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# CONTEMPORARY CHALLENGES OF TRANS-NATIONAL DEMOCRACY: THE EUROPEAN CITIZENSHIP BETWEEN THE INDIVIDUAL LEGAL ACTIONS IN THE LISBON TREATY AND THE REINFORCEMENT OF THE INDIVIDUAL RIGHTS INSIDE THE EUROPEAN UNION\*

## *LE ATTUALI SFIDE DELLA DEMOCRAZIA TRANSANZIONALE: LA CITTADINANZA EUROPEA TRA LE SINGOLE AZIONI LEGALI NEL TRATTATO DI LISBONA E IL RAFFORZAMENTO DEI DIRITTI INDIVIDUALI ALL'INTERNO DELL'UNIONE EUROPEA.*

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**ABSTRACT:** European citizenship has been introduced and disciplined by the Maastricht Treaty of 1992. From then on the “European citizen status” development has followed a way slow, but important. There are two phenomena that are intertwined in this way: on the hand there’s the reinforcement of the individual rights inside the European Union and on the other hand there’s the improvement inside the Lisbon Treaty 2009 of the individual legal actions at the Court of Justice of the European Union. In fact, before the Lisbon Treaty existed some type of action in front of European Court of Justice. This paper, in the first part, aims to deepen the juridical action by persons and

**RIASSUNTO:** La cittadinanza europea è stata introdotta e disciplinata dal Trattato di Maastricht del 1992. Da allora lo sviluppo dello “status di cittadino europeo” ha seguito un cammino lento, ma importante. Ci sono due fenomeni che si intrecciano su questa strada: da una parte c’è il rafforzamento dei diritti individuali all’interno dell’Unione Europea e dall’altra c’è il miglioramento all’interno del Trattato di Lisbona 2009 delle singole azioni legali alla Corte di Giustizia dell’Unione europea. Infatti, prima del Trattato di Lisbona esisteva qualche tipo di azione dinanzi alla Corte di giustizia europea. Questo articolo, nella prima parte, mira ad approfondire

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firms in front of European Court of Justice before and after the Lisbon Treaty, considering the strengthening of individual right. The second part of this paper aims to investigate the interpretation, in the standard procedure and in the jurisprudence, of article 263 of the Treaty on the Functioning of the European Union. In particular, the purpose of this paper is to understand if, currently, the jurisprudence and majority doctrine are inclined to restrictive or wide interpretation of article 263 looking for to know the concrete possibility of any natural or legal person to assert individual rights proceeding against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct to them and does not entail implementing measures. The interpretation of this article affects on real value of the status of European citizen creating a political juridical consciousness of the European citizenship similar to the national citizenship.

**KEYWORDS:** Individual legal actions. European Union. European citizenship. Individual rights proceeding. Democracy.

*l'azione giuridica delle persone e delle imprese di fronte alla Corte di giustizia europea prima e dopo il trattato di Lisbona, considerando il rafforzamento dei diritti individuali. La seconda parte di questo lavoro mira a studiare l'interpretazione, nella procedura standard e nella giurisprudenza, dell'articolo 263 del Trattato sul Funzionamento dell'Unione europea. In particolare, lo scopo di questa ricerca è capire se, attualmente, la giurisprudenza e la dottrina maggioritaria sono inclini a un'interpretazione restrittiva o larga dell'articolo 263 cercando di riconoscere la possibilità concreta di qualsiasi persona fisica o giuridica di poter affermare i propri diritti individuali contro un atto indirizzato a quella persona o che è di interesse diretto e individuale, e contro un atto normativo che è di diretto a loro e non comporta misure di attuazione. L'interpretazione di questa norma interessa per capire il valore reale della condizione di cittadino europeo, che genera una coscienza giuridica politica della cittadinanza europea simile alla cittadinanza nazionale.*

**PAROLE CHIAVE:** Unione Europea. Cittadinanza Europea. Democrazia. Azioni legali individuali. Procedimenti individuali per la tutela dei diritti.

**CONTENTS:** 1 Introduction: the judicialisation of citizenship inside the reinforcement of the individual rights in the European Union. 2 European citizenship: origin and development. 3 Juridical actions by persons and firms in front of the European Court of Justice before and after the Lisbon Treaty. 4 The interpretation of the article 263 of Treaty on the Functioning of the European Union in standard procedure and in jurisprudence: restrictive or wide view? 5 Conclusion: the article 263 of TFEU and “European citizen status”: what future perspective?.

## **1 INTRODUCTION: THE JUDICIALISATION OF CITIZENSHIP INSIDE THE REINFORCEMENT OF THE INDIVIDUAL RIGHTS IN THE EUROPEAN UNION**

The European integration process has followed a long way with progressive step. This is the idea of Jean Monet who devised a functional model of building the European Union. Monet's model is made of integrations partial, subsequent, gradual. Where is the precedence of economic sector to political field, but addressing the first to the second. The sovereignty must be divided between inter government power and the power of the member States.

The key of this model is the combination of a strong method with a limited object. Essential is to concentrate to only objective.

For these reasons functional method has been the winner idea of European integration. European Community was born in 1950 and, initially, it is only of "carbon and steel". It will be monetary only in 1999. It will improve to become in 1955 Community of defense.

