Effective judicial protection in the EU
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I. General observations

- The right to effective judicial protection, which is now enshrined in Article 47 of the Charter, is an essential element of the ‘rule of law’ within the EU.

- Article 47 of the Charter applies to the EU institutions and to the Member States when they are ‘implementing EU law’.¹

- As to the Member States, in Åkerberg Fransson, the European Court of Justice (the ‘ECJ’) explained what the expression ‘implementing EU law’ means:
  ‘Since the fundamental rights guaranteed by the Charter must […] be complied with where national legislation falls within the scope of [EU] law, situations cannot exist which are covered in that way by [EU] law without those fundamental rights being applicable. The applicability of [EU] law entails applicability of the fundamental rights guaranteed by the Charter.’²

- For the purposes of Article 47 of the Charter, this means that an individual may rely on the right to effective judicial protection with a view to protecting the substantive rights which EU law confers on him or her.
  o For example, in DEB,³ the ECJ ruled that Article 47 of the Charter applies to judicial proceedings in which a legal person brings an action for damages against a Member State on the ground that the latter’s failure to implement a Directive on time had allegedly caused that person economic harm.
  o By contrast, in Boncea,⁴ the ECJ ruled that the national law in question which, as interpreted by the Romanian Constitutional Court, did not allow individuals to obtain compensation for non-material damage caused by a politically-motivated conviction imposed during the period from 6 March 1945 to 22 December 1989, did not constitute a measure ‘implementing EU law’. Accordingly, the ECJ did not have jurisdiction to examine the compatibility of that law with Article 47 of the Charter.

- Moreover, ‘it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed’.⁵

¹ See Article 51(1) of the Charter.
² Case C-617/10 Åkerberg Fransson, judgment of 26 February 2013, not yet reported, para. 21.
⁴ Joined Cases C-483/11 and C-487/11 Boncea, order of 14 December 2011, not to be published, para. 34.
⁵ Joined Cases C-317/08 to C-320/08 Alassini and Others [2010] ECR I-2213, para. 63 and Case C-418/11 Texdata, judgment of 23 September 2013, not yet reported, para. 84.
According to the explanations relating to Article 47 of the Charter, the protection offered by the first paragraph of that provision is more extensive than that offered by Article 13 of the ECHR since it guarantees the right to an effective remedy ‘before a court’. The same applies in relation to Article 47(2) of the Charter (the right to a fair hearing) which, unlike Article 6(1) of the ECHR, is not confined to disputes relating to civil law rights and obligations.

Apart from those two aspects, the rights set out in Article 47 of the Charter correspond to those laid down in Articles 6 and 13 ECHR and accordingly, ‘the meaning and scope of the former rights shall be the same as those laid down by the [ECHR]’. As a matter of fact, the ECJ has often referred to the case-law of the European Court of Human Rights (the ‘ECtHR’) when interpreting Article 47 of the Charter.

Moreover, in the light of Article 53 of the Charter, the level of protection guaranteed by Article 47 of the Charter may never be lower than that guaranteed by the ECHR.

II. The principle of effectiveness before national courts

A. General observations

The application of EU law is, and has always been, decentralised. In the light of the principle of national procedural autonomy, it is for the national courts, acting in this supplementary capacity as EU courts, to enforce EU rights in cases falling within their jurisdiction. Since national courts are, in principle, entitled and indeed expected to apply national procedural rules when applying substantive EU rules, there is effectively a division of functions between the EU and national legal systems, with the former providing the rights, and the latter the remedies.

However, in the absence of any degree of harmonisation of national procedures and remedies, EU rights could be seriously weakened. There would be a danger that strict procedural rules in certain Member States might hamper the uniform application of EU law, thereby calling into question the principles of primacy and direct effect on which the entire EU legal order is founded. In order to be effective, EU rights must be accompanied by adequate remedies, wherever they are enforced. Thus, although it is for the Member States to establish a system of legal remedies and procedures, EU law requires them to do so in a way that ensures respect for the right to effective judicial protection. This judge-made principle is now codified in the second paragraph of Article 19(1) TEU which provides that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. Moreover, in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that achieves that result.

