Lisbon and access to justice for environmental NGOs: A watershed?

A case study using the setting of the total allowable catches under the Common Fisheries Policy.

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Abstract: Before the Lisbon Treaty, environmental non - governmental organisations could rarely or not satisfy the admissibility test to gain access to the European courts. This contribution examines whether the rules on locus standi under the Lisbon Treaty will facilitate their access to justice. Attention will be given to what is understood by a 'regulatory act', the EU obligations under the Aarhus Convention and whether the new perspectives within the Lisbon Treaty will allow environmental non - governmental organisations to challenge TAC Regulations.

Keywords: Access to justice, Locus standi, Lisbon Treaty, non - governmental organisations, environmental justice, common fishery policy.

1. Introduction

In order to preserve the rule of law and to carry out its obligations under the Aarhus Convention[1], the European Union (*EU*)[2] should grant access to justice to environmental non - governmental organisations (*ENGOs*) to challenge measures taken by EU institutions. However, until today the Court of Justice of the EU (*CJEU*)[3] has rather a conservative approach in granting legal standing. One of the major obstacles which ENGOs have to overcome is the continued application of the *Plaumann* formula. This contribution will analyse whether the new provisions in the Lisbon Treaty will create new perspectives which will enable ENGOs to bring proceedings before the CJEU. Before using the setting of the total allowable catches (*TAC*) under the Common Fisheries Policy (*CFP*) as a case study, a general review will be given of the Courts approach towards *locus standi* for ENGOs. Subsequently, a short survey will elucidate what is meant by CFP, TAC and Regional Advisory Councils (*RACs*). Some insight will be given in the problems related to the setting of the TAC, as well as possible solutions thereto. Thereafter an analysis will be made of the procedural rights of ENGOs under the CFP. The final section will look at the compliance by the EU with

[1] Convention on Access to information, Public Participation in decision-making and Access to justice in Environmental matters, ECE/CEP/43 (1998).

[2] Since the Treaty of Lisbon that entered into force on 1st December 2009, the term European Community is merged into the European Union.

[3] Article 19, Treaty on European Union, OJ 2008, C 115/15. Since the Treaty of Lisbon the whole court system of the European Union is known as the Court of Justice of the European Union, comprising three courts: the Court of Justice, the General Court and the Civil Service Tribunal.

its obligations under the Aarhus Convention, the new article 263 Treaty on the Functioning of the European Union (*TFEU*) and discuss possible alternatives.

2. Access to justice

2.1 Treaty provisions on access to justice

According to article 263 (2), (4) and 267 TFEU the MS, the European Parliament (*EP*), the Council, the Commission (the privileged applicants), and under strict conditions, private parties (the non- privileged applicants) have access to the CJEU.[4] In this contribution the emphasis will be placed on article 263 (4) TFEU.

Under the rules before the Lisbon Treaty,[5] private applicants had to be 'directly and individually concerned' by a measure to have standing before the CJEU. EU measures are of direct concern if they directly affect the legal situation of the applicant. These include measures that are self executing, i.e. where implementation results from the EU measure without any intermediate rule, action or discretion by the MS. On the contrary, where a measure confers discretion to the addressee, the applicant is not considered to be directly affected.[6] On the other hand, the interpretation by the CJEU of individual concern has been very restrictive, as constituted in the *Plaumann* formula.[7] The challenged measure must affect the applicant's position 'by reason of certain attributes peculiar to them, or by reason of circumstances which differentiate them from all other persons and distinguishes them individually'.[8] This interpretation is not easy to be satisfied by ENGOs and leaves them little room to challenge environmental measures, as ENGOs protect the public interest and environmental matters are in general shared.[9] Although the Court of Justice (*CJ*) has confirmed that ENGOs can be directly and individually concerned,[10] the *Greenpeace* case[11] illustrated that it is almost impossible for ENGOs to enjoy standing before the CJEU. Since ENGOs strive for environmental protection in general, they do not represent an individual interest. This means that the *Plaumann* formula which demands that a person's interest be particularly affected cannot fulfill a distinguishing function here.[12]

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[4] Article 263 (2), (4) and 267, Treaty on the Functioning of the European Union (*TFEU*), OJ 2008 C 115/47.

[5] Article 230, Treaty of the European Community, OJ 2002 C 325/33.

[6] *J. Ebbesson*, Access to Justice in Environmental Matters in the EU, 2002, p. 76.

[7] *D.Chalmers & A. Tomkins*, European Union public law: text and materials, 2007, pp. 420-422; *P. Craig & G. de Búrca*, EU law: text, cases, and materials, 2008, pp.511-513.

[8] Case 25/62, Plaumann & Co v. Commission [1963] ECR 95, para. 107.

[9] *M. Lee*, Legislation and Policy: The environmental implications of the Lisbon Treaty, ENV L REV 2008 (10), p. 131, 136.

[10] For a detailed description of the different situations in which ENGOs are considered to be directly and individually concerned see *T. Markus*, European Fisheries Law: from promotion to management, 2009, p. 256.

[11] Case T-585/93, Greenpeace and Others v. Commission, [1995] ECR II-2205; Case C-321/95, Greenpeace and Others v. Commission, [1998] ECR I-1651.

[12] Case T-585/93, *supra* note 11, paras. 54, 59 and 63; Case C-321/95, *supra* note 11, para. 35; See also CaseT-264/03, Schmoldt and others v. Commission, [2004] ECR II 1515, paras. 100, 131-145.

