that the EU institution or body must consider any such request, take a decision on the matter and state its reasons in a written reply. Under Article 12(1), as it still stands, the organisations which have made a request for internal review under Article 10 'may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty'; according to the second paragraph of the Article, this also applies to cases where the EU institutions have failed to consider a request under Article 10(2). The organisations which have made a request for internal review may thus seek the annulment of a *decision to reject their request for internal review*; in this case, they will be granted standing under the first limb of Article 263(4) TFEU, as they will qualify as the 'addressees' of the relevant decision. This means that the applicants can only challenge the *act* which was the object of their request for internal review indirectly, in so far as they challenge and seek the annulment of the EU institution's *refusal to grant an internal review* of that specific act.

Pursuant to Article 2(1)(f) of the Aarhus Regulation, which has remained unchanged, 'environmental law' includes all EU legislation which, irrespective of the legal basis under which it was adopted, contributes to the pursuit of environmental and public health protection. Under the 'old'

[9] See Article 1 of the Aarhus Convention.
[10] See Article 2(4) and (5).

version of Article 2(1)(g), the notion of an 'administrative act' encompassed 'any measure of individual scope under environmental law […] having legally binding and external effects'.[11] This category only included acts 'directly addressed to a person or where the person affected can be distinguished individually'.[12]

An analysis of Article 2(1)(g) sheds some light on the main problematic aspect associated with the 'old' Aarhus Regulation. To be truly faithful to the Aarhus Convention, the procedures in the 'old' Aarhus Regulation should have encompassed within their scope of application all non-legislative acts. The origins as well as the rationale of the 2006 Regulation's reference to 'administrative acts of individual scope' is unclear.[13] Intuitively, in a field involving collective and indivisible stakes, acts of individual scope are bound to be a residual category. The vast majority of non-legislative acts adopted in the fields of EU environmental law and EU risk regulation have general application.[14] In practical terms, individual permits and decisions having an individual scope of application were the only acts that NGOs managed to challenge through the internal review and access to justice procedures.[15] The authorisations of genetically modified organisms ('GMOs') are a partial exception: these qualify as acts of individual scope due to the intellectual property rights of the developers of specific GM varieties. Any acts which are adopted within procedures initiated at the request of a market applicant, but which produce general effects for different categories of actors, cannot qualify as acts of individual scope.[16]

The overly narrow scope of application of the 'old' Aarhus Regulation can only be explained by a desire to limit the opportunities for NGOs to challenge EU environmental acts. As highlighted by the General Court ('GC') in *Stichting Natuur*, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in the context, and in the light of its object and purpose.[17] On these grounds, the GC acknowledged that the limitations in the 'old' scope of application of the Regulation's procedures were *not* justified in the light of the objectives and purpose of the Aarhus Convention.[18] If any doubts surrounding the compatibility of the 'old' text of Articles 2(1)(g) and Article 10(1) with the Aarhus Convention persisted, they would have been dispelled by the Findings

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[11] See Article 2(1)(g) of Regulation (EC) No 1367/2006, prior to the 2021 amendments.
[12] See the Commission Proposal, *supra* note 6, 2.
[13] See Leonelli, *supra* note 1, 346, referring to the GC's own acknowledgment in Case T-338/08 *Stichting Natuur and Pesticide Action Network* EU:T:2012:300, paras 71, 73, 80 and 81.
[14] See *infra*, section II, sub-section B.
[15] A list of all requests for an internal review made by NGOs and subsequent challenges to the CJEU is available on the Commission's website: see <https://ec.europa.eu/environment/aarhus/requests.htm> (accessed July 2021).
[16] See Case T-12/17 *Mellifera* v *Commission* EU:T:2018.616, paras 60 and 63 in particular. See also Case C-784/18 P *Mellifera* v *Commission* EU:C:2020:630.
[17] Case T-338/08 *Stichting Natuur and Pesticide Action Network*, para 72, citing Case C-344/04 *IATA and ELFAA* EU:C:2006:10, para 40.
[18] Ibid., para 72. See also Case T-396/09, *Vereniging Milieudefensie* v *Commission* EU:T:2012:301. The GC's Judgment was overruled by the ECJ; see Joined Cases C-404/12 P and C-405/12 P *Council and Commission* v *Stichting Natuur and Pesticide Action Network* EU:C:2015:5, and Joined Cases C-401/12 P to C-403/12 P *Council* v *Vereniging Milieudefensie* EU:C:2015:4.

of the Aarhus Convention Compliance Committee. These expressly stated that the 'old' Aarhus Regulation *failed to* implement Article 9(3) of the Aarhus Convention.[19]

Throughout the years, environmental NGOs made several attempts to broaden the scope of application of the internal review and access to justice procedures of the 'old' Regulation. Nonetheless, these attempts were to no avail. Ever since *Slovak Bear* and *Stichting Natuur*,[20] the Court of Justice ('ECJ') has consistently held that Article 9(3) of the Aarhus Convention does not contain any unconditional and sufficiently precise obligations. On these grounds, the ECJ overturned the GC's decision in *Stichting Natuur* and found that Article 9(3) of the Convention could not be relied on to plead the invalidity of Articles 2(1)(g) and 10(1) of the 'old' Aarhus Regulation. In *Mellifera*, predictably, the EU Courts also found that the duty of conform interpretation may not result in a *contra legem* interpretation of the wording of the Aarhus Regulation.[21] For this reason, the attempt to broaden the scope of application of the 'old' Regulation through an interpretation in the light of Article 9(3) of the Convention did not yield any successful results.

From an environmental law perspective, this state of things was highly unsatisfactory. After the publication of the 2017 Findings of the Aarhus Convention Compliance Committee, and after the Council took position on this matter, a reform of the Regulation was almost taken for granted by societal stakeholders.[22] Indeed, in October 2020 the Commission published a proposal for reform.[23] As regards the category of acts which may be challenged, the proposal conceded that the scope of application of the Regulation should be broadened beyond acts of individual scope.[24] More specifically, the text of Article 2(1)(g) in the Commission's proposal defined an 'administrative act'

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[19] Aarhus Convention Compliance Committee, Findings and recommendations with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union, adopted on 17 May 2017, paras 48 to 57. See also Aarhus Convention Compliance Committee, Findings and recommendations with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, adopted on 14 April 2011.

[20] Case C-240/09 *Lesoochranárske Zoskupenie* ('*Slovak Bear*') EU:C:2011:125, para 45; Joined Cases C-404/12 P and C-405/12 P *Council and Commission* v *Stichting Natuur and Pesticide Action Network*, para 47. See also Joined Cases C-401/12 P to C-403/12 P *Council* v *Vereniging Milieudefensie*.

[21] Case T-12/17 *Mellifera*, para 87. For a more detailed analysis, see Leonelli, *supra* note 1.

[22] See Council Decision 9422/18 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in Case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation 1367/2006 [2018] OJ L 155.

[23] Commission proposal, *supra* note 6. The publication of the Commission's proposal came after the publication of a study on access to justice at the EU and the Member State level. See 'Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters', Final report, September 2019, 07.0203/2018/786407/SER/ENV.E.4. See also Commission Staff Working Document, Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters, SWD (2019)378 Final; and European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: improving access to justice in environmental matters in the EU and its Member States, COM(2020) 643 Final. The Commission ultimately focused on three elements: 'broadening' access to justice at the Member State level in cases involving the implementation of EU environmental law, the specific role of national courts in the context of the preliminary reference procedure, and reforming the Aarhus Regulation.

[24] Commission proposal, *supra* note 6, 2.

as a 'non-legislative act adopted by a Union institution or body, which has legally binding and external effects and contains provisions that may, because of their effects, contravene environmental law [as defined in Article 2(1)(f)] excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level'. Symmetrically, Article 10(2) in the 2020 proposal stipulated that 'where an administrative act is an implementing measure at Union level required by another non-legislative act, the [NGO] may also request the review of the provision of the non-legislative act for which that implementing measure is required, when requesting the review of that implementing measure'. The proposal thus provided that, when requesting an internal review of an EU implementing measure, the NGOs may also request an internal review of the EU 'parent' measure.

The Commission's 2020 proposal has been superseded by the agreement between the European Parliament and the Council on a different text. The 'new' amendments to the Aarhus Regulation, negotiated by the European Parliament and the Council, have been incorporated in Regulation (EU) 2021/1767. This was formally adopted on 8 October 2021. The 2021 reform triggers a number of questions. How have the EU institutions approached the relevant issues? How are we to assess the 2021 amendments to the scope of application of the Aarhus Regulation's internal review and access to justice provisions? And in what sense does the 'new' Regulation solve the main problem of the EU system of access to justice in environmental public interest litigation?

A broader perspective and a systemic overview of access to the EU Courts in cases involving environmental and public health acts are necessary to answer these questions meaningfully. The next section thus turns to an analysis of access to justice in environmental matters under Article 263(4) TFEU. Section IV will revert to the questions surrounding the Aarhus Regulation, setting the Commission's 2020 proposal and the amendments of Regulation (EU) 2021/1767 against the more encompassing backdrop of the examination of sections II and III.

II. Systemic Vision: Mapping Access to the EU Courts in Cases Involving Different Actors and Different Categories of Acts

This section explores the obstacles faced by different stakeholders seeking access to the EU Courts under Article 263(4) TFEU; the examination is conducted by reference to specific categories of EU acts, adopted across different areas of EU environmental law and EU risk regulation. It respectively takes into consideration challenges to legislative acts entailing implementation of an automatic or non-automatic nature, regulatory acts which do not entail implementation, regulatory acts with automatic or non-automatic implementing measures, and acts of individual scope.

The analysis employs cases brought by regional or local authorities, NGOs and different societal stakeholders to illustrate the extent to which different actors may succeed in bringing actions for annulment to the Court of Justice of the European Union ('CJEU') under different scenarios. This

provides a comprehensive overview of the state of access to the EU Courts in environmental public interest matters. This enquiry paves the way for an in-depth analysis of the most problematic aspect of the EU system, and of the potential remedy (and final amendments) in the specific context of the Aarhus Regulation. The below sub-section starts the examination by focusing on legislative acts.

A. Legislative Acts Entailing Automatic or Non-Automatic Implementation: the Second Limb

Under the first limb of Article 263(4) TFEU, non-privileged applicants may challenge any acts which are addressed to them. If they are not the addressees of the act, they may be granted standing under the second or the third limb of Article 263(4). Legislative acts, i.e. acts adopted under the EU legislative procedures,[25] may only be challenged if the applicants meet the standing criteria enshrined in the second limb. Therefore, the action will be admissible if the applicants can demonstrate that the relevant legislative act is of direct and individual concern to them.

