T.C.

MARMARA ÜNİVERSİTESİ

AVRUPA ARAŞTIRMALARI ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

DOES THE EU JUDICIAL REVIEW MECHANISM PROVIDE A COMPLETE SYSTEM OF REMEDIES AND PROCEDURES FOR PRIVATE INDIVIDUALS?

YÜKSEK LİSANS TEZİ

Gizem KÖSTEM VINUALES LOPEZ

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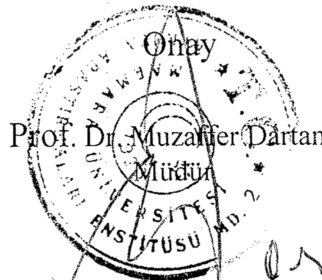

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ABBREVIATIONS

EU	: European Union
EC	:European Community
TEU	:Treaty on European Union
TFEU	:Treaty on the Functioning of European Union
ECLI	:European Case-Law Identifier
ECHR	:European Convention on Human Rights
ECtHR	:European Court on Human Rights
CFR	:Charter of Fundamental Rights
CJEU	:European Court of Justice
GC	:General Court
EC Treaty	: Treaty Establishing the European Community
EEC	: Treaty Establishing the European Economic Community
AG	: Advocate General

ABSTRACT

The effective judicial protection of individuals has been an important notion in the modern legal systems that are ruled by law. It is not surprising that this concept has long been discussed in the EU legal order. The presence of a complete system of remedies and procedures is a must for a legal system to provide an effective judicial system to individuals which is closely linked to the protection of fundamental rights, rule of law, and a properly functioning judicial review system.

Despite the strict interpretation of the CJEU on the action for annulment, the academic debates, the famous opinion of the AG Jacobs and especially the amendments that have taken place in the article with the Lisbon Treaty have contributed to the relaxation of the locus standi criteria. Although the CJEU had consistently stated that the EU legal order had a complete system of remedies for individuals in its case-law, even with the Lisbon amendments it is difficult to conclude that this modern legal system provides the judicial protection that it should to individuals.

The other procedures that are provided for the individuals cannot be considered to be as effective alternatives for the protection of individuals due to the characteristic of these procedures. The progress that has taken place in the field of judicial protection in the EU within the last decades cannot be underestimated, however, it is time for drastic changes in order to provide a more complete judicial protection sytem to individuals in this *sui generis* and developed legal order.

ÖZET

Bireylerin etkin hukuki korunması hukukun üstünlüğünü kabul eden modern hukuk sistemlerinde önemli bir kavram olarak kabul edilmektedir. Bu sebeple, bu terimin AB hukuk düzeninde uzun zamandan beri tartışma konusu olması şaşırtıcı değildir. Temel hakların korunması, hukukun üstünlüğü ve doğru işleyen bir hukuki denetim mekanizmasının varlığı ile yakından bağlantılı olan bireylere hukuki korunma sağlanması prensibi eksiksiz bir usul hukuki sisteminin varlığı için vazgeçilmez bir unsurdur.

ABAD'nın iptal davası konusundaki katı yorumlarına rağmen, akademik tartışmalar, Hukuk Sözcüsü Jacobs'un meşhur mütaalası, ve özellikle Lizbon Antlaşması madde metninde yapılan değişiklikler dava ehliyeti konusundaki şartları yumuşatmaya katkıda bulunmuştur. ABAD içtihatlarında istikrarlı bir şekilde, AB hukuk sisteminin bireyler için tam ve eksiksiz bir usul hukuku kurallar bütünü sağladığını belirtse de, Lizbon değişiklikleriyle dahi, bu modern hukuk sisteminin bireylere sağlaması beklenen hukuki korumayı başardığını söylemek mümkün değildir.

Bireylere tanınan diğer dava çeşitleri karakteristik özelliklerinden ötürü, bireylere hukuki korunma sağlanması konusunda etkin alternatifler olarak değerlendirilememektedir. Her ne kadar, AB'de bireylerin etkin korunması konusunda son birkaç on yılda gerçekleşen gelişmelerin hafife alınması mümkün olmasa da bu kendine özgü, ve gelişmiş hukuk sisteminin bireylere daha bütün ve eksiksiz bir hukuki koruma sağlaması için köklü değişikliklerin yapılması zamanı gelmiştir.

1.INTRODUCTION

Can we find evidence of effective judicial protection, in the historical legal documents or is it only a modern notion of law? What one considers as a sign of effective judicial protection can be relative, but legal scholars refer to Magna Carta as being an underdeveloped form of a document that contains the signs of effective judicial protection and the rule of law principles.

According to Magna Carta,"not even the King was above the law, the access to justice had to be free, the judges needed to be qualified."[1] None could be arrested, imprisoned or exiled unless the presence of a lawful judgement.[2]

In his work the Social Contract, in 1762, Jean-Jacques Rousseau has referred to the private parties as being people "whose life and liberty are naturally independent of…(the Public person)" as he named the State as the "Public Person". He has added that, it was necessary to distinguish the rights and duties of the citizens towards the state (and vice versa) from "the natural rights they should enjoy as men." He stated that with the Social Contract, each individual renounces a part of his "powers, goods, and liberty". Although not being a modern times document, in his piece of work he describes the importance of individual rights and remedies, and clearly acknowledges the human rights, referring to a system in which both the State and the indiviuals are bound with rules.[3]

Both documents refer to the rule of law and connections can be found between these two documents and Articles 6 and 13 of the European Convention on Human Rights (Hereinafter ECHR) and Article 47 of the Charter of Fundamental Rights (CFR).

Rule of law has always been the main tool, the center of European Integration[4] and has been described as "the core principle of the judicial protection in the European

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[1] Elizabeth Gibson-Morgan, and Alexis Chommeloux, **The Rights and Aspirations of the Magna Carta**, Palgrave Macmillan, 2016, Switzerland, page v.
[2] Metin Uracın, "Magna Carta Libertatum Büyük Özgürlükler Sözleşmesi" www.istanbulbarosu.org.tr/files/docs/magna/2017-2.pdf .
[3] Jean-Jacques Rousseau, **The Social Contract**, Cosimo Inc, 2008, page 36.
[4] İlke Göçmen, **Avrupa Birliği Hukuku'nda Direktiflerin Bireyler Arasındaki İlişkilere Etkisi**. 2st Edition Ankara: Yetkin, 2008, Preamble.

Union. (EU)"[5] As judicial review is an important part of a legal system based on rule of law, it is not a coincidence that whether or not an "effective judicial protection" was provided by the European Union legal system has long been discussed. Judicial review allows the individuals' rights and legitimate interests to be protected[6]. In many cases before the Court of Justice of the European Union (CJEU), references have been made to "individual rights" and it has been underlined that the European Union law provides the private parties with substantive and procedural rights.[7]

This thesis aims to find the answer to the question of whether the EU judicial system provides a complete mechanism of remedies and procedures for private individuals.

The wording of the "remedy" refers to "a successful way of dealing with a problem" and the "procedure" to"a way of doing something, especially, the usual correct way."[8] The legal term of procedural law is described as "the technical aspects of a legal system that states the steps that need to followed while enforcing criminal or civil law."[9]

Procedural laws regulate the steps of having a right or a duty to be enforced and govern what will happen at the end of challenging the law. Procedural laws in short "govern litigation", and regulate the rules that the parties must follow to bring their action before the court and the following steps.[10] Literally, having a complete mechanism of remedies and procedures for private parties would mean, providing a convenient and effective judicial system for protection of individual rights. It is worthy to mention that the question of whether the EU legal system provides a complete system of remedies to

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[5] Koen Lenaerts and Ignace Maselis and Kathleen Gutman, **EU Procedural Law**. 1st Edition. Oxford: Oxford University Press, 2014, page 2.
[6] Alexander H.Türk, **Judicial Review in EU Law**.UK: Elgar European Law, 2009 page 1.
[7] Bjarte Thorson, **Individual Rights in EU Law.** 1st Edition, Switzerland: Springer, 2016 page 3.
[8] https://www.collinsdictionary.com/dictionary/english/procedure available on 16.12.2018.
[9] https://thelawdictionary.org/procedural-law/ available on 3.3.2019.
[10] Kristin B. Gerdy, "What if the Difference Between Substantive and Procedural Law? And How Do I Reasearch Procedure?" Teacheable Moments For Students, https://info.legalsolutions.thomsonreuters.com/pdf/perspec/2000-fall/2000-fall-3.pdf.

individuals requires an analysis of the procedural rules in the judicial review system more than the substantive law rules.

In a modern legal system, the judicial review in the light of the rule of law principle, enforces the accountability of the administration, protects the balance of separation of powers and has an important function on the protection of individual rights.[11] The presence of effective legal remedies against the administration is a principle of the rule of law which is described in Article 6 of the Treaty Functioning of the European Union (TEU).[12]

As the effective judicial protection is recognized as "a fundamental right and a general principle of EU law" the discussion becomes more interesting.[13] *Ubi jus ibi remedium,* "Where there is right there is remedy principle" is the road map of how to determine whether there is a complete system of remedies and procedures or not in a legal system. The principle refers to the violation of one's right and states that the law gives a remedy to protect it or compensates its damages for the loss.[14]

The EU institutions are obliged to ensure the protection of individual rights as it has become clear with the jurisprudence of the CJEU, and clearly regulated in Articles 19 of the TFEU and 47 of the CFR.[15] Especially Article 47 of the CFR has a special place in terms of the principles of rule of law and effective judicial protection.[16]

The fact that Union law brings rights and obligations to private parties shows that European Union law has gone further than being an international legal system[17] and has become a supranational legal system moving forward to integration step by step. The

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[11] Mustafa T. Karayiğit, **Gerçek ve Tüzel Kişilerin AB Tasarruflarına Karşı Yargısal Korunması.** 1st Edition, Ankara: Adalet, 2009, page 1.
[12] Hacı Can and Seher Sarıaslan, **Avrupa Birliği'nin Yargısal Koruma Sistemi ve Türk Şirketlerinin Durumu" Türkiye İşveren Sendikaları Konfederasyonu.** İzmir: Türkiye İş Sendikaları Federasyonu: 2011 page 27.
[13] Rasmus Naeye,"Judicial Protection for Individuals Against European Community and Union Measures", Master Thesis, Faculty of Law, University of Lund, 2007 page 1.
[14] http://www.oxfordreference.com available on 16.12.2018.
[15] Thorson, op. cit footnote 7 p. 3.
[16] Can& Sarıaslan, op. cit. footnote 12.
[17] Albertina, Albors-Llorens, **Private Parties in European Community Law**, 1st Edition, Oxford: Clarendon Press, Oxford 1996 page 7.

CJEU in the *Van Gend En Loos*[18]case has stated that a legal order which was separate than the legal orders of the Member States was established and that individuals had rights and obligations in this legal system.[19]

The question of whether the EU provides a complete system of remedies to private individuals has been an area of discussion for decades, however it is indisputable that the most important actor in this field has been the CJEU being granted a broad jurisdiction over Union law, and a duty of interpreting Union law, as well as the right to create law to fill in the gaps. This has caused the CJEU from time to time to be considered as a judicial law-making organ within the Union, embracing the constitutional, administrative and judicial duties.[20] It was also commented that "if the CJEU has been an activist court then it was most certainly in the field of remedies."[21]

The possibility of direct access of the private parties to the CJEU has a critical importance for providing a complete system of remedies to the individuals, and "helps to maintain stronger bonds between nations" according to Mengiler.[22] It is accepted in the doctrine that direct access of the private parties to the Court has great importance for the effective judicial protection to be provided for different reasons however within the context of this thesis both the direct actions and the alternative remedies will be analyzed The direct actions, especially the action for annulment will be evaluated in a historical approach both in terms of Treaty amendments and the jurisprudence of the CJEU. The advantages and disadvantages of the direct actions and the alternative means will also be discussed. The action for annulment will be reviewed as before and after the Lisbon amendments and it will be questioned if the amendments have been able to liberalize the private parties' direct access to the Court or not. This thesis will also bee seeking an

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[18] Case, C- 26/62, *Van Gend En Loos,*EU:C:1963:1,page 11.
[19] Can& Sarıaslan, op. cit. footnote 12.
[20] Gülören Tekinalp and Ünal Tekinalp, **Avrupa Birliği Hukuku.** İstanbul: Beta, 2000, page 233.
[21] Rachel Craufurd Smith," Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection", The Evolution of EU Law, Oxford: Oxford University Press, Paul Craig and Grainne de Burca (Ed),**Evolution of the EU Law,** 2nd Edition.
[22] Özgür Mengiler, **Paris Antlaşması'ndan Lizbon Antlaşması'na Avrupa Birliği.** Ankara:İmaj,2013 page 42.

answer to the question of whether the judicial system of the EU provides a complete system of remedies and procedures to individuals.