This restrictive interpretation has been highly criticised in the established doctrine. If the criterion of 'direct and individual concern' is fully applied it results in the situation that '*the more people that are affected by an EU measure, the less likely that the threshold of the criterion can be met*'.[13] The *Plaumann* formula has also been critised by Advocate General Jacobs and the General Court (*GC*) in the cases of *UPA v. Council* and *Jégo-Quéré v. Commission*.[14] In the *UPA* case, Advocate General Jacobs proposed for relaxing the admissibility test and advised that the CJ should adopt a new test on individual concern, which should focus on '*the degree of the effect of the measure on the applicant*'.[15] The GC adopted a similar test in the *Jégo-Quéré* case. The General Court stated that '*a natural or legal person is to be regarded as 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*'. [16] Albeit the critique, the CJ confirmed that any reform on standing would have to come from the MS by modifying the Treaty, not from the Court.

The Treaty of Lisbon has amended access to justice. Article 263(4) TFEU[17] maintains the *Plaumann* formula, but provides also that a private applicant may challenge 'a regulatory act which is of direct concern to them and does not entail implementing measures'. In other words, individual concern is being dropped as a condition for the admissibility of individual annulment proceedings against regulatory acts.

However, the TFEU does not define the term 'regulatory act'. In this context it is important to have a closer look at the nomenclature installed by the TFEU, as described in article 288 et seq. TFEU.[18] The TFEU makes a distinction between legislative acts, adopted by the Council and the EP by ordinary and special legislative procedure, and non - legislative acts, which appear to include all other acts. The natural meaning of the phrase of article 263(4) TFEU would be any binding act of general application, whether legislative or non-legislative in nature, and regardless of its classification as a regulation, directive or decision. However, it seems that the Convention which originally drafted these reforms intended the phrase

[13] *J.H. Jans & H.H.B. Vedder*, European environmental law, 2008, pp. 209-214.

[14] Case C-50/00 P, Unión de Pequeños Agricultores v. Council [2002] ECR I-6677, Jacobs AG, paras. 60-66*;* Case T -177/01, Jégo-Quéré v. Commission [2002] ECR II-2365, para. 51.

[15] *Chalmers & Tomkins*, *supra* note 7, pp. 429-430.

[16] Case T -177/01,, *supra* note 14, para. 51; *S. Weatherill*, Cases and materials on EU Law, 2005, pp. 265-267.

[17] Article 263 (4) TFEU stipulates *'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*'.

[18] Article 288 et seq. Treaty on the Functioning of the European Union, *supra* note 4.

'regulatory act' to refer only to non- legislative measures.[19] Consequently, EU legislative acts, even if self-executing, will remain subject to the individual concern requirement. However, the CJEU will have to decide whether to adopt a wide or narrow definition of 'regulatory act'.[20]

2.2 The Aarhus Convention[21](AC) and the Aarhus Regulation[22] (AR)?

The EU signed and approved the AC which lays down conditions under which state parties have to provide ENGOs with access to justice. Under article 351 TFEU it became an integral part of EU law.[23] Afterwards, the EU adopted the AR on the application of the provisions of the AC to the EU institutions. In the context of this contribution attention must be paid to the following. Articles 6(2) and 2(5) of the AC adjudge ENGOs to participate in the process for adopting environmental legislation.[24] And article 9 AC require state parties to grant ENGOs the right to bring an action before a court when they consider that environmental law has been infringed by public authorities.[25]

Article 10 AR and 12 AR stipulates internal review and access to justice. Article 10 AR states that ENGOs can demand for '*internal review to Union institution or body that has adopted an administrative act under environmental law* [...]'.[26] Environmental law is broadly defined in article 2(f) AR.[27] Article 12 AR provides that ENGOs may bring an action before the CJ in accordance with the relevant provisions of the Treaty. Since the Lisbon Treaty it refers to the admissibility conditions laid down in article 263 TFEU. It must be noted that internal review is a pre-condition for commencing judicial proceedings. In other words, for ENGOs access to the European courts is conditioned upon the exhaustion of the possibility to request for

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[19] The European Convention, CONV 734/03 (2003),p. 20.

[20] *Lee*, *supra* note 9, pp. 135-136; *A. Ward*, The Draft EU Constitution and Private Party Access to judicial Review of EU Measures, in: T. Tridimas & P. Nebbia (eds.), European Union law for the twenty-first century: rethinking the new legal order, 2004, pp.209-218.

[21] Convention on Access to information, Public Participation in decision-making and Access to justice in Environmental matters, *supra* note 1.

[22] Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264/13.

[23] Article 351, Treaty on the Functioning of the European Union, *supra* note 4.

[24] Articles 6(2) and 2(5), Aarhus Convention, *supra* note 1.

[25] Articles 9(3) and 9(4), Aarhus Convention, *supra* note 1. *Markus*, *supra* note 10, pp. 260- 261.

[26] Article 10, Aarhus Regulation, *supra* note 22.

[27] 'environmental law' means '*Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems'*. Article 2(f), Aarhus Regulation, *supra* note 22.

internal review to the EU institutions.[28] The possible effect of article 263(4) TFEU and the AR on measures taken in the context of the CFP will be discussed below.