The EU Courts have consistently applied the *Plaumann* formula to assess whether the criterion of individual concern is met. This, as is well known, entails that the relevant act shall affect the applicants by reason of specific attributes which are peculiar to them, or by reason of factual circumstances which distinguish them individually as if the act were addressed to them.[26] Before the entry into force of the Lisbon Treaty, non-privileged applicants could only seek to establish their standing by reference to the second limb of Article 263(4). This provided environmental NGOs and societal actors with several opportunities to challenge the paradoxical effects of the *Plaumann* formula in the field of environmental and public health law.[27] Environmental and public health protection are collective interests; for this reason, the acts adopted in these fields of law are bound to have a diffuse reach and a general scope of application. Unsurprisingly then, establishing individual concern within the meaning of the *Plaumann* formula is an impossible endeavour for societal stakeholders. This also raises considerations surrounding the (neglected principle of the) equality of arms; as noted by several environmental NGOs, and as also highlighted by the Aarhus Convention

[25] On the distinction between legislative and regulatory acts, see Case T-18/10 *Inuit Tapiriit Kanatami* v *Parliament and Council* EU:T:2011:419, paras 38 to 56. See also the Opinion of AG Kokott in Case C-583/11 P *Inuit Tapiriit Kanatami* v *Parliament and Council* EU:C:2013:21, paras 26 to 62; and Joined Cases C-622/16 P to C-624/16 P, S*cuola Elementare Maria Montessori* v *Commission*, EU:C:2018:873, paras 22 to 39.

[26] Case C-25/62 *Plaumann* v *Commission of the EEC* EU:C:1963:17. See also Case C-583/11 *Inuit Tapiriit Kanatami* v *Parliament and Council* EU:C:2013:625, para 72; Joined Cases C-408/15 P and C-409/15 P *Ackermann Saatzucht* v *Parliament and Council* EU:C:2016:893, paras 27 to 46.

[27] See the analysis in Leonelli, *supra* note 1, 327 to 329, discussing inter alia Case C-321/95 *Greenpeace International* v *Commission* EU:C:1998:153, paras 10 to 24; Case T-219/95 *Danielsson* v *Commission* EU:T:1995:219, paras 24 to 27; and Case T-236/04 *EEB and Stichting Natuur en Milieu* v *Commission* EU:T:2005:426, paras 40 to 49.

Compliance Committee, market actors and stakeholders acting in the public interest are by no means placed on an equal footing when it comes to standing matters.[28]

Throughout the years, NGOs and societal stakeholders have put forward different arguments in favour of a reinterpretation of the notion of individual concern in cases involving public health and environmental law acts.[29] These attempts were to no avail.[30] More recently, societal groups and NGOs have increasingly relied on Article 47 (right to effective judicial protection) of the Charter of Fundamental Rights, Article 9(3) of the Aarhus Convention or a combination of the two in their attempts to broaden the standing criteria of the second limb of Article 263(4) TFEU.[31] These attempts have been equally unsuccessful. The most famous example is perhaps the *People's Climate Case*, an action for the annulment of the legislative package enacted at the EU level to comply with the EU Nationally Determined Contributions ('NDCs') under the Paris Agreement. The applicants, 36 private individuals and a Swedish association, relied on alleged infringements of their fundamental rights, on Article 47 of the Charter and on Article 9(3) of the Aarhus Convention[32] to substantiate their argument that they should be granted standing.

Both the GC and the ECJ were adamant on the point that granting standing under such conditions would make the requirements of the second limb of Article 263(4) TFEU devoid of any purpose. First, the Courts excluded that alleged breaches of fundamental rights would be sufficient to

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[28] See the analysis in Leonelli, *supra* note 1, 328, referencing Case C-321/95 *Greenpeace*, para 17; Case T-236/04 *EEB and Stichting Natuur*, para 47; and ClientEarth's submissions to the Aarhus Convention Compliance Committee.

[29] See the analysis in Leonelli, *supra* note 1, 328. In *Greenpeace* (paras 23 to 25) and *EEB and Stichting Natuur* (paras 42 to 44) the applicants advocated a reinterpretation of the *Plaumann* test in cases involving environmental and public health law acts. For a broader perspective, see *Danielsson* (paras 24 to 27); the Opinion of AG Jacobs in Case C-50/00 *Unión de Pequeños Agricultores* v *Council* EU:C:2002:197, para 60; and Case T-177/01 *Jégo-Quéré v Commission* EU:T:2002:112.

[30] The EU Courts' approach to standing in environmental litigation is much more stringent than the approach that they have followed in other areas of the case law; an example is data protection law. The traditional 'floodgate' argument and concerns surrounding the capacity of the EU Courts to handle potentially significant numbers of environmental cases brought in the public interest have most probably played a role.

[31] From a human rights perspective, see already *Danielsson* (paras 24 to 27), referencing Articles 6 and 13 of the ECHR; and the Opinion of AG Jacobs in Case C-50/00 *Unión de Pequeños Agricultores*, para 39, referencing Article 47 of the Charter. In recent years, see Case T-16/04 *Arcelor* v *Parliament and Council* EU:T:2010:54 (alleging breaches of fundamental rights, but without specific references to Article 47 of the Charter); Case T-18/10 *Inuit Tapiriit Kanatami*, para 51; Case C-583/11 *Inuit Tapiriit Kanatami*, paras 86 to 107 (on Article 47 of the Charter and Articles 6 and 13 of the ECHR); Joined Cases C-408/15 P and C-409/15 P *Ackermann* (where the appellant alleged breaches of fundamental rights protected by the Charter and specific provisions of the International Convention for the Protection of New Varieties of Plants); Case T-600/15 *Pesticide Action Network* v *Commission* EU:T:2016:601, paras 46 and 48 (where the applicants invoked Articles 37 and 47 of the Charter and Article 9(3) of the Aarhus Convention in the different context of the interpretation of the third limb of Article 263(4) TFEU); Case T-330/18 *Carvalho and Others* v *Parliament and Council* ('*People's Climate Case*') EU:T:2019:324, para 32 (where the applicants invoked Article 47, Article 9(3) of the Aarhus Convention and several alleged violations of their fundamental rights); Case C-565/19 P *Carvalho and Others* v *Parliament and Council* ('*People's Climate Case*') EU:T:2021:252, paras 53 to 66; Case T-178/18 *Région de Bruxelles-Capital v Commission* ('*Brussels-Capital Region*') EU:T:2019:130, paras 34 to 37; Case C-352/19 P *Région de Bruxelles-Capital v Commission* ('*Brussels-Capital Region*') EU:C:2020:978 (with the applicant/appellant invoking Article 9(3) of the Aarhus Convention).

[32] Case T-330/18 *People's Climate Case*, para 32.

establish standing; although the EU institutions are bound to respect fundamental rights and higher ranking rules of law, a claim that such rights or rules have been infringed is insufficient to establish admissibility.[33] Secondly, an interpretation of the conditions of Article 263(4) TFEU in the light of the fundamental right to effective judicial protection enshrined in Article 47 of the Charter cannot have the effect of setting aside the express conditions of the Treaty.[34] The ECJ reached a very similar conclusion in *Brussels-Capital Region*, analysed below in the next sub-section. The appellant had invoked Article 9(3) of the Aarhus Convention. Unlike the AG, the ECJ did not even assess whether the Region could qualify as a member of the 'public' within the meaning of the Convention; it merely stated that the international agreements concluded by the EU, while binding on EU institutions, cannot prevail over EU primary law. Thus, it concluded that Article 9 of the Aarhus Convention could not have the effect of modifying the conditions of admissibility laid out in Article 263(4) TFEU.[35]

Overall, it is fair to suggest that the *Plaumann* test makes it impossible for *societal actors* or *environmental NGOs* to meet the standing requirements of the second limb and challenge legislative acts. A partial exception applies to NGOs; the latter will be granted standing if they can either establish that they are vested with specific procedural powers of relevance to the case that they are bringing, or demonstrate that they are distinguished individually by reason of their own interests or the interests of their members.[36] Nonetheless, these requirements will rarely be met in practice. Further, it is unclear whether societal actors and NGOs would qualify as being *directly* concerned. Leaving aside the question of implementing measures, which is addressed in further detail below, the criterion of direct concern entails that the *legal* position of the applicant has been affected by the contested act.[37] In the field of environmental and public health protection law, it is unclear whether societal actors or NGOs can make a case that they have been affected in their legal sphere;[38] several doubts persist as to whether the EU Courts regard them as directly concerned in legal terms.[39] Against this background, the chances for societal stakeholders and NGOs to successfully challenge legislative acts are close to zero.

The last relevant category of actors is the one of *regional or local authorities*; borrowing the words of AG Bobek, these qualify as 'atypical' non-privileged applicants.[40] In this case, the EU

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[33] Case T-330/18 *People's Climate Case*, para 48; Case C-565/19 P *People's Climate Case*, para 48, citing Case C-345/00 P, *FNAB and Others* v *Council* EU:C:2001:270, para 40, and C-297/20 P, *Sabo and Others* v *Parliament and Council* EU:C:2021:24, para 29. See also Case T-16/04 *Arcelor*, para 103.

[34] Case T-330/18 *People's Climate Case*, paras 50 and 52; Case C-565/19 P *People's Climate Case*, paras 69 and 76 to 78, citing Case C-50/00 *Unión de Pequeños Agricultores* v *Council*, para 44; and Case C-263/02 P *Commission* v *Jégo-Quéré* EU:C:2004:210, para 36. For an analysis of the *People's Climate Case*, see also Van Wolferen and Eliantonio, *supra* note 1.

[35] Case C-352/19 P *Brussels-Capital Region*, paras 25 and 26.

[36] Case T-330/18 *People's Climate Case*, para 51; Case C-565/19 P *People's Climate Case*, paras 81 to 95, and case law cited therein.

[37] Recently, see Joined Cases C-622/16 P to C-624/16 P *Montessori*, para 42.

[38] See for instance Case T-330/18 *People's Climate Case*, paras 25 and 27.

[39] See *infra*, the analysis in sub-section B.

[40] Opinion of AG Bobek in Case C-352/19 P *Région de Bruxelles-Capital v Commission* ('*Brussels-Capital Region*') EU:C:2020:588, para 141.