The CJEU, which is responsible "to ensure that in the interpretation and application of the Treaties, the law is observed,[23] had made it clear for many years that, the principle of effective judicial protection is closely related to the principle of rule of law, but also made us understand that these principles cannot be evaluated solely being limited to the protection of fundamental rights. [24] The interpretations and jurisdiction of the CJEU have tended to be in a progressive manner and the route to the integration has been proportional to the efforts of the CJEU, except for the times that it has taken a step backwards with its jurisprudence.[25]

It is a well known fact that in the EU legal system neither the institutions nor the Member States can avoid judicial review. However CJEU has stated that although the system of remedies were complete, it was the Member States' duty to fill in the gaps[26] if necessary by amending the Treaties.[27]

It is clear that both the CJEU and the national courts have to respect the rule of law in order to maintain the proper functioning of the system[28] but the roles of the national courts and the European Courts in providing effective judicial remedies to individuals should also be discussed. Is it the European Courts or the national courts that have a more important role on the progress of the effective judicial protection of private parties? I will be also seeking answer to this question throughout this thesis, while discussing effective judicial protection as a notion of law, comparing the roles and the relationship between the CJEU and the European Court of Human Rights (ECtHR), the role of the CFR, direct

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[23] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu. Page 2.
[24] Stephanie Laulhe Shaleou, "Access to Justice in Europe: The principle of Effective Judicial Protection in EU Law-A Comparative Prespective Post-Lisbon, seminar speech.
[25] Mehmet Emin Akgül, **Avrupa Birliği Adalet Divanının Yargı Yetkisi.** Ankara: Yetkin, 2008,page 32.
[26] Case, C-50/00, *UPA*, EU:C:2002:462, para,41.
[27]Sjöstrand Cecilia, "Effective Judicial Protection of Indivduals" Lund University Faculty of Law, Spring 2011 http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=19735238fileOId=1973907 page 4.
[28] Ibid, p. 9.

and indirect procedures available for individuals and the development of jurisprudence on this area including before and after Lisbon amendments.

2. EFFECTIVE JUDICIAL PROTECTION IN THE EU

2.1. THE NOTION OF EFFECTIVE JUDICIAL PROTECTION

The EU legal system which has derived from the public international law, has an "autonomous, sui generis, supranational" characteristic and is separate from national and international law. [29] The EU legal order is said to have "evolved into a constitutional legal order",which also adopts the individuals as its subject, and is different than public international law.[30] The acts of the Union rely on the general principles of law[31] which promote the development of the Union legal system.[32]

In all the legal systems, the general principles of law are applied by the judges, and in EU law this duty is perfomed by the CJEU.[33] Although normally the CJEU decides in accordance with the sources of law of the Union in the light of the general principles of law,[34] references are also made to human rights in the decisions of the CJEU.[35]

There is no doubt that the EU legal order, having unique characteristics, is a modern legal order, just like the Member States that form it, which is based on the rule of law and respects general principles of law. The fact that the EU system has used the law as a tool and has continuously developed its system, makes it different from the other integrations.[36] It is a dynamic system, whose main purpose is to achieve effective and uniform application.[37] Özkan, states that the presence of a judicial review mechanism in the EU differenciates it from other international integration actions.[38] The CJEU also

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[29] Kalatin Gombos, "EU Law viewed through the eyes of a national judge" page 1. http://www.ec.europa.eu.
[30] Hildur Briem,"The Preliminary Ruling Procedure as a Part of A Complete System of Remedies", 2005, Faculty of Law University of Law, page 9.
[31] Şeref Ünal **Avrupa Birliği Hukukuna Giriş.** Ankara: Yetkin, 2007 page 77.
[32] Mehmet Hanefi Bayram, **Avrupa Birliği Hukuku Dersleri.** Ankara: Seçkin, 2014, page 186.
[33] Ünal, op. cit. Footnote.
[34] Haluk Günuğur, **Lizbon Anlaşması Sonrasında Avrupa Bütünleşmesi.** Ankara: Avrupa Ekonomik Danışma Merkezi, 2012 page 93.
[35] Göçmen, op. cit. 4 page 41.
[36] Sanem Baykal, **Avrupa Birliği Hukukunda Tazminat Davası** Ankara:Yetkin,2006, page 15.
[37] Lale Burcu Önüt, **Avrupa Birliği Hukukunun Üye Devletlerde Uygulanması**. İzmir:Seçkin, 2017 Preamble.
[38] Meral Sungurtekin Özkan, **Avrupa Birliği /Avrupa Topluluğu Usul Hukukuna Giriş.** Ankara: Yetkin,page 31.

states that access to courts is one of the most important elements of the EU that is based on rule of law. [39]

The "core principle of rule of law" is situated in the center of the judicial protection system of the EU.[40] *Les Verts*[41] case has a great importance as being one of the first judgements in which the CJEU stated that the Union is based on rule of law. *Les Verts*[42] case has shown that neither the Member States nor the Union institutions could avoid judicial review.[43]

Ubi Jus, Ibi Remedium ,"rights must have remedies" is an ancient principle which refers to the right to a remedy, and it is not surprising that the EU legal system has easily adopted it,[44] as being a "highly developed, complete and coherent" legal order ruled by law.[45]

As the "core principle" of judicial review is rule of law, these two concepts have been discussed together in the jurisprudence of CJEU. The Court which has accepted that a new legal order has been formed in the *Van Gend en Loos Case* has confirmed in the *Les Verts* case that no one can avoid the judicial review of the EU. The two cases have further importance in the jurisprudence of the EU. The Court in the *Les Verts* Case has confirmed that the EU is being ruled by law, and that this was the first time that the CJEU's jurisprudence has "attracted attention to the constitutional nature of the Union"[46]. This judgment reflects the belief of the Court that the Treaties established a system of rights and remedies which shall ensure that the rights of the individuals granted by the

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[39] Detailed Analysis of the Courts' Jurisprudence" Appendix 1. www.unece.org/fileadmin.org/fileadmin/DAM/env/pp/complianee/C2008-32/ communication/ Appendixes .doc.pdf page 20.
[40] Lenaerts, Maselis & Gutman, op. cit. footnote 4.
[41] Case, C-294/83, Les Verts, EU:C:1986:166, para 23.
[42] Les Verts, op. cit. footnote 43.
[43] Mustafa T Karayiğit, **Avrupa Birliği Normlarının Denetiminde Gerçek ve Tüzel Kişiler Faktörü.** 1st Edition Ankara: Adalet, Ankara 2008 page 1.
[44] Tracey A Thomas, " Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy" The University of Akro, 2004, page 4.
[45] Lenaerts, Maselis & Gutman, op. cit. footnote 5 p. 1.
[46] Patricia Fragoso Martins, "Rethinking Access by Private Parties to the Court of Justice of the European Union: Judicial Review of Union Acts Before and After the Lisbon Treaty", Universidade Catolica Portuguesa, 2012 page 8.

EU legal order are highly protected.[47] *Van Gend en Loos* on the other hand, is the jurisprudence in which the Court announced that the EU legal order is a new legal order separate from international law whose subject is not only Member States but also individuals.[48]

The Treaties have established a system of courts, procedures and remedies for the protection of rights conferred by the EU to all the subjects of the EU law. Although the separation of rights and remedies as legal terms is not the subject matter of this thesis, it might be worthy to shortly mention that rights which are based on the substantive law, and remedies which are covered by the procedural law are closely related. The presence of remedies (*Ubi jus ibi remedium*) is a *must* for the protection of rights, and for providing an effective judicial protection, which can only be possible by a developed and effective judicial review mechanism.

The meaning of judicial review is slightly different in the national legal systems, and especially in the civil law countries' legal systems, as the judicial review of the EU legal order does not have a clear cut characteristic, as there is no distinction between the laws and administrative acts.[49] The Union judicial review mechanisms contain both constitutional and administrative review in the same system.

It is beyond discussion that in a modern legal order which is ruled by law, review of the constitutionality of legislative measures and the legality of administrative measures is a task more than a responsibility.[50] The protection of rights can be only possible with a system of adequate remedies, which realizes the judicial control by way of judicial review. It is also the type of proceeding in which the court reviews the validity of a measure or the decision of a lower court.

The judicial review in a legal system refers to the courts' supervision of the measures. In a legal system, judicial review helps to realize the accountability of the

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[47] Ibid.
[48] Karayiğit, op. cit. footnote 45.
[49] Albors-Llorens, op. cit. footnote 17, p.4.
[50] Briem, op. cit. footnote 32, p.9.

administration, strengthens the separation of powers principle, realizes the constitutionality and legality of acts in the light of the rule of law principle, and protects the fundamental rights. The presence of an independent judiciary realizes the legality review of the administrative and legislative organs as stated by Karayiğit. [51] It also allows the protection of "legitimate interests of the individuals."[52] The judicial review, apart from the judicial control also determines whether the rights were infringed by the acts or measures.[53]

Every legal system which is ruled by law should have a mechanism to test the legality of measures adopted by its institutions. Especially due to the fact that the European Parliamant does not have the exact role as the legislature in the national legal systems the judicial review has a more critical role in the EU system.[54]

As stated by Karayiğit, judicial review has the role of developing fundamental rights and the European integration.[55] Both the EU and the CJEU take their legality from the relationship they formed with the individuals, and that even in the early jurisprudence of *Van Gend en Loos* the individuals were mentioned as subject of the EU law, it is clear that the judicial review of individual rights and the role of the individuals in the judicial review mechanism of the EU have been a very important concern of the CJEU and the EU legal doctrine.

According to the Court, the EU judicial review system is a highly developed and complete system in terms of providing judicial protection. Judicial protection is provided to individuals in both Union and national levels.[56] National courts are also under the obligation of ensuring the effectiveness of the judicial protection. Although at the beginning the court did not interfere with the national autonomy, in its latter decisions it

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[51]Karayiğit, op. cit. footnote 11, p.4.
[52] Türk, op. cit. footnote 6.
[53]Thorson, op. cit. footnote 7, p.11.
[54] Mariolina Eliantonio and Haakon Roer-Eide, " Regional Courts and Locus Standi for Private Parties: Can CJEU Learn Somethin from the Others?", 2014, Brill Academic Publishers, Volume 13 Issue 1 p.121.
[55] Karayiğit, op. cit. footnote 11.
[56] Thorson, op. cit. 7 p. 1.

has started to establish that the Member States are also responsible with providing the effective judicial protection and to increase the effectiveness of it. In 1968, *Salgoil* case[57] when the protection of individual rights were mentioned the Court stated that it was the Member States' responsibility to ensure the individual rights. National courts are considered to be normal Union courts as most of the proceedings are brought before the national courts.[58]According to Leczykiewicz, the duty given to the national courts "which leads to their national autonomy to be restricted.[59]

"The right to an effective judicial protection is a fundamental right recognised at international level, and in the majority of national legal orders, as an essential element of democratic accountability." [60] The effective judicial protection, for this reason is considered as a human right and a general principle of law.[61] The EU legal order also accepts the effective judicial protection as a principle of EU law. CJEU has also accepted the duty of protecting fundamental rights and individual rights and in *Kadi* decision, the CJEU has even considered the fundamental rights in a higher position than the primary law in the hierarchy of norms.[62]

Many references have been made to individuals and protection of rights in the CJEU decisions. [63] According to Pernice "No institution in Europe has taken effective remedies and the defense of the rights and freedoms guaranteed by the law of the Union more seriously than the CJEU during its 60 years of existence... The only open question in this regard is the access to justice in cases of individuals directly affected by the EU legislative acts."[64] It has been mentioned in these decisions that not only the Union institutions but also the Member States are under the obligation to protect the fundamental

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[57]Case, C-13/68, Salgoil, EU:C:1968:54.
[58]Thorson, op. cit. 7 p. 5.
[59] Dorota Leczykiewicz, " Effectibe Judicial Protection of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law?" Trinity College and the Institute of European and Comparative Law, University of Oxford, 2010, 35 EL Rev, Part 3 page 22.
[60] Linda Maria Ravo, " The Role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions" page 102 http://www.google.com.tr/+q=the+role+of+the+effective+judicial&* .
[61] Naeye, op. cit. footnote 13 p.11.
[62]Karayiğit, op. cit. footnote 11 p. 7.
[63] Ingolf Pernice, "The Right to Effective Judicial Protection and Remedies in the EU" *CJEU* 2013 http://link.springer.com page 390.
[64] Ibid.

rights and contribute to the efforts of attaining effective judicial protection. This was codified under Article 19 of the TEU, which holds the Member States responsible for providing an effective judicial protection to individuals,[65] and Article 47 CFR which is the article directly related to the effective judicial protection. Apart from these, many of the Court's judgement depended on Articles 6 and 13 of the ECHR.