Adjectives are served to limit the field object of the unification, to circumscribe.

In 2009, after the failure of Constitutional project, it will become political and stronger. After the Lisbon reform, treaties are always two, but the subject now is one: European Union. In particular, the Lisbon Treaty, entered into force in December 2009, reinforces democracy in the European Union and its capacity to promote the interests of citizens. The Lisbon treat has effectively revolutionized European Union policymaking in the areas of justice, fundamental rights and citizenship. Moreover, the Charter of Fundamental Rights of the EU was made binding by the Lisbon treaty. European Union institutions must respect the rights enshrined in the Charter. Charter also applies to European Union countries when they implement European Union law.

So, the reinforcement of the human rights and of the individual rights in the European Union brings to search a judicialition of European citizenship. More justice union in European Union space

is required by individual subjects that are European citizenship.<sup>1</sup>

With this preamble, it is possible to know the importance that proceedings in front of the European Union Court of Justice by persons and firms have assumed in the debate about the research of political union in Europe. The European citizens are not only economic subjects, but carriers of several rights which are always more and more object of European legislative intervention. There are many questions on the table in this debate. In particular, there is a question that regards us from close up: “Is there a complete and effective jurisdictional protection system to individual rights in European Union”?

And moreover: “Can individual subjects, persons and firms, have an effective protection in front of the European Court of Justice after the Lisbon treaty”?

There is a strong interconnection between individual rights inside the European Union and judicialization of the European citizenship that must be considered.

## 2 EUROPEAN CITIZENSHIP: ORIGIN AND DEVELOPMENT

It’s necessary to consider the origin of European citizenship and, obviously, its development in the last time.<sup>2</sup> It is an important

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1 See Guner, S. Ece, “*The Role of the European Court of Justice in the Integration Process of the European Union.*” A Thesis Submitted to the Graduate School of Social Sciences of Middle East Technical University (2005), p. 1-129 that affirms: “The European Union (EU) is accepted as one of the most challenging political experiments in world history by political scientists, legal, and international relations scholars. This is because of the interesting structure of the EU, in which some of the most powerful European states voluntarily delegated their governing powers to supranational institutions. Hence, it is not generally regarded as a traditional international organization within the traditional framework of international law. The legal principles and mechanisms which were formed by the founding Treaties and community institutions played a significant role during the formation of this new political structure. The legal structure, which has been established over a long period, is still in the development phase, and this legal order is now ready to adopt its formal constitution. The European Court of Justice (ECJ) has played an important role during the constitutionalization of the EU, hence the efforts of the ECJ require some attention”.

2 For a general examination of the European citizenship see: Maas Willem: *Creating European Citizens*, Lanham-Rowman & Littlefield, 2007; O’Leary- Siofra, *The evolving concept of community citizenship*, Kluwer Law International. The Hague,

preamble of our research to know in deep the real sense of European citizenship in the process of citizenship judicialisation.

So, the first thing can be said is that citizenship of the European Union was introduced by Maastricht Treaty, which was signed in 1992, and has been in force since 1993. European citizenship doesn't take the place of national citizenship, but it is a complementary element of national citizenship, that, in fact, is essential condition to obtain European citizenship.<sup>3</sup>

Before Maastricht Treaty, European Communities treaties provided guarantees for the free movement of economically active persons, but not, generally, for others. This is coherent with the integration logic of European Union. Integration for sectors. In fact, the 1961 Treaty of Paris establishing the European Coal and Steel Community provided a right to free movement for workers in these industries and Treaty of Rome, in 1957, provided for the free movement of workers and services.

Now, the European citizenship affords important rights such as the right to vote in European elections, the right to free movement, settlement and employment across the European Union and the right to consular protection by other European Union States' embassies when the citizenship' country of person doesn't maintain an embassy or consulate in some country.

According to European integration process, initially and historically, the most important aspect of European citizenship has been that of free movement. This is the beginning.

Also now, this is a central aspect of European citizen status, in fact the article 21 of Treaty on the Functioning of the European Union states that: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States,

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1996. For a critical examination see: Soysal Yasemin, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, University of Chicago Press; Wiener Antje, *European citizenship practice: Building institutions of non state*, Westview Press, 1998.

3 See article 20 of the Treaty on the Functioning of the European Union states that: "Citizenship of the Union s hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship".

subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

However with the creation of European Union citizenship, certain political rights came into being.

Treaty on the Functioning of European Union provides for citizens to be “directly represented at Union level in the European Parliament” and “to participate in the democratic life of the Union”.

Because the search of a political sense inside the European Union is the objective of the last years in integration way.

In particular, political rights regard: voting in European elections: a right to vote and stand in elections to the European Parliament, in any European Union member State; voting in municipal elections: a right to vote and stand in local elections in an European Union State other than their own, under the same conditions and the nationals of that State; a right to access to European Parliament, Council and Commission documents; petitioning Parliament and the Ombudsman: the right to petition the European Parliament and the right to apply to the European Ombudsman in order to bring to his attention any cases of poor administration by European Union institutions and bodies, with the exception of the legal bodies.

Finally, there are also linguistic rights: the right to apply to the European Union institutions in one of the official languages and to receive a reply in the same language.