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6 Article 52(3) of the Charter.
7 See, e.g., see DEB, above n 3, paras 36, 45, 46, 47, 49, 50 and 51.
It is apparent that an underlying tension exists between, on the one hand, the principles of primacy and direct effect and, on the other hand, the principle of national procedural autonomy. It is submitted that neither of these competing imperatives should enjoy absolute precedence over the other: neither should all procedural rules be prescribed by EU law, nor should such rules be the sole preserve of the Member States. Instead, in cases where these constitutional principles point in opposite directions, balancing emerges as the only viable solution. In order to put that solution into practice, the ECJ has conditioned the lawfulness of national rules of procedure on compliance with two principles, namely the principle of equivalence and the principle of effectiveness.

While the first of those principles amounts, in essence, to the extension to the law of remedies of the general principle of non-discrimination, the second requires that the enforcement of EU rights at national level must not be ‘virtually impossible or excessively difficult’, that is, national rules of procedure must reach a basic threshold of judicial protection. Those two principles operate as a ‘framework’ limiting and directing – but in no sense supplanting – the procedural autonomy of the Member States.

It follows from the foregoing that, before national courts, the principle of effectiveness may be examined from three different, albeit constantly related and sometimes overlapping, perspectives.  

- First, the principle of effectiveness gives expression to the right to effective judicial protection. Where Member States are implementing EU law, the rights that EU law confers on individuals must be accompanied by effective judicial remedies (ubi ius ibi remedium). Where an EU right is violated, national court must be empowered to grant injunctive and monetary relief. Thus, this aspect of effectiveness focuses on access to the court, effective judicial review and the need for judicial supervision.

- Second, the principle of effectiveness may be examined as a means of upholding the primacy of EU law vis-à-vis conflicting national procedural law.

- Third, the principle of effectiveness ensures the effective application of EU law (the principle of effectiveness strictu sensu).

B. The principle of effectiveness: some examples

- Access to the court – When Member States are implementing EU law, they must provide individuals actual access to a court and to judicial proceedings. This may entail, for example:
  - Extending national provisions granting legal aid to legal persons
  - Expanding the jurisdiction of national courts to EU law matters for which they have no competence under national law.

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8 See, e.g., Case C-93/12 Agrokonsulting, judgment of 27 June 2013, not yet reported.
9 See DEB, above n 3.
10 Case C-268/06 Impact [2008] ECR I-2483, para. 54.
Legal aid – In DEB, the ECJ found that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right, whether they pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which the national rule seeks to achieve.\(^\text{11}\) The ECJ further held that, in making that assessment, the national court must take into consideration the subject-matter of the litigation, whether the applicant has a reasonable prospect of success, the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent himself effectively. In order to assess the proportionality of the national rule, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. With regard, more specifically, to legal persons, the national court may take into consideration, *inter alia*, the form of the legal person in question and whether it is profit-making or non-profit-making, the financial capacity of the partners or shareholders and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.\(^\text{12}\)

Statement of reasons – The ECJ has held that ‘effective judicial review, which must be able to extend to the lawfulness of the reasons for the decision being challenged, presupposes in general that the court before which the matter is brought may require the competent authority to communicate those reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by [EU] law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its decision is based, either in the decision itself or in a subsequent communication made at their request’.\(^\text{13}\)

National rules on standing – It is obvious that national rules of procedure must grant standing to persons who fall within the scope *ratione personae* of a directly effective provision of EU law. In addition, where compliance with the principle of effective judicial protection militates in favour of giving access to the court to persons having an interest in the correct application of an EU provision, those persons must enjoy *locus standi*.\(^\text{14}\)

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\(^\text{11}\) *DEB*, above n 3, paras 59 and 60.


