SCIENTIFIC REVIEW

PROCEDURAL LEGITIMATION OF PRIVATE PARTIES BEFORE THE COURT OF JUSTICE OF THE EU IN THE LIGHT OF CARVALHO CASE

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ABSTRACT

The paper discusses the position of private individuals as applicants before the Court of Justice of the EU, particularly in the context of cases related to regulating the consequences of climate change and environmental protection. Individuals wishing to challenge measures of European Union institutions related to climate change face, for now, an insurmountable obstacle in proving the existence of an individual concern as a condition for filing an action. After analyzing the positive legal regulation of procedural legitimacy for private individuals and briefly considering cases before the Court of Justice of the EU related to the regulation of the consequences of climate change, the paper outlines how the Court interprets the existence of an individual concern as a condition for filing an action.

Keywords: *European Union, European Union Law, Court of Justice of the European Union*

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INTRODUCTION

The Court of Justice of the EU dismissed on March 25. 2021, an application seeking the annulment of several individual acts of the European Union related to the emission of greenhouse gases (hereinafter referred to as GHG gases) due to the lack of direct and individual concern to bring the action [1]. This decision by the Court of Justice follows the established path in cases concerning the regulation of the consequences of climate change, demonstrating that the absence of individual concern, according to this Court, remains an insurmountable obstacle for potential applicants in similar cases. Considering the increasing significance and impact of climate change, as well as the proclaimed ambition of the European Union to regulate its effects, the ruling in the mentioned case once again draws attention to the issue of determining individual concern in environmental protection matters.

PROCEDURAL LEGITIMACY BASED ON ARTICLE 263 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

A significant legal remedy for challenging acts of the EU considered illegal is an application before the Court of Justice of the European Union. The privileged applicants, who do not need to demonstrate a legal interest to file an action, include member states, the Council of the EU, and the European Commission. On the other hand, natural or legal persons from member states can also seek the annulment of specific acts but only if they can prove a legal interest in doing so. These latter entities are referred to as non-privileged applicants due to the requirement of establishing a legal interest as a condition for bringing an action. The Lisbon Treaty [2] has changed the position of non-privileged applicants, both legal and natural persons, as regulatory acts that are not directly addressed to natural or legal persons no longer require proof that the act "directly and individually affects them [3]."

According to paragraph 2 of Article 263 of the TFEU [4], there are four grounds for annulment of the acts mentioned: lack of competence, procedural irregularity, breach of the treaty, or any rule of law relating to their application, and misuse of powers. Paragraph 4 of the same article has the following content:

"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."

Thus, an individual or legal entity can challenge a particular act if it is addressed to them or if they are directly and individually affected by it. Regarding the first condition, the Court of Justice considers a measure to be of direct interest to the applicant if their legal position is directly affected by that measure. In other words, there must be a direct connection between the contested measure and the damage or loss suffered by the applicant. While a direct interest can be contested, the decisive factor is the individual concern, as was the case in the Carvalho matter. For determining the existence of direct and individual concern, the famous definition first formulated in the Plaumann case is upheld: persons to whom the decision is not directly addressed can claim a individual concern if the decision affects them based on specific characteristics that only they possess or due to particular circumstances that distinguish them from all other persons, thus making them personally singled out, similarly to the person to whom the decision is directly addressed [5].

This passage discusses the importance of distinguishing between legislative and regulatory acts of the Union, particularly in the context of challenging Union acts without the need to prove an individual concern. The conditions for challenging a Union act without the need to show individual concern include that the contested measure is a regulatory act, of direct concern to the applicant, and does not require the adoption of implementing measures. However, it highlights a terminological confusion as the Treaty on the Functioning of the European Union (TFEU) does not provide a defined concept of a regulatory act, causing ambiguity. The definition of a legislative act is provided in the Treaty, leading to the inference that a regulatory act encompasses everything that is not a legislative act.

Based on Article 263(4) of the TFEU, the requirements for bringing an action by individuals against regulatory acts that do not require the adoption of implementing measures have been relaxed. However, this provision does not apply to the following two situations.

Firstly, if an individual wishes to challenge a non-regulatory act that does not require implementing measures, they still need to prove that the act directly and individually affects them. If an individual cannot demonstrate that the contested act individually affects them, they will be left without a legal

remedy, as they will not have a national executive measure to challenge. Consequently, the individual will not have access to indirect access to the court through the preliminary ruling procedure. The second situation pertains to challenging regulatory or non-regulatory acts that require the adoption of implementing measures. In this case, the individual must prove that the act directly and individually affects them. If the individual cannot meet these conditions, they will still have an open path to judicial protection through the preliminary ruling procedure.