Now, there is also a future perspective to development for European citizenship: rights provided by European Union Law aren't a closed number, but they can be integrated thanks to evolutionary clause that permits to Council, on proposal of Commission and after consultation of European Parliament, to adopt, with unanimity vote, dispositions to complete rights concerning the European citizenship.

In fact, this slow but important development of European citizen status is not a closed circle. It is not only exhausted in the political rights now existed and possible in the future.

We must be considering that, in the last time, there is a strong reinforcement of the individual rights inside the European Union. Many types of rights seek protection in the European Union, not only of economic nature. This aspect, in the future, no more distant, can be interest the protection of these rights in front of European

Union Justice Court. In part, this way has been entered yet. With the Lisbon Treaty it is provided juridical actions by persons and firms in front of European Court of Justice disciplined, in particular, by article 263 of the Treaty on the Functioning of the European Union.

In fact, it's interesting to improve to deepen the correlation between individual rights protection in the European Union and European Citizenship, and in other words the individual rights protection inside the European citizenship future development. Because the good integration results not only by political rights, without every doubt important and necessary, but also by a good protection of individual rights in front of European Court of Justice. This is an interesting lecture key. This probably is the next passage in the integration way that wait for to development.

### **3 JURIDICAL ACTIONS BY PERSONS AND FIRMS IN FRONT OF EUROPEAN COURT OF JUSTICE BEFORE AND AFTER THE LISBON TREATY**

The Lisbon Treaty, to give a better access to justice system at individual subject, has amended some disposition about the annulment proceeding.

To understand in deep the change introduced by the Lisbon Treat, it's necessary to spend some words on the previous regulation.

The previous regulation provided, in accordance with article 230 co. 4 of TCE that, in the case of individual decisions, the action of annulment was always carried out only by addressees of the act. In the cases of regulations or decisions adopted in regard of other subjects, the contestation was conditioned by concrete verification on the existence of interest "direct" and "individual" to annulment of the act impugned. In practice, it was doubtful the admissibility of a recourse proposed against a directive, because the norm was silent about this type of act.

In summer, we can say that only for acts directly addressed at single individual, person natural or juridical, was possible propose a recourse to European Court of Justice to persons and firms (in particular to specialized Court); for other decisions indirectly addresses, they had not juridical protection. In fact, the requisites

contained in adverbs “directly”<sup>4</sup> and “individually”<sup>5</sup> were an important filter to institute the proceeding of annulment. In according to previous discipline about this type of proceeding, persons and firms were exceptionally successful with the proof burden requested in order to the direct effects of act with general reach on their situation.

In other words, the way to protect individual rights for persons and firms in front of European Court of Justice was full of obstacles, not always surmountable. In European law, there was the possibility to individual recourses of annulment but the discipline was difficult to practice. We can affirm, in unanimity with the big part of the doctrine, that the previous discipline of individual recourse against acts of European Union was a complete betrayal of the effective jurisdictional protection right.<sup>6</sup> This right is emerged in the last year in the jurisprudence of the European Court of Justice. In the famous sentence *Parti écologiste Les Verts against European Parliament*, n° 294/83, the Court of Justice made clear that: “European Community is a Community of right, in the sense that neither Member States or its institutions are shirked of the conformity of their acts at constitution established in the treaty”. In

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- 4 Mean of “*Direct concern*”: Private persons can apply for annulment of a Community decision only if it is of direct concern to them. The Courts have interpreted direct concern to mean that the impugned Community act should be directly applicable without any discretion on part of the member States. Direct concern simply requires that the contested Community act directly affect the individual’s legal situation and that it leaves no discretion to the addressees entrusted with the act’s implementation, such implementation being purely automatic and resulting exclusively from Community regulations without the application of any intermediate rules. The rationale behind requiring direct effect of the community act for judicial level being that if the member States have a role in the implementation of the Community act, then the same can be subject to challenge in the national Courts. To a great extent, the object behind restrictive wording of Article 230 is to avoid multiplicity of litigation and strain to the ECJ.
- 5 For “*Individual concern*”: The requirement of individual concern is more complex, and has been the bone of contention in many cases before the ECJ. Their objective is to restrict access to the judicial review in the Court of Justice only to measures which are individual and not general, and in which applicants have personal interest.
- 6 K. Leenaerds, *The legal protection of private parties under the EC Treaty: a coherent and complete system of judicial review?*, in *Studi in onore di Giuseppe Federico Mancini*, Milan, 1998.

the recent time, European jurisprudence<sup>7</sup> affirms that the European Union law is in keeping with principle of effective jurisdictional protection derived by constitutional traditions of every Member State, provided by articles 6 and 13 of CEDU and underlined by article 47 of the European Union fundamental rights Constitution.

The most important weakness of previous discipline about the individual recourse at European Courte of Justice surely regarded regulation acts that need of execution measures. For this type of acts existed an empty of protection appeared in particular in sentence 25 July 2002, C- 50/00 P, *Unión de Pequeños agricultores*.

In this sentence, the European Court of Justice has declared not valuable annulment recourse of a group of firms against a regulation that doesn't request execution or accomplishment acts, limiting it to recall the national judge's obligation to interpret the norms of national law system for guarantee the effective jurisdictional protection in this type of cases.