3. The Common Fisheries Policy as a case study: some preliminary issues

3.1 Introduction

Europe is the third largest fish producer in the world. However, most of the European fish stocks are depleting seriously in the recent decades.[29] Many of fish stock are overexploited, or outside safe biological limits. Overfishing surges the loss of marine biodiversity. The 'UN Millennium Ecosystem Assessment' emphasised depleted fish stocks leading to the destruction of marine life as one of the most significant examples of accelerating, abrupt and potentially irreversible changes to ecosystems.[30]

The main instrument within the EU for managing fisheries is the Common Fisheries Policy (*CFP*).[31] In the CFP, the basic Regulation of 2002[32] requires that the CFP should take account its implications for the marine environment. The EU limits the fishing opportunities to assure that fishermen do fish at sustainable levels and that fish stocks are only exploited within their safe biological limits. To reach this goal the EU adopts total allowable catches (TAC). On the basis of article 43(3) of the TFEU, it is for the Council, based on a proposal from the Commission, to adopt measures regulating the quantitative limitations of fishing opportunities.[33] The CFP stipulates that fisheries measures must be taken in consultation with stakeholders, in particular, with the Regional Advisory Councils (*RACs*).

3.2 Common Fisheries Policy (CFP)

After the UN straddling stocks agreement,[34] which sets out principles for conservation and management of fish stocks including the precautionary approach, the EU started to reflect on the sustainable development of fisheries. At the 2002 World Summit on Sustainable

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[28] Article 12 (1), Aarhus Regulation, *supra* note 22; *D. Obradovic*, EC rules on public participation in environmental decision-making operating at the European and national levels, E.L.Rev 2007, 32(6), p.829, 834 et seq.

[29] "Fisheries", available at http://ec.europa.eu/maritimeaffairs/pdf/thematic_factsheets/fisheries_en.pdf, p.1.

[30] *J. Sarukhán & A. Whyte*,, Millennium Ecosystem Assessment, Ecosystems and Human Well-being: Biodiversity Synthesis, World Resources Institute 2005, p.8 et seq. .

[31] The communication mentions: '*The Common Fisheries Policy should promote the sustainable management of fish stocks in the EU and internationally, while securing the long-term viability of the EU fishing industry and protecting marine ecosystems*'. Communication from the Commission, A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, COM (2001) 264, p. 6.

[32] Council Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ 2002 L358/59.

[33] Article 43(3), Treaty on the Functioning of the European Union, *supra* note 4.

[34] UN Doc. A/CONF.164/37 (1995).

Development, the EU committed itself to maintain and restore fish stocks.[35] The same year, the EU incorporated the precautionary approach as well as the ecosystem approach to fisheries management in its basic Regulation for the CFP.[36]

The CFP sets out the legal framework for the management and conservation of fisheries resources in the waters under the jurisdiction of the member states (*MS*). In this matter the MS have transferred their powers to the EU. Thus, MS cannot act unilaterally with regard to fisheries management and conservation (with a few exceptions).[37] If the legislative duties have not been delegated to the Commission, MS and the Commission negotiate together the CFP and final legislation is adopted within the Council.[38] The CFP has constituted participation rights for stakeholders within the CFP legislative process, including in the process of the setting of the TACs. Both aspects will be described below.

3.3 Total Allowable Catches (TAC)

One of the instruments used to conserve and manage fish stocks is the TAC. These annual catch limits regulate how much of each species a national fleet is legally allowed to catch and can be landed from a specific area.[39] The legal for basis the allocation of fishing opportunities can be found in article 20 of the CFP.[40] The final decision on the TAC is taken by the Council, based on a proposal of the Commission. When drawing up its proposal, the Commission consults stakeholders, formally in the RAC. Meanwhile the Technical Committee for Fisheries (*STECF*) receives data from different institutions.[41] Based on the information from the stakeholders' consultation and the STECF, the Commission formulates its proposal. Before sending it to the Council, the proposal is send to the European Parliament's Fisheries, Economic and Social and Regions Committees for consultation. The latter gives non - binding recommendations on the proposal. The Council bases its decision, on the scientific and economic advice, provided by the Commission.[42]

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[35] UN Doc. A/CONF.199/20 (2002), Chapter IV *Protecting and managing the natural resource base of economic and social development*, p. 20 et seq., nr. 31(a).

[36] Preamble (3) and (4) and Article 2(1), Council Regulation (EC) No 2371/2002 of 20 December 2002, *supra* note 32.

[37] Article 8-10, Council Regulation (EC) No 2371/2002 of 20 December 2002, *supra* note 32.

[38] Article 43(3) TFEU, *supra* note 4; Article 29 Council Regulation (EC) No 2371/2002 of 20 December 2002, *supra* note 32.

[39] *T. Daw & T. Gray*, Fisheries science and sustainability in international policy: a study of failure in the European Union's Common Fisheries Policy, Marine Policy 2005 (29), p.189, 189.

[40] Article 20, Council Regulation (EC) No 2371/2002 of 20 December 2002, *supra* note 32.

[41] Institutions such as the International Council for the Exploration of the Sea, International fisheries commissions, Member States and third countries. *Markus*, *supra* note 10, pp. 66 et seq.

[42] *J. Hatchard*, Engaging stakeholder preferences through deliberative democracy in North sea fisheries governance, in: *T.S. Gray* (ed.), Participation in fisheries governance, 2005, p. 45 , pp. 47 et seq.; *Markus*, *supra* note 10, pp.68-69.