\(^\text{13}\) See, e.g., Case 222/86 *Heylens and Others* [1987] ECR 4097, para. 15, and Case C-75/08 *Mellor* [2009] ECR I-3799, para. 59. See, more recently, Case C-182/10 *Solvay*, judgment of 16 February 2012, not yet reported, para. 59.

\(^\text{14}\) Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, para. 49 (‘whilst it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, [EU] law nevertheless requires, in addition to observance of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection’).
Moreover, in *Unibet*, the ECJ held that EU law does not require national law to provide for direct and free-standing challenges against legislation, unless ‘it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under [EU] law’. In this regard, the ECJ stressed the fact that a remedy which consists in ‘testing the lawfulness of the law by breaking it’ is not an effective one.

- In the field of environmental law, the principle of effectiveness must be interpreted in light of the Aarhus Convention. In *Lesoochranárske zoskupenie*, the ECJ held that, in the fields covered by EU environmental law, the principle of effective judicial protection must be interpreted in accordance with the Aarhus Convention: if national rules on standing do not comply with Article 9(3) of that Convention, no effective judicial protection is awarded to the rights conferred by EU environmental law. Accordingly, EU law mandates national courts to interpret, to the fullest extent possible, national rules on standing so as to meet the objectives sought by Article 9(3) of the Aarhus Convention.

- Specialised courts – Can national procedural rules provide that claims framed in terms of the same form of action but based on EU law provisions are excluded from the purview of specialised courts, falling instead within the jurisdiction of ordinary courts? Were that the case, actions based partly on national law and partly on EU law might even have to be split in order for each issue to be dealt with by the court that properly enjoys jurisdiction under national law. In *Impact*, the ECJ held that, in so far as dividing the action into two separate complaints would result in procedural disadvantages for individuals seeking to rely directly on EU law, the principle of effectiveness mandates specialised national courts to extend their jurisdiction accordingly, in order to remedy that discrepancy. That would be the case where the costs, the duration or the rules governing representation rendered the exercise of EU rights excessively difficult. The ECJ did not decide whether the applicant was actually disadvantaged in the case at hand, that determination being left to the national court.

More recently, in *Agrokonsulting*, the ECJ was called upon to examine the compatibility with EU law of a general rule on territorial jurisdiction whose effect was to concentrate before a single court a certain type of disputes. For the case at hand, this meant that, under Bulgarian law, the Administrative Court of Sofia enjoys exclusive jurisdiction to control the validity of administrative decisions concerning the payment of agricultural aid under the common agricultural policy. In this regard, the ECJ limited itself to providing a framework of analysis that the national court had to apply. The national court had thus to

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15 Case C-432/05 *Unibet* [2007] ECR I-2271.
16 Ibid., paras 40 and 41.
17 Ibid., para. 44.
18 Article 9(3) of the Aarhus Convention provides that ‘3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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’.
20 *Impact*, above n 10, para. 51.
21 Ibid., para. 54.
22 *Agrokonsulting*, above n 8.
1) examine whether the farmer was required to participate in person in the legal proceedings,
2) determine whether the proceedings were rendered more complicated by the fact that the agricultural parcels concerned were far away from the competent national court,
3) check whether the length of proceedings was excessive,
4) take due account of the fact that a specialised court would gain expertise and ensure uniform practice, thereby limiting the average length of the proceedings and contributing to legal certainty.

- **Limitation periods** – Member States may impose reasonable restrictions, including statutes of limitations to ensure compliance with the principle of legal certainty. However, ‘time-limits […] laid down by national law must not be less favourable than those relating to similar domestic claims (principle of equivalence) and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness).’

The question whether a time-limit complies with the principle of effectiveness will often depend on the circumstances of the case at hand.