Trying to fill this gap,<sup>8</sup> before the reform of the discipline concerning annulment's proceeding, the jurisprudence tried to give a broad interpretation of the article 230 of TCE. In this sense, the jurisprudence of the European Court of Justice was constant. In particular, in the sentence *Plaunamm* against Commission,<sup>9</sup> the European Court of Justice has explained that as well when a subject is not explicitly the addressed of a decision, this decision regards this person individually when, on the basis of personal quality, this person is distinct from other general actors. In this type of cases, person, natural or juridical can be identified like *consignee*.

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7 See, in particular, sentence 3 September 2008, C-402/05 P AND C.415/05 P. *Kadi*.

8 Thus there was a legal lacuna with regard to self-executing acts of general application which have direct legal effects without the adoption of national legal measures or Community legal measures. Such an act may concern an individual directly and if individual alleges its illegality, he is refused access to the Courts directly. The only recourse available to him is to breach the Community law and then appeal against the sanction which the national courts could impose on him by reason of that breach, in order to contest the validity of an allegedly illegal measure before the national Court.

9 See Case 25/62 *Plaumann v Commission* [1963] ECR 95 and, most recently, Case

The principal point is that it is no important the denomination of act but its substantial characteristic.<sup>10</sup>

The subjects concerning with the act are identifiable on the basis of a specific situation that regards themselves. More specifically, the Court assumes the same position in the sentence: “International Fruit Company and other against Commission”, underlining that the subject can institute a proceeding of annulment because they are identified and identifiable: in fact they are members in a narrow circle of operators that, in specific case in point, were struck by restrictive regime of licences on Greek cotton importation.

Applying this address of European jurisprudence, the Court has admitted the recourse of person natural or juridical in every case in which the provision regards themselves directly and individually, over the formal nomination of the act. With this address, the European Court of Justice has also admitted recourse against

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C-451/98 *Antillean Rice Mills*, paragraph 49 of the judgment delivered on 22 November 2001. The Plaumann Rule & its Implications regarding when a decision can be said to be of ‘individual’ concern to the private person, the ECJ has traditionally attributed very stringent interpretations. One of the most important decisions in this regard that set a trend is *Plaumann v. Commission*. In this case, Germany was refused authorization by the Commission to reduce import duty on clementines. The applicant, a German importer of clementines, challenged this decision of the Commission. The ECJ refused to entertain this plea holding that, claimants to be individually concerned should prove that the decision “affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually”. Though Plaumann was directly affected by the decision, he stood as yet another importer of clementines, and there was nothing that distinguished him from the rest of the importers, and hence was not “individually concerned”. The interpretation of the Court thus excluded the possibility of challenge by a member of an affected class/group, the rationale being that parties are competent only to challenge decisions of the Community institutions and not generally applicable orders/regulations though the individual may be directly affected, leaving the affected The *Plaumann* test is very difficult to meet and requires the applicants to belong to a closed, fixed group ascertainable on the date of adoption of the measure.

The dictum of *Plaumann* has been consistently followed through the subsequent decades. However, there have been departures such as, in *Codornui*, the Court held that the applicant who possessed a trademark that would have been overruled by a regulation (found to be of legislative character) was individually concerned, and also in anti-dumping cases where Courts have been more inclined in finding individual concern of the claimants, rather than in general policy areas.

10 See sentence 60/81 IBM against Commission.

a regulation of the Commission addressed to a definite number of persons. But, in spite of the wide interpretation, the European Court of Justice has always excluded the possibility for single to propose annulment recourse against a regulatory or a directive with general reach. In these cases there was always the limit of general reach of the act, incompatible with individual interest of the person requested of the norm. It was a presumption insuperable by jurisprudence. But in the sentence of 3 May 2002, T-177/01, Jégo- Quéré against Commission, the Tribunal of the first degree is proposed a different solution giving an interpretation very wide of the concept of person individually interesting. In the opinion of the Court, in fact, “a person, legal or natural, must be considered individually interested by European Union disposition with general effects that regards this person directly if the disposition considered weighs upon, with sureness and topicality, juridical situation of the person narrowed rights or imposing duties. The presence of plural subjects interesting can't be an obstacle for the possibility to institute annulment proceeding against an act by person, legal or individual. The innovative sentence of first degree Tribunal took arguments supported by general lawyer Jacobs in the other case in front of the European Court of Justice: C-50/00P, Unìon de pequenòs Agricultores against Counsel.<sup>11</sup> In this sentence, instead, the European Court of Justice

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11 In this case an association of farmers appeals against an order of the Court of First Instance dismissing as manifestly inadmissible its application for the annulment of Regulation No 1638/98, which amended substantially the common organization of the olive oil market, on the ground that the members of the association were not individually concerned by the provisions of the Regulation within the meaning of the fourth paragraph of Article 230 EC. For critical commentary on the case-law by members of the Court of Justice and the Court of First Instance, see F. Schockweiler, L'accès à la justice dans l'ordre juridique communautaire, *Journal des tribunaux, Droit européen*, no. 25, 1996, p. 1, at pp. 6 to 8; J. Moitinho de Almeida, Le recours en annulation des particuliers (article 173, deuxième alinéa, du traité CE): nouvelles réflexions sur l'expression la concernent ... individuellement, *Festschrift für Ulrich Everling*, Vol. I, (1995), p. 849, at pp. 857 to 866; G. Mancini, The role of the supreme courts at the national and international level: a case study of the Court of Justice of the European Communities, *The Role of the Supreme Courts at the National and International Level*, P. Yessiou-Faltsi (ed.), (1998), p. 421, at pp. 437 to 438; A. Saggio, Appunti sulla ricevibilità dei ricorsi d'annullamento proposti da persone fisiche o giuridiche in base all'Art. 173, quarto comma, del Trattato CE, *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, (1998), p. 879, at pp. 903 to 904; and my article

didn't receive argumentations of the general lawyer Jacobs (and, so, the interpretation of the Tribunal of first degree in the sentence T-177701, *Jégo- Quéré against Commission*)<sup>12</sup> confirming that a regulatory, like acts with a general effects, cannot impugned by subjects different by institution.