3.4 Regional Advisory Councils (RAC)

The participation rights of stakeholders in CFP have been established in two different committees. Additional to the existing Advisory Committee on Fisheries and Aquaculture[43] the Council has established new fora on the regional basis during the 2002 CFP reforms, the Regional Advisory Councils (*RACs*).[44] The RACs are advisory bodies, and their opinion is requested on proposals made by the Commission. It must be mentioned that these participation rights are limited to the pre-decision phase, as the RACs are only 'consulted' by the Commission.[45]

Each RAC has a General Assembly and an Executive Committee. Both bodies are composed by representatives of all interest groups affected by the CFP. On the one hand the groups directly affected by fisheries decisions, the fisheries sector, which are assigned two third of the seats. On the other hand, the representatives of other interest groups inter alia ENGOs.[46] These groups are only given the remaining one third of the seats.[47] It must be noted that it is possible for the RAC members to submit majority and minority reports as advice. However, there is little doubt that a consensus advice, which has the backing of all the stakeholders, will be the most influential.[48]

3.5 Does this formula work to protect fish stocks?

It must be noted that the TAC system has failed to conserve the fisheries resources. Since the 2002 CFP reform slow progress has been made in stock recovery. As a result, more than 80% of EU stocks are overfished. One of the reasons for this is that the TACs consistently have been set at levels which were too high for the fish stocks to sustain.[49] In most cases the Commission's suggested limit is increased by the Council. In other words, the TACs are often set on higher levels than recommended by scientists. Generally this can be explained by the fact that the proposal is conflicting with the economic interests of the MS. Ministers are

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[43] Commission Decision (1999/478/EC) on renewing the Advisory Committee on Fisheries and Aquaculture, OJ 1999 L 187/70. Amended by Commission Decision (2004/864/EC) on amending Commission Decision 1999/478/EC of renewing the Advisory Committee on Fisheries and Aquaculture, OJ 2004 L 370/91.

[44] Article 31, Council Regulation (EC) No 2371/2002 of 20 December 2002, *supra* note 32. Note that in this paper the emphasis will be placed on the role of the RACs, not of the Advisory Committee on Fisheries and Aquaculture.

[45] Article 31 (4), Council Regulation (EC) No 2371/2002 of 20 December 2002, *supra* note 32; Article 3(3) Council Decision (EC) 585/2004 of 19 July 2004 on establishing Regional Advisory Councils under the Common Fisheries Policy, OJ 2004 L 256/17; *T. Gray & J. Hatchard*, The 2002 reform of the Common Fisheries Policy's system of governance – rhetoric or reality?, Marine Policy 2003 (27), p.545, 547.

[46] The other members of this group are representatives from the aquaculture sector, producers' organisations, consumers' organisations and recreational fishermen.

[47] Council Decision (EC) 585/2004 of 19 July 2004 on establishing Regional Advisory Councils under the Common Fisheries Policy, *supra* note 45.

[48] *L. Motos & D. C. Wilson*, The knowledge base for fisheries management, 2006, pp.256-258.

[49] Commission opens the discussion on fishing possibilities for 2010, IP/09/747 (12 May 2009).

occupied with their popularity in the light of the next elections. They have no incentive to take decisions to tackle the stock decline as they only pay-off in the long term. This short-term concern of getting re-elected causes ministers to take populist decisions and set the TACs at unsustainable levels. Thus, the Council decision is often more based on social and economic reasons rather than ecological reasons.[50]

Regarding the participation rights of the stakeholders in the RAC, different points of critique can be formulated. First, given the multiplicity of stakeholders involved and their conflicting interests, it is not correct that the industry representatives dominate the RACs.[51] This proves to be mistaken, especially since the current state of the fish stocks mainly results from fishing practices and lobbying activities of the fishing industry. While on the other hand ENGOs pay much attention to overfishing and other threats to the marine environment.[52] In general, ENGOs are rather critical of the CFP. Secondly, the division of the RACs into two groups of representatives can be regarded as discordant. In addition, the inclusion of a range of different interests in the 'other interest' group can lead to the dilution of the voice of the ENGOs.[53] Problems arise also due to the structure of the bodies. Once a RAC is established, it is difficult to maintain the ratio of two thirds for the fisheries sector and one third for the other interest groups.[54] Fourthly, the participation is limited to the pre-decision phase as the RAC have not been given any decision-making powers.[55] Sometimes the RACs' recommendations have been implemented, while in other cases the Commission has decided not to follow them.[56] Finally, critique can be given that when TACs are set, stakeholders have less than one month to comment on the Commission's proposal.[57]

3.6 Towards sustainable stock recovery?

[50] *A.E. Delaney, H. A. McLay &W. L.T. Densen*, Influences of discourse on decision-making in the EU fisheries management: the case of North Sea Cod (Gadus morhua), *ICES Journal of Marine Science* 2007 (64), p. 804, 804 et seq.; *Daw & Gray*, *supra* note 39, pp. 190-191; *Markus*, *supra* note 10, p. 18 et seq.

[51] V. Frank, The European Community and marine environmental protection in the international law of the sea: implementing global obligations at the regional level, 2008, p. 103.

[52] For example: WWF, Greenpeace, Seas at Risk, Friends of the Earth Europe. They conduct research, review EU legislation, issue reports and opinions to the EU.