Courts have traditionally applied the so called *Vlaams Gewest* test: a regional or local authority is considered to be individually and directly concerned by an EU act as long as the latter prevents it from exercising its specific, constitutionally attributed powers as it sees fit.[41] As AG Bobek acknowledged in a recent Opinion, this test relaxes the standing criteria for this category of non-privileged applicants;[42] for this reason, it also affords regional and local authorities an opportunity to challenge legislative acts. Nonetheless, the direct concern element within the second limb of Article 263(4) TFEU comes into play at this point. In accordance with settled case law, for the direct concern requirement to be met, the act which is being challenged must leave no discretion to its addressees; the implementation of the act must be automatic and exclude the exercise of discretion by other authorities, in order not to interrupt the direct causal link between the EU act and the alteration of the applicant's legal situation.[43] This implies that legislative acts which entail implementation of a *non-automatic* nature will *not* be directly challengeable by any actors, including regional or local authorities.[44]

This adds a further layer of complexity. Legislative acts in the field of environmental and public health law will usually have implementing measures; where implementing acts are required, these are very often non-automatic in nature. This poses further obstacles to access to justice. For instance, if a regional authority had taken part to the *People's Climate Case*, it would have also been denied standing; indeed, the climate change package under challenge entailed non-automatic implementation at the EU and at the national level. Against this backdrop, to draw some conclusions, direct challenges to legislative acts will only be possible where the acts either do not entail any implementation, or entail implementation of an automatic nature. In any case, only actions brought by regional and local authorities or by NGOs vested with specific procedural rights will be admissible.

B. Self-Executing Regulatory Acts and Regulatory Acts Entailing Automatic or Non-Automatic Implementation: the Second and the Third Limbs

Unlike legislative acts, regulatory acts may be challenged under both the second and the third limbs of Article 263(4) TFEU. Nonetheless, non-market actors still face considerable obstacles in their

[41] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, paras 58 to 60, citing inter alia Case T-214/95 *Vlaams Gewest* v *Commission* EU:T:1998:77, para 29; Joined Cases T-132 and T-143/96 *Freistaat Sachsen and Others* v *Commission* EU:T:1999:326, paras 89 and 90; and Case T-288/97 *Friuli Venezia Giulia* v *Commission* EU:T:1999:125, para 32. See also the clarification in para 62 of the Opinion of AG Bobek, on the nature of the competences attributed to regional or local authorities.

[42] Opinion of AG Bobek, paras 60 and 61.

[43] See inter alia Joined Cases C-622/16 P to C-624/16 P *Montessori*, para 42; and Case C-663/17 P *ECB v Trasta Komercbanka and Others* EU:C:2019:923, para 103; Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 48.

[44] See *infra*, sub-section B, for an analysis of Case C-352/19 P *Brussels-Capital Region* (involving a challenge to a regulatory act).

attempts to get direct access to the EU Courts. In order to be granted standing under the second limb, the applicants will have to demonstrate that they are individually and directly concerned by the relevant act; the same considerations developed in regards of challenges to legislative acts apply. Thus, only actions brought by regional and local authorities (*Vlaams Gewest* test) or by NGOs vested with specific procedural rights will be deemed admissible. Yet again, a further caveat applies: these two categories of actors will only be granted standing where the regulatory acts that they are challenging do not entail implementation, or entail implementing measures of an automatic nature.

As acknowledged in the recent Opinion in *Brussels-Capital Region*, the EU Courts have sometimes embraced a substantive perspective and assessed the question of the automaticity of implementing measures *in concreto*. First, direct concern must be examined 'in the light of the purpose of that measure':[45] if the specific effects which have impacted the applicant's legal sphere stem automatically from the challenged act, it will be irrelevant whether other provisions of the same act entail implementation of a non-automatic nature.[46] Secondly, a substantive interpretation of the notion of 'automatic' implementation involves a focus on whether the EU or the national authorities may exercise any genuine discretion when implementing the EU act,[47] whether the relevant implementing measures are mechanical or ancillary,[48] and whether 'the possibility for the addressees not to give effect to the EU measure is purely theoretical and their intention to act in conformity with it is not in doubt'.[49] Overall, the criterion of direct concern will be met where it is obvious that implementing powers are 'bound to be exercised in a particular way',[50] and the action to be taken by the authority may be regarded as 'a foregone conclusion'.[51]

Reliance on the second limb of Article 263(4) TFEU may enable regional and local authorities or NGOs which qualify as being individually concerned to get direct access to the EU Courts and challenge regulatory acts.[52] Nonetheless, it is worth stressing that a plurality of EU regulatory acts adopted in the fields of environmental law and risk regulation entail implementation of a non-automatic nature; in these cases, the 'automaticity' requirement is an insurmountable obstacle. Further, the EU Courts have often failed to adhere to a substantive, *in concreto* interpretation of direct

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[45] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 52, citing Case T-119/02 *Royal Philips Electronics* v *Commission* EU:T:2003:101, para 276.
[46] Ibid.
[47] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 50, citing Case C-519/07 *Commission* v *Koninklijke Friesland/Campina* EU:C:2009:556, para 49.
[48] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, paras 50 and 51, referencing inter alia Case C-41/70 *International Fruit Company and Others* v *Commission* EU:C:1971:53, paras 23 to 26; Case C-135/92 *Fiskano* v *Commission* EU:C:1994:267, para 27; Case T-80/97 *Starway* v *Council* EU:T:2000:216, paras 61 to 65; and Joined Cases T-273/06 and T-297/06 *ISD Polska and Others* EU:T:2009:233, para 68.
[49] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 52. See also Case C-386/96 P *Dreyfus* v *Commission* EU:C:1998:193, para 44.
[50] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 54, citing Case T-223/01 *Japan Tobacco and JT International* v *Parliament and Council* EU:T:2002:205, para 46.
[51] Opinion, para 54.
[52] For an example, see Joined Cases T-339/16, T-352/16 AND T-391/16 *Ville de Paris and Others v Commission* EU:T:2018:927.

concern in cases involving challenges to environmental and public health law acts. This scenario is perfectly exemplified by the recent decisions in *Brussels-Capital Region*.

In this case, the Region sought the annulment of Commission's Implementing Regulation (EU) 2017/2324, by which the latter had renewed the approval of the controversial pesticidal active substance glyphosate. The Region claimed that glyphosate's renewal of approval compromised the exercise of its constitutionally attributed environmental competences.[53] It also laid emphasis on the automatic nature of the national implementing measures at stake in this case, thus arguing that it was directly concerned by the Commission's Regulation.

In accordance with the multi-level arrangements of the Plant Protection Products ('PPP') Regulation, pesticidal active substances are approved, re-approved and regulated at the EU level; however, pesticidal products containing the relevant active substance(s) may only be marketed upon being authorised at the Member State level.[54] Article 43(5) and (6) of the PPP Regulation stipulates that the Member States which have received an application for the re-authorisation of pesticidal formulations shall adopt their decision at the latest 12 months after the renewal of approval of the relevant active substance. Where this proves impossible, the Member States shall extend the authorisation for the period necessary to complete the examination. In this case, the Region claimed that the obligation for Belgium to extend the authorisation of glyphosate-based pesticidal formulations, pending the procedure for their re-authorisation, excluded any form of discretion. On these grounds, the Region argued that glyphosate's re-approval at the EU level *automatically* affected its own legal position (i.e. exercise of environmental competences). AG Bobek embraced the same substantive approach, highlighting that the Member States did not enjoy any discretion in this case and that the existing national authorisations for pesticides were automatically maintained as a direct consequence of the adoption of the act under challenge.[55] From a completely different perspective, both the GC and the ECJ adhered to a formalistic approach. Upon noting that the EU renewal of approval of an active substance does not automatically cause the confirmation, extension or renewal of national authorisations for pesticidal products,[56] the GC indirectly suggested that the temporary extension of national authorisations resulted from delays attributable to the Member States.[57]

Turning to the third limb of Article 263(4) TFEU, non-privileged applicants may challenge 'a regulatory act which is of direct concern to them and does not entail implementing measures'. As clarified since *Inuit*, the notion of a 'regulatory' act refers to all *non-legislative* acts of *general*

[53] Under Belgian law, the regions have environmental competences and are entrusted with regulating the use of plant protection products on their territory. In 2016, the Brussels-Capital Region enacted an order prohibiting the use of any glyphosate-based pesticidal formulations.
[54] See Chapter II, Section 1 (Active Substances), Articles 4 to 24 of Regulation (EC) 1107/2009/EC of the European Parliament and of the Council concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L 309/1 ('PPP Regulation'); and Chapter III (Plant Protection Products), Articles 28 to 57, and Annex I to the PPP Regulation.
[55] Opinion of AG Bobek, paras 83 to 86.
[56] Case T-178/18 *Brussels-Capital Region*, para 53.
[57] Ibid, para 54.

application; the second criterion implies that the acts shall apply to objectively determined situations and produce legal effects for categories of actors determined in general and abstract terms.[58] The requirement that regulatory acts shall not entail implementation is much broader than the automaticity requirement of the second limb. The existence of *any* implementing measures, regardless of their automatic or non-automatic nature, will prevent the applicants from being granted standing.[59]

Indeed, the second and the third limbs follow a different rationale. For the purposes of standing under the second limb, it is irrelevant whether the applicants could challenge the EU 'parent' act by relying on Article 277 TFEU, or through the preliminary reference procedure. These will be the only available judicial routes in cases involving acts which entail implementation of a non-automatic nature; however, direct and immediate access to the EU Courts is not excluded by the mere existence of implementing measures and by the possibility for the applicants to get judicial protection via alternative routes.[60]

By contrast, the third limb is clearly informed by a narrower 'alternative judicial route' rationale. This provision was added to Article 263(4) TFEU with a view to enabling applicants to challenge self-executing EU regulatory acts; before the Lisbon Treaty, these actors would have to infringe the relevant provisions in order to have access to a national court and indirectly plead the invalidity of a self-executing EU regulatory act.[61] For this reason, whenever a regulatory act entails implementation at the EU or at the national level, non-privileged applicants will be unable to rely on the third limb; they will have to indirectly plead the invalidity of the 'parent' act under Article 277 TFEU, or activate the preliminary reference procedure of Article 267 TFEU through an action at the Member State level. As the EU Courts have recently reiterated in their Judgments in the *People's Climate Case* (on legislative acts) and *GranoSalus* (on regulatory acts), Article 47 of the Charter does not imply that direct access to the CJEU shall be granted.[62] According to the EU Courts, the 'complete system of legal remedies and procedures' established by the Treaties is sufficiently robust to safeguard the right to effective judicial protection of non-privileged applicants.[63]

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[58] See Case T-262/10 *Microban International and Microban (Europe)* v *Commission* EU:T:2011:623, para 21; Case C-384/16 *European Union Copper Task Force* v *Commission* EU:C:2018:176, para 95; and Case T-125/18 *Associazione Granosalus* v *Commission* EU:T:2019:92, para 54.

[59] See inter alia Case C-244/16 P *Industrias Químicas del Vallés* v *Commission* EU:C:2018:177, para 47 and case law cited therein.