We can conclude underling that jurisprudence of the European Court of Justice is tempted a wide lecture<sup>13</sup> of the annulment proceeding to increase the possibility to person of seek effective justice, but it was necessary a legislative intervention.

So, the new version of article 263 TFUE tries to resolve these problems. In fact, article 263 TFUE now provides that acts can be contest are: legislative acts, acts adopted by Counsel, Commission, European Central Bank which aren't recommendations or advices and acts of European Parliament and European Counsel destined to produce juridical effects towards third party adapting the previous discipline to new type of derived acts that now distinguishes, without a great clearness, between legislative acts, delegated acts and acts of execution.

This aspect represents without doubt an opening to include many types of acts in the range of action of the annulment recourse by persons and firms. In fact, it's provided the contestation of Euro-

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Access to justice as a fundamental right in European Law, *Mélanges en hommage à Fernand Schockweiler* (1999), p. 197.

12 In *Jégo-Quéré*, dealing with a self-executing Community act of general application, the CFI took a teleological approach to 'individual concern' and held that there was no compelling reason to adhere to the *Plaumann* test and, in keeping with the guarantee of effective judicial protection, held: "...a person is individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard."

13 See moreover the support for wider access for individual applicants in Opinions of Advocates General, e.g. the Opinion of Advocate General Slynn in Case 246/81 *Bethell* [1982] ECR 2277, at p. 2299, my Opinions in Case C-358/89 *Extramet Industrie* [1991] ECR I-2501, at paragraphs 71 to 74, and Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, at paragraphs 20 to 23, and the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-142/95 P *Associazione agricoltori della provincia di Rovigo and others* [1996] ECR I-6669, at paragraphs 40 and 41.

pean Council acts and of acts by European Union organs and organizations destined to produce juridical effects towards third party. The European Council sometimes can adopt binding deliberations ex article 7 of TUE. Moreover, with the overcoming of the distinction in pillars, new article 263 TFUE provides the contestation of acts adopted in the sector of police and judicial cooperation in criminal field, but with exclusion, in order to article 275 of the TFUE, of the acts in the sector of foreign politics and common security.

Leaving the substantial criterion more utilized with the previous discipline, new Treaty divides acts on formal proceeding of adoption. So, firstly there are acts adopted with legislative proceeding, ordinary or special ex article 289, par. 3, of the TFUE. Secondly there are delegated acts, so called not legislative acts with general effects, which integrate or modify stated no essential of the legislative acts and they are emanated by Commission on delegation of legislator ex article 290 TFUE. Finally, acts of execution are acts that permit to Member States, Commission and exceptionally Council to carry out act juridical binding of European Union ex article 291, par. 1, TFUE.

This consideration regards the article 263 in general. But the new Treaty has adopted a new formula for the annulment proceeding by individual subjects, persons or firms, in the article 263, paragraph 4, of the TFUE.

Now, the norm appears more light.

The article 263, par. 4, TFUE, provides that: “Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceeding against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”.

In this new form of the norm 263, par. 4, TFUE, there are important changes. Any natural or legal person can institute proceeding against: 1) acts addressed to that person; 2) acts which are of direct and individual concern to them; 3) regulatory acts which are of direct concern to them and does not entail implementing measures.

Firstly, the great new is the change of term “decision” with the term “act”. Obviously, this change enlarges types of provisions that can be contest by any person, natural or legal. This change of words also regards the second type of acts considered by the norm: acts which are of direct and individual concern to person can institute a proceeding in front of European Court Justice, or more precisely, in front of specialized Court. Finally, there is the big new: the new formula of the norm introduces new rules of standing for private parties concerning “regulatory acts not entailing implement measures”. In fact, the Treaty of Lisbon revises the article relating to the standing of private parties adding this third category to the existing two (addressee and party directly and individually).

This is the normative datum. And in juridical analysis the normative datum is always the important point of start. But, due to the lack of definitions, the effect that the revision has on applications depends on the juridical interpretation of the provision. In particular, the question on that doctrine and jurisprudence rack themselves’ brain is the significant of the regulatory acts does not entail implementing measures.<sup>14</sup> What is the means of this disposition? The answer of this question measures the significance of reform and the change in the judicialisation of citizenship inside the reinforcement of the individual rights of person, legal or natural, in European Union law.