[53] *Motos & Wilson*, *supra* note 48, p.258.

[54] Communication from the Commission to the Council and the European Parliament, Review of the functioning of the Regional Advisory Councils, COM (2008) 364, p. 6.

[55] The Commission argued that giving decision- making powers to the RAC would not be compatible with the legal foundations of the CFP, under the terms of the Treaty of the EU. So, the Commission could not allow any formal increase in stakeholder involvement. To some authors this seems an extraordinary reading of the Treaty. *Gray & Hatchard*, *supra* note 45, p.547; *Motos & Wilson*, *supra* note 48, p.257.

[56] *E. Penas*, The fishery conservation policy in the European Union after 2002: towards long-term sustainability, ICES Journal of Marine Science 2007 (64), p. 588, 592.

[57] *Markus*, *supra* note 10, p. 61.

It has been proven that several multi-annual strategies[58] have been implemented successfully, generating signs of stock recovery. In other words, setting a TAC only is not sufficient to limit fishing mortality. Moreover, in the case of stocks which are seriously overfished, an annual limitation in the TAC variation is producing results which go against long term interests. Therefore, there should be a stronger focus on long term plans and more flexibility in changing TACs, to enable more effective recovery measures for overexploited stocks.[59] At present the uptake of TACs is measured only by landed catch, paying little attention to discarded fish. Future TACs should set limits on the total amount of stock that can be removed, irrespective of the catch is landed or discarded.[60] Lastly, to avoid that TAC decisions are based on mostly economic reasons, it would be likely that the final decision would not only be in the hands of the Council. However, the current formulation of article 43 TFEU does not point in that direction.[61]

To improve the stakeholders' participation of the RACs, provisions should be made for compulsory consultation and the advice and opinions should have a binding legal effect. In that way stakeholders would really participate in decision making. However, the willingness of the EU to change the CFP governance towards a bottom - up system of decision making seems far away.[62] ENGOs should also be able to act as a counterweight to the views of the group of the fisheries sector. To create a better balance between the various interests, the current 2/1 ratio within the RACs should be reviewed. Inadequate stakeholder representation could lead to advice that is only in the interest of one group, the fisheries sector. Although, no high hopes for changes in the current ratio has to be expected.[63]

In other words, if ENGOs would like to influence the CFP and put more emphasis on the environmental aspect, it is important that ENGOs have standing before the CJEU. This would enable them to challenge the legality of CFP measures. Their *locus standi* would be a useful tool to ensure that the economic and ecological interests are balanced in a viable way to achieve sustainable exploitation of fish stocks. However, the current case law of the CJEU regarding the right of standing of ENGOs in environmental matters reveals a conservative approach, as will be discussed below.

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[58] Two types of plans can be distinguished: recovery plans (article 5) for stocks outside safe biological limits, and management plans (article 6) for stocks inside safe biological limits. Article 5 and Article 6 Council Regulation (EC) No 2371/2002, *supra* note 32.

[59] *Penas*, *supra* note 56, pp. 588-589.

[60] 'The Scottish Conservation Credits Scheme, Moving fisheries management towards conservation', WWF Scotland (December 2009), available at http://assets.wwf.org.uk/downloads/scottish_conservation-_credits_scheme.pdf.

[61] The TFEU still preserves the state's theoretical sovereignty in the field of fisheries. *C. Lequesne*, The Politics of fisheries in the European Union, 2004, p 42.

[62] *Gray & Hatchard*, *supra* note 45, pp. 546- 548.

[63] Communication from the Commission to the Council and the European Parliament, Review of the functioning of the Regional Advisory Councils, *supra* note 54, p. 5 et seq.

4. Current case law of the CJEU: WWF - UK Ltd. v. Council[64]

In the light of what is described above, the privileged applicants will be unlikely candidates to challenge CFP measures. Therefore it is important that ENGOs have standing before the CJEU. Particularly when there is concern about whether CFP measures comply with the conservation requirements as laid down in the EU law.

As a member of the North Sea RAC, WWF brought an annulment procedure before the GC in which it challenged the legality of specific cod TACs adopted by the Council. WWF argued that the Council was in breach with its obligations under EU law in adopting TACs which were not conform to the provided scientific data and which did not comply with the precautionary principle.[65] Also WWF contested that the TACs were not in accordance with the cod recovery plans.[66] In order to have standing the WWF had to fulfill the conditions of former article 230 (4) EC and had to demonstrate direct and individual concern. In other words, WWF had to fulfill the conditions of the traditional *Plaumann* formula. As the *Plaumann* formula and in particularly the criteria of individual concern is consistently applied to all non - privileged applicants WWF disputed that no effective legal protection exists as this admissibility test hold back their right to challenge such a breach by the Council.[67] WWF argued with a number of arguments why the GC should grant the organisation standing before the court.[68] The organisation tried to prove to be individually concerned by referring to the role it played in the RAC which was involved in the system for the setting of the challenged TAC.[69] Within its argumentation WWF also emphasised that the EU was bound by the AC since it forms an integral part of the EU legal order.[70] Based on the AC, the EU should have taken into account WWF's contribution into the decision-making procedure that led to the adoption of the TACs. That entitlement would give WWF a particular status which makes it individually concerned within the meaning of article 230 EC Treaty.[71] WWF

[64] Case T-91/07, WWF-UK v. Council [2008] ECR; Case C-355/08, WWF-UK v. Council [2009] ECR. It must be noted that these most current cases regarding the procedural rights of ENGO under the CFP dates from before the entering into force of the Lisbon Treaty and thus from before the new article 263 TFEU. See for a detailed analysis, *Markus*, supra note 10, pp. 263-269.