In the *Johnston*[66] case effective judicial protection was described as being is an expansion of the principle of effectiveness, while some others have commented that effectiveness was a part of the effective judicial protection principle. [67] The CJEU established the effective judicial protection as one of the principles of Union law, and in *Rewe* judgement the Court has established the equivalence and effectiveness standards.[68]

Factortame I[69] and *Francovich*[70] jurisprudence have helped the effective judicial protection principle to be "defined as a positive obligation of national authorities to create the legal and administrative environment that would allow the assertion of EU rights before the national courts".[71] In *Stauder*[72] case, the "idea of general principles of Union law" was introduced by the CJEU. In the *Internationale Handelgesellshaft*[73] Case the Court has made reference to the general principles as being based on the constitutional traditions of the Member States. In the *Nold*[74] Case it stated that "the human rights agreements and international conventions were sources of inspiration for general principles". In the *Alassini* Case, the Court has once more referred to the principle of effective judicial protection as being a fundamental right.[75]

According to the jurisprudence of the CJEU, "the effective judicial protection contains the access to court and effective judicial review both at national" and EU

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[65]Ibid footnote 65.
[66]Case, C-222/84, *Johnston* [1986], ECLI:EU:C:1986:206.
[67] Sjöstrand, op. cit footnote 29 p11.
[68] Briem, op. cit. footnote 32 p. 14.
[69]Case, C- 213/89, Factortame I, [1989], ECLI:EU:C:1990:257.
[70] Case, Joined Cases 6/90 & 9/90, Francovich, [1991], ECLI:EU:C:1991:428.
[71] Constantin and Xanthaki, Helen op. cit. footnote 24 page 3.
[72]Case, C- 29/69 *Stauder*, EU:C:1969:57.
[73]Case, C-11/70, *Internationale Handelgesellshaft*, EU:C:1970:114.
[74] Case, C-4/73, *Nold*, EU:C:1975:114.
[75] Sjöstrand, op. cit footnote 29 p11page 13-15.

levels.[76]Although both the Member States and Union institutions have to respect the effective judicial protection principle, Biernat comments that although the case-law obliges the respect to this principle, in reality this obligation is only applied to the Member States. She adds that the Court has been always strict with the national courts whenever the principle is breached by the national courts.[77] The principle of effectiveness in the European legal system imposes duties to Member States to protect the individual rights and to make sure that the national rules will not make it impossible to exercise the rights granted by EU law.[78]

Arnull states that the case law of the Court gives an important place to the effective judicial protection and that both national courts and the Union courts are obliged to respect this principle, but adds that the national courts are more affected by it.[79]According to Sjöstrand, the principle of effective judicial protection is a combination of different rights. She also adds that Article 4(3) of the TEU which regulates the duty of cooperation is also related to the principles of effectiveness and equivalance.[80]

Effective judicial protection also contains securing some procedural rights such as "the right to be a party, the right to be heard, the right to access to relevant documents, the right to a legal counsel, the duty to give reasons for administrative decisions, the right to an administrative act within reasonable time, the right to access to the court, the right to appeal" etc.[81]The principle also includes the right "to a fair process within a reasonable time."[82] The effective judicial protection requires the natural and legal persons who have

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[76] Lenaerts, Maselis& Gutman, op. cit 5 page 111.
[77] Ewa Biernat, "The Locus Standi of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community" NYU School of Law, 2012 page 22 http://www.jeanmonnetprogram.org .
[78] Zoltan Szente and Konrad Lachmayer (Ed), **The Principle of Effective Judicial Protection in Administrative Law A European Comparison,** 1st Edition, New York: Routledge, Taylor-Francis Group London and New York, 2017 page 3.
[79] Anthony Arnull, "The Effective Judicial Protection in EU Law:An Unruly Horse?" February 2011 http://www.researchgate.net/publication/290568823_The_Principle_of_Effective_Judicial_Protection_n_EU_Law_An_Unruly_Horse.com page 51.
[80]Sjöstrand, op. cit footnote 29 p. 11.
[81]Szente & Lachmayer (Ed), op. cit footnote 80 p 7
[82] Ibid, preamble.

been affected negatively by the administrative act to be able to apply to a court and have a fair trial. [83]

Although the right to effective judicial remedy was developed with the *Johnston* case, the effective judicial protection term was used for the first time in its *von Colson and Kamann*[84] judgement. In this judgement it was stated that the national remedies "had to guarantee real and effective judicial protection." [85] "The Member States are requested to ensure that their courts provide direct and immediate protection and that the Union rights are effectively protected in each case."*Von Colson* case is the case of "explicit recognition of the principle of effective judicial protection".[86]

Arnull states that the Court adopted in the *UPA*[87] case that the effective judicial protection shall not be only applied to national remedies, but also to the ones created by the Treaties. In the *UPA* case[88] the Court stated that the right to effective judicial protection was a general principle of law based on the constitutional traditionals of Member States which has also been stated in Articles 6 and 13 of the ECHR.[89]

In *Coote*[90] case the Court stated that "the principle of effective judicial protection might not be fully applicable if the enforcement of Community rights is completely precluded" and added that " fear of such measures, where no legal remedy is available against them, might deter workers… from pursuing their claims by judicial process".[91] The approach of the Court in the *Upjohn*[92] case has been less liberal in which the Court

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[83] Ibid footnote 84 page 7.
[84] Case, C-14/83, *von Colson and Kamann*,EU:C:1984:153.
[85] Sjöstrand, op. cit. footnote 29, p 11.
[86] Sacha Prechal, & Rob Widdershoven, " Redefining the Relationship Between Rewe-effectiveness and Effective Judicial Protection" Review of European Administrative Law Volume 4 ,Paris Publishers, 2011.
[87] Case, C-50/00, *UPA*,EU:C:2002:462.
[88] *UPA*, Ibid.
[89] Marton Varju, **European Union Human Rights Law, The Dynamics of Interpretation and Context.** 2014, Cheltenham: Edward Elgar Publishing Inc, page 64.
[90] Case, C-185/97, *Coote*, EU:C:1998:424.
[91] Briem, op. cit. foonote 32, p.15.
[92]Case, C-120/97, *Upjohn*, EU:C:1991:147.

held that an administrative decision did not need to be reviewed by a court capable of substituting their assessment of facts… for the assessment made by the authorities".[93]

In *Jego-Quere* case[94] the General Court (GC) stated "that access to courts was one of the essential elements of a community based on the rule of law" and the CJEU based the effective judicial protection to the constitutional principles of Member States and to Articles 6 and 13 of the ECHR.In this decision reference has also been made to Article 47 of the CFR.[95]

Another case in which the Court has pointed at the importance of the effective judicial protection was the *Alassani*[96] judgement. In this judgement "the principle of effective judicial protection and effectiveness" were stated and the principles of effectiveness and equivalence were mentioned as a part of the principle of the effective judicial protection. The understanding of the principle of effectiveness points out the importance of "national remedies and the procedural rules"[97] to be in consistency with Union law.

In *Kadi*,[98] the Court decided that the regulation in question caused an infringement of the effective judicial protection. However, the Court is also criticized "when it comes to the execrcise of its own powers the Court seems uncertain about how much weight to give to that principle."[99]

2.2. HOW DO WE KNOW IF A LEGAL SYSTEM PROVIDES EFFECTIVE JUDICIAL PROTECTION?

We would expect the concepts of the modern legal systems to be objective. So the answer to the question of how to know if a legal system provides effective judicial protection should have an objective answer. Non-exhaustively, the effective judicial

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[93] Briem, op. cit. footnote 32 p. 15.
[94] Case, C-177/01, Jego Quere,EU:C:2004:210.
[95] Varju, op. cit. footnote 64 p 65.
[96] Case, C-317/08, *Alassini.[*2000], ECLI:EU:C:2010:146.
[97] Sjöstrand, op. cit. footnote 29 p 9.
[98] Case, Joined Cases 402/05 & 415/05, Kadi, and 584/10, Kadi II, EU:C:2008:461 and ECLI:EU:C:2013:518.
[99] Arnull, op. cit. footnote 81 p 69.

protection may be considered to be provided if the rule of law, general principles of law, fundamental rights are respected in a legal system. The presence of a developed judicial review mechanism, access to justice to be possible for the individuals and the existence of legal certainty can be counted as other important factors for a positive consideration on an effective judicial protection. It would also be expected for the locus standi conditions not to be very strict so that substantial and procedural protection of rights can be possible. In short, the remedies and procedures should be effective and it should be possible to access to justice and to reach an impartial tribunal or court. These examples can be increased. Articles 6 and 13 of the ECHR and 47 of the CFR would be good criteria for determining whether or not a legal system has an effective judicial system. While the EU legal system was criticized for not providing an effective judicial protection to individuals, the CJEU has been consistently stating that the EU legal system did provide an effective judicial protection to individuals.

In terms of the EU legal system, as explained in the previous section, as the EU and the Member States that form it are all ruled by law, and that Articles 6 and 13 of the ECHR have been inserted into the jurisprudence of the CJEU for several decades by now, the increasing importance of the effective judicial protection in the EU legal order cannot be underestimated. However, are the procedures and remedies complete as they should be? Does the judicial review mechanism provide a complete system for individuals? Is there a satisfactory way of compensating the rights that are infringed, or is there are gap in the protection of individual rights? These questions should be discussed in the light of the Treaty articles including the situations before and after the Lisbon amendments, and the jurisprudence of the CJEU.

We now know that with the developing jurisprudence of the CJEU, the effective judicial protection is considered as a general principle of EU law which is also a human right, but what criteria should be taken into consideration to determine whether a legal system provides effective judicial protection? As this thesis is focused on the rights provided to individuals, the analysis will be limited to the effective judicial protection provided to individuals.

Due to the sui generis characteristic of EU law, the individuals are also the subjects of it as admitted by the CJEU in its jurisprudence, but this has not been enough to stop the harsh critics stating that there is lack of protection in the field of individual rights in general and in judicial protection.[100] As the fundamental rights are very closely linked to the rule of law, and the effective judicial protection and fundamental rights are correlated to the effective judicial protection the EU legal order could not avoid giving importance to the fundamental rights[101]. A legal order which is ruled by law surely requires a system of judicial review of the administrative, and legislative acts, as well as judicial independence and respect to law.[102] The rule of law and the fundamental rights make sure that legislation and the administration respect law and are accountable for any breach of law or fundamental rights.[103]

Although the CJEU and the constitutional traditions of Member States which are all modern countries ruled by law, and accept the importance of effective judicial protection why is the progress in the effective judicial protection is slow compared to other areas and notions of the EU? Some may answer telling that EU is historically not a human right organization[104] and that it has been more focused on economical goals, or CJEU activism may be criticized to be only focusing on the interests of the Union more than the individuals which form the Member States, and some others may state that the developments that are taking place in the human rights sector are affecting the EU law but that CJEU does not have the duty or the power to interpret the articles of the Treaty broader than they are. However, I do not believe that many scholars will be of the legal opinion that the effective legal protection of the individuals was a complete system of remedies before the Lisbon amendments.

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[100]Aybike Aygün, "Avrupa Birliği Temel Haklar Çerçevesinde Bireylerin Hukuki Statüsü", 2007, Ankara Üniversitesi, http://tez.yok.gov.tr.

[101] İrem Belin, " Avrupa Birliği'nde İnsan Haklarının Gelişimi" Dokuz Eylül Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı Avrupa Birliği Hukuku Programı Yüksek Lisans Tezi, 2007 http://tez.yok.gov.tr page 4.

[102] Tanrıkulu, M.Sezgin "İnsan Hakları Avrupa Sözleşmesi ve Etkili Başvuru Hakkı" Seçkin 2012, Ankara page 25-81

[103] Marton Varju, **European Union Human Rights Law, The Dynamics of Interpretation and Context.** 2014, Cheltenham: Edward Elgar Publishing Inc, page 25.

[104]Leczykiewicz, op. cit. footnote 61, p18.

It is a well known fact that the presence of an effective and developed judicial review system is a must for the effective judicial protection to be present in a legal system. We know that we should focus more on the procedural rights of individuals in terms of judicial review for determining whether or not a legal system contains an effective judicial protection to individuals. The strict locus standi conditions of direct actions and the slow progress in the jurisprudence of the CJEU in the field of protection of individual rights have caused hesitations of whether the EU have provided gaps in its system of remedies and procedures over the last decades. It might be worthy to start analyzing the progress in the field of human rights and than to summarize at what points the gaps existed in the procedures available and up to what level have they been closed.

2.3. EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EFFECTIVE JUDICIAL PROTECTION

The ECHR which is an important legal document for the protection of fundamental rights has also evidence that shows that individuals are also subject of the Convention.[105] Although having an important role in the development of the human rights field in the Member States and the EU law, including the jurisprudence of the CJEU, the EU is still not a part to the ECHR.

"The CJEU has developed a jurisprudential legal system on human rights field starting from the end of 1960s."[106]At the time, although no legal regulations were present, the jurisprudence of the CJEU has started to develop the fundamental rights.[107] "The Community that has evolved into being a Union has been obliged to be more careful in the area of fundamental rights."[108] According o Defeis, "human rights have been placed at the forefront of the agenda of the EU"[109] after some point. In the first stage of the

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[105] Sead S Fetahagic, **European Convention on Human Rights in the Context of the European Union Law**. Grin, Seminar Paper, 2003, University of Sarajevo 8 page 3.

