Is the European Union guilty of promulgating a dangerous double standard for granting access to Judicial Review?

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Individuals and companies affected by government decisions, which have been reached at either a national or EU level, have the right to challenge the legality of that decision in a Claim for Judicial Review (CJR) proceedings, thereby holding the State accountable for its actions. Judicial review is the legal process by which state actions are subject to review and possible invalidation by the judiciary. For a person to have access to CJR the court must first be content that the applicant, or claimant (in English law), is sufficiently affected by the decision under scrutiny to warrant the intervention of the court. This requirement is known as standing. If standing is granted then the state action challenged may become the subject of judicial review.

The concept of standing in the English courts appears to have been liberalised to such an extent that standing can be established, regardless of the claimant’s interest, if the challenge is deemed to be in the public interest to vindicate the rule of law (Dixon1998). However, rules on standing, for challenging directly the legally binding measures passed by the European Union (EU) institutions before the Court of Justice of the European Union (CJEU), are extremely restrictive where the applicant is not a specific addressee of the measure being challenged. In 1963 the (already narrow) wording of the EU Treaty was further restricted in the Plaumann [1963] judgment and this has only been marginally altered by the recent Treaty of Lisbon (TOL) reforms.

Prior to the TOL, a measure under question needed to be of both ‘direct and individual’ concern to the applicant requesting judicial review. In Plaumann the words ‘direct and individual’ were interpreted by the court as meaning that the individual had to be directly affected and the EU measure had to affect them as a member of a fixed and identifiable group. The TOL reforms can be found in Article 263 of the Treaty on the Functioning of the European Union (TFEU). Although standing requirements now appear to have widened the entitlement to institute proceedings in respect of a regulatory act which is of direct concern if the does not entail implementing measures. It is also clear that the Plaumann formula (the need to show both direct and individual concern for all other measures) has been reiterated. Article 263 TFEU, rather than adding clarity or developing a progressive stance towards standing in the EU JR claims, has necessitated the need to debate and clarify when an act is a regulatory act for the purposes of the Article, and what constitutes an implementing measure.
The question arises as to whether access to judicial review at EU level should be on similar terms to those granted within a nation state of the EU or whether it should be accepted that EU JR challenges should be treated differently. In other words, should EU justice be considered in an isolated, EU environment and not be regarded as connected with the justice system of a nation state.

The CJEU has long argued that there should be parity of EU law across the EU, but this should not be confused with the goal of parity of national law within the EU. Whilst Article 67(4) TFEU states: ‘The Union shall facilitate access to justice in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters’, it should be noted that mutual recognition is not the same as assimilation. Again at Article 81(2)(f) TFEU there is the stated aim of ‘promotion of compatibility of the rules of civil procedure’, but the word compatible is understood to mean different systems being able to work together, not different systems being merged into a single pan European judicial system.

For the notion of a ‘dangerous double standard’ to exist, it would have to be argued that the access to judicial review before the CJEU was overly restrictive in comparison with the national courts of all 27 Member States. This also is founded on the premise that the notion of what constitutes or can be subject to judicial review is the same. The concept of ‘direct and individual concern’ would be familiar to a German court, but in Sweden any alleged error in Government ordinances under review would need to pass the uppenbarhetsrekvisitet (‘requirement of being manifest’). It is clear, therefore, that at present there can be no parity of judicial review across the national law of the Member States.

It is also arguable that a double standard can only exist where the same single body exercises two levels of judgement on different applications using different criteria. If two systems (i.e. a national jurisdiction and an EU jurisdiction) exist separate from each other and exercise their power of judgement solely within their own sphere, then whilst the standards may be different they cannot be said to be ‘double’ standards.