[65] The precautionary principle as laid down in the in article 2 (1), 4 and 5(3) of the Regulation 2371/2002, in article 174 of the EC Treaty (current article 191(2) TFEU), and in article 5 and 6 of the Fish Stock Agreement. Council Regulation (EC) No 2371/2002, *supra* note 32; Treaty of the European Community, *supra* note 5; Fish Stock Agreement, *supra* note 34.

[66] Council Regulation (EC) 423/04 establishing measures for the recovery of cod stocks, OJ 2004 L70/8.

[67] *J. Wakefield*, Sustainability and socio-economic need in the common fisheries policy, E.L.Rev 2010, 35 (4), p. 476, 484.

[68] For the arguments of WWF, see Case T-91/07, *supra* note 64, paras. 42 – 60.

[69] Case T-91/07, *supra* note 64, paras. 42 - 43.

[70] Case T-91/07, *supra* note 64, para. 53

[71] Case T-91/07, *supra* note 64, paras. 53-55.

argued that if it was not allowed to challenge the TACs, no other applicant would bring an action before court. The later would be in conflict with the rule of law.[72]

According to its traditional case law the GC rejected the arguments of WWF and dismissed the claim. The GC first considered whether the disputed TACs were of individual concern to WWF, since that was not the case, it would be otiose to investigate whether the TACs directly affected WWF.[73] With regard to the AC the GC held that no particular status was conferred on WWF, so the entitlements under the AC and AR did not differentiated WWF's position distinguishable from other persons in the meaning of the *Plaumann* formula.[74] By simply applying the *Plaumann* formula, the CJ reaffirmed the Order of the GC and concluded that WWF, as a RAC member, was not individually concerned. It must be noted that these rulings were subject to critique.[75]

5. Any chances for a positive development?

5.1 Article 263 (4) TFEU

(i) Individual concern

The question which emerges is what the possible impact could be of article 263(4) TFEU on an action for annulment of a Council Regulation fixing the fishing opportunities and setting the TAC. This act, taken by the Council, cannot be considered as a legislative act as it does not fulfill the conditions of article 289(2) TFEU. Under the Constitutional Treaty a number of new legal instruments were proposed, including a 'European regulation', which was defined as a non-legislative act. And regulations as know under the EC Treaty were renamed 'European Laws'.[76] Thus, under the Constitutional Treaty such an act of the Council would have been a 'European regulation'. Based on what is discussed above the wording 'regulatory act' probably does not concern legislative acts. Therefore, it seems that an autonomous act cannot be considered a legislative act. Thus, to the extent that such an autonomous act is of general application, it can be considered as a regulatory act. Following

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[72] Case T-91/07, *supra* note 64, paras. 58-59.

[73] Case T-91/07, *supra* note 64, para. 40. For the other finding of the Court, see Case T-91/07, *supra* note 64, paras. 61-90.

[74] Case T-91/07, *supra* note 64, paras. 80-83.

[75] Amicus intervention by WWF-UK in respect of Communication ACCC/C/2008/32, submitted on 1 December 2008 by ClientEarth and others, available at http://www.unece.org/env/pp/compliance/C2008-32/.

[76] It must be noted that an agreement on the Constitutional Treaty which proposed these new legal instruments was attained in June 2004. However, in 2005, the Constitutional Treaty was rejected in a French and in a Dutch referendum. Upon these rejections the MS agreed on convoking a period of reflection. Finally, the Constitutional Treaty was not adopted. After some adjustments, the Lisbon Treaty was proposed and implemented many of the reforms included in the Constitutional Treaty. The Lisbon Treaty did not take over the new legal instruments as proposed under the Constitutional Treaty. However, based on the drafting history of the Lisbon Treaty a nuance can made between the different legal instruments. The Lisbon Treaty entered into force on 1 December 2009. See for more information http://europa.eu/lisbon_treaty/index_en.htm.

this reasoning, a Council Regulation setting the TAC can be considered as a regulatory act. As a result, individual concern will no longer be required.[77]

(ii) Direct concern and not entail implementing measures

However, in order to fulfill the *locus standi* requirement, the applicant will need to satisfy the direct concern criteria and show that the regulatory act does not entail implementing measures. According to settled case-law, for an individual to be directly concerned by a EU measure, that measure must directly affect the legal situation of that individual and there is no room for any discretion left to the addressees of that measure who are responsible for its implementation. That implementation is a purely automatic matter and results from EU rules alone without the application of other intermediate rules. Only in this case there is considered to be no discretion.[78] Consequently, the direct concern criteria and the proof that the regulatory act does not entail implementing measures will be not an easy hurdle to pass in the context of the CFP, as Council Regulation setting the TAC is not implemented directly by the EU.[79] The MS decide how to allocate their national quota among their fishermen.[80] In this case it will be difficult for an ENGO to argue that the Council Regulation is of direct concern.