[106] Ahmet Burak Bilgin, **Avrupa Birliği'nde İnsan Haklarının Gelişimi ve Korunması** ,İstanbul: Legal, 2016 p. 31.

[107] Gökçe Topaloğlu, **Avrupa Birliği'nin Avrupa İnsan Hakları Konvansyonu'na Katılımı.** İstanbul:12 Levha, 2015, page 1.

[108] Sionaidh Douglas-Scott and Nicholas Hatzis, **Research Handbook on EU Law and Human Rights**. UK:Elgar, 2017 page 15.

[109] Elizabeth F Defeis,"Human Rights and European Court of justice: An Appraisal", Fordham International Law Journal, 2007, Volume 31, Issue 5, page 1115.

Court's jurisprudence no reference was made to the ECHR, second stage of the jurisprudence the Court on the other hand has adopted a precautious attitude, and in the third stage many references have started to be made to the fundamental rights. [110]

It is easy to find a close relationship between Article 47 of the CFR and Articles 6 and 13 of the ECHR.[111] Article 6 guarantees the fair trial, public hearing and the right to defence, whereas Article 13 mentions the right to an effective remedy. Article 47 of the CFR on the other side, covers both the content of Articles 6 and 13.[112] In this perspective Dougan states that "The Court's general principle of access to judicial process is broader in its scope of application than the requirement of judicial control contained in Article 6 ECHR". He adds that Article 6 of the ECHR is related to the civil rights and obligations and criminal charges whereas the Union principle on access to effective judicial review refers to rights and obligations arising from the Treaty as well as the decisions taken by national authorities of administrative nature. [113]

The principle of effective judicial protection was for the first time referred by the CJEU in the *von Colson and Kamann* [114]case in which the court questioned whether the national remedy was sufficient to provide effective judicial protection of Union rights. The court stated clearly in this decision that the national remedies shall guarantee "real and effective judicial protection."[115]

The understanding of fundamental rights has been affected by some dynamics in the European Union law. Varju suggests that the protection of fundamental rights was intentionally introduced to the EU legal discussions in order to relieve the tension which was caused due to the challenges directed to the domestic constitutional principles, discussions on autonomy and supremacy. In the *Johnston*[116] case the CJEU has extended the coverage of the principle and questioned the effective judicial review and access to a

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[110] Işıl Özkan, **Avrupa Birliği Kamu Hukuku.** !st Edition, Ankara: Seçkin, 2017, page 261.
[111]Briem, op. cit. footnote 32 p18.
[112] Mak, op. cit footnote 112 page 4.
[113] Michael Dougan, **National Remedies Before the Court of Justice.** 1st Edition, Portland HartPublishing 2004,page5.
[114] Case, C-14/84, Kamann EU:C:1984:153.
[115] Sjöstrand, op. cit footnote 29,p 8.
[116]Case, C-222/84, Johnston, EU:C:1986:206.

competent court.[117]The importance of the principle was stressed out in the *Heylens*[118] case, and the principle started to be "applicable in cases where the principle was not in codified form."[119]

The principle is referred to in Articles 6 and 13 of the ECHR, article 6 being related to "the right to fair and public trial within a reasonable time by an independent and impartial tribunal established by the law" and Article 13 refers to the right to effective remedy in case of individual rights. Sjöstrand suggests that the court has taken these two articles as reference in the *Johnston* and *Heylens* cases at the time that the effective judicial protection principle had started to be inserted in the Union law.[120]

2.4 SECURITY COUNCIL RESOLUTIONS AND THE EFFECTIVE JUDICIAL PROTECTION

The *Kadi*[121] case is another milestone case in the effective protection of private parties. Which has started a discussion on the relationship between the UN Security Council Resolutions and the human rights.

In 1999 the UN Security Council has passed a Resolution which freezes the assets of suspects who are believed to have relationship with Al-Qaida. Mr Kadi, a Saudi national was listed by the Sanctions Committee as being suspected to have a connection with Usama bin Laden. The Council of the EU has implemented these measures in accordance with the Chapter VII of the UN Charter and has applied the sanctions to the persons whose names were listed. Kadi brought an action against measures of EU which were based on the Security Council Resolution, and the case was before the GC in 2001. He claimed that his rights to be heard, effective judicial protection, property rights and proportionality principles were breached. He also stated that the Community had no competence to adopt these measures. The GC stated that there was no breach of jus cogens

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[117]Sjöstrand, op. cit. footnote 133.
[118] Case, C- 222/86, Heylens EU:C:1987:442.
[119] Sjöstrand, op. cit. footnote 29,p 9.
[120] Sjöstrand, op. cit. footnote 29, p.9.
[121] CJEU Case, *Kadi,* 405/5, 415/05, [2008], ECLI: EU:C:2008:461.

and Kadi has taken this decision to appeal. At the time the AG Maduro had criticized the decision of the GC. In 2008 the Court reversed the decision of the GC and agreed with the claims of Mr Kadi. This has been a very important step in the effective judicial protection of individuals. With this decision the CJEU has referred to the core constitutional principles of the EU and has stressed the importance of protection of fundamental rights for the EU. This has shown that the EU acts implementing the UN Security Council Resolutions cannot be immune from review.

The Commission had with new reasons and with a new measure insisted to include Mr Kadı's name in the blacklist which has caused Mr Kadı's legal team to take a new action for the annulment of this measure. The GC has decided that there was a breach of fundamental rights of Mr Kadı in the *Kadi II* decision and that the fact that he was not given any information was also a breach. This decision of the GC was appealed by the Council, the Commission and the UK and 13 MS have intervened into the case. However the outcome of the *Kadı II* appeal decision was as expected, the CJEU has again depended its judgement on the fact that the EU is based on rule of law, and that protection of fundamental rights was a constitutional principle. The Court has also made reference to Article 47 of the CFR of the EU. The CJEU has stated in the judgement that the effect of international agreements could not endanger the protection of fundamental rights and the constitutional principles of the EU.[122] This decision had the importance of referring to the constitutional nature of the EU legal order and underlining the cooperation between the human rights and the rule of law. It has also clarified the status of the Security Council Resolutions in the hierarchy of norms. [123] With the *Kadı* decision the ECtHR has gained support in giving the human rights priority when compared with the Security Council Resolutions.

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[122] Andrea Guazzarotti, "Security Council Resolutions before European Courts: The Elusive Virtue of Non Direct Effect", Centro Studi Sul Federalismo, Perspectives on Federalism, Vol 4, issue 3, 2012.
[123] Varju, op. cit. footnote 91 page 37.

Mr Kadi's legal team is still considering whether or not to take legal action based on Article 340.[124]

Karayiğit suggests that the Union is neither a member of the United Nations nor the addressee of the Security Council Resolutions and does not have to act in accordance with them. He adds that in any case as the Member States had the will to fulfill their obligations arising out of the Charter and this responsibility is implicitly stated in the Ex-articles 297 and 307.[125] According to GC the Security Council Resolutions are outside of the Court's jurisdiction and the Court cannot even indirectly review these decisions. The only review mechanism that the Court has against these Resolutions is the *jus cogens* principles and as long as the Security Council Resolutions are not against the human rights which is considered as jus cogens, these Resolutions are at a higher hierarchy than the Treaties. [126] He adds that as under this agreement there is no review available for the Security Council Resolutions, this is a clear gap in the protection of individual rights. [127] The GC also states that the Union is not directly bounded with the United Nations Charter like its Member States. CJEU has also stated that the UN Security Council resolutions did not have direct effect.

There are three theories in terms of relationship between the Security Council Resolutions and the other treaties which have been included in the case-law of the CJEU and of ECHR. The first one, which is named as the monist theory, considers the UN Security Council Resolutions at the top of the hierarchy of norms in accordance with Article 103 of the UN Charter, so that their provisions shall prevail all the measures including the Treaties. The second approach is in line with the first one except that the Security Council Resolutions are considered not to be immune from judicial review when the resolutions are in conflict with *jus cogens*. The third approach states that due to the autonomous nature of the EU law, the implementing measures of the UN Resolutions

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[124] Matej Avbelj and Filippo Fontanelli and Guiseppe Martinico n & Fontanelli,Filippo & Martnico Guiseppe, **Kadi on Trial** 1st Edition, New York: Taylor and Francis Group,2014 , pages 17-22.
[125]Karayiğit, op. cit. footnote p. 165.
[126] Ibid p.122.
[127] Ibid p 123.

shall be subject to the judicial review of the CJEU in terms of compatibility with the EU "constitutional principles." [128]

[128] Guazzarotti, op. cit. footnote 141 p. 129.

3.JUDICIAL REVIEW OF INDIVIDUAL RIGHTS

3.1 JUDICIAL REVIEW IN EU LAW

What are the conditions for a system to have adequate remedies? Is judicial protection provided with the possibility of access to a competent court? How much do the admissibility criteria affect the presence of a complete system of remedies? Different answers can be given to these questions however it is a fact everyone will admit that judicial review is a requirement of a legal system that is ruled by law. Taking into consideration the progress of the case-law and the development of the judicial review system it is clear that this subject has more depth into it.

Apart from being a requirement for protecting the rights of individuals, judicial review also has a significance in maintaining the balance between institutions, attaining legitimacy of the government and institutions and many other ideals. As this thesis is concerned about the individuals and the remedies provided to them, the focus of the analysis on judicial review mechanism will be limited to that. [129]

All the legal systems have different judicial review mechanisms which provide different remedies to individuals. In national legal systems the courts practice in one area of law which is their expertise, however, the actions that are followed by the Union courts are more complex, sometimes being of constitutional, administrative or civil character. [130] The judicial review mechanism of the Treaty has established a system which consists of direct and indirect remedies.[131] The direct and indirect procedures are expected to complement each other however, the question of whether the procedures and remedies provided to individuals is a complete system can only be answered after going through the remedies available for individuals.

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[129]Türk, op. cit. footnote 6 page 1.
[130] Özkan, op. cit. footnote 40 p.35.
[131] Josephine Steiner and Lorna Woods and Christian Twigg- Fleshner, **EU Law.** Oxford: Oxford University Press, 2006 page 147.

The Union focuses on the principle of "integration through law" and tries to achieve a legal order in which the norms are applied properly and their review is done effectively.[132]Lenaerts comments that the EU rights "must be accompanied by adequate remedies" and he adds that "although it is for the Member States to establish a system of legal remedies and procedures, EU law requires them to do so in a way that ensures respect for the right to effective judicial protection"[133] on the ground that EU judicial review system is the combination of direct and indirect procedures to be carried out at the both EU and national levels. So the proceedings before the national courts also have a great importance in order for reaching a completer system of judicial remedies for individuals.

The action for annulment which is regulated under Article 263 and the action for failure to act regulated under Article 265 are the direct actions. It is also possible to consider the damages actions under Articles 288 and 340 a being considered as direct actions too. The plea of illegality under Article 277, which is considered to be as a declaratory action allowing the parties "to challenge an act which constitutes the basis of another act"[134] and the preliminary ruling procedure under Article 234 are the indirect actions which are available for individuals. The European Courts also have the right to grant interim measures under the fulfillment of some conditions although the actions before the European Courts do not have suspensory effect. [135]

The remedies available at the Union level are supplemented with the possibility of challenging the acts at the national level.[136] The validity of EU regulations can also be contested according to Article 267 of the TFEU as a preliminary ruling procedure by the EU nationals applying to the national courts agaist the measures that are executed in that country.[137] The preliminary ruling procedure and the action for annulment are the most

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[132] Dougan, op. cit. 131 footnote p 19
[133] Koen,Lenaerts,"Effective Judicial Protection in the EU" http://ec.europa.eu/justice /events/assises-justice-2013/files/interventions/koenlenaerts.pdf. p 2
[134] Albertina Albors-Llorens, "Institutions After Lisbon, The Remedies against the EU institutions after Lisbon: An Era of Opportunity", Cambridge Law Journal, 2012, p. 509
[135] Albors-Llorens, op.cit. footnote 17 p 9
[136] Sjöstrand, op. cit. footnote 29, p 18
[137] Arsava, op.cit footnote 115

common and most debated judicial review procedures in the discussion of effective judicial protection for individuals. The action for annulment and the preliminary ruling procedure have different purposes, and are independent from each other. The objectives and conditions of both of the procedures are completely different from each other. In this section while explaining the procedures available for individuals I will also be discussing if the preliminary ruling procedure is a successful complement of the action for annulment or just a weak alternative of it in the area of protection of individuals rights.

The fact that the remedies available in the Union legal system are more than one, does not give the private parties the option to choose the remedy they would like to choose. The Union has been careful not to have the remedies collide with one other. The admissibility criteria for all the remedies are different from each other, one remedy cannot be used "to block or bypass" other ones. [138]

According to the CJEU, although the Treaties keep the Union courts responsible for providing a legal protection to the individuals, in order for the protection provided to be effective the national courts shall also provide the necessary remedies.[139] CJEU states in many of its judgments that that the system of remedies does not have any gaps however the Member States are given important duties, for providing effective judicial protection to individuals.