- For example, in **Pontin**, Luxembourg labour law provided that a pregnant worker who had been dismissed could bring an action for nullity and reinstatement before the president of the tribunal du travail within 15 days of the contract being terminated. In that regard, the ECJ held that a 15-day limitation period ‘[did] not appear to meet [the principle of effectiveness], but that [was] a matter for the referring court to determine.’ Indeed, the ECJ reasoned that ‘it would […] be very difficult for a female worker dismissed during her pregnancy to obtain proper advice and, if appropriate, prepare and bring an action within the 15-day period’.

- By contrast, in **Samba Diouf**, the ECJ ruled that ‘a 15-day time limit for bringing an action does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved’. In that case, the 15-day time limit applied to asylum seekers which clearly did not qualify for the status conferred by the 1951 Geneva Convention or had misled the authorities by presenting false information or documents. That time-limit intended to ensure that unfounded or inadmissible applications for asylum are

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23 In this regard, the ECJ observed that the preferred means of assessing evidence was, in general, experts’ reports based on the orthoimages and the data in the integrated administration and control system provided for in Article 14 of Regulation No 73/2009. In addition, inspection of agricultural parcels by means of a visit to the lands concerned will often not be of much use for the purposes of checking the precise use to which such parcels were put during a previous year. Thus, for the ECJ, ‘it [did] not appear that the proceedings are rendered more complicated by the fact that the agricultural parcels concerned are far away from the competent national court’.


24 For the ECJ, that was not the case as actions brought before the Administrative Court of Sofia were on average solved within a period of six to eight months. *Ibid.*, para. 55.


26 See, e.g., Case C-261/95 **Palmisani** [1997] ECR I-4025, para. 27.

27 Case C-63/08 **Pontin** [2009] ECR I-10467.


30 Case C-69/10 **Samba Diouf**, judgment of 28 July 2011, not yet reported.

processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently.

- **Burden of proof** – Regarding the recovery of unlawful charges, the ECJ has held that a national provision which imposes on the taxpayer the negative burden of proving that the charge was not passed on to third parties or embodies a presumption that the charge was passed on does not comply with the principle of effectiveness.\(^{32}\)

- **Mandatory out-of-court dispute settlements** – In *Alassini*,\(^{33}\) the ECJ was asked to rule on the compatibility with EU law of Italian legislation under which the admissibility before the national courts of actions relating to electronic communications services between end-users and providers of those services, concerning the rights conferred by Directive 2002/22/EC,\(^{34}\) was conditional upon the opening of a mandatory out-of-court dispute settlement procedure. Having held that the national rule in question was compatible with the specific provision of the directive dealing with out-of-court procedures,\(^{35}\) the ECJ found that neither the principle of effectiveness nor the principle of equivalence precludes national legislation which imposes, in respect of disputes such as those at issue, prior implementation of an out-of-court settlement procedure, provided that
  - firstly, that procedure does not result in a decision which is binding on the parties,
  - secondly, that it does not cause a substantial delay for the purposes of bringing legal proceedings,
  - thirdly, that it suspends the period for the time-barring of claims,
  - fourthly, that it does not give rise to costs – or gives rise to very low costs – for the parties, and,
  - fifthly, only if electronic means are not the only ones by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.\(^{36}\)

- **Levels of jurisdiction** – It is worth noting that Article 47 of the Charter does not include a right to appeal. In *Samba Diouf*, the ECJ ruled that ‘the principle of effective judicial protection affords an individual a right of access to a court but not to a number of levels of jurisdiction’.\(^{37}\)

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\(^{32}\) See, e.g., Case 199/82 *San Giorgio* [1983] ECR 3595.

\(^{33}\) *Alassini*, above n 5.


\(^{35}\) See Article 34 of the Universal Service Directive, above n 34. The first paragraph of that Article provides that ‘Member States shall ensure that transparent, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes, involving consumers, relating to issues covered by this Directive. Member States shall adopt measures to ensure that such procedures enable disputes to be settled fairly and promptly and may, where warranted, adopt a system of reimbursement and/or compensation. Member States may extend these obligations to cover disputes involving other end-users’. For its part, Article 34(4) states that ‘[t]his Article is without prejudice to national court procedures’.