It must be noted that there is not a very extensive case law on the direct concern requirement which date from before the entry into force of the Lisbon Treaty. In many cases actions before the courts were dismissed and failed because the courts found it lacked individual concern. As a result the courts were of the opinion that it was useless to investigate whether the challenged measure directly affected the applicant. Under the Lisbon Treaty, the lack of clarity about the meaning of 'discretion' and the issue of 'not entailing implementation' has not been clarified by the new article 263(4) TFEU. On the contrary, article 263(4) TFEU places more emphasis on the direct concern requirement which will force the courts to elucidate what is understood by 'discretion'. For example, in the context of the allocation of the national quota where there is no discretion left to implement the quota but where there is discretion to the MS on how they will allocate their national quota among their fishermen. Also the courts will have to shed more light on the meaning of implementing measures. In other words, the courts need to adjudicate whether direct

[77] *R. Barents*, Het Verdrag van Lissabon: achtergronden en commentaar, 2008, p. 508.

[78] Case T-127/05, Lootus Teine Osaühing v. Council [2007] ECR II-1, para 39.

[79] Case T-127/05, *supra* note 78, paras. 42-43-46-47.

[80] Voorstel voor een Verordening van de Raad van 16 oktober 2009 tot vaststelling, voor 2010, van de vangstmogelijkheden voor sommige visbestanden en groepen visbestanden welke in de wateren van de Gemeenschap en, voor vaartuigen van de Gemeenschap, in andere wateren met vangstbeperkingen van toepassing zijn, COM(2009) 553.

access to the courts is prevented by the fact that implementation measures by the MS exists.[81]

Therefore it will remain to be seen whether the courts will apply article 263(4) TFEU narrowly or whether they will provide effective *locus standi* to non - privileged applicants. However, the latter remains rather doubtful in the case to challenge a Council Regulation setting the TAC.

5.2 The Aarhus Convention (AC) and the Aarhus Regulation (AR)

One can argue that the setting of the TACs falls within the scope of article 9(2)[82] and 9(3) AC. If a TAC regulation is considered as a decision subject to article 6 (1) (b) AC or as a plan or programme subject to article 7 AC, an ENGO should be granted standing.[83] As article 9(2) stipulates that there is no requirement for ENGOs fulfilling the definition of the public concerned to show "sufficient interest".[84]

Under article 9(3) AC access to justice has to be granted to challenge acts of public authorities. However, the AC notion of public authorities excludes institutions 'acting in a legislative capacity'.[85] Whether to determine of a Council regulation on TACs fall outside the scope of AC and therefore also of the access to justice provisions of article 9(3), attention has to be paid to the nature of the Council's decision when setting the TACs. As discussed above, the Council regulation on setting the TACs cannot be considered as a legislative act as it does not fulfill the conditions of article 289(2) TFEU. However, it will be up to the CJEU to determine whether the Council is acting in a legislative capacity or not.

With regard to the AR the following has to be remarked. Based on the definition of environmental law in the AR, administrative acts connected to CFP measures could be subject to internal review.[86] However, the scope of the internal review is limited and thus also the use with regard to the CFP. The definitions of 'Community institution' (now EU institutions) and 'administrative act' seem to exclude the internal review of regulations,

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[81] *D. Wyatt QC*, The boundaries of judicial protection against invalid community acts after the Lisbon Treaty: Will the Reform Treaty make it easier to challenge the legality of Community Acts?, 2009, Jean Mon Jean Monnet seminar, Advanced Issues of European Law University of Zagreb in Dubrovnik. p. 1, 9-19; *G.Berrisch & P. Bogaert*, EU Litigation: New opportunities for private litigants to challenge EU legislation under the Lisbon Treaty – Is the door to the Union Courts wide open?, 2009, p.1, 3 - 4.

[82] In relation to article 6 Aarhus Convention, public participation in decisions on specific activities. Article 6 Aarhus Convention, *supra* note 1.

[83] Update on the WWF-UK case addressed by ClientEarth to the Compliance Committee in relation to Communication ACCC/C/2008/32, p. 4.

[84] Article 2(5), article 9(2)(a) and(b), Aarhus Convention, *supra* note 1.

[85] Article 2(2) Aarhus Convention, *supra* note 1.

[86] Markus, *supra* note 10, p. 262.

which are the instruments regularly used under the CFP.[87] First, Community institutions '*acting in judicial or legislative capacity*' are excluded from internal review as stipulated in article 2 (c) AR.[88] Second, the meaning of an administrative act, as defined under article 2(g) AR is limited to measures of individual scope.[89] This definition does not leave much room for manoeuvre and implies that only decisions can be subjected to internal review.[90] Since regulations on TACs regulate in general manner the use of the fish stocks and their extraction rates, they cannot be considered as a measure of individual scope and thus fall outside the scope of the internal review provided in the AR.[91] The fact that regulations on TACs contain detailed provisions does not alter this reasoning. Accordingly, as *Markus* argues, the regulations setting the TAC should be considered as legislative acts in the context of the AR.[92] As the internal review is a pre-condition for commencing judicial proceedings, the AR will have facilitate or improve access to justice with regard Council Regulations setting the TAC.