If the application of judicial review were to remain within the remit of the CJEU it would be fairly straightforward to argue that any test for standing adopted by it referred to a distinct body of law with its own court systems and practices. Although it could also be said that: ‘the comparison with the position in national law ... seems irrelevant. The legitimacy of the Union cannot be equated with that of Member States’ (Arnull 2004, 288). The argument is complicated by the further mechanism
which exists for individuals to challenge a decision made by an institution of the EU through the National Courts. Article 267 TFEU proceeding may be undertaken whereby the court of a Member State is required to refer an issue in respect of the validity of EU measures in the context of domestic judicial review proceedings for clarification by the CJEU. A clear indication was given in the Lisbon Treaty, at what became Article 19 TEU, that: ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. The advantage of this system is that it allows for judicial challenge at a more local, accessible level. That this system fails to acknowledge that access to judicial review is different in each of the Member States is its fundamental flaw. The system cannot, unlike Schrödinger’s cat, exist in two states simultaneously – it cannot work within the processes of each nation state and be part of the national legal system and argue that it is distinct and therefore outside the judicature of each member state.

This then is where a double standard could be perceived to exist. If a national court is used to administer justice for two systems, will the citizen of the EU expect, and be correct to expect, the same standard of access to judicial review regardless of whether the decision brought forward for review related to national or EU law?

The issue of double standards is not one which is confined simply to the existence of two parallel systems of law, where either or both systems must be used dependent upon the substance of the claim. Within the EU legal system itself a lack of consistency in granting standing exists. Usher highlights this paradox using the examples of two cases: Greenpeace [1995], where a protest group sought to bring a class action on an environmental issue, and Cordorniu [1994], where a commercial company challenged an EU directive with implications for the sale of its products. In Greenpeace, he argues, the Court acknowledged the existence of a procedural right within a directive but insisted on operating within rules which ‘denied effective protection of the substantive right’ (Usher 2003, 1011), thus leaving no alternative route of challenge. This can be contrasted with Cordorni, where secondary legislation did allow for an alternative due process (through an application via the national court for an Article 267 TFEU ruling) to be followed, but where the court adopting a line of reasoning which allowed the claimant standing. The answer to this contradictory approach to standing between public or commercial interest cases is found in the judgments of the original nascent EU court.

Historically, the court is the tribunal of an economic trading zone. As such it is more at ease with deciding on issues of a purely commercial nature and where basic contract law can be used to
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determine the respective obligations of parties under an agreement. the more esoteric rights of the citizen to hold the state to account for any alleged illegal act is a concept which the public law systems of member states have developed over centuries. any developments in this respect by the eu have been hampered not least by the continuing debate as to where the eu exists within the spectrum of a state in its own right or a collaboration of like-minded nation states.

the fundamental issue of access for judicial review for groups which attempt to gain standing for an application in the public interest remains to be addressed. the uk has seen the acceptance of standing for public interest groups for judicial review as a means of allowing important issues to be brought before the scrutiny of the court. granting standing for public interest cases serve, as craig states, to highlight the importance of the vindication of the rule of law (2008, 807).

following the upa case the cjeu itself stated its preferred method for individuals to seek the judicial protection they were entitled to under the eu legal order. this would involve either an indirect application to plead the invalidity of an act before the eu courts under article 241 ec (now article 277 tfeu), or via an article 234 ec (now article 267 tfeu) reference from the national courts (usher 2003, 584). both articles are indirect ways of challenging an eu measure which provide explicitly for individuals to challenge the acts of eu institutions. as article 263 was the most commonly used method of challenging eu measures directly it was, therefore, for member states to establish the system and procedures for effective legal protection.

the principal objection to this system (highlighted in both jégo-quéré and upa), is that, since national implementation measures were generally not required in order for the measures to become part of national law, there was little for the applicants to challenge in the national courts. this seems to suggest that, in cases such as this, the individual would need to infringe the eu rule or national administrative decision and then argue the case once proceedings had been brought against them (arnull 2006, 82). a legal procedure which requires the applicant to break the law before they can request a review of the validity of that law, it can be argued, is not fit for the purpose intended.