[60] See inter alia Case T-279/11 T& L Sugars *Açúcares* v *Commission* EU:T:2013:299, paras 70 to 72.

[61] Case T-18/10 *Inuit Tapiriit Kanatami* (T-18/10) EU:T:2011:419, para 50; and Opinion of AG Kokott in Case C-583/11 P *Inuit Tapiriit Kanatami*, paras 32 to 3; Joined Cases C-622/16 P to C-624/16 P *Montessori*, para 58.

[62] Case T-330/18 *People's Climate Case*, para 52; Case C-565/19 P *People's Climate Case*, para 77. See also Case C-313/19 P *Associazione GranoSalus* v *Commission* EU:C:2020:869, para 62.

[63] On the notion of the EU 'complete system of legal remedies', i.e. the interlocking of Article 263(4) TFEU, 277 TFEU and 267 TFEU with a view to granting direct or indirect access to the EU Courts to non-privileged applicants, see Case C-294/83 *Les Verts v Parliament* EU:C:1986:166, para 23; Case C-50/00 *Unión de Pequeños Agricultores*, para 40; Case C-236/02 P *Commission v Jégo-Quéré* , para 30; Opinion of AG Kokott in Case C-583/11 P *Inuit Tapiriit Kanatami,* paras 115 to 124; Case C-583/11 P *Inuit Tapiriit Kanatami,* paras 92 to 107; Case C-274/12 P *Telefónica* v *Commission* EU:C:2013:852, para 28; Case C-384/16 *European Union Copper Task Force* v *Commission*, paras 112 to 114; Case C-313/19 P *GranoSalus*, paras 31 to 33 and para 62.

The last relevant considerations relate to the EU Courts' interpretation of the notion of a 'regulatory act which does not entail implementing measures', and the question of direct concern in cases involving regulatory acts which do not entail implementation. According to settled case law, the question whether a regulatory act entails implementation must be evaluated by reference to the position of the applicant and the subject matter of the action. In other words, it is irrelevant whether an act entails implementation vis-à-vis actors other than the applicant; equally, it is irrelevant whether other (i.e. different) provisions of the same act entail implementation.[64] Several AGs have advocated a substantive interpretation of the requirement that a regulatory act shall not entail implementation. On these grounds, they have argued that the Courts should simply consider whether the challenged act is *legally self-contained*, irrespective of the adoption of further implementing measures,[65] or *fully and autonomously operational* in the light of its purpose, content and effects.[66] Throughout the years, the EU Courts have increasingly focused on the extent to which indirect review via the preliminary reference procedure would be 'artificial and unreasonable'.[67] Regrettably, they have too often failed to take this perspective in cases involving environmental public interest litigation. Yet again, *Brussels-Capital Region* offers a good example in this respect. The controversial question whether Member State authorisations of pesticides qualify as *stricto sensu* implementing measures came into play in that context; the EU Courts, however, fell short of providing a substantive interpretation.[68]

The final point regards the issue of direct concern, in the (few) cases involving regulatory acts adopted in the environmental and public health law fields which do not entail implementation. To what extent would regional or local authorities, environmental NGOs and societal stakeholders be granted standing in these circumstances? The question is more straight forward for regional or local authorities; if they can prove that the challenged act prevents them from exercising their constitutionally attributed competences, they will be considered to be directly concerned. Nonetheless, these applicants will still have to make a case that the challenged act affects the exercise of specific competences bestowed on them; mere references to general powers or general interests

[64] See inter alia Case C-274/12 P *Telefónica* v *Commission*, paras 30 and 31; Joined Cases C-622/16 P to C-624/16 P, *Montessori*, paras 63 to 65.

[65] See the Opinion of AG Wathelet in Case C-384/16 *Copper* v *Commission*, paras 37, 46, 53 to 55 and 63 to 71, and the corresponding points in the Opinion in Case C-244/16 P *Industrias Químicas del Vallés*.

[66] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 172; Opinion of Advocate General Cruz Villalón in Case C-456/13 P *T & L Sugars and Sidul Açúcares*, para 32.

[67] See Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, paras 173 to 175, and the case law cited therein. However, for the direct concern criterion to be met, the relevant acts must still entail implementation of a *non-automatic nature*; see *infra*, note 82.

[68] In a different vein, in Case C-313/19 P *GranoSalus*, the ECJ drew on Joined Cases C-622/16 P to C-624/16 P *Montessori* to evaluate the question whether glyphosate's renewal of approval entailed implementing measures *for the applicant/appellant*; in this light, it found that the applicant/appellant would only be able to indirectly challenge the EU act by resorting to artificial litigation at the national level. Nonetheless, the ECJ still found that the criterion of *direct* concern was not met in this case, as the EU act did not entail automatic implementation. Overall, the ECJ failed to assess whether the EU act was legally self-contained and whether the national authorisations of pesticidal formulations qualify as stricto sensu implementing measures. On this last point, see Leonelli, *supra* note 1.

will be insufficient to establish standing.[69] Turning to environmental NGOs, the position of the EU Courts is unclear; uncertainty persists as to whether these actors are regarded as directly affected in their legal sphere rather than in their factual position. Cases such as *Pesticide Action Network*[70] or *GranoSalus*[71] cast doubts on the EU Courts' position as regards the direct concern of NGOs or associations representing the interests of specific societal constituencies. Finally, it is dubious whether societal stakeholders could make a case that a regulatory act which does not involve implementation directly affects them in their legal sphere. The Commission raised this point in its observations in the *People's Climate Case*;[72] it is then reasonable to suggest that even if the measures challenged by the applicants in this case had been regulatory acts not entailing any form of implementation, these actors would have not been granted standing.

Importantly, the same considerations developed here on the direct concern of regional or local authorities, NGOs and societal stakeholders also apply in the context of the procedure of Article 277 TFEU: where EU implementing measures are at stake, these actors will be curtailed in their attempts to indirectly plead the invalidity of the 'parent' act if they cannot establish that they are directly concerned. Overall, to draw some conclusions, the interlocking of the second and third limbs of Article 263(4) TFEU makes it excessively difficult for all categories of actors to challenge regulatory acts.

C. The Last Category: Acts of Individual Scope

The final considerations of this section pertain to the residual category of acts of individual scope; these have been briefly considered in section I. On the one hand, administrative acts of individual scope will not be challengeable under the third limb of Article 263(4) TFEU. As explained above, the notion of regulatory acts merely includes acts of *general application*. On the other hand, individual acts may be challenged under the second limb; in this case, however, the applicants would have to establish their (direct and) individual concern.

It is worth stressing again that the number of acts of individual scope enacted under EU environmental or public health law is extremely limited. In the vast majority of cases, including in the context of procedures initiated by market applicants, the final acts will regulate objectively determined situations and produce legal effects for categories of actors determined in general and

[69] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 62, citing Case C-417/04 P *Regione Siciliana* v *Commission* EU:C:2006:282.
[70] Most worryingly, see Case T-600/15 *Pesticide Action Network*, paras 27 to 45.
[71] This point has remained unsettled in Case C-313/19 P *GranoSalus*; see paras 51 and 52. The ECJ excluded direct concern in light of the non-automatic nature of the implementing measures; however, it did not explicitly address the point whether glyphosate's renewal of approval impacted the association in its legal sphere.
[72] Case T-330/18 People's *Climate Case*, paras 25 and 27. However, direct concern may be established in cases involving an alteration of the applicant's legal sphere or the impairment of a specific right.

abstract terms.[73] In any case, as already explained in section I, these acts have always been challengeable under the Aarhus Regulation procedures.

This sub-section concludes the systemic overview of section II. The next section takes stock of the findings of this analysis and points to the most problematic aspect of the EU system: the application of the 'complete system of legal remedies' rationale in cases involving regulatory acts.

III. Of 'Apples' and 'Oranges': Legislative and Regulatory Acts, the 'Complete System of Legal Remedies', and the Aarhus Regulation

Section II has explored the obstacles faced by regional and local authorities, environmental NGOs and societal stakeholders acting in the public interest in their attempts to get access to the EU Courts under Article 263(4) TFEU. This section takes stock of the findings of the analysis and highlights several problematic aspects associated with the 'complete system of legal remedies' rationale.

The starting point of the analysis is a closer look at the 'complete system of legal remedies', involving either recourse to Article 277 TFEU or indirect challenges to EU acts through the preliminary reference procedure. The Article 277 TFEU scenario may materialise in challenges to legislative or regulatory acts which entail implementation at the EU level; the relevant implementing measures may be non-automatic or automatic in nature, depending on whether the applicants could or could not establish their standing under the second limb of Article 263(4) TFEU. The same considerations apply to Article 267 TFEU, in cases where implementation takes place at the Member State level.

An analysis of the 'complete system of legal remedies' triggers several considerations on its limits and weaknesses. The first problematic aspect is associated with both recourse to Article 277 TFEU and indirect access to the ECJ through the preliminary reference procedure; this consideration applies regardless of whether legislative or regulatory acts are under challenge, and regardless of the automatic or non-automatic nature of the relevant implementing measures. Under both the Article 277 or Article 267 scenarios, challenges to the EU 'parent' acts are 'postponed' until the relevant implementing measures have been adopted at the EU or the Member State level. In environmental public interest litigation, this is not likely to be an effective and timely solution. Most importantly, it deprives stakeholders of any opportunity to challenge the *self-standing* and *self-contained* policy or regulatory determinations which are inherent to the EU 'parent' acts at the time when these are adopted; these very determinations lie at the heart of environmental and public health actions which are brought in the public interest. For instance, the determination of the specific EU targets enacted to comply with the EU NDCs, rather than any subsequent implementing measures at the EU or the national level, was the very object of the action brought in the *People's Climate Case*. In a similar

[73] See Case T-262/10 *Microban*; Case T-12/17 *Mellifera*; and Case C-784/18 P *Mellifera*.

vein, the determination that the active substance glyphosate is safe enough to be re-approved at EU level, as opposed to any national authorisations of glyphosate-based pesticidal formulations, lay at the heart of *Brussels-Capital Region* and *GranoSalus*. As AG Jacobs highlighted in his famous Opinion in *Unión de Pequeños Agricultores*, waiting for any relevant implementing measures to be adopted in order to challenge the validity of the 'parent' act is ineffective in terms of judicial protection and hardly reconcilable with the principle of legal certainty.[74]

The second problematic aspect is specifically associated with recourse to the preliminary reference procedure, in cases involving challenges to both legislative and regulatory acts. As extensively discussed in the literature, the applicants face several difficulties in their attempts to activate the procedure through actions at the national level.[75] To begin with, the applicants must be familiar with the relevant national legal systems, identify the relevant national implementing measures, and bring proceedings before the competent national courts. This requires an adequate knowledge of national law, national judicial procedures, and national remedies.[76] Further, in specific circumstances and under the judicial procedures of some Member States, it may prove impossible for applicants acting in the public interest to bring any action at the national level. This issue recently resurfaced in *GranoSalus*.[77] As AG Jacobs maintained in his Opinion in *Unión de Pequeños Agricultores*, the divergencies between national judicial procedures thus 'inevitably lead to inequality and a loss of legal certainty in an area of law already marked by considerable complexity', infringing the principle of equal treatment.[78] In several cases, the extent to which actions brought at the Member State level may give rise to a suitable reference for a preliminary ruling is also unclear. This point has recently been made by the applicants in the *People's Climate Case*.[79] Moreover, even in cases where a suitable reference for a preliminary ruling could be made, a matter will only be referred where the national judges have acquiesced to the applicants' request. To conclude, as AG Bobek recently argued, the radically changed structure of the EU Courts and the increasing 'congestion' of national courts begs the question whether insisting 'that there still be limited access through the door which

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[74] Opinion of AG Jacobs in Case C-50/00 *Unión de Pequeños Agricultores*, para 102.