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14 Ever since the drafting of the Treaty Establishing a Constitution for Europe, the exact meaning of the ‘regulatory act’ has been one of the most debated topics among scholars concerned with the *locus standi* requirements in annulment actions. This was mainly caused by the fact that neither the Constitution for Europe, nor the Lisbon Treaty, contains a definition of a regulatory act or uses this wording in other articles. For long time the legal writings were based solely on the *travaux préparatoire* of the Treaties and opinions of scholars, waiting for the EU Court of Justice to have the final word. See, for example; Barents, Rene, “*The Court of Justice after the Treaty of Lisbon*”, 47 CML Rev (2010), p. 709-728; Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law. Text and Materials*, 2nd edition, Cambridge University Press, 2010, p. 414; Albors-Llorens, Albertina, “*Edging Towards Closer Scrutiny? The Court of Justice and Its Review of the Compatibility of General Measures With the Protection of Economic Rights and Freedoms*”, in Anthony Arnall, Catherine Barnard, Michael Dougan & Eleanor Spaventa (eds.), *Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, 2011), p. 245-267.

#### 4 THE INTERPRETATION OF THE ARTICLE 263 OF TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION IN THE STANDARD PROCEDURE AND IN THE JURISPRUDENCE: RESTRICTIVE OR WIDE VIEW?

In the article 263, par. 4, of the TFUE, the expression “regulatory act” is mentioned, but it is not explained. This is the question must controversial about the proceeding of annulment by persons, legal or natural. The general idea in the interpretation of this expression is that individual proceeding of annulment for person or firms must be effective to guarantee the juridical protection by an act, but it cannot be extended to all types of acts, never the less.

So, the question that is the center, the point of balance of all interpretation effort on the article 263 regards the “regulatory act”. Does it regard all acts of European Union?

And if the answer is no: “What type of acts is included in this expression?”

Surely, the first point of reference is represented by the jurisprudence of the European Court of Justice. It offers a negative answer to the question that we are seeking.<sup>15</sup> The arguments of the Court are various, but all support a restrictive interpretation. The reason is to preserve the functionality of the European Union Court of Justice, in particular, and of the European Union, in general. Surely, this is also the most dangerous risk in the wide interpretation of the expression “regulatory act”: it might have consequence in the future on the load of work for European Union Court of Justice.

But, while the jurisprudence of the Court is enough compact in this interpretation, the doctrine is more divided. There are two big orientations. The first<sup>16</sup> retains that the expression “regulatory

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15 Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*. [2013] ECR II-0000; Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2011] ECR I-00164.

16 In this sense see: E. Triggiani, *L'Unione Europea secondo la riforma di Lisbona*, Bari, 2008; S. Balthasar, *Locus standi Rules for challenge sto regulatory acts by private applicants: the new article 263 TFUE*, in *European Law Review*, 2010; M. Harker, M. Hviid, Wright, *The EU Rules on standing in Merger cases: Should firms have to demonstrate harm to completion?*, in *European Law Review*, 2001.

act” is synonymous of no legislative act. The second<sup>17</sup> interpretation, on the contrary, supporting to widen and to favour the annulment proceeding of individual subject, affirms that the controversial expression “regulatory act” is referred to every type of act of European Union with general reach and juridical effects, whether legislative or not legislative, executive or delegated. Consequently, for the part that support the limitations offered by “Plaumann formula”<sup>18</sup> these limitations are applied to all legislative acts.

For the second orientation, instead, legislative acts do not entail implementing measures are excluded from the limitation of the Plaumann formula. But a limit important in the interpretation of the expression is the fact that the Lisbon Treaty keeps distinction between legislative acts and no legislative acts. It is necessary to return at the jurisprudence of the EUCJ, that represents a key lecture of the interpretation problem.

*Inuit* was the first case where the European Union Court of Justice was called to interpret the notion of “regulatory act”, a novelty introduced by the Lisbon Treaty. The case concerned the European Parliament and Council Regulation No. 1007/2009 on trade in seal products, which the applicants claimed to be a regulatory act. However, the General Court (order of 6 September 2011) was of the opposite opinion. It concluded that “regulatory act” for the purposes of Article 263(4) TFEU must be understood as covering all acts of general application apart from legislative acts. It dismissed the action for annulment as it was lodged against regulation adopted through the legislative procedure.

Hoping that the Court of Justice will decide to introduce a more flexible interpretation of “regulatory act”, Inuit Tapiriit Ka-

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17 T. Tridimas, , In T. Tridimas, P.Nebbia eds., *European law of The European Court of Justice and the draft Constitution: a Supreme court of Union the twenty first ples of European Constitutional law*, Oxford, 2004.

18 Plaumann v Commission 25/62 [1963] ECR 199, The Plaumann test sets out the criteria for non-privileged applicants to prove individual concern: “*Applicants must show that the decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*”.

natami and other applicants brought an appeal against the order of the General Court. However, the Court of Justice has decided to follow Advocate's General Kokott opinion (delivered on 17 January 2013) and to stick to interpretation of "regulatory act" presented by the General Court.

The Court firstly noted that it is apparent from the third limb of the Article 263(4) TFEU that its scope is more restricted than that of the concept of 'acts' used in the first and second limbs of the Article 263(4) TFEU, in respect of the characterization of the other types of measures which natural and legal persons may seek to have annulled.