if a comparison is made between standing in, for example, the english courts and the cjeu, it is very apparent that, in the uk, weight is frequently given to the merits of the case as a whole and whether the review would serve the greater public interest. neither of these considerations forms any part of the decision on standing in eu law. this can only serve to give the impression that, in respect of eu law, the institutions of the union (though these institutions hold privileged status which gives
automatic standing if the institution itself seeks judicial review) see themselves as beyond challenge by the private individual. Whilst some protection should be necessary, given the wide ranging discretionary policy choices before the EU institutions, it would be an arrogant or narrow-minded administration which considered itself beyond challenge. Access to the law is complex and expensive. Often it is a public interest group, such as Greenpeace, which has the organisation, expertise and funds to bring an action on behalf of a group of citizens. It is understandable that the CJEU has concerns in respect of a relaxation in the interpretation of the rules of standing leading to an opening of the floodgates for litigation. It is, after all, a small and finite number of advocates (members of the EU judicature) which serve 27 Member States and whilst it is acknowledged that the decisions of the institutions of the EU will always disadvantage some group, company or individual, whilst at the same time making systems fairer for countless others, this is also true of government in Member States. Neither is it true that the original terms of the Treaty were themselves so constricting that the CJEU was required to apply them strictly. This argument, that the CJEU is constrained by the terms of the Treaty in its interpretation of ‘individual’, is surprising, because, as Albors-Llorens points out: ‘this notion was not defined in the Treaty, giving the Court the option of adopting a flexible construction as it has done in relation to numerous other Treaty concepts’ (2003, 75). The reference to ‘individual concern’ has survived any attempt to remove it from the Treaty, thereby maintaining the barrier to challenge.

In the Treaty of Lisbon (now TFEU) EU policy makers did avail themselves of the opportunity to clarify the distinction between those decisions, directives and regulations passed by either the Council or Council and Parliament as part of a co-decision making process and those regulations and decisions made by the Commission through delegated powers. Prior to the Treaty no real distinction was made between these forms of binding measure, despite the argument that measures which had been subject to the scrutiny entailed in the full democratic process should be less open to challenge than those passed without the opportunity for democratic scrutiny. Following the adoption of the TFEU it is theoretically easier to challenge a non-legislative measure and it is possible (though yet to be evidenced in case law) that this recognition of a difference in the binding nature of EU decisions could be the start of a softening of the rigorous requirements of the Plaumann formula for non-legislative measures.

The opportunity to shift the emphasis of the CJEU from its commercial tribunal origins to the wider role of ‘watchdog’ of the decision makers of the EU was available during the committee stage of discussions for the Treaty of Lisbon. The new Treaty was the opportunity for EU legislators to move
beyond the restrictions of the *Plaumann* formula and build upon attempts made by Advocate General Jacobs (English QC Francis Jacobs in his capacity as a member of the EU judicature) when serving as to shift the emphasis of judicial review to the merits of the case, rather than concentrating on whether the applicant fell within the narrow confines of what constitutes sufficient involvement to bring the case (under *Plaumann* rules). Unsurprisingly, as with any decision which seeks to please all parties, for those who sought progressive widening of standing (as per the English system), and those who supported the *Plaumann* formula (based on German rules for standing), the situation remained unchanged. The result was the newly worded Article 263 which created further tests for standing associated this time not with the individual bringing the action, but with the status of the decision under review and which also retained, for some situations, the ‘direct and individual concern’ wording of *Plaumann*.

Writing before the Treaty of Lisbon, Cygan looked forward to a modified Treaty which would: ‘allow for targeted public interest litigation to allow citizens to protect their own rights and safeguard the rights of the community in which they live’ (Cygan 2003, 1012). The problem is: does the new Article 263 TFEU allow for this? This would be unlikely as the two-fold test for direct and individual concern remains, unless it falls into the stated exception of a regulatory action with does not entail implementing measures. However, a degree of obfuscation remains as to what exactly this will mean and it is likely that the definition of what constitutes a regulatory act may potentially be developed through CJEU case law.

Chalmers et al. (2006) question whether pressure or interest groups, which have already been part of the formulation of the law through the lobbying process, be allowed standing to question the legality of an act if the legislators, after hearing the pressure groups argument at the policy stage chose to disregard it to some extent. The somewhat tenuous argument holds that the appropriate place for pressure groups to put their case is at the legislative stage, before the law is passed. This continued provision of restrictive access ensures that challenges to the law can be made through the courts but (the argument follows) that spurious legal challenge (or that which is overtly political) can be prevented from using the time and resources of the court inappropriately. There is nothing intrinsically wrong with the current practice followed by the CJEU of ordering a review of decisions based solely on questions of law (as opposed to public interest or holding decision makes to account), but the recognition must surely follow that this practice will be fundamentally different from other, national legal systems which have adopted a more liberal interpretation of the concept of standing. Both these systems, with quite different interpretations of the requirements of standing
are accessible by the same groups of people. This inevitably leads to the perception of the existence of double standards.