[75] For detailed overviews, see inter alia J Ebbeson, 'Access to justice at the national level: impact of the Aarhus Convention and European Union law', in M Pallemaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011); C Backes and M Eliantonio, 'Access to courts for environmental NGOs at European and national level: what improvements and what room for improvement since Maastricht?' in M De Visser and AP Van Der Mei (eds) *The Treaty on The European Union 1993-2013: Reflections from Maastricht* (Intersentia 2013); M Eliantonio, 'The role of NGOs in environmental implementation conflicts: stuck in the middle between infringement proceedings and preliminary rulings?' (2018) 40 *Journal of European Integration* 753; and M Eliantonio, 'The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: towards a new dawn for the language of rights?' (2019) 12 *Review of European Administrative Law* 95.

[76] See the Opinion of AG Jacobs in Case C-50/00 *Unión de Pequeños Agricultores*, para 52; and Case T-236/04 *EEB and Stichting Natuur*, para 46.

[77] Case C-313/19 P *GranoSalus*, paras 21 to 27.

[78] Opinion of AG Jacobs in Case C-50/00 *Unión de Pequeños Agricultores*, para 53 (referring to the possibility for the applicants to challenge a self-executing EU regulatory act in front of national courts, specifically).

[79] See Case C-321/95 *Greenpeace*, para 19; and Case T-330/18 *People's Climate Case*, para 32.

has capacity, while allowing for unfettered access on the same issues through the other door which […] has limited capacity'[80] is a viable option.

This concise overview sheds some light on the weaknesses of the 'complete system of legal remedies', in general, and recourse to the preliminary reference procedure, in particular. Clearly, the application of the 'complete system of legal remedies' rationale in the context of environmental and public health litigation places the applicants in a very difficult position. Nonetheless, it is necessary to underline that these difficulties can be more easily justified in cases involving legislative acts. More specifically, three reasons militate in favour of a *differentiated treatment* of *legislative* and *regulatory* acts. This form of analysis helps to draw a clearer distinction between the two categories of acts, and provides the foundations for a *pragmatic approach* to broadening access to the EU Courts in environmental public interest cases.

First, the adoption of EU legislative acts in the specific context of the legislative procedures results in a higher degree of democratic legitimation for this category of acts. This higher level of legitimacy can justify greater obstacles to direct and immediate access to the CJEU and greater difficulties, in so far as the relevant stakeholders must rely on the 'complete system of legal remedies'. As AG Kokott noted in her Opinion in *Inuit*, 'the distinction between legislative and non-legislative acts in respect of legal protection cannot be dismissed as merely formalistic'.[81] Accordingly, more restrictive standing criteria and recourse to the 'complete system of legal remedies' can be more easily justified where legislative acts are at stake. Indeed, in her recent Opinion in *Bayer CropScience*, AG Kokott went so far as to indirectly suggest that a differentiated (i.e. more intense) standard of review should apply in the context of challenges to regulatory acts, as compared to actions brought against legislative acts.[82]

Secondly, indirect challenges by means of the preliminary reference procedure are much more likely to address questions surrounding the validity of EU acts in an effective manner in cases where legislative (rather than regulatory) acts are at stake. The extent to which preliminary rulings may enable the ECJ to appropriately assess the validity of regulatory acts has been recently discussed by AG Bobek in his Opinion in *Brussels-Capital Region*. Faced with the question of the admissibility of the action, in a case where the complex dynamics underlying the PPP Regulation came into play, the AG developed a number of substantive arguments in favour of granting standing under the second or alternatively the third limb of Article 263(4) TFEU. The AG noted that, in the specific circumstances of the case, recourse to the preliminary reference procedure would have not enabled the ECJ to conduct a thorough assessment of the factual questions and technical-scientific evaluations that the Region was disputing, in so far as it alleged that glyphosate's re-approval was in breach of the overarching tenets of the precautionary principle. The AG stressed that the 'standard dogma of the

[80] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 142.
[81] Opinion of AG Kokott in Case C-583/11 P *Inuit Tapiriit Kanatami*, para 38.
[82] Opinion of AG Kokott in Case C-499/18 P, *Bayer CropScience and Bayer* v *Commission* EU:C:2020:735, para 175, in the context of judicial review of the Commission's duty to produce evidence and prove that it had taken all relevant factors into account when exercising its discretion in the exercise of implementing powers.

fully operational [preliminary reference] alternative avenue'[83] is bound to yield unsatisfactory results in cases like *Brussels-Capital Region*. In preliminary rulings the ECJ 'will not collect any evidence [and] virtually never hear any expert witnesses, with facts being exclusively for the referring court to establish (or rather frequently, in such complex technical cases, not to establish)'. He thus argued in favour of the admissibility of the action, suggesting that 'similar cases [should be allowed] to start before the General Court […]'.[84]

Moving beyond the specifics of *Brussels-Capital Region*, an examination of cases in the field of environmental law and risk regulation testifies of the inadequacy of the preliminary reference procedure when the validity of regulatory acts is disputed. As an analysis of cases like *Monsanto Italia*, *Confédération Paysanne* and *Blaise* shows, the preliminary reference procedure provides a viable judicial route for the ECJ to assess the validity of legislative acts.[85] All relevant legal questions and any points of law surrounding the applicable regulatory arrangements can be appropriately addressed in this context, with the ECJ potentially interpreting the relevant legislative frameworks in such a way as to reconcile them with the overarching principles of EU environmental and public health law.[86] Similar considerations apply to preliminary rulings on the validity of legislative acts which are challenged for being too restrictive.[87] The opposite is true of questions surrounding the validity of regulatory acts which are challenged for being insufficiently protective, if referred via the preliminary reference procedure; in cases such as *GranoSalus*, *Pesticide Action Network* or *Brussels-Capital Region*, recourse to the preliminary reference procedure would have not done any justice to the applicants' claims.[88] This situation is further exacerbated by the question of the equality of arms: as already mentioned, market actors willing to challenge regulatory acts which they deem too restrictive are much more likely to meet the standing criteria of the second limb of Article 263(4) TFEU and get direct access to the GC.

Finally, and importantly, it is worth stressing again that the Aarhus Convention draws a clear distinction between legislative and non-legislative acts; the actions or omissions of public authorities

[83] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 144.
[84] Ibid., para 145.
[85] See Case C-236/01 *Monsanto Agricoltura Italia and others* EU:C:2003:431; Case C-528/16 *Confédération Paysanne and others* v *Premier Ministre and Ministre de l'Agriculture, de l'Agroalimentaire et de la Forêt* EU:C:2018:583; and Case C-616/17 *Blaise and others* EU:C:2019:800. For an in-depth analysis of these preliminary rulings, see GC Leonelli, 'Judicial review of compliance with the precautionary principle from *Paraquat* to *Blaise*: quantitative thresholds, risk assessment and the gap between regulation and regulatory implementation' (2021) 22 *German Law Journal* 184. For an analysis of *Blaise*, see also A Bailleux, 'Don't judge a case by its cover: the pesticides Regulation survives judicial scrutiny but is given new teeth' (2020) 57 *CML Rev* 861.
[86] See the analysis in Leonelli, *supra* note 85.
[87] For examples of such challenges, see GC Leonelli, 'Acknowledging the centrality of the precautionary principle in judicial review of EU risk regulation: why it matters' (2020) 57 *CML Rev* 1773.
[88] Compare for instance potential indirect challenges to EU regulatory acts via the preliminary reference procedure, and direct actions for the annulment of EU regulatory acts such as Case T-229/04 *Sweden* v *Commission* EU:T:2007:217, or Case T-257/07 *France* v *Commission* EU:T:2011:444. For an analysis of these two cases, see Leonelli, *supra* note 85. For a different perspective on *Sweden v Commission*, see the analysis in C Anderson, 'Contrasting models of EU administration in judicial review of risk regulation' (2014) 51 *CML Rev* 424.

are excluded from the scope of application of the Convention if the authorities are acting in their legislative or judicial capacity. Taken together, the considerations developed in this section all militate in favour of a differentiated treatment of legislative and regulatory acts.

First of all, the intrinsic differences between legislative and regulatory acts suggest that regulatory acts should at the very least be *directly*[89] and *immediately*[90] challengeable in front of the EU Courts whenever they entail *automatic* implementation at the *EU* or the *Member State level*. From this perspective, the main obstacle lies in the restrictive 'alternative judicial route' logic underpinning the third limb of Article 263(4) TFEU. Reliance on the second limb, by contrast, could achieve this goal.

Secondly, it is legitimate to suggest that the provisions of regulatory acts which entail *non-automatic* implementation at the *Member State* level should also be challengeable *directly* in front of the EU Courts, rather than via the preliminary reference procedure. Considerations surrounding the specific nature of regulatory acts, legal certainty, the excessive difficulties in accessing national courts and the inability of the ECJ to take factual matters into due consideration in preliminary rulings come into play. In this context, the problem lies in the EU Courts' entrenched interpretation of the notion of direct concern under both the second and the third limbs.[91]

Thirdly, any applicants who seek to challenge the provisions of regulatory acts which entail *non-automatic* implementation at the *EU* level would also benefit from the possibility of challenging these acts *immediately*, rather than via Article 277 TFEU; the issue of the specific nature of regulatory acts and matters of legal certainty come into play in this case. Yet again, the obstacle consists in the Courts' interpretation of direct concern.