\(^{36}\) *Alassini*, above n 5, para. 67.

\(^{37}\) *Samba Diouf*, above n 30, para. 69.
III. Before the EU Courts

A. Changes brought about by the Treaty of Lisbon

- **Change in name** – As we all know, the ECJ and the European General Court (‘EGC’, formerly the Court of First Instance) are no longer ‘Community Courts’ but ‘Union Courts’. The change in their official name is far from being a mere and obvious formality. But it canvasses the most important reform introduced by the Treaty of Lisbon to the EU’s judicial architecture.

- **The CFSP and the EU Courts** – As mentioned above, the Treaty of Lisbon has expanded the jurisdiction of the EU judiciary beyond the former ‘Community’ pillar. While it is true that, as a general rule, Common and Foreign Security Policy (‘CFSP’) measures escape judicial scrutiny, Article 24(1) TEU provides for two exceptions. First, as ex Article 47 EU (now Article 40 TEU) already established, the ECJ enjoys jurisdiction to police the boundaries between CFSP measures and other EU measures. Second, the Treaty of Lisbon introduces a ground-breaking reform: from now on, private applicants are entitled to bring annulment actions against CFSP measures laying down restrictive measures which adversely affect them. It is worth recalling that this type of remedy was not possible under the old EU Treaty. Prior to the entry into force of the Treaty of Lisbon, applicants were forced to pursue the circuitous route of bringing an annulment action against the Community measure implementing the contested CFSP measure. However, this type of ‘indirect review’ was not satisfactory as it did not preclude the contested CFSP measure from being implemented at national level. On the one hand, national courts could refuse to review the legality of the national legislation implementing the contested CFSP measure on the ground that the latter prevailed over the former. On the other hand, national courts could also call into question the consistency of the external action of the Union, by declaring the contested CFSP measure unconstitutional. Hence, the Treaty of Lisbon improves significantly the judicial protection of individual EU rights in matters falling within the CFSP.

- **The AFSJ and the EU Courts** – In the same way, the jurisdiction of the EU Courts has also been expanded in the AFSJ. Once the transitional period expires on 30 November 2014, the jurisdiction of the ECJ and EGC in matters pertaining to this field will no longer be subject to limitations. Therefore, from the standpoint of individual rights, no measure falling within the scope of application of the Treaties is immune from judicial review. Put simply, as regards individual rights, the ECJ and the EGC are truly ‘Union Courts’.

- The Treaty of Lisbon repeals ex Article 68 EC. This means that the limits placed on the ECJ’s jurisdiction to give preliminary rulings disappear. From now on, inferior courts may engage in dialogue with the ECJ in respect of issues relating to the AFSJ.

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38 See Article 19 (1) TEU.
39 See Chapter 2 of Title V of the new Treaty on European Union.
40 Case C-91/05 Commission v Council (ECOWAS case) [2008] ECR I-3651.
41 See paragraph 2 of Article 275 TFEU.
42 See, for example, Case T-228/02 OMPI v Council [2006] ECR II-4665.
43 See Article 2, point 67 of the Treaty of Lisbon.
Consequently, urgent matters concerning visas, immigration, asylum or judicial cooperation in civil matters must no longer reach national courts of last instance before they can be addressed by the ECJ. Instead, an inferior court may refer an urgent question to the ECJ which, by having recourse to the urgent preliminary ruling procedure, will try to provide a ruling as quickly as possible. This is good news for litigants faced with important questions, such as child custody or deportation orders, as these modifications contribute to reinforcing the judicial protection of individuals by providing them with faster justice.

- As to acts adopted in the field of Police and Judicial Cooperation in Criminal Matters (‘PJCC’), the Treaty of Lisbon repeals the jurisdictional limitations contained in ex Article 35 EU, subject to one specific exception provided for in paragraph 5 of that provision. Indeed, when the EU exercises its powers regarding Treaty provisions on police cooperation and judicial cooperation in criminal matters, Article 276 TFEU, which reproduces ex Article 35(5) EU, provides that the ECJ lacks jurisdiction to ‘review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’.