The granting of permission to seek Judicial Review does not, in itself, confer any notion that the challenge should be upheld by the Court. It merely indicates that there is an issue which the Court would be prepared to hear. The notion that a public interest group is able to achieve a second attempt at influencing a policy decision works on the assumption that the challenge will automatically be upheld. This is not the case. Whilst there is no argument for allowing vexatious challenges for publicity or improper purposes, the leave to stand before the Court allows for the general public to see clearly that the issue is being considered. This transparency of process should give a greater feeling of participation than any lobbying behind closed doors. The desire of the EU to evidence citizen participation would be augmented by this greater ease of access for public interest cases, as long as these cases are challenges to a legal decision and not an attempt for the court to impose policy. The distinction needs to be made very clearly that the remit to challenge on policy should work within the democratic process of an elected chamber and the access to challenge on a point of law should be available through the Courts. As Endicott points out: ‘the people of the [Union] share an interest in a system that prevents arbitrary government, so the government acts responsibly on their behalf’ (2009, 403). Whether the access to challenge government at the EU level is sufficient to address Endicott’s concerns is, I would argue, a moot point.

However, the issue in respect of participation rights is that the interest group has been unable to enforce its rights to be consulted in the first instance and yet would lack the standing to seek judicial review to enforce those rights again enforces the perception of a double standard and is a lacuna which should be addressed.

Some consideration should be given to the argument here that a legislative and judicial system may offer other methods to ensure accountability through public concern. There is a requirement under the Aarhus Convention to ensure access to information, public participation in decision making and access to justice in respect of environmental issues at EU level. The enforcement of Aarhus participation rights by Non Governmental Organisations (NGO) may be the subject of direct challenges before CJEU by the NGO and as such would be governed by the test for standing as set out in Article 263 TFEU. Paradoxically, an association formed to protect the group interests of a number of individuals cannot be individually concerned through differentiation of them from all other persons because the definition of ‘group interest’ implies that more than one individual is
involved. Therefore no NGO would be able to enforce its Aarhus rights. This would appear, therefore, to be another indication of the feasibility of a system on paper being unworkable in practice. Obradovic states that: ‘The ECJ has already ruled out the possibility that an NGO can be individually and directly concerned only because it is interested in the protection of the environment. As a consequence, the legality of decisions taken by [EU] institutions that may potentially harm public interest cannot be contested by NGOs’ [before the EU courts] (2007, 851).

This can be contrasted sharply with the view taken by the English Court where, for example, standing was granted in the Dixon [1998] case, in order to vindicate the rule of law, where unlawful conduct had been reasonably alleged to ensure that statutory powers had not been exceeded (Craig 2008, 807). This willingness to look beyond rules of standing and consider what would be the most appropriate course of legal action in order to assure accountability, whilst apparent in English judicial review is not at all apparent in EU law. It should also be emphasised here that the UK Courts in this instance were content to look at a planning decision – even though it had been discussed and passed by a democratically elected body it was still not considered to be outside the remit of the court. This contrasts sharply with the position under the TFEU, where a binding measure is weighted according to where and how it was made – a legislative measure, which had gone through the democratic scrutiny processes required by the treaty-based legislative procedure, would still have to satisfy both requirements of being of direct and individual concern. It is well to argue that the substance and amount of applications are different and should therefore be dealt with using different approaches but the inability of an NGO to enforce its Aarhus participation rights through judicial review is indicative that the rules on standing may be too prescriptive. It remains to be seen whether the liberalisation to the rules of standing as stated in Article 263 TFEU (in respect of regulatory action not requiring implementing measures being outside the direct concern rule) will allow for any successful interest group challenge to be made.