Against this background, the argument can be put forward that *all regulatory acts* adopted in the fields of EU environmental and public health law should be challengeable *directly* and *immediately* in front of the EU Courts, regardless of whether the provisions under challenge entail *automatic* or *non-automatic* implementation at the *EU* or the *Member State* level. This argument is particularly strong for regulatory acts which entail automatic or non-automatic implementation at the Member State level, due to the specific shortcomings of the preliminary reference procedure. However, it can also apply to the case of regulatory acts which entail automatic or non-automatic implementation at the EU level. From this perspective, the main problem in the system of access to the EU Courts in environmental public interest cases consists in the EU Courts' reliance on the 'complete system of legal remedies' rationale. More specifically, the 'complete system of legal remedies' rationale prevents stakeholders acting in the public interest from challenging the *self-*

[89] I.e., rather than via the preliminary reference procedure of Article 267 TFEU.
[90] I.e., rather than via Article 277 TFEU.
[91] In Case C-313/19 P *GranoSalus*, for instance, the ECJ found that glyphosate's renewal of approval did not entail implementing measures *for the applicant/appellant*, as the latter would have only been able to challenge this act via the preliminary reference procedure if it resorted to artificial litigation. However, the further obstacle of direct concern and the non-automaticity of the national implementing measures came into play. See *supra*, note 68.

standing and *legally self-contained* component of EU regulatory acts which are deemed insufficiently protective.

Is there any potential way forward in the context of the TFEU, though? Clearly, a re-framing of the standing rules along the lines suggested above is impossible in the context of the Treaties. The role of the national courts in the preliminary reference procedure is encoded in the very DNA of EU law.[92] Similar considerations apply to the role of Article 277 TFEU. Nor is there any 'interpretative' way out of the conundrum, if the standing requirements of Article 263(4) TFEU are taken into account. It is unlikely that the ECJ will ever broaden direct and immediate access to the EU Courts by qualifying specific categories of stakeholders, for instance environmental NGOs, as being individually concerned under the second limb; the reason is that this would enable these actors to challenge legislative as well as regulatory acts. Even in such hypothetical scenario, the individually concerned categories of actors would only be able to directly or immediately challenge legislative or regulatory acts which entail *automatic* implementing measures (direct concern criterion). However, as already explained, this does not apply to a considerable number of acts adopted under EU environmental or public health law. Turning to the third limb, the express Treaty reference to regulatory acts which do 'not entail implementing measures' makes it impossible for the ECJ to interpretatively broaden the scope of direct and immediate access to the EU Courts. This result could only be achieved by means of a Treaty amendment.

In his Opinion in *Brussels-Capital Region*, AG Bobek took into consideration a string of preliminary rulings on access to justice at the national level and examined their relevance in the (different) context of the interpretation of the standing criteria of Article 263(4) TFEU. Ever since the famous *Slovak Bear* case,[93] involving the implementation of the Habitats Directive, the ECJ has directed the national courts towards a broad interpretation of national rules on administrative or judicial proceedings in environmental matters, expressly referencing Article 9(3) of the Aarhus Convention. In the following years, in cases involving the implementation of EU environmental law at the Member State level, the ECJ has repeatedly invoked Article 9(2) of the Convention (access to justice as specifically regards public participation matters), Article 9(3) of the Convention, Article 47 of the Charter of Fundamental Rights or a combination of these provisions to impose '[…] on Member States an *obligation* to ensure *effective judicial protection* of the rights conferred by [EU environmental law]' (emphasis added).[94]

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[92] See Article 267 TFEU and Article 19 TEU, in particular.

[93] See Case C-240/09 *Slovak Bear*. For an analysis, see M Eliantonio, 'Case C-240/09 Lesoochranárske zoskupenie and Case C-115/09 Trianel Kohlekraftwerk' (2012) 49 *CML Rev* 767.

[94] Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* EU:C:2017:987, para 45, with reference to Article 47 of the Charter and Article 9(3) of the Aarhus Convention; see also the Opinion of AG Sharpston in Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, para 86. For references in other cases, see Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* EU:C:2011:289, citing the Aarhus Convention; Case C-243/15 *Lesoochranárske Zoskupenie VLK* EU:C:2016:838, referring to Article 9(2) of the Aarhus Convention; the Opinion of AG Bobek in Case C-529/15 *Folk* EU:C:2017:1, paras 85, 86 and 93, invoking Article 9(3) of the Aarhus Convention; Case C-470/16 *North East Pylon Pressure Campaign and Sheehy* EU:C:2018:185, para 57, referring to Article 9(3) of the Aarhus Convention; the Opinion of AG Kokott in Case

In the Opinion in *Brussels-Capital Region*, the AG referenced these findings and noted that 'what is required of the national courts must also be required of the EU Courts';[95] on these grounds, he maintained that 'primary law can and should be interpreted, where appropriate and as far as possible, in conformity with international law'.[96] Further, he emphasised that Article 263 TFEU 'is a manifestation of the principle of effective judicial review enshrined in Article 47 of the Charter of Fundamental Rights of the European Union',[97] noted that 'Article 9(3) of the Aarhus Convention is also, within its specific field, an expression of the same principle',[98] and highlighted that the ECJ has expressly linked the two provisions in its case law.

The question of the EU Courts' interpretation of Article 263(4) TFEU is bound to resurface in the case law. At the current stage, however, it is very difficult to envisage how the ECJ could employ the principle of consistent interpretation with a view to broadening access to justice in environmental matters under the TFEU. As illustrated above, there is no easy 'interpretative' way out of the TFEU conundrum. Further, as the ECJ expressly noted in *Brussels-Capital Region*, the international agreements concluded by the EU can neither prevail over EU primary law nor modify the conditions of admissibility laid out in Article 263(4) TFEU.[99]

These considerations all militate in favour of a different focus on *secondary* law, i.e. the Aarhus Regulation. On these grounds, a solution to the constraints associated with the 'complete system of legal remedies' rationale had to be identified in the specific context of the reform of the Aarhus Regulation. An extension of the Regulation's scope of application and an inclusion of all

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C-280/18 *Flausch* EU:C:2019:449, paras 89 and 113, making express reference to Article 9(3) of the Aarhus Convention and Article 47 of the Charter; Case C-197/18 *Wasserleintungsverband and Others* EU:C:2019:824, paras 33 and 34; and the Opinion of AG Hogan in 131 Opinion of AG Hogan in Case C-535/18 *Land Nordrhein-Westfalen* EU:C:2019:957, paras 25, 26 and 34, on Article 9(2) of the Aarhus Convention; Case C-535/18 *Land Nordrhein-Westfalen* EU:C:2020:391, para 45; the Opinion of AG Saugmandsgaard Øe in Case C-752/18 *Deutsche Umwelthilfe Ev* EU:C:2019:972, para 46; and Case C-752/18 *Deutsche Umwelthilfe Ev* EU:C:2019:972, paras 34, 35 and 43 to 46.

[95] Opinion of AG Bobek in Case C-352/19 P *Brussels-Capital Region*, para 116.

[96] Para 117.

[97] Ibid.

[98] Ibid.; see also para 140 of the Opinion.

[99] Case C-352/19 P *Brussels-Capital Region*, paras 25 and 26. None of the considerations made above, however, apply to *secondary* law. By adopting the Aarhus Regulation internal review and access to justice provisions, the EU institutions are *implementing the Aarhus Convention at the EU level* and *complying with their obligations under public international law*. Their position is not dissimilar from the one in which the Member States find themselves when implementing EU environmental law in accordance with the commitments flowing from EU membership of the Aarhus Convention. In this specific context, the *obligations* of the *EU institutions* and of the *EU Member States* are the same. The ECJ's findings in its preliminary rulings on access to justice at the national level should then be equally applicable to the internal review and access to justice procedure under the Aarhus Regulation. Building on these elements, an argument surrounding the invalidity of the 'old' Aarhus Regulation was put forward before the 2021 amendments. More specifically, the point was made that applicants challenging the inadmissibility of their request for an internal review could plead the invalidity of Articles 2(1)(g) and 10 of the 'old' Aarhus Regulation vis-à-vis Article 47 of the Charter, as interpreted in the light of the overarching tenets of Article 9(3) of the Aarhus Convention and of the findings of the 2017 Recommendations of the Convention Compliance Committee. In other words, applicants whose requests for an internal review were deemed inadmissible could invoke the same exact provisions that the ECJ has invoked in its preliminary rulings on access to justice at the Member State level, with a view to pleading the invalidity of the 'old' Regulation. For a concise statement of this argument, see Leonelli, *supra* note 1.

regulatory acts, *regardless* of whether the provisions under challenge entail the adoption of further *implementing measures* and of the latter measures' *automatic* or *non-automatic nature*, would provide a way forward.[100] More specifically, a solution along these lines would achieve three goals. First, as illustrated throughout this section, it would fill a vacuum and solve the main problem in the EU system of access to justice in environmental matters. Secondly, it would be faithful to the specificities of the 'complete system of legal remedies' established by the Treaties. Thirdly, it would enable the EU institutions to take a step towards full compliance with the obligations enshrined in the Aarhus Convention. Indeed, the findings of the Aarhus Convention Compliance Committee did not merely point to the EU institutions' failure to correctly implement Article 9(3) of the Convention in the context of the Aarhus Regulation procedures. The Compliance Committee also highlighted the structural limits of the 'complete system of legal remedies'; in this regard, it laid particular emphasis on the point that '[…] the system of judicial review in the national courts of the EU Member States, including the possibility to request a preliminary ruling, […] cannot be a basis for generally denying members of the public access to the EU Courts […]. The system of preliminary ruling neither meets the requirements of access to justice in Article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts'.[101]

This concludes the systemic overview and the analysis of all considerations surrounding the question of access to the EU Courts by non-market stakeholders in environmental public interest cases. The following section picks up the questions which were left unanswered at the end of section I. How does the 2021 reform of the Aarhus Regulation score? How have the EU institutions approached the relevant issues? And how are we to assess the 2021 amendments to the scope of application of the Aarhus Regulation's internal review and access to justice provisions?

IV. The 2021 Amendments to the Aarhus Regulation: A Happy Ending

Sections II and III have demonstrated that the sore point in the TFEU system of access to justice in environmental public interest cases lies in the application of the 'complete system of legal remedies' rationale to the specific case of regulatory acts. Further, they have highlighted that this situation cannot be easily remedied in the context of the TFEU. Taking stock of these findings, the analysis has identified the crucial point to be targeted and addressed by the Aarhus Regulation reform: the possibility for stakeholders to challenge any provisions of regulatory acts *directly* and *immediately*, regardless of whether the relevant provisions entail automatic or non-automatic implementation at the EU or the Member State level. This section reverts to the reform of the Aarhus Regulation, looking

[100] For the first reference to this argument, see Leonelli, *supra* note 1.
[101] Aarhus Convention Compliance Committee, Findings and recommendations with regard to Communication ACCC/C/2008/32 (Part II), *supra* note 19, para 58.

back at the Commission's 2020 proposal and analysing the final amendments enshrined in Regulation (EU) 2021/1767.