- In accordance with Article 10 of Protocol (No 36) on transitional provisions annexed to the Treaty of Lisbon, a distinction must be drawn between EU acts in the field of PJCC which had been adopted before the entry into force of the Treaty of Lisbon (‘pre-existing EU acts’) and EU acts adopted thereafter.
  - As to the former category of EU acts, Article 10 provides that for a period of five years after the entry into force of the Treaty of Lisbon, the Commission may not bring infringement actions in respect of them. Article 10 also states that for the same period of time, the jurisdiction of the ECJ ‘in the field of police and judicial cooperation in criminal matters, in the version in force prior to entry into force of the Treaty of Lisbon, shall remain the same’. In relation to pre-existing EU acts, the jurisdiction of the ECJ continues to be governed by ex Article 35 EU until 30 November 2014. Upon expiration of the transitional period, pre-existing EU acts are subject to the regime described below.
  - As to EU acts adopted after 1 December 2009 (which include pre-existing EU acts amended after that date), the ECJ enjoys jurisdiction to review the legality of acts adopted in the Area of Freedom, Security and Justice by way of actions for annulment or on the occasion of actions for damages. Hence, if today the Council adopts an EU act containing a list of terrorist organisations in relation to which the EU aims to reinforce police and judicial cooperation, such organisations may bring an action for annulment as well as an action for damages against the Council. For example, regarding EU acts adopted after the entry into force of the Treaty of Lisbon, there would be a different outcome to a case like Gestoras Pro-Amnistía and Segi. In addition, the jurisdiction of the ECJ to issue preliminary rulings is no longer made conditional upon a declaration of a Member State to this effect. Finally, infringement actions can be brought like in any other field of Union law.

44 See Article 10 (2) of Protocol (No 36) on transitional provisions annexed to the Treaty of Lisbon.

45 On this point, the Treaty of Lisbon does not bring substantial changes to ex Articles 235 and 288(2) EC (now Articles 268 and 340 TFEU).
Moreover, in order to assess the legal effects of EU acts in the field of PJCC, the distinction between pre-existing EU acts and acts adopted after the entry into force of the Treaty of Lisbon is also relevant. In this regard, Article 9 of Protocol (No 36) states that the legal effects of pre-existing EU acts should be preserved until those acts are repealed, annulled or amended. In accordance with ex Article 34(2)(b) EU, this means that pre-existing EU acts (Framework Decisions) may not have direct effect unless the EU legislator decides to amend them. Thus, the Pupino jurisprudence is still of paramount importance, requiring national courts to interpret national law in the light of the wording and the purpose of pre-existing EU acts. For acts adopted after 1 December 2009, the classic case-law on direct effect applies.46

B. The concept of EU ‘regulatory acts’

There is another aspect of the jurisdiction of the EU Courts that has been affected by the Treaty of Lisbon and is worth mentioning in this section, namely the modifications introduced to the rules on locus standi.

In relation to actions for annulment, the application of the restrictive Plaumann case-law 47 is no longer applicable in respect of actions brought by natural or legal persons against ‘a regulatory act which is of direct concern to them and does not entail implementing measures’. This shows that the authors of the Treaty of Lisbon sought to facilitate the direct access of private parties to the EU judiciary where, in situations such as that examined in Jégo-Quéré, 48 it was previously difficult for private parties to find national measures that they could use as a vehicle for bringing indirect challenges against EU acts before the national courts.

The question is then what one must understand by ‘regulatory acts’ as provided for in Article 263 TFEU. In Inuit Tapiriit, the EGC and, on appeal, the ECJ were confronted with that very question.