As the CJEU is of the opinion that the judicial review mechanism doesn't contain a gap and that the preliminary ruling procedure is a successful complement of the action for annulment, it will be necessary to analyze both of these remedies in details in the light of the jurisprudence and the on-going debates. It is clear that both the national courts and the Union Courts are considered to be responsible with the protection of individual rights. This duty is mentioned both in the Treaty and the jurisprudence of the CJEU. However, while the advantages and the disadvantages of the preliminary ruling procedure is being

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[138]Karayiğit,op. cit. footnote 45, 165.
[139] Can &Sarıaslan, op. cit. footnote 12, page 33.

analyzed, it will also be discussed up to what point can the preliminary ruling procedure be an effective alternative to the action for annulment.

3.2. THE REMEDIES AVAILABLE FOR INDIVIDUALS BEFORE THE LISBON TREATY

Although the Treaties have established a system of remedies for the private individuals which consists of different procedures before the EU or national courts, the debates on whether or not there is a gap in the effective judicial protection for them has been an on-going debate for the last several decades. The direct actions have been the remedies which are before the EU courts whereas the indirect actions give the possibility of challenging measures either before the national courts under the preliminary ruling procedure or before the EU Courts under plea of illegality.

The action for annulment which was regulated by ex Articles 173 and 230 have attracted so much of attention not only because of its limited criteria and the strict interpretation of the CJEU for the admissibility of the individual applications, but also because of this remedy having a more central role in the providing an effective judicial protection to individuals as being the direct procedure for challenging Union measures.[140] The right of individuals to to lodge an application for the action for annulment was first regulated under Article 173(2) of the EEC Treaty.

The Article stated that,

> *"Any natural or legal person may, under the same conditions, appeal against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to him"*

The right of the individuals was first discussed with this article in the EU legal order which was later on also codified in Article 230 of the EC Treaty. The article has

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[140] Eliantonio, Mariolina & Kaş, Betül " Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?" Journal of Politics and Law, Volume 3 No 2 September 2010, http://citeseerx.ist.psu.edu/viewdoc/download page 121

been regulated under Article 230 with the entry into force of the EC Treaty under Article 230(4), no changes were done in the article in terms of protection of individuals' rights.[141]

> *"Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."*

Under this article the possibility of the private individuals challenging the measures by this remedy was very limited due to the strict criteria and to the *Plaumann* doctrine. It would not be wrong to say that the restrictive articles and the approach of the CJEU were the reasons why the discussions have started on the effective judicial protection of individuals. It was also stated that these restrictive criteria led to "denial of justice". However the aim was stated to limit this procedure to individuals who had direct and individual concern and to measures which did not have general application.[142] Although the preliminary ruling procedure was referred to as being a supplementary remedy due to the fact that the proceeding would have to be before the national courts the fact of whichy caused it to be a less effective and different procedure than the action for annulment.[143]

The case-law of ex article 230/4 mainly focused on the meaning of a decision which is in the form of regulationand the criteria of direct and individual concern.[144] It is important to mention that although the criteria for the action for annulment for individuals were very strict most of the times the applications were being dismissed due to admissibility because of procedural rules and not because of the substance. In accordance with the clear wording of the article, an individual would be considered to have locus standi in three situations which are; if a decision was addressed to him, if a decision was

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[141] Magdelena Kucko, " The Status of Natural or Legal Persons According to the Annulment Porcedure Post-Lisbon", LSE Law Review, 2017, Volume 2, page 105

[142] Eliantonio, Mariolina & Kaş, Betül " Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?" Journal of Politics and Law, Volume 3 No 2 September 2010, http://citeseerx.ist.psu.edu/viewdoc/download p.122

[143] Kucko, op. cit. footnote page 105

[144] Bilgi, op. cit. footnote 194 p.106

addressed to a third party, but was of direct and individual concern to him, and if a decision in the form of a regulation was of direct and individual concern to him. According to the wording of the article, the applicants could apply to the action for annulment within three different situations:

3.2.1.The Decisions Addressed to the Applicant:

The applicants did not have any difficulty in terms of admissibility in the decisions addressed to the applicant, this is why these kinds of measures have not taken an important part in the doctrine and the jurisprudence of the CJEU.

3.2.2.Decisions Addressed to Third Parties and are of Direct and Individual Concern to the Applicant:

Decisions addressed to a third party could also be reviewed under this procedure with the existence of direct and individual concern criteria.[145] At the time of Article 230 (and ex Article 173) for the decisions that were not directed to the applicant both the direct and individual concern criteria had to be fulfilled which was more strict than the current version of the article.

3.2.2.1. Locus Standi of Individuals Pre-Lisbon :

Before the Lisbon amendments the possibility of bringing a direct action for annulment was very limited for the natural and legal persons which was not only because of the strict criteria set out in article 230 but also because of the strict interpretation of it by the CJEU. The restrictive approach of the Court has been the starting point of all the academic discussion on the possibility of access to court for the individuals.[146]

In accordance with the jurisprudence of the *Plaumann* case, the CJEU has restrictively interpreted the "individual concern" criterion for individual applicants. This

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[145] Roberto Mastroianni and Andrea Pezza, " Access of Individuals to the European Court of Justice of the European Union Under the New Text of Article 263, Para 4 TFEU" Rivista Italiana Di Diritto Pubblico Comunitario, Anno XXIV Fasc. 5-2014, Milano page 924

[146] Eliantonio& Kaş op. cit. footnote p 121

has consistently been used as a criterion for the courts in order to examine whether the natural and legal persons are individually concerned by the acts in question. The *Plaumann* formula[147] and the difficulty in fulfilling the individual concern criterion had important impact on the slow progress in the protection of individual rights.[148] The application of this criterion was criticized for being extremely strict. [149]

3.2.2.1.1. Direct Concern

The direct concern criterion which was the easier one to fulfill compared to the individual concern criterion has not been the centre of the academic debates as much as the latter one. This criterion meaning that the act is directly applicable to the aplicant's situation,[150] affects the applicant's legal status immediately and without leaving any dicreation to the Member States to implement measures.[151] The logic behind this criterion is that the Member States are granted the duty and the right to have a role in the implementation of the Union law.[152]

Direct concern has two dimensions one being the necessity of having a direct and "causal link between the act that is being challenged and the damage that was suffered" being present and the second one is that the "measure in question has to be a legal measure".[153]

Before the article was amended the individual concern criterion was not enough to have a standing for the non-privileged applicants. In the *International Fruit Company* case the Court considered that the applicant was directly concerned due to the act that the national authorities were not given any discretion for the issuance of a license. The direct

[147] Case,C- 25/62, Plaumann, ECLI:EU:C:1963:17
[148] Naeye, op. cit. footnote p26
[149] Kucko, op. cit. footnote 195, p. 102
[150] Directorate –General For Internal Policies Policy Department Citizen's Rights and Constitutional Affairs" "Standing up for Your Rights in Europe Locus Standi" Study 2012 ,page 27
[151]Türk, op. cit. footnote 6
[152]Türk, op. cit. footnote 6
[153] Kucko, op. cit. footnote 195, p. 105

concern criterinon was considered to be an easier criterion as the direct concern was mush easier to fulfill than the individual concern criteria.[154]

3.2.2.1.2. The Individual Concern- The Plaumann Formula

In accordance with Article 230, although the individuals had the right to take legal actions against Union measures that are of direct and individual concern to them, due to the strict criteria the chances of taking these direct actions before the Union courts were very low. The approach of the Court has been critized by the academicians and although with some cases the Court seemed to have adopted a less strict attitude in the locus standi of the individuals which could not stop the critics. [155]

The individual concern criterion has been first determined with the *Plaumann* judgement. The definition of individual concern was made in the *Plaumann* jurisprudence.[156] This criterion has always ben more problematic than the first one and is more difficult to fulfill. It was defined by the Court in the famous *Plaumann* judgement, establishing that the private individiuals could apply for the action for annulment procedure if they were able to distinguish themselves from all the other individuals.[157] In the *Plaumann* judgment the CJEU has stated that persons would be individually concerned and of a measure addressed to others if they were "affected by reasons attributed peculiar to them that differenciates them from others"[158] They had to prove that the decision affected them for specific reasons which separate them from all the other persons. In the case of *Plaumann,* he was not accepted to have locus standi because anyone could do the same activity anytime according to the Court.[159]

With the *Plaumann* test the individual had to prove that he belongs to a "*closed class*" which is affected in a different way than the other individuals of the EU. The

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[154] SnorrenWelling, "Locus Standi Knocking on Heaven's Door " Master of European Programme, Faculty of law Lund University 2004
[155] Bilgin, op. cit footnote 124 p. 39
[156] Sjöstrand, op. cit footnote 29 p19
[157] Kucko, op. cit. footnote 195, p. 106
[158] Welling, op. cit footnote 154 p. 12
[159] Ibid. p.12

individual concern is now known as the "*Plaumann test*" or as the "*closed category test*" "The CJEU considered that in the *Plaumann* that the applicant was not individually concerned", "as the company did not distinguish itself from any other person who could practice such commercial activity at any time."[160] The private individuals could challenge acts that are of direct and individual concern to them. It is stated that "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"[161] This criteria was strictly applied by the CJEU.[162]

The *Plaumann*[163] judgment had an important role in the evolution of the literature on the action for annulment. Since the time of ex-article 230 was in force, no problems would arise, if the act in question was addressed to the individual willing to contest the act. However, if the act was addressed to another person, or if the act in question was in the form of a regulation than, the direct and individual concern criteria would need to be fulfilled. The individual would need to prove that he is a part of a "*closed category*".[164]

The jurisprudence on the individual concern has become confusing after the judgements following the *Plaumann* judgement.

In 1995, with the *Greenpeace*[165] Case, which was initiated with environmental purposes, the GC and the CJEU have applied the Plaumann formaula, and rejected the application. According to Naeye, the CJEU's decision was based on the fact that

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[160] Kucko, op. cit. footnote 195, p. 106
[161] Case C- 25/62 *Plaumann*, EU:C:1963:17
[162] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu. Page 26
[163] Case, *Plaumann*, C-25/62,EU:C:1963:17
[164] Briem, op. cit. footnote 32 p 25
448,Case, *Greenpeace*, 585/93, EU:C:1963:17

individuals can challenge the Union measures through preliminary ruling procedure before the national courts.[166]

3.2.3. Decisions in the form of a Regulation Which are of Direct and Individual Concern to the Applicant:

The judicial review application of individuals against regulations was enabled under very strict criteria, especially before the Lisbon amedments. The CJEU has refused the broad application of the article on the action for annulment and accepted the actions brought against regulations when the regulation is in the character of a decision and when the direct and individual concern criteria are met. The CJEU has not been of the opinion that this strict interpretation of the article caused lack of effective judicial protection to individuals and stated that the supporting mechanisms as a whole provided a complete system of remedies to the individuals.[167]

The *"abstract terminology test"* which was developed according to the substance of the act instead of the form was being applied by the Court.[168] The abstract terminology test was mainly related to the third situation which was related to the substance of the measure in other words, the decisions in the form of Regulations.

In the *Calpak* case the Court has improved its jurisprudence and has started to look at the substance of the measure more than the form of it to determine if it is a decision or a decision in the form of a regulation which was called the abstract terminology test.[169] In the *Calpak* Case, the applicants claimed that they were closed and an identifiable group at the time that the disputed measure was adopted. The CJEU has developed the abstract terminology test which required the applicant to prove that the regulation being challenged is in fact a decision which of individual concern to the applicant. A real regulation is a measure that applies "to objectively determined situations". In this case the Court was not convinced that the regulation being challenged was a group of decisions

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[166] Naeye, op. cit. footnote 13 p. 27
[167] Can & Sarıaslan, op. cit. footnote 12 p 45
[168] Baykal&Göçmen, op. cit. footnote 185 p 439
[169] Eliantonio& Kaş op. cit. footnote p 121

in the form of a regulation.[170] The abstract terminology test was applied considering the substance of the act in question. According to this test a regulation could be considered a true regulation if it was covering abstractly determined situations and if the effects would be on the persons in categories which are general and abstract.[171]

Codorniu[172] case also has an importance in the action for annulment case-law history. In this case the Court has decided that the nature and the spirit of the act could be independent from these problems. In short, with a regulation it was decided that the good quality sparkling wine produced in France and Luxembourg were to be called cremant. However, Codorniu was a company who was producing sparkling wine with a commercial name that includes the cremant word in it since 1924. So the company has initiated an action for annulment against the act. The Council has defended that due to the fact that the act in question was a regulation without needing to take into consideration the number of individuals it affects, the regulation could not be the subject matter of an action for annulment. The CJEU however in this decision stated that as long as there is individual and direct concern the directives could also be contested by this proceeding.[173]With the jurisprudence of the Court it was decided that the Court could not limit itself with the name of the act and that the content and the purpose of the act had to be taken into consideration. With the *Codorniu*[174] decision in 1994 the Court has decided that the private individuals had to prove the individual concern by leaving aside if the act in question was a decision or not.This has made it possible for the individuals to contest the regulations and directives too.