It is a useful point to note when making a comparative analysis that the test for standing for challenges to measures breaching Aarhus participation rights at the national level vary from tests of ‘sufficient interest’ and ‘impairment of a right’ to the test used by Germany which mirrors the EU concept of ‘individual and direct concern’ (Obradovic 2007, 855). This serves to illustrate that any attempt to ensure that a pan-European standard exists for access to Judicial Review is fraught with the difficulties of national interpretation. Each Member State has its own distinct legal tradition, so that when new concepts or ideas are added (as in Aarhus participation rights) they need to be interpreted within a national framework which already exists. True parity of protection will not exist
until parity of access is attained. However, this parity of access is not within the gift of the EU. It would need to be separately agreed by all Members States – a situation unlikely to occur in the foreseeable future.

One final issue needs to be addressed when considering the comparative standard of access to judicial review between the UK and European legal systems and the rationale set out under EU treaty legislation, that questions of legality of EU decisions should be considered via national courts. Barriers to access to justice between Member States are beginning to break down, either through application of treaty provision for EU law, through developments in international law (particularly in areas of information technology), or through the willingness of national courts to accept that they have a jurisdiction wider than acts undertaken by their own citizens within their own state. This begs the question of whether applicants for judicial review should be restricted to using their own national court or will they succeed in gaining access to justice via the judicial system of whichever nation state gives the most likely chance of success for their action? It is already the case that UK courts are used internationally for litigants seeking to access the remedies available in English legislation in the areas of defamation and divorce. It is also the case that UK courts have been prepared to grant access for judicial review to a non UK citizen (e.g. R (Hasan) v Trade and Industry Secretary [2007] EWHC 2630). Is it possible that, in future, a choice of where to access judicial protection for EU could result in the ‘dangerous double standard’ (Ward 2006, 326), of a virtual postcode lottery of justice at EU level. The problem of access is centred on the concept of using one (national) legal system to implement the requirements of another (EU) system. Would a different way forward, therefore, be for the CJEU to bypass national legal systems completely and require consideration of EU law challenges only before an EU court, without any involvement of national courts in EU law. Would this compete separation of the two national and EU legal systems ensure equality of access for EU law for all citizens, which would evidence a parity in judicial protection, even if the threshold for that access was considered to be restrictive? Or is the alternative for the EU to try to follow and expand its existing strategy of intervention? This requires, through CJEU rulings, that EU rights must be effectively protected at national level. This may require adjustments to national remedies and procedures and would involve the imposition of guidelines for standing for judicial review in Member States where the issue is one of EU law. In some national systems where the test for standing is already similar to the EU test the use of the national judicature to implement EU requirements might not be immediately apparent. Other jurisdictions might be required to apply two very different tests dependent upon the origin of the decision challenged. This may be construed as the EU seeking to regulate and control the judicial system of a national state protected
by that states constitution. It would be a highly contentious move and would cause serious divergence of opinion over where the jurisdiction of the EU ended and Member States began.

The Treaty of Lisbon must be regarded as a statement of policy. Access to judicial review before the CJEU remains tightly defined for the most part by the need to prove both direct and individual concern. The only concession to this accumulative test has been the recognition of the need for access to some form of judicial protection where no access is available through the national courts. The issue before the courts now, both at EU level and in Members States is to ensure that the practice of effective judicial protection is clearly evidenced through sound judgments and practice.

Whether the interpretation of the new Article 263 TFEU dampens the academic criticism of EU, standing remains to be seen. It is more likely that the debate will merely move on to its next chapter of dissecting the issues raised by ‘a regulatory act which is of direct concern and does not entail implementing measures’. Ward herself has argued that there is an ‘absence of a clear division in EU law between normative, executive and administrative measures’ (Ward 2007, 332), thus demonstrating legal uncertainty over the definition of a ‘regulatory act’. There will need to be clear guidance in case law for this criticism to be answered.

The revisions contained in the Treaty of Lisbon have indicated that, rather than allowing access to judicial review directly before the CJEU, the EU is keen to persevere in its promotion of the concept of subsidiarity. The conclusions presented by the Working Group on the CJEU in 2003 (Final report of the Discussion Circle on the ECJ CONV 636/03, paragraph 22) indicate that the preferred future route of access to justice will be in the national court with a decision from the ECJ being sought via an Article 267 (ex Art 234) preliminary ruling. Some commentators maintain that this will solve neither the problem of a complete denial of a remedy or the denial of an effective remedy (Koch 2005, 527).