Therefore, the changes introduced by the Lisbon Treaty have eased the conditions for active procedural legitimacy only in situations challenging regulatory acts that do not require the adoption of implementing measures. In such situations, the individual will only need to prove that the act directly concerns them, without the need to demonstrate the existence of an individual concern. However, in other combinations, the individual will still need to prove the existence of an individual and direct concern.

THE CARVAHLO CASE

The Carvalho Case, also known as the People's Climate Case, was initiated in 2018 by thirty-six individuals engaged in agriculture and tourism in climate-sensitive areas both within and outside of Europe, such as the German North Sea coast and northern Kenya [6]. Climate change poses one of the most dangerous threats to human survuval [7]. Having already experienced the consequences of climate change, such as rising sea levels, floods, and droughts, they were dissatisfied with the legislative package from 2018 that regulated the emission of GHG (Greenhouse Gas) for the period 2021-2030. The EU set a goal with these measures to reduce GHG emissions by forty percent compared to the emission levels of 1990. Based on Article 263, paragraphs 1 and 4 TFEU, the applicants requested the annulment of relevant provisions of these acts, arguing that they allowed emissions far exceeding the levels permitted by international law. Claiming that their fundamental rights were violated and invoking, among others, the Paris Agreement, the applicants combined two types of claims: a request for annulment and a request for damages under Article 340, paragraph 2 TFEU. The latter claim is not directed at seeking monetary compensation but rather at ordering the Council and the Parliament to adopt stricter objectives concerning the reduction of GHG emissions by fifty to sixty percent. The applicants stated that they were not interested in monetary compensation but in preventing further damage, thus seeking to establish more stringent emission reduction targets. The application alleges economic and health damages, supported by attached evidence. The fact that the tourism and agribusiness sectors have suffered distinguishes this case from others, such as Urgenda v. Netherlands, [8] where the applicants are non-governmental organizations and citizens advocating for the general interest but may not necessarily have suffered harm themselves at the time of initiating the proceedings [9].

The application was first considered by the General Court as the body competent to decide in the first instance on actions brought by natural and legal persons seeking the annulment of Union acts. In 2019, this Court declared the application inadmissible. The Court strictly applied the criteria set out in the Plaumann case and concluded that the application lacked the individual concern to bring the action [10]. Thus, an opportunity to address whether the EU can commit to stricter goals for reducing GHG emissions was missed.

The applicants appealed the decision of the General Court, but the Court of Justice of the European Union, as the appellate court, upheld the first-instance decision. According to the applicants' claims, the three contested GHG acts, by allowing harmful emissions, violate the fundamental rights of the applicants and their families. These rights include, among others, the right to life, occupation [11], equal treatment, property, and the well-being of children [12]. [13] This concerns the rights that constitute the content of a broader, collective right—the right to self-determination of a people. This is particularly crucial for members of indigenous communities whose traditional way of life is threatened by the consequences of climate change [14]. The first two grounds of appeal, which were related to locus standi and individual concern, are significant, especially for future cases involving the regulation of the consequences of climate change [15]. The application and appeal followed a two-step approach. The applicants first argued that they indeed had a individual concern in line with the standards set in the Plaumann case. If the General Court and the EU Court of Justice were not convinced by their arguments within the first ground of appeal, the applicants requested the Court of Justice to modify these standards to ensure adequate judicial protection in cases of serious violations of fundamental rights [16]. Thus, as an alternative possibility, in case neither the General Court nor the EU Court of Justice recognized the existence of individual concern according to the Plaumann test, the applicants provided a request for a revision of the test itself.

The applicants, both in their initial application and in their appeal, stated that the emissions affect them in factually distinct manner. For example, one applicant's family lost their forest estate due to fires caused by heatwaves; another apllicant experienced soil degradation on their property due to droughts followed by sudden floods; the property of a third applicant is exposed to rising sea levels and tornadoes; and a fourth applicant's herd of cattle is starving due to harsh winter conditions. Furthermore, the applicants argue that they are also de jure individually concerned. They point out that the EU Court of Justice has so far established three types of rights for which individual concern can be determined, and fundamental individual rights are one of them [17]. They further assert that the fact that there are other holders of the same right cannot be relevant since the individual concern is based on the nature of that right as a personal right of the applicant. This means that the infringement of fundamental rights, in and of itself, is distinctive, considering that each fundamental right must be protected regardless of how many people are affected. Although in principle, everyone can enjoy the same rights (such as the right to life or occupation), the consequences of climate change (contributed to by the contested EU acts) and violations of fundamental rights due to these climate changes are distinctive and different for each individual [18]. In contrast, the defendants argued that neither the de facto consequences nor the violation of fundamental rights distinguish the applicants from other individuals, which the General Court accepted.