Thus, according to the Court, "regulatory act" cannot refer to all acts of general application but relates to a more restricted category of such acts. The Court of Justice supported the position of the General Court agreeing that legislative acts, which, although they may also be of general application, are not covered by the concept of "regulatory acts", and, therefore, continue to be subject to more stringent admissibility rules (applicants must prove direct and individual concern).

Thus, it can now finally be stated that the case is solved and it is clear what types of acts are 'regulatory acts' and might be subject to less stringent standing rules. According to the jurisprudence of the CJEU, for an act to fall under the concept of 'regulatory act', it shall satisfy the following requirements:

- It shall be an act of general application (not an individual act)
- It shall be non-legislative. Whether an act is legislative or not is determined by the procedure which led to its adoption: legislative is an act adopted through legislative procedure (ordinary or special).

Considering such case law, the 'floodgates' were not opened and the possibilities for private applicants to challenge legislative acts remain extremely limited. On the other hand, the doors for challenging non-legislative acts after Lisbon Treaty became more open.

So, if we want to explain and to summarize the interpretation of the Court, we can say that the direct active legitimation is always limited to given act of the European Union.

A possible simplified recourse is provided by the third hypothesis of the article against regulatory acts and not against all type of legislative act.

This conclusion, in the opinion of the general lawyer Kokott,<sup>19</sup> is reinforced also by the genesis<sup>20</sup> of the article 263, co. 4, TFUE and by the comparison between different linguistic version, in which the regulatory acts are presented with a formulation that recalls promulgation of norm by executive organ and not by legislative organ.

For many parties of the doctrine, it is clear that narrow interpretation offered by Court is reductive. On the one hand, it permits to avoid the European Court of Justice can be overloaded of recourse proposed by every person can consider oneself damaged from every acts of the European Union (so called: “*actio popularis*”).

While, on the other hand, it is not the exhaustive answer all are waiting to resolve the problem of inefficient annulment proceeding by individual person, legal or natural.

Considering that article 263, p. 4, TFUE, in new formula after the Lisbon Treaty, removes the conditions of the interest “individual” only for the contestation of the regulatory acts don’t entail implementing measures and if the interpretation of this expression is referred to not legislative acts, it is clear that individual interest requirement always remains for the cases of legislative acts contestation. In particular, the European Court of Justice Jurisprudence underlines that two types of acts, legislative and no legislative is only founded on the adoption procedure and not on its contents.

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19 See, in particular, point 40 of the conclusion Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*. [2013] ECR II-0000; See also: Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2011] ECR I-00164.

20 AG Kokott added that the distinction was discussed in European Convention working groups and was moreover written into the Constitutional Treaty. The General Court’s interpretation was thus in line with the drafting history of the Lisbon Treaty (point 40). Regarding the issue of why the Treaty of Lisbon took the term “regulatory acts” from the Constitutional Treaty project without providing a definition, AG Kokott explained :“*The ‘end product’ of the Intergovernmental Conference was therefore to be as similar as possible in substance to the failed Constitutional Treaty, and to stop short of it only in a few particularly symbolic aspects*”. (point 44).

So, the General Lawyer Kokott explains like the big onerous of the annulment proceeding of the legislative acts is derived by greatest democratic legitimation.<sup>21</sup>

In fact, to legislative acts is required the European Parliament participation in the adoption proceeding compared with acts delegated and executive.

The big onerous of the legislative acts annulment is also derived by consideration, in the opinion of European Court of Justice jurisprudence, regard the no contestation of legislative acts in many Member States juridical system. Moreover, The European Court Of Justice makes it clear that difference between legislative acts and no legislative act cannot be founded on formality, but must be founded on qualitative difference.

But, this aspects is not been explain by the Court of Justice.<sup>22</sup>

In the sentence Inuit, European Court of Justice rejects the observations of recurrences about the effective jurisdictional protection of person and firm because the solution reached is not a violation of fundamental right of effective jurisdictional protection ex article 47 of Fundamental rights Constitution and ex articles 6 and 13 of Human Rights European Card, because, in the opinion of European Court of Justice, the jurisdictional control system is complete: it is founded on interaction between Luxemburg Judge and National Judge in according to article 19 of TUE.

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

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After this excursus, it can be said that the European Court of Justice follows the restrictive interpretation of the article 263, par. 4, of the TFUE.

So, the no privileged subjects (they are called persons, legal or natural) continue to maintain two possible jurisdictional actions against act of the European Union. The choice of these actions depends essentially by the legislative technique utilized by European legislator to adoption act, and not on substance of the act.

It is the principal orientation. Before the judgment of European Court of Justice and the European Tribunal in the cases *Inuit* and *Microban*<sup>23</sup> defined the regulatory acts as general no legislative acts on the basis of a formal point of view. The European Court of Justice had a chance to adopt in the appeal in *Inuit* a more extensive approach, but it did not.