An examination of the amendments proposed in 2020 against the backdrop of the analysis of the previous sections reveals the inadequacy and the weaknesses of the Commission's proposal. Under the 2020 proposal, as briefly explained in section I, any provisions of EU non-legislative acts for which implementing measures are required at the Member State level would have been excluded from the scope of application of the Regulation's internal review and access to justice procedures. In the case of provisions entailing implementation at the EU level, the text proposed in 2020 followed the blueprint of Article 277 TFEU. Clearly, these regulatory arrangements were influenced by the 'complete system of legal remedies' rationale. More specifically, the 2020 proposal drew on the highly restrictive 'alternative judicial route' logic of the third limb of Article 236(4) TFEU, rather than merely focusing on direct concern; there was no reference to the automatic or non-automatic nature of implementing measures in the proposal. The clarification that specific provisions could have been the object of a request for review regardless of whether other provisions in the relevant act entailed implementation did not detract from this blueprint, either. In fact, this clarification corresponded to the EU Courts' consistent finding that the question whether a regulatory act entails implementation within the meaning of the third limb of Article 263(4) must be evaluated by reference to the position of the applicant and the subject matter of the action.[102]

The 2020 proposal thus failed to address the shortcomings of the 'complete system of legal remedies', and failed to tackle the main problem of the EU system.[103] If the proposal had been adopted, for example, the attempt to challenge the EU approval of a pesticidal active substance via the Aarhus Regulation procedures would have been to no avail; cases such as *Brussels-Capital Region*, *GranoSalus* or *Mellifera* would have still gone through the preliminary reference route. In the instances where EU implementation is required, on the other hand, the stakeholders would have had to wait for the relevant implementing measures to be adopted prior to challenging the 'parent' measure. In either case, they would have had no opportunity to challenge the *legally self-standing* EU regulatory determinations directly and immediately. Yet, this story has a (surprisingly) happy ending.

Since the opening of the negotiations on the reform, the European Parliament strenuously advocated broadening the scope of application of the Regulation's internal review and access to justice provisions beyond the boundaries set in the Commission's 2020 proposal. After several months of very intense negotiation, the European Parliament and the Council finally succeeded in reaching an agreement on a different text. The final amendments agreed by the Parliament and the

[102] See *supra* section II, sub-section B.
[103] For a criticism of this point of the Commission's proposal, see also Aarhus Convention Compliance Committee, Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3, not yet adopted, paras 56 to 68.

Council have been incorporated in Regulation (EU) 2021/1767, which amends the original 2006 text of the Aarhus Regulation.[104]

The 2021 Regulation has resulted in three significant changes to the 2006 text, alongside further amendments of a procedural nature.[105] The first change had already been included (in part) in the 2020 Commission's proposal. Pursuant to the new text of Article 2(1)(g) and (h), a request for internal review may be directed to any non-legislative act which has *legal and external effects* and which contains provisions that *may contravene environmental law* within the meaning of Article 2(1)(f), or to any failure to adopt a non-legislative act which has *legal and external effects* where such failure *may contravene environmental law*.[106] This change comes as welcome news. As already mentioned, the 2006 version of the Regulation only included acts adopted under EU environmental law.[107] This amendment draws on the express wording of Article 9(3) of the Aarhus Convention and correctly implements the recommendations of the Aarhus Convention Compliance Committee.[108] According to Recital (10) of the 2021 Regulation, assessing whether the provisions of an act may 'contravene environmental law' involves a consideration of the potential adverse effects of those provisions on the attainment of the objectives of Article 191 TFEU. Recitals (11) and (12) provide further clarifications on the notion of 'legal' and 'external' effects, citing the relevant case law.[109]

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[104] For further information, see the Council's press release of 6 October 2021, available at <https://www.consilium.europa.eu/en/press/press-releases/2021/10/06/aarhus-regulation-council-adopts-its-position-at-first-reading> (accessed October 2021); and the Commission's previous press release of 13 July 2021, available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3610> (accessed October 2021).

[105] For the procedural amendments, see Recital (13) and Article 1 points (2)(a) and (2)(b) of Regulation (EU) 2021/1767, on time limits; and Recitals (22), (23) and (24) and Article 1 point (3)(b) and point (4) of Regulation (EU) 2021/1767, on the applicable procedures.

[106] Article 1 point (1) of Regulation (EU) 2021/1767, amending Article 2(1)(g) and (2(1)(h) of Regulation (EC) No 1367/2006. See also Article 1 point (2)(a) of Regulation (EU) 2021/1767, amending Article 10(1) of Regulation (EC) No 1367/2006, and Article 1(1) and 1(2)(a) in the Commission's 2020 proposal.

[107] As mentioned in section I, in accordance with Article 2(1)(f) of Regulation (EC) No 1367/2006, 'environmental law' includes all EU legislation which, irrespective of the legal basis under which it was adopted, contributes to the pursuit of environmental and public health protection.

[108] See Recitals (7) and (9) of Regulation (EU) 2021/1767. See also the Advice of the Aarhus Convention Compliance Committee, *supra* note 103, paras 47 to 55. The Commission's 2020 proposal referred to non-legislative acts having 'legally binding and external effects'; however, in para 55 of its Advice the Compliance Committee recommended that the word 'binding' should be excluded from the text. This recommendation has been implemented by the European Parliament and the Council. It is worth mentioning that the Compliance Committee has also assessed the Aarhus Regulation's exemption of measures adopted by EU institutions and bodies when acting in their capacity as 'administrative review bodies'. This exemption is provided for in Article 2(2) of Regulation (EC) No 1367/2006, which includes a non-exhaustive, illustrative list of such acts: this includes state aid acts. Regrettably, the question of state aid measures taken by the European Commission has not been addressed by the 2021 amendments to the Regulation. As specifically regards EU compliance with the Committee's findings and recommendations on Communication ACCC/C/2015/128 (European Union, ECE/MP.PP/C.1/2021/21), on state aid measures taken by the European Commission, see *supra* note 5. At the seventh Meeting of the Parties to the Convention in October 2021, the Parties postponed all decision-making on this matter to the 2025 Meeting of the Parties.

[109] More specifically, footnotes 10 to 12 in these Recitals reference Case C-583/11 P *Inuit Tapiriit Kanatami*, para 56; Joined Cases 1/57 and 14/57 *Usine à Tubes de la Sarre* v *High Authority* EU:C:1957:13, p. 114; Case 22/70 *Commission* v *Council* EU:C:1971:32, para 42; Case C-325/91 *France* v *Commission* EU:C:1993:245, para 9; Case C-57/95 *France*

The second change relates to the 'opening up' of the internal review and access to justice procedures to societal actors other than environmental NGOs.[110] The newly added paragraph 1a of Article 11 of the Aarhus Regulation enables other 'members of the public' to make a request for internal review, provided that they meet one of two alternative criteria.[111] Under the first criterion, the members of the public shall demonstrate an impairment of their rights caused by the alleged contravention of EU environmental law *and* that they are directly affected by such impairment in comparison with the public at large.[112] Recitals (18) and (19) clarify that members of the public shall demonstrate a violation of their rights, such as an unjustified restriction or an obstacle to the exercise of specific rights. As expressly noted, they do *not* have to demonstrate that they are directly and individually concerned within the meaning of the second limb of Article 263(4) TFEU; however, they must demonstrate that they are 'directly affected in comparison with the public at large, for example in the case of an imminent threat to their own health and safety, or of prejudice caused to a right to which they are entitled pursuant to Union legislation, resulting from the alleged contravention of environmental law, in accordance with the case law of the CJEU'.[113]

This provision is compatible with the text of the Aarhus Convention, which does not provide for an unqualified and unconditional right to request an internal review and have access to justice.[114] Further, it reflects (and cross-references) the CJEU's interpretation of the TFEU standing criteria. The express requirement that members of the public shall be directly affected in comparison with the public at large is aligned to the criterion of direct concern, as provided for under the second and the third limb of Article 263(4) TFEU; in other words, the stakeholders need to establish that their legal sphere has been altered and that their legal situation has been affected.[115]

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v *Commission* EU:C:1997:164, para 22; and Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany* v *Commission* EU:C:2011:656, para 36.

[110] See also the points raised in this respect by the Aarhus Convention Compliance Committee, *supra* note 103, paras 36 to 42. Article 1 point (5) of Regulation (EU) 2021/1767 amends Article 12(2) of Regulation (EC) No 1367/2006, but does not amend Article 12(1) therein. The latter paragraph of the Aarhus Regulation provides: 'The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty'. The absence of amendments to Article 12(1), whereby references to 'members of the public' have not been included, begs the question whether the Parliament and the Council intended to exclude 'members of the public' and prevent them from seeking the annulment of a refusal by the EU institutions to grant internal review under Article 10 of the Aarhus Regulation; however, this is more likely to be an instance of poor drafting of the text. Further, regardless of the intention of the legislators, 'members of the public' who have requested internal review of an EU act and who have received a refusal would still qualify as the 'addressees' of the EU institutions' decision; on these grounds, they have standing under the first limb of Article 263(4) TFEU.

[111] Further, 'members of the public' must be represented by either an environmental NGO which meets the criteria of Article 11 of Regulation (EC) No 1367/2006, or by a lawyer authorised to practice in front of a court of a Member State. See Article 1, point (3)(a) of Regulation EU 2021/1767.

[112] Article 1, point (3)(a) of Regulation EU 2021/1767.

[113] See Recital (19) of Regulation EU 2021/1767, referencing Case C-237/07 *Janecek* EU:C:2008:447; Case C-529/15 *Folk* EU:C:2017:419; and Case C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others* EU:C:2019:824.

[114] See Recital (19) of Regulation EU 2021/1767.

[115] As explained in section II, in accordance with the CJEU's case law on Article 263(4) TFEU, an applicant will establish direct concern where the act under challenge does not entail implementation or entails (EU or Member State) implementing measures of an automatic nature. Although there are no references to this component of the direct concern

Under the second criterion identified in the 2021 Regulation, the members of the public shall demonstrate a sufficient public interest *and* that their request is supported by at least 4,000 members of the public residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States.[116] Recital (20) of the 2021 Regulation stipulates that, when demonstrating 'sufficient public interest', members of the public should demonstrate a public interest in preserving, protecting and improving the quality of the environment, protecting human health, ensuring the prudent and rational utilisation of natural resources, or combating climate change.[117]

This brings us to the final, crucial change in the reform. Article 1, point (1) of Regulation (EU) 2021/1767 provides a new definition of the notion of 'administrative act' and 'administrative omission'. An 'administrative act' is now defined as any non-legislative act adopted by a Union institution and body which has legal and external effects and which contains provisions that may contravene environmental law. Article 2(1)(h) on the notion of 'administrative omission' has been amended along the same lines. The exclusion of the 'provisions of [the relevant administrative] act for which Union law explicitly requires implementing measures at Union or national level', which was incorporated in the Commission's 2020 proposal, has been eliminated from the final text of the amendments. There is no reference to provisions which entail implementing measures in the final text; nor is there any specific caveat regarding provisions which entail implementation of a non-automatic nature.