Here, it is necessary to mention another case initiated under Article 263 of the TFEU. The case of Sabo and Others v. Parliament and Council [19] involves the annulment of acts related to the regulation of climate change and shares several elements with the Carvalho case. In 2019, a group of individuals and civil society organizations from Estonia, France, Ireland, Romania, Slovakia, and the United States filed a lawsuit challenging EU acts that allowed the burning of forest biomass (wood, branches, and bark) considered a renewable energy source. The applicants come from areas particularly affected by deforestation, such as the southeastern United States, Estonia, and the Carpathian region in Eastern Europe. Relying on the fact that biomass power plants emit more carbon into the atmosphere than coal-fired power plants, the applicants sought the annulment of EU acts related to forest biomass. Therefore, while the Carvalho case challenges EU legislation related to general goals regarding climate change regulation, the Sabo case contests a specific measure aimed at relying on biomass to achieve those goals [20].

Although the emphasis in the Carvalho and Sabo cases was on different elements, the argumentation in both cases is similar. In both cases, the applicants relied on Article 191 of the Treaty on the Functioning of the European Union (TFEU), which establishes that EU environmental policy should aim to achieve the following objectives: the preservation, protection, and improvement of the quality of the environment, the protection of human health, the prudent and rational use of natural resources, and the enhancement of measures at the international level to combat regional and global environmental protection issues, especially climate change. In both cases, the applicants argued that elements of the contested acts violated the fundamental treaties of the EU and the EU Charter of Fundamental Rights, which has the same legal value as the mentioned treaties.

Despite invoking a violation of fundamental rights, the Court of Justice was not convinced of the merits of the appellant's arguments. The Court of Justice reiterated its conclusion from the Sabo case in the Carvalho case: " [...] the claim that an act infringes fundamental rights is not sufficient in itself for it to be established that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless." The Court of Justice considered that this would mean that locus standi is granted to everyone without distinction. [21]

This approach by the Court significantly hinders access to justice, especially in cases related to climate change. Climate change affects everyone, both present and future generations. However, in the Codorníu case, [22] the Court of Justice applied a broader approach. In this instance, the Court found that there is an individual concern because a personal right, the right to a trademark, was significantly harmed by the legislative act. It can be inferred that the Court's reasoning is that a personal right ranks higher than a universal fundamental right. Such logic from the Court appears to be debatable.

INDIVIDUAL CONCERN

The decision of the Court of Justice in the Plaumann case has been criticized for favoring private interests at the expense of public ones. However, the Court of Justice continues to adhere to the formula established in this case, as we have seen in the Carvalho case. Therefore, it is necessary to examine how the criteria for establishing the existence of individual concern in the Plaumann case were developed.

In 1961, the Federal Republic of Germany requested the European Economic Community Commission's permission to partially suspend customs duties applied to tangerines and clementines imported from third countries. The Commission refused to grant the authorization, leading the applicant, an importer of clementines, to challenge the legality of the Commission's decision. Since the decision was not directly addressed to him, Mr. Plaumann had to prove his individual concern. However, the Court established that the applicant still lacked *locus standi*. In doing so, it developed a formula for determining the existence of individual concern that remains in force to this day. According to the decision in the Plaumann case: "Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed [23]." It is necessary that these characteristics and circumstances be permanent and decisive, distinguishing members of a particular group from others.

In the Plaumann case, the Court applied this reasoning, known as the Plaumann test, and determined that any person could, in theory, become an importer of clementines in the future, and Mr. Plaumann could not be distinguished from others. As a result, he was found to lack the individual concern necessary for standing to challenge the Commission's decision. In this regard, a distinction can be made between open and closed ("fixed") categories of applicants. A category may be considered open if membership in it was not fixed at the time of the decision. Conversely, if membership in a particular category is fixed at that moment, then such a category is closed. [24] In order to be recognized as having an individual concern, the complainants must prove that they belong to a group that cannot be expanded after the entry into force of a specific Community act. However, it is noted in the literature that the market reality of supply and demand implies that there is a natural existence of a certain number of firms that do not change drastically [25].