There is also a different interpretative solution, minority, presented, in the delays of the European Court of Justice decision, in the case *Inuit* and supported by general Attorney *Wahélet* till now

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23 After the General Court has explained the meaning of ‘regulatory act’ in the *Inuit Tapiriit Kanatami* case, it still had yet to define the meaning of ‘direct concern’ and the lack of ‘implementing measures’ in this context. This was done in *Microban* case. The measure challenged by the applicants in *Microban* case was a Commission decision on non-inclusion of triclosan in the ‘positive list’ of authorised substances. The decision was adopted using Commissions implementing powers. Therefore, according to the classification of legal acts provided for in the Treaty, it was a decision falling within the ambit of implementing acts. As, due to its scope, it was also an act of general application, the Court concluded, referring to the *Inuit Tapiriit Kanatami* case, that the contested decision should be considered to be a regulatory act. As regards the concept of ‘direct concern’ as re-introduced in the Article 263(4) TFEU, the Court decided to continue to interpret it in the same way as it appeared in Article 230(4) EC. Elaborating on the concept of lack of implementing measures, the Court noted that the Commission decision on non-inclusion of triclosan in the ‘positive list’ had the immediate consequence of the removal from the provisional list and a prohibition on the marketing of triclosan. Though an established transitional period allowing Member States to extend marketing triclosan until 1 November 2011 might have given rise to implementing measures by the Member States, these measures, according to the Court, were optional and ancillary to the main purpose of the contested decision, namely the prohibition of the marketing of triclosan. For this main purpose Member States did not need to adopt any implementing measures, therefore, the Court held that the contested decision did not entail implementing measures and ruled the application admissible. See: Case T-262/10 *Microban International and Microban (Europe) v Commission* [2011] ECR II-0000.

outstanding in the contestation judgment. Following a different solution, this interpretation asserts that regulatory acts aren't opposed to legislative acts. In fact, on the lecture of article 291 TFUE the legislative acts are opposed to executive acts.

This very interesting solution affirms, in conclusion, that restrictive interpretation proposed by Tribunal and Court is paradoxical for several aspects. Firstly, the restrictive interpretation creates the same situation of the sentence of the European Court of Justice *Pequenos Agricultores* of the 2002: no reception of the demand.

Secondly, it is a paradox that the European Court of Justice takes it for granted that the Lisbon Treaty doesn't not permit to individual subjects to take legal proceeding against European Union legislative acts and then it imposes at these Member States to provide this type of action, in indirectly way, against the European Union acts. It is a paradoxical presumption and enough problematic solution.

## **5 CONCLUSION: THE ARTICLE 263 OF TFUE AND "EUROPEAN CITIZEN STATUS": WHAT FUTURE PERSPECTIVE?**

In conclusion, there is an another observation to underline that emerged in *Inuit* case about the annulment proceeding of individual subject: it is regards the support to national jurisdictional protection with respect to direct annulment proceeding in front of European Union Court of Justice.

By their third ground of appeal, the appellants claimed that the General Court's interpretation of Article 263 TFEU was in breach of Article 47 of the Charter and Articles 6 and 13 of the ECHR in refusing to natural and legal persons the right to an effective remedy enabling them to challenge the legality of acts of general application affecting directly their legal situation.

After its *UPA* judgment and the Lisbon reform, the European Court of Justice could hardly start a revolution against the Member States. The Court repeated that the FEU Treaty had "*established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and*

*has entrusted such review to the Courts of the European Union*” (point 92). It also decided that Article 47 of the Charter was “*not intended to change the system of judicial review laid down by the Treaties*” (point 97).

The Court went on to describe the role that national judges were expected to play regarding the respect for the fundamental right to effective judicial protection. Having recalled Article 19(1) TEU, which states that Member States “*shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law*”, the ECJ tried to detail, in a rather confusing way, the obligations of the Member States.

In a nutshell, despite their obligation to “*designate (...) the courts and tribunals with jurisdiction and to lay down the detailed procedural rules governing actions brought to safeguard rights which individuals derive from European Union law*”, the Lisbon treaties did not intend “*to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law*” (point 102-103). It would only be different “*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 European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully*” (point 104). Even then, though, EU law does not require that “*an individual should have an unconditional entitlement to bring an action for annulment of European Union legislative acts directly before the Courts of the European Union*” or “*should be entitled to bring actions against such acts, as their primary subject matter, before the national courts or tribunals*” (point 105-106).

The solution adopted by the ECJ in its *Inuit* judgment does not really revolutionize the question of access to the Court for individuals and private legal persons. The model that prevails remains a decentralized system that relies mostly on national courts as first instance judges of the EU. At the end of the day, the changes brought about by the Lisbon treaty were mainly aimed at tackling situations as the one described in the *Jego-Quéré* judgment or the ECHR’s *Posti Rahko* case.

The Court chose undoubtedly the most respectful interpretation of the intention of the authors of treaty, making it very difficult for individuals to challenge legislative acts. This is hardly surprising since many Member States have opted for similar solutions in their domestic legal order. At the national level, allowing the challenge of legislative acts amounts to hurting popular sovereignty, but forbidding it leads to providing these acts with a quasi impunity. This respect of democratic legitimacy must, however, be put into perspective when one talks about the EU legal system. Indeed, many special legislative procedures only provide a limited role to the European Parliament. Did the Court of Justice miss an opportunity to promote its status of the Supreme Court of the European Union to the status of Supreme Court of the citizens of the European Union? It left, in any case, some questions unanswered, like its definition of a “legislative act”.

But there is the consciousness that wide interpretation of article 263, par. 4, TFUE, could improve European citizen status. Maybe, at this point, the jurisprudence of ECJ is not sufficient to resolve the question. A new intervention of European legislator about the legislative sources and about institutional proceeding that lead to adopt them is attending.