As explained above, the Commission's 2020 proposal was informed by the highly restrictive 'alternative judicial route' logic of the third limb of Article 236(4) TFEU. The final text of the amendments to the Aarhus Regulation, by contrast, has embraced a radically different perspective. Article 1 point (1) neither reflects the rationale of the third limb of Article 263(4) TFEU, nor the 'automatic implementation' requirement of direct concern under the second limb. In other words, the 'new' Aarhus Regulation does *not* reflect the 'complete system of legal remedies' rationale. It enables NGOs and stakeholders to request an internal review of any provisions in non-legislative acts, *regardless* of whether they entail *automatic* or *non-automatic* implementation at the *EU* or the *Member State* level.

As mentioned in the Preamble to the 2021 Regulation, the new amendments to the scope of application of the Aarhus Regulation bring the EU into compliance with the recommendations of the

criterion in Regulation (EU) 2021/1767, the CJEU's consistent interpretation begs the question whether 'members of the public' which are directly affected in their legal sphere compared to the public at large would be entitled to request an internal review of an EU act which entails non-automatic implementation, or whether they would *not* be considered as 'directly' affected in their legal sphere in so far as the EU act entails non-automatic implementing measures. At the current stage, it is impossible to provide an answer to this question. Regardless, an EU measure entailing non-automatic implementation at the EU or at the Member State level may still be challenged, under the 'new' Regulation's rules, by environmental NGOs or by members of the public which have established a sufficient public interest.

[116] Article 1, point (3)(a) of Regulation EU 2021/1767, adding paragraph 1a to Article 11 of Regulation (EC) No 1367/2006.

[117] The wording is drawn from Article 191(1) TFEU.

Aarhus Convention Compliance Committee, as specifically regards broadening the applicability of the internal review and access to justice provisions.[118] They are compatible with the fundamental principles of the EU system of judicial review, and faithful to the specificities of EU law;[119] indeed, the co-legislators have identified a solution in the context of secondary law. Further, they contribute to 'the effectiveness of the Union system of administrative and judicial review and […] strengthen the application of Articles 37, 41 and 47 [of the Charter of Fundamental Rights of the EU] […]'.[120] Most importantly of all, however, they tackle the problem which lay at the heart of the system of access to the EU Courts in environmental public interest cases. The European Parliament and the Council have finally managed to breathe new life into the Aarhus Regulation. They have acknowledged the main problem of the system, and recognised the need to solve it in the specific context of the reform of the Aarhus Regulation.

V. Conclusions: the Challenge Ahead for the EU Courts

This article has analysed the 2021 amendments to the scope of application of the Aarhus Regulation's internal review and access to justice procedures against the backdrop of a comprehensive examination of the EU system of access to justice in environmental public interest cases. It has demonstrated that the inclusion of all non-legislative acts, regardless of whether the relevant provisions entail automatic or non-automatic implementation at the EU or the Member State level, is by far the most important change introduced by the 2021 reform. Section II has provided a systemic overview of access to justice in environmental and public health cases under the TFEU rules. Taking stock of the findings of this analysis, section III has embraced a pragmatic perspective and identified the main problem of the system: the application of the 'complete system of legal remedies' rationale to the case of regulatory acts. Section IV has then assessed the Commission's 2020 proposal for a reform of the Aarhus Regulation and the text of Regulation (EU) 2021/1767 against the background of the examination of sections II and III. The analysis has demonstrated that the 2021 amendments have finally solved the problem which lay at the heart of the system. As concluded in section IV, the European Parliament and the Council have managed to breathe new life into the Aarhus Regulation. This is a (surprisingly) happy ending. Is it *really* the end of the story, though? Are new challenges lying ahead?

As explained in section I, the Aarhus Regulation access to justice procedures only enable the applicants to challenge a refusal by the EU institutions to grant internal review. The applicants can

[118] Recital (5) of Regulation EU 2021/1767. However, as already mentioned, the EU is not yet in full compliance with its obligations under the Convention; see *supra* notes 5 and 108.
[119] See Recital (5) and (7) of Regulation EU 2021/1767.
[120] See Recital (26) of Regulation EU 2021/1767. This sounds like an implicit acknowledgment that the 'old' Aarhus Regulation was hardly compatible with Article 47 of the Charter. On this point, and for an analysis of a potential plea of invalidity of the 'old' Regulation, see *supra* note 99 and Leonelli, *supra* note 1.

only challenge the *act* which was the object of their request for internal review indirectly, in so far as they challenge and seek the annulment of the EU institution's *refusal to grant an internal review* of that specific act. It is important to highlight that a decision to grant internal review does not necessarily lead to the repeal or the withdrawal of the relevant act; the EU institution or body may decide to suspend it, amend it, request further evidence, or conduct further risk assessments.[121] Symmetrically, if an action brought under the Aarhus Regulation is successful, the administrative act which was the object of the request for internal review will *not be annulled*.[122] Rather, a successful action will result in the annulment of the decision refusing an internal review.

In the few admissible actions brought under the Aarhus Regulation, the GC has repeatedly applied the 'standard' manifest error of assessment test.[123] On these grounds, it has consistently found that the NGO applicants had failed to establish a manifest error of assessment on the part of the Commission (i.e., the EU institution which had refused to open the internal review procedure). In so doing, however, the GC has conflated the standard of scrutiny which should apply in the context of the review of a *decision to reject a request for internal review*, and the standard of scrutiny which should apply in the context of the review of the *underlying act*. In other words, it has conflated the standard of review that the EU Courts apply in 'standard' actions for annulment, and the (different) standard of review which should apply in actions brought under the Aarhus Regulation procedures.

This matter fell for consideration in *TestBioTech*. Issues pertaining to the Courts' standard of review and the question of the applicants' burden of proof are two sides of the same coin. In this case, which involved a request for an internal review of a GMO authorisation, the NGO appellants expressly raised the issue of the burden of proof;[124] the Opinion of Advocate General ('AG') Bobek, by contrast, centres on both the allocation of the burden of proof and the applicable standard of review. The AG remarked that the internal review procedure exists to establish whether any elements might have been overlooked during an authorisation process,[125] allowing EU institutions to check whether 'new information or the re-evaluation of known information might justify' an internal review.[126] As he noted, this is '[…] perfectly in line with the precautionary principle […]'.[127] The AG went so far as to suggest that the competent institution should 'demonstrate that the NGOs' arguments

[121] See Case T-177/13 *TestBioTech and Others* v *Commission* EU:T:2016:736, paras 44, 46 and 52.
[122] In this respect, see also Case T-108/17 *ClientEarth* v *Commission* EU:T:2019:215, paras 24 to 30.
[123] For an in-depth analysis, see Leonelli, *supra* note 87.
[124] The NGO applicants claimed that, when submitting their request for an internal review, they were not required to prove that the relevant GM variety was *unsafe*. Rather, NGOs should raise substantive doubts as to the *safety* of a product or process, with a view to substantiating the claim that *internal review* is *warranted*. See Case T-177/13 *TestBioTech and Others*, para 82. The GC found that the applicants should have adduced 'substantial evidence liable to raise serious doubts as to the lawfulness of the grant of that authorisation'; see para 67, citing Case C-546/12 P *Schräder* v *CPVO* EU:C:2015:332, para 57. On appeal, the NGOs lamented that the GC had erred in law by imposing on them an excessive burden of proof. For an in-depth analysis, see GC Leonelli, 'GMO authorisations and the Aarhus Regulation: paving the way for precautionary GMO governance?' (2019) 26 *Maastricht Journal of European and Comparative Law* 505.
[125] Opinion of AG Bobek in Case C-82/17 P *TestBioTech and Others* v *Commission* EU:C:2018:837, para 32.
[126] Paras 40 and 41.
[127] Ibid.

are unsubstantiated and that the case does not warrant internal review'.[128] Further, he added that 'the burden of raising and presenting the issues allocated to the party requesting review […] should not be too strict for the purposes of launching the internal review procedure'.[129]

These findings could have lent support to a partial shift in the burden of proof. They could have also been used to advocate the adoption of a less stringent standard of review than the traditional manifest error of assessment test. The same applies to the AG's acknowledgment of the differences between 'standard' actions for annulment and actions for annulment brought under the Aarhus Regulation procedure. Nonetheless, somewhat surprisingly, the AG simply concluded that such differences could not have an impact on the applicable standard of review and evidentiary rules.[130] Clearly, this conclusion deprives the previous statements of principle of any purpose. The ECJ adhered to the Opinion.[131]

If due regard is had to the goals of the Aarhus Convention, this state of things is highly unsatisfactory. The scope of the notion of a manifest error of assessment, as applicable in the specific context of actions brought under the Aarhus Regulation, should be clearly identified and fleshed out by the EU Courts. The same applies to the applicable evidentiary rules. By employing the 'standard' manifest error of assessment test, the Courts have focused on the errors of assessment which justify the annulment of an act; the actions brought under the Aarhus Regulation, however, cannot produce that result. On these grounds, the relevant threshold (and corresponding burden of proof) should be much lower. The focus should shift to the question whether the EU institutions have incurred a manifest error of assessment in finding that a request for internal review did *not warrant further consideration*; this question should be interpreted in the light of the overarching principles of EU environmental and public health law.[132]

Has the time come for the EU Courts to rethink the standard of review that they employ in cases brought under the Aarhus Regulation? Is the time ripe? The Parliament and the Council have already done their part, in the context of the legislative procedure. It is now the CJEU's turn to breathe new life into the Aarhus Regulation internal review and access to justice procedures.

[128] Para 47.
[129] Paras 50 and 37.
[130] See paras 26 and 54 in particular.
[131] Case C-82/17 P *TestBioTech and Others* v *Commission* EU:C:2019:719, paras 62 to 73. See also the express references to para 69 of this Case in in Recital (14) of Regulation (EU) 2021/1767.
[132] For a detailed analysis, encompassing questions surrounding the applicable burden of proof and standard of review of the EU Courts, see Leonelli, *supra* note 124.