This test has since been widely used by the Court to assess whether individuals or entities have a sufficient individual concern to bring actions before the EU courts, and it has been criticized for its strict application, which has made it challenging for many to establish standing in environmental cases, including those related to climate change.

CRITICISMS AND ATTEMPTS TO MODIFY THE PLAUMANN FORMULA

The Plaumann test has sparked a debate in academic literature, predominantly with a critical tone [26.] Calls for a modification of this formula have come not only from academic circles but also from courts within the Community. Here, we refer to the opinion of the Advocate General Jacobs in the case of Union of Small Agricultural Producers (UPA) v. Council [27] and the judgment of the Court of First Instance in the case of Jégo-Quéré v. Commission [28].

In his opinion in the UPA case, [29] Advocate General Jacobs highlighted the procedural challenges faced by private individuals and suggested ways to overcome these obstacles. He primarily questioned the position of the ECJ that the individual's standing before the Court was justified considering the "complete system of legal remedies" established by the EC Treaty. According to the Court, the system is comprehensive because a Community act can be challenged either through an action under Article 230 of the EC Treaty or through a preliminary ruling procedure under Article 234 of the EC Treaty. However, Jacobs pointed out that when it comes to Community acts that do not require the implementation of executive measures by national authorities, such as the regulation challenged in this case, individual applicants are left without an act to challenge before national courts. The only way for individual applicants to initiate a preliminary ruling procedure, where they could request a decision on a preliminary question, is by knowingly violating the law. This leads to the paradoxical situation where individual applicants must break the law to access the Court. The essence of Jacobs's position is that a individual applicants who does not otherwise have *locus standi* for annulment proceedings cannot automatically overcome such an impossibility by challenging the act in a preliminary ruling procedure. Whether such a procedure will be initiated depends on the Member State, and it can simply decide not to do so. Therefore, an individual applicant is largely dependent on the national court, and the preliminary ruling procedure cannot be considered a guarantee of an effective legal remedy.

As the best solution that would not deviate from the Treaty but would depart from the previously unjustifiably strict practice, Jacobs proposes the introduction of a new test for determining standing.

According to this proposal, an individual possesses standing for the annulment of Community measures if, due to specific circumstances in which they find themselves, the measure has or could have a significant negative impact on their interests. This solution guarantees direct access to the Court, making it simpler, according to the Advocate General, and eliminates the possibility of denying justice. However, Jacobs also pointed out a potential downside to this solution, which is overburdening the ECJ with the number of cases. Nevertheless, Jacobs also notes that this should not be a problem, considering the existence of the General Court, which is competent for applications filed by individual applicants, and the lack of evidence that case overload has occurred in legal systems of Member States with a liberal approach to individual applicants' access to the court.

It is interesting that parallel to the proceedings in the UPA case, another case of interest for the procedural legitimacy of individual applicants was ongoing, namely the case of Jégo-Quéré v. Commission. In this case as well, it involved the challenge to a regulation by individual applicants who lacked an individual concern. What is significant is that the Court of First Instance decided to accept the opinion of the Advocate General and propose further relaxation of the Plaumann formula, that is, a liberalization of the access of individual applicants to the Court. Specifically, in this case, the General Court determined the following: " [...] i*n order to ensure effective judicial protection for individuals, 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 [30]."*

The applicant Jégo-Quéré met the criteria of the newly formulated test by the Court of First Instance, and the application was declared admissible. It is noticeable that, compared to the opinion of the Advocate General, the new test has a limited scope. It applies only to measures of general application, requiring that the measure in question restricts rights or imposes obligations. The way in which the contested measure affects the legal position of the applicant must be specific and direct, not just potential, as in the opinion of Advocate General Jacobs. This approach by the Court of First Instance indicates its inclination to render a judgment that would be approved by the ECJ. However, the ECJ did not accept the new test. When the UPA case came before the ECJ, it did not adopt the opinion of the Advocate General but insisted on the Plaumann formula [31]. The ECJ also overturned the judgment in the Jégo-Quéré case in the appeal proceedings initiated by the Commission [32]. In both cases, it was determined that any potential reform must first come from the member states themselves, rather than the Court. It turned out that the Court was not willing to deviate from the established practice based on the Plaumann formula.