The acts were classified according to their real characteristic not to their titles.[175] Article 230 allowed the review of decisions addressed to the applicant even if the act was

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[170] Welling, op. cit footnote 154 p. 13
[171] Cases, *Calpak*, C-789-790/79,EC:C:1980:159
[172] Case, *Codorniu*, C-309/89,EU:C:1994:197
[173]Akgül, op. cit. footnote page 130
[174] CJEU Decision 309/89 Codorniu, [1994]
[175]Bilgi, op. cit. footnote 194 p.106

not called a decision. Decisions in the form of regulations could also be challenged by the individuals as long as they were of direct and individual concern to them. [176]

In the wording of the old article 230 directives were another important point of discussion for this remedy. From the wording of Article 230 it could be possible to understand that the directives were excluded from the coverage of this action. GC in the *Asocarne* case ruled that directives could not be challenged by individuals. The reasoning was that the judicial review of the directives was assured by the national courts which reviewed "the transposition of the directives into domestic law". The appeal of this decision left the matter unclear as the Court ruled that "the directive was of a general and abstract nature and could not be considered as a decision in the substantive sense".[177]

However, the text of Article 230 was interpreted as not willing private parties to challenge legislative acts. This gap was adviced to be filled in with the preliminary ruling procedure. [178] When the act requires an implementing measure at the national level, the applicant could claim the invalidity of the act when challenging the implementing measure through preliminary ruling procedure. In the lack of implementing measures, it was almost impossible for the individuals to fulfil the conditions of individual concern which has been one of the harshest critics that was directed to Article by the scholars.

3.2.4. Missed Opportunities or Progress? Case-Law and Opinion on UPA & Jego-Quere:

The interpretation of whether the *UPA* and *Jego-Quere* are missed opportunities or important progress in the case-law of the CJEU will probably depend on whether we wish to see the full or emty side of the glass. However many scholars consider these as

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[176] Roberto Mastroianni and Andrea Pezza, " Access of Individuals to the European Court of Justice of the European Union Under the New Text of Article 263, Para 4 TFEU" Rivista Italiana Di Diritto Pubblico Comunitario, Anno XXIV Fasc. 5-2014, Milano page 924

[177] Türk, op. cit. footnote p 53

[178] Ibid p. 48

missed opportunities for the chance of relaxing the locus standi conditions of the action for annulment.[179]

After the Plaumann judgement CJEU has started to apply the individual concern test very strictly, except for some specific areas such as environmental cases. *UPA* and *Jego-Quere* cases have a great importance in the development of jurisprudence of CJEU in the actions for annulment. The approach of the GC and the CJEU have been different and surely the famous Opinion of the AG Jacobs on the *UPA* case had a great impact on it. It would not be wrong to say that this Opion also had an effect on the current development of the jurisprudence or even the Lisbon amendments on locus standi.

3.2.4.1. UPA

In the UPA case the applicant was contesting a measure that was cancelling an aid provided by Union Law. UPA had made an application under article ex article 230, but there were no national implementing remedies were present. It was also not possible for the applicant to infringe the measure as it was not a prohibition and simply the cancellation of a benefit. The GC found the case inadmissible on the basis that the applicant did not have locus standi.[180]

The *UPA* case was brought before the CJEU by the organization called *Union de Pequenos Agricultores (UPA)*[181] which is formed by the Spanish farmers who are producers of olive oil. The regulation which was contested had changed the market organization in this sector and was cancelling the future financial support for the olive trees which were planted after 1.5.1998.

The CJEU has refused the case and has continued with its restrictive interpretation on individual concern stating that changing the interpretation of the article would conflict with the authorities granted by the Treaty.[182] The Court refusing to modify

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[179] Mariolina Eliantonio and Nelly Stratieva, "From Plaumann, through UPA and Jego-Quere, to the Lisbon Treaty", Maastricht Working Papers Faculty of Law, Maastricht, page 1
[180] Sjöstrand, op. cit footnote 29 p 21
[181] Case, C- 50/00, *UPA*, EU:C:2002:462
[182] Arsava, op.cit footnote 115

its approach on individual concern and arguing that it could not amend the letter of the Treaty,[183] added that legal protection shall be provided to individuals by national courts "who have the right to ask the Court to give preliminary ruling."[184] The Court added that the Union legal system did have an effective judicial protection for individuals as the Founding Treaties had created a complete system of remedies, with the action for annulment, the plea of illegality and the preliminary ruling procedure. The individuals will have the chance to apply to one of these paths and have an effective judicial protection. The Member States are also responsible to establish national courts that are respectful to the system and to the same principles. [185]

3.2.4.2. Opinion of the AG Jacobs on the UPA

The AG Jacobs has given his Opinion on the UPA case which was stating that the individual concern criterion should be relaxed which has also inspired the decision of the GC in the Jego-Quere case with similar reasons but was not able to convince the CJEU to change its view neither in the UPA nor in the Jego-Quere cases. The Opinion of the AG has been a hope for the effective legal protection to be improved for the individuals.

The AG in the *UPA* Opinion has suggested the individual concern criteria to be reinterpreted. He stated that it is true that even when the locus standi criteria are not fulfilled the preliminary ruling procedure is still an option, but pointed out that there are some situations where this proceeding is not available, especially in the cases where the implementing measures were absent at the national level just like in UPA and Jego-Quere cases. The AG Jacobs listed the reasons why he thinks that the preliminary ruling procedure cannot provide a full effective protection system. Firstly, he stated that it was the national court that refers the question and the applicant could not decide for the measure to be sent for preliminary ruling procedure and that is was the national court to make this decision. Secondly, the applicant could not decide which provisions to be referred, and could not even choose the questions to be referred as the formulation of the

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[183] Albers-Llorens, op. cit. footnote 170 p 514
[184] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu. Page 27
[185] Baykal&Göçmen, op. cit. footnote 185 p 442

questions was being done by the national court. Thirdly, the applicant did not have the chance to determine the grounds of invalidity as it was the national court's duty as well. Lastly, in case of the absence of an implementing measure the individual could not even apply to the preliminary ruling procedure and worst of all in order to be able to challenge the validity in some cases the applicants were being forced to breach the law so that they could challenge the validity.[186] He also added that it was not fair to oblige somone to start breaching the law in order to have legal standing. He considered that these were denial of justice. [187]

The AG stated that the preliminary ruling procedure was not able to complete the system of remedies for individuals. However, the CJEU in many jurisprudences has adopted a more relaxed approach in some actions related to some areas such as the anti-dumping and competition cases. [188] The main purpose of the AG was surely to provide a completer system of judicial review to provide an effective judicial protection to individuals.[189] The AG Jacobs also added that the case-load problem should be taken into consideration seriously, but it should not be an obstacle for liberalizing the standing rule for the individuals. He stated that there were ways to prevent increasing the number of cases too much and that the GC would be able to take over some work load from the CJEU if the actions brought by the individuals are transferred to it. He also added that since 1994 the GC has the jurisdiction over the cases brought by individuals.[190]

The AG was of the opinion that individual and direct concern criteria should be relaxed. The AG has criticized the interpretation of the article as being "incoherent, complex and impairing legal certainty" The opinion of the AG Jacobs[191] has tried to amend the Plaumann test, which was also supported by the GC in the following judgement *Jego-Quere* which was decided by the GC after the Opinion of the AG but before the

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[186] Opinion of the AG see also Welling, op. cit footnote 154 p. 23
[187] Welling, op. cit. footnote 154 p21
[188] Ibid p. 21
[189] Briem, op. cit. footnote 32 p 25
[190] Anatole Abaquesne De Parfouru," Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France?", Maastrtich Journal Eur. & Comp. 14 MJ 4, 2007 p.364
[191] Opinion of AG, UPA Case, 21 March 2002, C-50/00

decision of the CJEU.[192] AG Jacobs in the *UPA* case and GC in the *Jego-Quere* case argued that the current interpretation of the individual concern criteria was not securing to provide effective judicial protection to individuals. The acts that can be challenged under this article by the individuals are; the ones that are addressed to himself, the acts that are directed to someone else but if the individual is directly and individually concerned or if the act to be challenged is a regulatory act without the need of implementing measures. The standing rules have been relaxed with the Lisbon amendments. [193]

3.2.4.3. Jego-Quere

In *Jego Quere* case the applicant fishing company has argued that no national implementation act was needed for the measure they were contesting, for preliminary ruling application was not possible. The applicant argued that the "the inadmissibility of the action brought before the GC would result in a violation of the right to an effective judicial remedy under article 47 of the Charter of Fundamental Rights of the European Union, and Articles 6 and 13 of the ECHR[194] and "leave it without remedy since no act has been adopted at national level." [195] The applicant asked for the *Codorniu* rule to be applied to the case.[196]

The GC ruled in line with the Opinion of the AG Jacobs stating that the strict application of the individual concern criterion should be relaxed in order to provide effective judicial protection to individuals in the light of the Constitutional principles of the Member States, ECHR and CFR.

With the *Jego-Quere* judgment the GC has also reinterpreted the individual concern criterion.[197] In case of an absence of an implementing measure the applicant

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[192] Briem, op. cit. footnote 32 p 26
[193] Sjöstrand, op. cit footnote 29 p18
[194] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu. p.28
[195] Sjöstrand, op. cit footnote 29 p 21
[196] Welling, op. cit footnote 154 p. 12
[197] Opinion ,*Jego Quere*, ECLI: EC: C: 2003:410

cannot take the act before a national court. For this reason "the individuals should not be forced to infringe the law in order to reach justice."[198]

CJEU has ruled that *Jego-Quere* was not differentiated from the other applicants due to the Plaumann case, it added that "it is wrong to mix the issue of admissibility with the right to an effective judicial remedy" and that "under Article 4 of the TEU the Member States were obliged to grant effective legal protection".[199] In this appeal case the CJEU has once more announced that it will continue applying the Plaumann test.

Although the CJEU continued to apply the *"closed category test"* in the appeal decision of *UPA* and *Jego-Quere*, AG Jacobs and the GC have tried to change this formula. Both in the UPA and the *Jego-Quere* cases, the CJEU has been determined not to relax its already established jurisprudence and argued that the Union is based on law and the individuals are entitled to effective judicial protection. The court stated that the combination of the action for annulment, preliminary ruling procedure and the plea of illegality were enough to provide an effective judicial protection. The Court in the *UPA* case has given the duty to provide effective judicial protection member states. This was sure that the it was holding responsible the Member States to complete the gaps that have taken place in the Union. The judgment of the CJEU in the *Jego Quere*[200] case makes us think that it is willing to provide access to judicial review to real and legal persons however it only accepts indirect actions.[201]

It can be interpreted as the Court has sacrificed the completeness of the legal protection system to the strict application of the Treaty articles. In fact, the Court has referred to the responsibility of the Member States in providing the complete system of remedies to individuals.

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[198] Baykal&Göçmen, op. cit. footnote 185 p 441
[199] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu. Page 28
[200] Case, C-263/02, Jego-Quere, ,EU:C:2004:210
[201] Pernice, op. cit footnote 65 page 388

In the *Jego-Quere* judgement the Court had given a direct answer to the opinion of the AG Jacobs which stated that in the absence of implementing measures the the acts which were able to challenge the act at Union level, they could also challenge in national levels.

The Opinion of the AG Jacobs on the *UPA* case and the judgement of the GC in the *Jego-Quere* case have been milestones for providing a completer system of judicial protection to the individuals, however these efforts have been most of the times followed with disappointments as the CJEU has not been willing to change its interpretation of Article stating that it could not interpret the criteria against the wording of the Treaty text. The main reason most probably was that the CJEU has consistently been of the opinion that the EU legal system did contain a complete system of remedies and procedures and if the MS consider as it does not it was their duty to amend the text of the Treaty.

Although the only remedy available for the individuals is not the action for annulment, it is the most debated and the one that has gone through important changes with the Lisbon amendments. The other remedies will also be analyzed in the following sections.

3.3. WHAT HAS LISBON INTRODUCED FOR INDIVIDUALS?

The majority of the comentators state that although some reform has been done with the Lisbon Treaty, the changes have not been successful in providing the complete system to remedies to individuals. In any case it is not possible to underestimate the effort put in the amendmends and the reforms introduced with Lisbon which can be considered as the intention of Member States to improve the legal system of the EU.