The facts of the case are as follows. Regulation (EC) No 1007/2009 on trade in seal products (‘the basic regulation’) allowed, as a general rule, the placing of such products on the European market only where they resulted from hunts traditionally conducted by Inuit and other indigenous communities and contributed to their subsistence.49 Taking the view that that rule adversely affects their economic interests, Inuit Tapiriit Kanatami, an association representing the interests of Canadian Inuits, and a number of other parties (seal product manufacturers and traders of various nationalities) applied to the EGC for the annulment of the basic regulation.

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46 Indeed, the application of the classic case-law on direct effect to new EU acts adopted under Title V of the TFEU is confirmed by the fact that legal instruments specific to the third pillar are abolished and replaced by Regulations, Directives and Decisions.
48 In broad terms, Article 263 TFEU codifies the ruling of the EGC in Case T-177/01 Jégo Quévé v Commission [2002] ECR II-2365, and thus supersedes the ruling of the ECJ in Case C-263/02 P Commission v Jégo-Quéré [2004] ECR I-3425.
By its order of 6 September 2011, the EGC dismissed the action as being inadmissible. It held that the basic regulation was a legislative act which could only be challenged by natural and legal persons who were directly and individually concerned by the basic regulation. However, all the applicants failed to satisfy, at the least, one of those two conditions of admissibility. In that context, the EGC stated that the concept of ‘regulatory acts’ does not include ‘legislative acts’. In addition to interpreting that Treaty provision systematically and teleologically, the EGC examined the drafting history of the fourth paragraph of Article 263 TFEU. Referring to a cover note of the Praesidium of the European Convention, it found that, when considering the proposals for an amendment to the fourth paragraph of ex Article 230 EC, the Praesidium had to choose between the expressions ‘an act of general application’ and ‘a regulatory act’. It adopted the latter approach, ‘since it would enable a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts (for which the "of direct and individual concern" condition remains applicable) while providing for a more open approach to actions against regulatory acts’. Thus, it may be deduced that the travaux préparatoires relating to Article 263 TFEU had an important bearing on the EGC’s ruling.

On appeal, the ECJ confirmed the order of the EGC. At the outset, it interpreted the fourth paragraph of Article 263 TFEU systematically and noted that that paragraph is divided into three limbs, namely:

1. Acts which are addressed to natural or legal persons
2. Acts which are of direct and individual concern to them, and
3. Regulatory acts which are of direct concern to them and do not entail implementing measures

In this regard, the ECJ held that the first two limbs of the fourth paragraph of Article 263 TFEU correspond with those which were laid down, before the entry into force of the Treaty of Lisbon, by the EC Treaty, in the fourth paragraph of ex Article 230 EC.

Accordingly, given the reference to ‘acts’ in general, the subject matter of those limbs of Article 263 is any EU act which produces binding legal effects. That concept therefore covers acts of general application, legislative or otherwise, and individual acts.

The second limb of the fourth paragraph of Article 263 TFEU specifies that if the natural or legal person who brings the action for annulment is not a person to whom the contested act is addressed, the admissibility of the action is subject to the condition that the act is of direct and individual concern to that person.

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50 T-18/10 Inuit Tapiriit Kanatami and Others v Parliament and Council, order of 6 September 2011, not yet reported.
51 Ibid., paras 44 to 48.
52 Ibid., para 50.
54 T-18/10 Inuit Tapiriit, above n 50, para. 49.
55 Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council, judgment of 3 October 2013, not yet reported.
56 Ibid., para. 55.
57 Ibid., para. 56.
Regarding the concept of ‘regulatory act’, the ECJ found that ‘its scope is more restricted than that of the concept of ‘acts’ used in the first and second limbs of the fourth paragraph of Article 263 TFEU, in respect of the characterisation of the other types of measures which natural and legal persons may seek to have annulled. The former concept cannot, as the [EGC] held correctly in paragraph 43 of the order under appeal, refer to all acts of general application but relates to a more restricted category of such acts. To adopt an interpretation to the contrary would amount to nullifying the distinction made between the term ‘acts’ and ‘regulatory acts’ by the second and third limbs of the fourth paragraph of Article 263 TFEU.’