PLAUMANN TEST IN CASES CONCERNING ENVIRONMENTAL PROTECTION

The restrictiveness of the Plaumann test is evident in cases related to the annulment of measures concerning climate change. The Greenpeace v. Commission case is a well-known example that highlights the challenges in interpreting the criteria for individual concern in environmental protection cases [33]. In this case, the environmental protection non-governmental organization Greenpeace sought the annulment of the Commission's decision to secure funds for the construction of a power plant in the Canary Islands. The applicants argued that their specific interests in environmental protection should be considered sufficient to meet the requirements for filing a claim. Additionally, they contended that the traditional interpretation of Article 173(4) of the EC Treaty should be revised to account for the peculiarities of the environment. They pointed out that the need to protect the general interest is a crucial factor for specific judicial protection of the environment. They argued that in the field of environmental protection, interests are "by their nature, general and common, and the rights relating to these interests are more appropriately enjoyed potentially by a large number of individuals [34]." The general advocate Cosmas agreed with the applicants on this matter, stating the following in his opinion: "F*or environmental protection is indeed a matter of general interest. Conservation of the environment is a legal interest theoretically shared by all natural persons; it thus has a communal dimension. Furthermore, the more significant is the intervention in or impingement on the environment, the greater is the number of persons affected thereby [35]." It is noteworthy that the general advocate also pointed out that primary EU law establishes that environmental protection requirements must be integrated into the definition and implementation of other EU policies.*

The court did not respond at all to these positions of the general advocate on the special regime for environmental protection. Instead, it established that the rights related to environmental protection, invoked by the applicants, are "fully judicially protected," based on the preliminary ruling procedure before national courts. In addition, the court did not affirm that the interests of the applicants were of a public nature (unlike private economic interests for which the Plaumann test was designed). Instead, it stated that public interests, such as environmental protection, are by definition diffuse, and therefore non-governmental organizations cannot meet the requirement of a unique position regarding the contested act. The court made similar decisions in other cases related to environmental protection [36]. Based on this, we can conclude that there is a conflict of views between the European Court of Justice and environmental protection organizations regarding how to recognize the "special treatment" of rights related to environmental protection. According to the Court, this should be achieved through an effective system of environmental judicial protection at the national level. Environmental protection organizations, however, believe that an effective system should include a broader approach to EU institutions [37].

AARHUS CONVENTION

The EU ratified the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (commonly referred to as the Aarhus Convention) [38] of the United Nations Economic Commission for Europe (UNECE) in 2005, which had already entered into force in October 2001. Although the applicants did not explicitly invoke it, it should be noted that the Plaumann test is not in line with this convention. Before the adoption of the Aarhus Convention, and in connection with it, Regulation 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies, [39] there were no specific provisions regarding access to judicial review of acts of Community institutions concerning environmental protection. The aim of the Aarhus Convention is to strengthen the role of citizens and civil society organizations in environmental matters, based on the principles of participatory democracy. The three "pillars" of the Aarhus Convention, as they are commonly referred to, include the right to access to information on the environment from public authorities, the right of the public to participate in decisions of significance to the environment, and the right to legal protection, which pertains to the right of citizens to challenge if the first two mentioned rights are violated, known as the right of access to justice.

According to Article 9, paragraph 3 of this Convention, each contracting party must ensure that "members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment." In its reports from 2011 [40] and 2017, [41] the Compliance Committee of the Aarhus Convention determined that the criteria from the Plaumann test are too strict to meet the Convention's criteria because individuals cannot be individually concerned if a directive or regulation has an effect based on an objective legal or factual situation.

CONCLUSION

As demonstrated by the cases of Carvalho and Sabo, the EU Court of Justice continues to refuse to adapt the Plaumann test and consider the reality of climate change. Its strict conditions for procedural standing present a significant obstacle both for individuals seeking to challenge EU acts of general application, even when human rights are at risk, and for environmental protection groups striving to represent the public interest before this Court. It was believed that this situation would change with the EU's accession to the Aarhus Convention and the adoption of a series of directives aimed at improving the position of environmental protection groups, but the decisions in the Carvalho and Sabo cases show that such hopes were in vain.

However, there are indications that there will be a revision of the Plaumann test in the near future. In 2020, in its effort to become the world's first "climate-neutral" continent, the EU raised its emissions reduction target from forty to fifty percent. It also announced new regulations to achieve an enhanced goal for the year 2030 and initiated the process of revising the Climate and Energy Framework of Action by 2030.

If, on the other hand, the EU Court of Justice maintains its restrictive interpretation of individual concern in cases related to environmental protection, there is a high possibility that individuals facing adverse effects of climate change will be left without a legal remedy for protection. This raises the question of whether such a situation aligns with the image of a pioneer in the fight against climate change that the EU aims to create for itself.

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