With the entry into force of the Lisbon Treaty article 230 has been replaced by article 263 and this new form of the article has extended the jurisdiction of the Court, and has liberalized the locus standi criteria for individuals.[202] The group of defendants in the

[202] Türk, op. cit footnote 6 p 9

action for annulment is also enlarged.[203]The Lisbon amendments do not change the notion of reviewable acts but widens the scope of reviewable acts under article 263(1).[204]

Before the Lisbon Treaty the article that regulated the action for annulment was very restrictive for the standing rules of the private parties. Individual concern criteria of the *Plaumann* case was being applied strictly.[205] With the amendments that have been made in the article, the private parties can initiate an action for annulment against regulatory acts which do not require implementing measures which are of direct concern to them without needing to prove the individual concern criterion. Baykal and Göçmen state that this change should be considered as the reflection of the effective judicial protection principle, as an individual should be entitled to contest an act that affects him/her.[206]

The Lisbon Treaty widening the scope of admissibility of actions for annulment is interpreted by some authors as being "a reaction to the gaps arising from the case law" of the CJEU.[207] In other words, Article 263's new form makes it easier for the private individuals to bring actions. The removal of the individual concern criteria in challenging regulatory acts which do not require implementing measures,[208] is surely a development in filling in the gaps and for providing a completer system of remedies for private parties. In fact Arsava states that the amendment made at the wording of the 263/4 is the most important reform of the Lisbon Treaty.[209]

The Lisbon Treaty, in other words the "Reform Treaty" has brought "significant changes to the system of judicial protection in the EU Law…"[210] The Lisbon Treaty states

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[203]Lenaerts, Maselis &Gutman, op. cit. footnote 5 p. 254

[204] Türk, op. cit footnote 6 p 9 p165

[205] Eliantonio, Mariolina & Kaş, Betül " Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?" Journal of Politics and Law, Volume 3 No 2 September 2010, http://citeseerx.ist.psu.edu/viewdoc/download page 121

[206] Sanem Baykal and İlke Göçmen,**Avrupa Birliği Kurumsal Hukuku.** Ankara: Seçkin 2016, page 443

[207] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu., p. 29

[208] Türk, op. cit. footnote 6 p 321

[209] Füsun Arsava "AB'nin Yasama Tasarruflarına Karşı Bireyleri Korumaya Matuf Merkezi Koruma Mekanizması" p 298 http://tbbdergisi.barobirlik.org.tr

[210] Lenaerts, Maselis & Gutman, op. cit. footnote 5 p 5

that CJEU shall make sure that the law is observed and that the Member States shall be responsible to provide effective remedies to ensure the effective legal protection in the EU Law.[211] The entry into force of the Lisbon Treaty has granted binding power to the Charter, started the process of the EU in the accession to the ECHR, and has amended the standing criteria of the action for annulment under article 263(4).[212]

Although the Lisbon amendments cannot be considered as a revolution in the effective judicial protection system, it can still be considered as an evolution in the judicial system. However, it is not possible to state that the changes introduced by the Lisbon amendments are flawless. Undeniably, the Lisbon amendments have introduced a series of improvements, but the question of whether a complete protection of human rights is provided is still a matter of discussion. With the CFR gaining effect with the Lisbon Treaty, it would not be wrong to state that "the fundamental rights have been put at the heart of EU law."

Lisbon Treaty aims to increase the transparency and efficiency of the system, and as a result supports the democratic legitimacy of the Union organs. [213]As it also aims to promote the protection and participation of the citizens, it is not surprising that this Treaty has introduced some innovations in terms of effective judicial protection for individuals.[214] In short, the amendments aim to form a more democratic Europe and to provide a more developed system of rights and freedoms to the citizens.

Although the EU is not "a human rights organization", the fundamental rights with the Lisbon amendments they have been placed at the core of the Union law and have started to be considered as "an integral part of the Union law". [215] Now the Charter is a primary source of the Union law and the individuals have the chance to invoke the Charter articles before the Member States or the Union institutions and plays an important role in

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[211] Paul, Craig, **The Lisbon Treaty**, Oxford:Oxford University Press, 2010 page 162
[212]Marek Safian, " A Union of Effective Judicial Protection" page 1
http://www.kcl.ac.uk/law/reasearch/centers/european /Speech-KINGS-COLLEGE.pdf
[213]Leczykiewicz, op. cit. foonote 61 p.17
[214] Petr Novak / Rosa Raffaelli , European Parliament,06/2017
http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.1.5.html
[215] Leczykiewicz, op cit. footnote 61, p18

the judicial review mechanisms of both national courts and at EU level. [216] Surely the CFR becoming binding after the entry into force of the Lisbon Treaty had an important impact on the protection of individual rights in the EU.[217]

The Lisbon amendments have a great importance as the democratic structure that was already formed in the European Union legal order has taken a step further with the incorporation of the CFR into the legislation of the Union. [218]

The EU's values have been codified in Article 2 of the TEU as being respectful to fundamental rights and being ruled by law. With article 6 of the TEU of the Lisbon Treaty CFR has gained a primary law status.[219]Article 19 (1) and (2) of the TEU has granted a responsibility to the Member State and that Article 47 of the CFR has become binding Article 19(1) of TEU amended by the Lisbon Treaty is said to "formalize the role of the CJEU" in the cases of Member States "breaching their duty to provide effective legal remedies to claimants".[220] According to this Article Member States shall provide effective judicial remedies in the fields covered by the EU law. Effectiveness also refers to the obligation of national rules not to make the enforcement of the EU law impossible to be enforced.[221]

The Lisbon amendments have upgraded the system of fundamental rights. Article 6 of the TEU states that CFR is legally binding, accession to the ECHR is regulated and the fundamental rights are admitted as the general principles of the EU law. [222]

With Article 17 of the Additional Protocol numbered 14 annexed to the ECHR, Article 59 of the ECHR has been amended on 1st of June 2010 and it has been stated that

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[216] Önüt, op. cit. footnote 39 p. 71
[217]Thorson, op. cit footnote 7 p. 200
[218] Hakan Keskin, **Mitos'tan Lizbon'a Avrupa Birliği El Kitabı.** 2nd Edition Ankara: Seçkin, page 237
[219] Accession by the European Union to the European Convention on Human Rights" http://eur-lex.europa.eu/ pg 4
[220]Shaleou, op. cit footnote 26
[221]Mak, op. cit. footnote 112 p 5
[222]Patricia Fragoso Martins, **Rethinking Access by Private Parties to the Court of Justice of the European Union: Judicial Review of Union Acts Before and After the Lisbon Treaty.** 2012, Universidade Catolica Portuguesa page 221

the EU can become a party to the Convention. The negotiations on the accession of the Union to the Convention have started upon this and parties have prepared an Accession Agreement Proposal which was later on evaluated by the CJEU. The Court has stated that the proposal was not in line with the Treaties. Due to the fact that an international agreement on which the Court does not provide a positive opinion cannot be signed it may be easily stated that the accession process is going to take some more time as stated by Bilgin.[223]

According to Leczykiewicz the new system of protection of human rights could be complete if the EU courts could have jurisdiction to review all the acts related to human rights. She adds that, if CJEU has the opportunity to interpret Article 275 of the TFEU it will be possible to determine the gaps in the human rights protection in the EU law and that the binding nature of the Charter now makes it unacceptable to have a non-complete system of human rights protection. [224] According to Petrescu, "The adoption of the CFR brings the EU closer to being bound by the ECHR". The CFR does not affect the validity and the use of the ECHR, and that it increases its usefulness. So in other words the strength of the Convention has been increased since the CFR gaining binding status with the Lisbon amendments.[225]

The amendments which have taken place in Article 263 TFEU on the other hand has made it possible for any natural or real person to bring a direct action against any regulatory act which is of direct concern to them.[226] The standing criteria for actions brought by the private parties have been relaxed. The individual concern is not taken into consideration in the event of regulatory acts that directly affect the individuals and do not require implementing measures.[227] The Lisbon amendments that have taken place in the

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[223]Bilgin, op. cit footnote 124 p. 7
[224] Leczykiewicz, "36
[225] Andra Petrescu, "EU Accession to the ECHR: The Potential Solutions to Post-Accession Problems and the Effect on Individual or Just Tying the Knot Between Two Big European Actors page 116
[226] Pernice, op. cit. footnote 65 page 385
[227] Craig, op. cit. footnote 148 p.165

wording of the article and the locus standi standards will be dealt below the sub-title of action for annulment in detail.

It would not be wrong to say that the Lisbon amendments have improved the status of the individuals as it has extended the locus standi conditions for especially the action for annulment.[228]

3.3.1. The Charter of Fundamental Rights

Until the Lisbon amendments many scholars have commented that the protection of human rights "were unsatisfactory". It was argued that the human rights should become constitutional rights in order to provide a completer protection,[229] and that in the modern societies the protection of fundamental rights is a very important concern.[230]

The CFR which was proclaimed in 2000 and amended in 2007 may be considered as one of "the most comprehensive and modern instruments" in the field of protection of fundamental rights, all around the world.[231] Although not becoming a legally binding instrument, the content of the CFR has included important rights for the individuals.

Article 47 of the CFR which was the article regulating the "right to an effective remedy and to a fair trial" was based on Articles 13 and 6 of the ECHR.[232] This article was a successful codification of the protection of individual rights. Article 47 not only covered the effective judicial protection of the rights stated out in the Charter but also included the rights and freedoms guaranteed by the Union law.[233] The Court of Justice's interpretation of Article 47 of the Charter of Fundamental Rights safeguarded the access to justice as well as providing remedies in the cases of effective remedies. This Article

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[228] Sjöstrand, op. cit. footnote, p15.
[229] Ibid.
[230] Jaaskinen, Niilo, "The Place of EU Charter Within the Tradition of Fundamental and Human Rights", Hart Publishing, 2015, page 35
[231] Ibid
[232] Briem, op. cit. footnote p.16
[233] Koen Lenaerts, "The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection", 2018, European Court of Human Rights page 6

also had a decisive role on whether or not effective judicial remedies were present for private parties. [234]Although Article 47 of the Charter "did not introduce new elements" to Union law, and that it "overlaped Articles 6 and 13 of the European Convention on Human Rights", which was accepted as a general principle of law,[235] and was also linked to the Universal Decleration on Human Rights, the EU concept of effective judicial protection has become a more developed concept than any of these stated Articles, and whose coverage was broader than others. [236]

In the light of Article 47/1 of the CFR, every individual whose rights and freedoms were violated could apply to a court for an effective legal remedy.[237] When the right to an effective remedy of a person whose "rights and freedoms guaranteed by the law of the EU" were violated, the protection provided without any doubt shall cover any rights provided by the Treaties, market freedoms, any rights deriving from the citizenship of the Union or from secondary legislation. [238]

Kadi case has been one of the most famous decisions in which the freezing of financial assets because of the defendant being associated with Al-Qaeda.[239] In this case Article 47 has affected the administrative proceedings related to "individual sanctions" and "access to economic assets". The effective judicial protection of human rights and the avoidance of discrimination due to nationality have been important points in this case-law. [240]The author adds that it also contributed to the legal integration and to the effectiveness of the legal system. According to the author the court made it clear in the *Kadi* [241]case that judicial protection is a constitutional principle. [242]

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[234] Chantal Mak, "Rights and Remedies Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters, 2012 University of Amsterdam, http://ssrn.com/abstract=2126551 page 17
[235] Ibid p. 19
[236]Sjöstrand, op. cit. footnote 29, p.9
[237] Arsava, Prof Dr Füsun " Topluluk Hukukunda Bireysel Hakların Etkin Olarak Temini" MHB Yıl 25-26, 2005-2006. http://www.dergipark.gov.tr/download/article-file/99338 , page 25 5.10.2017
[238] Pernice, op. cit footnote 65 page 388
[239] Mak, op. cit. footnote page 12
[240] Leczykiewicz, op. cit footnote 61 page 23
[241] Case, Joined cases, 402/05 and 415/05 Kadi, ECLI:EU:C:2008:461
[242]Varju, op.cit. footnote 91 p. 9

Thorson states that the judicial protection of individual rights has two aspects" being access to courts, fair trial and the presence of an effective remedy. Articles 6 and 13 of the ECHR and Article 47 of the Charter of Fundamental Rights are directly related to this subject.[243] In fact when the CFR was a draft as a proposal, Article 47 of the Charter was based on the provisions of the ECHR as the article has similar grounds with Articles 6 and 13 of the Convention.[244]

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[243] Thorson, op. cit footnote 7 p. 13
[244] Mak, op. cit. footnote 112. P. 4

4.DIRECT ACTIONS FOR INDIVIDUALS

4.1. ACTION FOR ANNULMENT

4.1.2. The Remedy

The scholars have been discussing "the optimum legal route" for providing effective judicial protection to individuals. Although the CJEU has stated in the *Les Verts* Case stated that the "Treaty created a complete system of remedies", the direct action for annulment is the most favorable procedure available for individuals not only because it is at the core of the judicial review system but also due to the effects of a successful annulment proceeding is more favorable than the other direct actions for the individuals in terms of legality review. but the criteria that have to be fulfiiled are strict which limits the access to justice in many occasion as the cases of the applicants are many times considered inadmissible. I am sceptic that it has been able to satisfy all the expectations, but for sure up to some point the Lisbon Amendments have been a step further in terms of liberalized admissibility.