Drawing on the travaux préparatoires of the European Convention, the ECJ found that ‘while the alteration of the fourth paragraph of Article 230 EC was intended to extend the conditions of admissibility of actions for annulment in respect of natural and legal persons, the conditions of admissibility laid down in the fourth paragraph of Article 230 EC relating to legislative acts were not however to be altered’. Thus, the ECJ ruled that ‘the purpose of the alteration to the right of natural and legal persons to institute legal proceedings, laid down in the fourth paragraph of Article 230 EC, was to enable those persons to bring, under less stringent conditions, actions for annulment of acts of general application other than legislative acts’.

Next, the ECJ ruled that the EGC was right in finding that the appellants involved did not satisfy, at the least, one of the two conditions of admissibility applicable to them, namely that of individual concern. Since the prohibition on the placing of seal products on the market laid down in the basic regulation is worded in general terms, it applies indiscriminately to any trader falling within its scope, and is not directed specifically at the appellants.

Last, the ECJ found that the Charter, and in particular its Article 47, does not require that an individual should have an unconditional entitlement to bring an action for annulment of EU legislative acts directly before the EU Courts.

- Whilst the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in light of the Charter, the ECJ found that Article 47 of the Charter is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the EU Courts, as is apparent also from the Explanation on that provision of the Charter. Such interpretation ‘cannot have the effect of setting aside the conditions expressly laid down in that Treaty’.

- In that context, the ECJ held that judicial review of compliance with the EU legal order is ensured by the EU Courts and the courts and tribunals of the Member States.

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58 Ibid., para. 58.
59 Ibid., para. 59.
60 Ibid., para. 60.
61 Ibid., para. 73.
62 Ibid., para. 97.
63 Ibid., para. 98.
64 Ibid., para. 90. See also Article 19(1) TEU and Opinion of the ECJ 1/09 [2011] ECR I-1137, para. 66.
o It recalled that ‘the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights’. According to the Treaties, the Treaties have established ‘a complete system of legal remedies and procedures designed to ensure judicial review of the legality of [EU] acts, and has entrusted such review to the [EU] Courts’.  

o Where responsibility for the implementation of those acts lies with the EU institutions, an individual is entitled, under certain conditions, to bring a direct action before the EU Courts against the implementing measures and to plead, in support of that action, the illegality of the general act at issue. 

o Where that implementation is a matter for the Member States, the invalidity of the EU act at issue may be pleaded before the national courts and tribunals and they may refer the matter to the ECJ and request a preliminary ruling. In proceedings before the national courts:

- Parties have the right to challenge before those courts the legality of any decision or other national measure relative to the application to them of an EU act of general application, by pleading the invalidity of that act.  
- It is therefore for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection. In this regard, the ECJ held that ‘in the absence of [EU] rules governing the matter, it is for the domestic legal system of each Member State to designate, with due observance of the requirements stemming from [Article 47 of the Charter] and the principles of effectiveness and equivalence, the courts and tribunals with jurisdiction and to lay down the detailed procedural rules governing actions brought to safeguard rights which individuals derive from [EU] law’.  
- However, referring to its previous findings in Unibet, the Treaties did not intend to create new remedies before the national courts to ensure the observance of EU law other than those already laid down by national law. The position would be otherwise only if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from EU law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully.

66 Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council, above 55, para. 92.
67 Ibid., para. 93.
68 Ibid.
70 Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council, above 55, paras 100 and 102.
71 Ibid., para. 102.
72 Unibet, above n 15, para. 40.
73 Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council, above 55, para. 103.
74 Ibid., para. 104.
IV. Concluding paragraph

In light of the foregoing considerations, the EU system of judicial protection is coherent and complete. The EU judicial function is vertically integrated as it is shared between the EU Courts and national courts. Both types of courts must, in the exercise of their respective jurisdiction, ensure that in the interpretation and application of the Treaties the law is observed.