The decision to provide access to justice through national courts whilst at the same time maintaining a restrictive standing for direct access, raises issues of its own concerning parity of access across the EU. There is still very clear evidence that in some national legal systems (for instance the English system) standing has lost importance as an issue in comparison to assessing the application on its substance. The Lisbon Treaty amendments declined to follow the same route thus. Arnull has pointed out that as far as judicial protection is concerned the EU must appear ‘whiter that white’ (2004, 288), it must go further than the national courts in order to give the perception of the same
level of access. It could be argued that the minor amendment to Article 263(4) TFEU was insufficient to counter this perception.

The distinction needs to be made between the access to justice of the private individual and the access to justice of a public interest groups acting on behalf of the citizen at large. It has been argued that there are a number of methods available to the interest group to influence decision making at the EU level without the need to resort to the judicial review process. Article 67(4) TFEU states that the Union will facilitate access to justice and the adoption of the Aarhus convention allows for a clear and transparent process of public consultation and participation in the formulation of policy and decisions. Nevertheless, this system is not compatible with, for example the English system, whereby a public interest group is likely to be granted standing if the court believes that the judicial review requested serves the public interest. The EU institutions have long been aware of the arguments of its insularity and lack of relevance to the ordinary EU citizen. As Cygan explains: ‘targeted public interest litigation to allow citizens to protect their own rights and safeguard the rights of the community in which they live would be an excellent starting point for shaping the future the social and political structure of the EU’ (2003, 1012)

For this to be transparent it is submitted that the existence and use of a clear consultation process is not enough. Chalmers et al. (2006) argue that there is a danger of political accountability being mistakenly transformed into a legal concern through the use of Judicial Review in public interest cases. However, the ability to hold a public authority to account for a decision is a fundamental public right under the Rule of Law, recognised and developed by the English Courts. The point is not that the objectivity of the law should be corrupted through a lobbying by Judicial Review but that access should be readily available for a challenge to be made. The objectivity would then be able to be evidenced in the decision of the court on the merit of the challenge.

It is also very clear that the development of judicial review in the EU has evolved from a commercial base. The tribunal of the old ECSC is now a legal system of a collaborative group of nations with an ambit far beyond that originally envisaged in 1952. It has the opportunity (the kompetenz kompetenz) to uphold the rule of law over a polity of peoples and yet the very minor amendments made to the threshold for standing by the TFEU demonstrate that it still chooses to apply (or to take the responsibility through to its ultimate level- the majority of states which make up the EU still choose to maintain) rules of standing as if it were considering a commercial agreement rather than
holding a law making body to account on behalf of its citizens. The world has moved on but the rules have not changed.

The scene for the foreseeable future is now set. There is meagre compensation to be had in establishing a system which is so complex and arcane that the perception exists that there is poor and restrictive access to judicial review. This in turn can only serve to promulgate the idea that the EU institutions are both above the law and isolated from the citizens they purport to serve.

Despite its past reluctance to use a teleological approach in its interpretation of the rules of standing, the increasingly flexible rules of some national judicatures can only serve to remind the CJEU that, if it so wished, it could apply the rules in a less restrictive fashion. The national example should serve as a comforting example that, far from opening the floodgates, the liberal application of locus standi has allowed justice, not only to be done, but to be seen to be done. This must surely act as an encouraging example for the future. The opportunity now exists for the CJEU to adopt a liberal interpretation of the ‘regulatory act’ to loosen the restrictive bonds of Article 263(4) TFEU.

It may be that, for access to effective justice throughout the EU, the ideal as set out in Article 67(4) for the Union to ‘facilitate access to justice ... through the principle of mutual recognition of judicial and extra judicial decisions in civil matters’ will ease the road ahead.

Note
This article is extracted from a much longer final year dissertation (submitted in May 2010), and has since been amended slightly following the implementation of the Treaty of Lisbon (Treaty on the Functioning of the European Union).

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**Further Reading**