6 Other possible routes for access to justice?

6.1 Article 19 (1) TEU[93]

This article imposes an obligation on the MS to provide remedies sufficient to ensure effective protection in the fields of EU law. In other words, it is an obligation for the MS to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. Thus, the MS must make it possible to bring an action before a national court with a view to obtain a reference to the CJ, without having to break the law. Where this requirement had to be realised 'as far as possible' it is now, under current article 19 TEU an obligation.[94] This results in an improvement of the indirect access to the CJEU. However, one can ask whether this article will have an impact on the *locus standi* of ENGOs because the Council Regulation regards the setting of the quotas at the EU level, and not at the domestic level. Thus, it would not be correct that ENGOs must start proceeding at the national level regarding an unlawful decision taken by the EU institutions.

6.2 Article 257 TFEU[95]

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[87] *Markus*, *supra* note 10, p. 263.

[88] Article 2 (c), Aarhus Regulation, *supra* note 22; *Markus*, *supra* note 10, p. 262.

[89] Article 2 (g), Aarhus Regulation, *supra* note 22; *Markus*, *supra* note 10, p. 262

[90] *J.H. Jans*, Over kanonskogels, bretels en andere ongelofelijke verhalen..., SEW 2006 (2), p. 419, 420 et seq.

[91] Article 10, Aarhus Regulation, *supra* note 22; *Markus*, *supra* note 10, 263.

[92] *Markus*, *supra* note 10, 263

[93] Article 19 (1), Treaty on European Union, *supra* note 3: '[...] *Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*.'

[94] Case C-50/00, *supra* note 14, para. 41.

[95] Article 257 TFEU, *supra* note 4. "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas [...]."

Notwithstanding, article 257 TFEU might provide an alternative gateway to provide access to justice as it empowers the EP and the Council to '*establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas*'. Based on this provision, EU institutions could take action. As suggested by the *Institute for European Environmental Policy* the EU institutions could establish a 'Judicial Panel for Environmental Disputes' to provide judicial review for measures taken by EU institutions which breach EU environmental law in accordance with the requirements of the AC.[96]

6.3 The European Convention on Human Rights (ECHR)[97] *and article 47 Charter of fundamental rights of the European Union*[98]

Following article 9(4) AC, whatever review procedures chosen by Parties to fulfil their obligations under article 9(3) AC, they have to meet certain minimal legal standards of effective remedy and fair hearing. This concept of 'effective remedies' in article 9(4) AC was inspired by article 13 of ECHR.[99] The case-law of the ECHR on this issue as it stands is considerable and refined, and following article 6 TEU, EU institutions have to respect the fundamental rights guaranteed by the ECHR as they '*constitute general principles of the Union's law'*. Thus, the article 13 ECHR case-law shall be of much significance to interpret the EUs obligations under article 9(3) AC. Moreover, the principles of 'effective remedy' and 'fair hearing' are also laid down in article 47 of the EU Charter of Fundamental Rights,[100] which is legally binding on all EU institutions since the entering into force of the Lisbon Treaty.[101]

6.4 Aarhus Convention Compliance Committee[102]

The AC Compliance Committee have already correctly concluded that parties to the AC are not entitled '*to introduce or maintain so strict criteria that they effectively bar all or almost all ENGOs from challenging acts or omissions that contravene environmental law*'.[103] There is currently an ENGO complaint before the Committee with regard to the above mentioned *WWF v. Council* case.[104] If the AC Compliance Committee should stress that the EU is not

[96] IEEP report "Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention", 2009, p. 7.

[97] The Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 UNTS 221, ETS 5.

[98] Charter of Fundamental Rights of the European Union, OJ 2000 C 364/20.

[99] Article 13 Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note98.

[100] Article 47 Charter of Fundamental Rights of the European Union, *supra* note 98.

[101] IEEP report, *supra* note 96, p. 14.

[102] The main task of the Aarhus Convention Compliance Committee is to review if the Parties of the AC fulfill the requirements of the Convention, report the findings to the Meeting of the Parties and make recommendations. See http://www.unece.org/env/pp/ccBackground.htm.

[103] UN Doc. ECE/MP.PP/C.1/2006/4/Add.2 (28 July 2006), p.8.

[104] Communication ACCC/C/2008/32, submitted on 1 December 2008 by ClientEarth and others, available at http://www.unece.org/env/pp/compliance/C2008-32/DatasheetC-2008-32v2009.01.19.doc

complying with the provisions under the AC, it would exert pressure on the EU to act according to its obligations under the AC.

7. Conclusion

Since environmental considerations permeate the CFP[105] it should be peculiar if ENGOs would not have the possibility to protect the environment before CJEU. The relaxation of the rules on standing under article 263(4) TFEU is likely to create some new opportunities. Nonetheless, this new rule also raises significant questions to answer. Only the CJEU itself can clarify the scope of article 263(4) TFEU. One can only hope that the Courts will not interpret article 263(4) TFEU in such a manner that the Council can adopt measures without fearing that it will be subjected to legal scrutiny. The above analyses shows that a broad interpretation of article 263(4) TFEU will be needed to enable ENGOs to challenge a Council decision on fixing the fishing opportunities and setting the TAC. In anticipation of the court's interpretation it can be concluded that the new article 263(4) TFEU offers the possibility to be a watershed for access to justice for environmental NGOs. However, it will entirely depend on the court's interpretation whether the existing gaps in the protection of ENGOs right to effective access to justice will be closed. How this will evolve is still to be seen.

[105] The objectives under the CFP stipulate "Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, *environmental* and social conditions [...]".Article 2 Council Regulation (EC) No 2371/2002, *supra* note 32.