Although there are strong discussions about the level of protection the action for annulment provides for the individuals, the scholars agree that the action for annulment "occupies the central position within"[245] the EU judicial review system and "is the main instrument by which the legality of EU legal acts can be judicially reviewed." [246]As this action is considered to be at the core of the judicial review system it has a great importance for the existence of a complete system of remedies providing an effective judicial protection to the subjects of the Union law.[247] The action for annulment was not designed as a remedy to protect the rights of private parties but it aims to supervise the allocation of power between the Union institutions with each other and with Member States. [248]

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[245] Albors-Llorens, op. cit. footnote 170 p.71
[246]Biernat, op. cit. footnote 79
[247] Lenaerts, Maselis &Gutman, op. cit. footnote 5 p. 254
[248]Karayiğit, op. cit. footnote 11 p.12

In the action for annulment, the individuals are not given priviledge and are referred to as the non-priviledged applicants. This may be due to the fact that the individuals are not an important actor in the EU's institutional framework. But as most of the individual claimants are the citizens of Europe, and the population that forms the Member States, in such a modern and developed legal system they need to be in a more central position. In other words, EU legal system should not underestimate the importance of providing useful remedies and protecting the fundamental rights of the individuals if it aims to be a judicial system that provides effective judicial protection with a complete system of remedies and procedures.

Due to the effect of the decision made at the end of the annulment procedure, the direct action for annulment seems to be the most favorable proceeding for the individuals. This is why it has always been important to analyze the situation of the locus standi and admissibility conditions of the action for annulment in order to be able to determine whether the system of remedies are complete or not. With the new amendments, the terms of regulatory acts and not entailing implementing measures have been introduced which are also worthy of analysis.

4.1.2. The Text After the Lisbon

The amendments that have taken place in Article 263 of the Lisbon Treaty have surely been a very important progress in terms of the future of the effective judicial protection of individuals and has already started to affect the case-law on the admissibility and locus standi of individuals.[249] However, there are still strong debates on whether or not the amendments are enough to change the status of the individuals as much as desired.

The new Article 263 states that:

The CJEU shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce

[249] Sjöstrand, op. cit footnote 29 p. 4

legal effects vis-à-vis third parties. It shall also review the legality of acts of, bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought before by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions referred to in the first and second subparagraphs, 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.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

In the Lisbon amendments whereas the direct and individual concern criteria are kept in the text, but the individual concern criterion is removed for the regulatory acts which do not require implementing measures. [250] Through this way The Lisbon amendments have widened the scope of challengable acts.[251] Which is probably one of the most important chances done in the text of the Treaty for the sake of providing a more effective judicial protection to individuals in the EU within the last decades.

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[250] Haakon Roer-Eide and Mariolina Eliantonio, " The Meaning of Regulatory Act Explained: Are There Any Significant Improvements fort he Standing of Non-Priviledged Applicants in Annulment Actions" German Law Journal, Volume 14 No 9, p. 1852

[251] Sjöstrand, op. cit. footnote 27. p. 24

As the individual concern has been the main difficulty on the locus standi of the individuals, the case-law on the direct concern has been more limited even before Lisbon. However as with the new amendment of the article the importance of the individual concern has been reduced this may change in the future jurisprudence. [252] The new jurisprudence is now mainly focused on the meaning of "regulatory acts" and "not entailing implementing measures".

With the new amendments the wording of the article which regulates the action for annulment has been slightly changed and the new article 263 has replaced the word "decision" with "act". The article regulates that the individuals can contest the acts that are addressed to them, addressed to third parties if they have individual and direct concern, and the regulatory acts which do not entail implementing measures if they are of direct concern to them.[253]

The amendments that have taken place in the article have surely been a very important progress in terms of the future of the effective judicial protection of individuals and has already started to affect the case-law on the admissibility and locus standi of individuals[254].

4.1.3. The Competent Court

The CJEU is competent in the action for annulment proceedings against a Member State or an institution, body, office, or an agency of the Union. The actions may be brought before the CJEU by the Member States, institutions or any natural or legal persons as long as they fulfil the locus standi criteria. The Court has exclusive jurisdiction over actions between institutions and the proceedings brought by the Member States against the Parliament and Council. The GC has jurisdiction in all the other procedings especially the ones brought by the individuals. The actions for annulment brought against

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[252] Kucko, op. cit. footnote 195, p. 106
[253] Kucko, op. cit. footnote 195, p. 111
[254] Haakon Roer-Eide and Mariolina Eliantonio, " The Meaning of Regulatory Act Explained: Are There Any Significant Improvements fort he Standing of Non-Priviledged Applicants in Annulment Actions" German Law Journal, Volume 14 No 9, p. 1852

the acts of the institutions, bodies, offices, agencies of the EU are dealt by the GC. The decisions of the GC can be appealed at the CJEU. [255]

4.1.4. Natural and Legal Persons

Article 263/4 regulates the applicants of the action for annulment and describes the notions of natural and legal persons. Natural person is a human being who is considered to have a personality before the law, and the citizens of the EU Member States or any other persons affected by the act in question are the natural persons according to this description. Legal person on the other hand is an independent legal entity which can be a private business entity, a non-govermental organization or a public organization. To have legal personality means to be capable of having legal rights and duties in a legal system, to have the capacity to bring an action and to be sued. The legal capacity also means the ability of amending rights and obligations.[256]

4.1.5. Grounds of Review

According to the wording of the article the grounds for the action for annulment can be "lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of powers."[257]In other words an act be challenged for violation of EU law. An EU act can be annulled when it violates a higher degree EU law or for for being in conflict with a general principle of EU law, the CFR or the Treaty articles.[258]

4.1.6. The Reviewable Acts

As used in the *ERTA*[259]case for the first time, legally binding acts which are subject to judicial review can be challenged with the action for annulment procedure

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[255] Baykal&Göçmen, op. cit. footnote 185 p 382
[256] Hande Bilgi, " Locus Standi for Natural and Legal Persons Under Action for Annulment Procedure in European Union Law", Beykent Üniversitesi Hukuk Fakültesi Dergisi, Cilt 2, Sayı 4, Aralık 2016, p.105
[257] Article 263 of the TFEU
[258] Lenaerts, Maselis & Gutman, op. cit. footnote 5 p. 365
[259] Case, C-22/70, ERTA, [1971], ECLI: EU:C:1971:2

which are the secondary sources of law.[260] Article 263 TFEU allows the judicial review of the binding acts, acts of the Council, Commission, European Bank, excluding the recommendations and opinions. The acts of the Parliament, the European Council and other bodies, or of agencies which intend to have legal effects are also reviewable acts under this article.[261] The primary sources of law cannot be reviewed by this procedure.As the remedy deals with validity and lawfulness of the acts, the actions of the EU institutions that have been carried out in an unlawful way can be the subject matter of the action for annulment.

The action for annulment gives the right to individuals to challenge reviewable acts directly. [262] As long as the act in question is a legally binding act it can be in verbal or written form. In order to decide if an act is subject to the judicial review under Article 263 the content of the act should be analyzed.[263]

It is clear that Article 263 has amended the locus standi requirements for the private parties, however "the extent of practical change brought about by the amendment is limited to a liberalization of the standing requirements for legal and natural persons."[264]

4.1.7. Locus Standi Post-Lisbon

The Lisbon Treaty has clarified the criterion of the action for annulment for the private parties,[265] while "widening the scope of the challengable acts".[266] The scope of the article has been reformed however is it criticized for leaving some points unclear. The aim of the Lisbon amendments was to relax the conditions of admissibility and to be able

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[260] Hande Bilgi, " Locus Standi for Natural and Legal Persons Under Action for Annulment Procedure in European Union Law", Beykent Üniversitesi Hukuk Fakültesi Dergisi, Cilt 2, Sayı 4, Aralık 2016, p.105
[261]Kucko, op. cit. footnote, p. 103
[262]Augistin Fuerea, "The ECJ Case-Law on the Annulment Action: Grounds, Effects and Illegality Plea", 2017, Lesij No 24,Volume
[263] Özkan, op. cit footnote 128 p.234
[264] Ibid
[265] Albors-Llorens, Albertina, "Sealing the Fate of Private Parties in Annulment Proceedings? The General Court and The New Standing Test in Article 263(4)TFEU", The Cambridge Law Journal, 2012, Volume 17 Issue 1 page 52
[266]Sjöstrand, op. cit footnote p.24

to provide a more effective judicial protection to the individuals against illegal acts of the EU.[267]

According to the old wording and the interpretation, in the cases where the individuals could not fulfill the standing requirments, for the measures that did not require implementing measures in the Member states they were either unable to access to a court or they had to breach the law in order to be able to have standing.[268] With the new amendments this has been aimed to be sorted by removing the individual concern criteria from the regulatory acts not entailing implementing measures.

The Lisbon Treaty has aimed to fill in the gaps that were left with the *UPA* and *Jego-Quere* judgments for the protection of individuals. Although the commentators accept the Lisbon changes as an important step they still mention that the concept of "regulatory act" and "the acts not entailing implementing measures" need to be clearly analyzed and need to be clarified with the judgements of the Court.[269] These two concepts will be analyzed in the below sections.

It is also necessary to mention that "the new rules apply for all the applications lodged after the entry into force of Lisbon" and the adoption date of the contested act does not have any affect over it. For the applications lodged before the date of the entry into force of Lisbon, the applicability rules will the ones that were in force at the time of the application.[270]

It is beyond doubt that with the Lisbon amendments some important reforms have been made and that it is surely a step forward. The amendments in the text of the article has partially solved the strict standing problem and has relaxed the individual concern criterion. However, in my opinion it still did not even aim to give full access to individuals. There can be many reasons such as the the concern of the Member States or the CJEU to lose some of their powers on the legal order or just a simple hesitation in

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[267] Ibid p. 19
[268] Ibid
[269] Sjöstrand, op. cit. footnote p. 24
[270] Mastroianni & Pezza, op. cit. footnote 199 p. 924

order not to cause blockages by increasing the number of direct actions for the sake for legal certainty. Whatever the reasons may be, it is a fact that the individual concern criterion has been relaxed.

4.1.8. Regulatory Acts

Article 263 of the Lisbon Treaty has introduced the term "regulatory acts" however as there is no description of this term, the Article was criticized of leaving the meaning of the term open. Article 289 of the Treaty describes the legislative and non-legislative acts. [271]

Article 289

1. The ordinary legislative procedure shall consist in the joint adoption by the European

Parliament and the Council of a regulation, directive or decision on a proposal from the Commission.

This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or

decision by the European Parliament with the participation of the Council, or by the latter with the

participation of the European Parliament, shall constitute a special legislative procedure.

3. Legal acts adopted by legislative procedure shall constitute legislative acts.

4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative

of a group of Member States or of the European Parliament, on a recommendation from the European

Central Bank or at the request of the Court of Justice or the European Investment Bank.

The legislative acts are described as being the acts that result from the legislative procedure whereas the non-legislative acts of general application are considered to be regulatory acts. [272]

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[271] Sjöstrand. op. cit, footnote 27 p. 24
[272] Ibid. p.25

The meaning of the regulatory acts was described with the *Inuit*[273] case, as "all the acts of general application apart from legislative acts" or as "a general act adopted with a procedure apart from a legislative one."[274] AG Kokott[275] who has presented her Opinion stated that the fact that the terms of regulatory act and regulation sound similar does not mean that they have the same meaning adding that the Treaty is "authentic in all the languages". In the *Inuit* case the GC stated that the legislative acts were not covered under the definition of the regulatory acts and that were subject to the direct and individual concern criteria. As the act which was being challenged by the applicant in this case was a legislative regulation the locus standi of the applicant was denied. The CJEU confirming the interpretation of the GC stated that new Article 263 was is in line with Article 47 of the CFR and that the system provided to the individuals by Articles 263 and 267 is complete.[276]

In the *Microban*[277]case the GC made a clearer description of the term.[278] This was the first judgement where unless the new version of the article was not applied the applicant would not have fulfilled the locus standi conditions. In this case measure being challenged was a regulatory act and the applicant was directly concerned. However, because there were no national implementing measures it would have not been possible for the applicant to apply to the preliminary ruling procedure otherwise. Microban has the importance of proving that individuals can actually benefit from the amendments that have taken place with the Lisbon reform. [279]

The Court had differentiated between regulatory acts and decisions in the *Producteurs* case. The interpretation was made in accordance with article 249 stating that a regulatory act shall have general application. Before the Lisbon amendments the interpretation of Article 230 in a restrictive manner and classification of the acts due to

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[273] Case, C- 398/13, *Inuit*, EU:C:2015:235
[274] Mastroianni & Pezza, op. cit. footnote 199 p. 928
[275] Case, C-398/13, *Inuit*, EU:C:2015:235
[276] Kucko, op.cit. footnote p.113
[277] Case, C-262/10 *Microban*, EU:C: 2015:235
[278] Baykal&Göçmen, op. cit. footnote 185 p 444
[279] Kucko, op. cit. footnote 195, p. 114

being general application and considering as a regulation in substance has led to deny individuals' right to challenge acts through direct action for annulment.[280]

4.1.9. Acts not Entailing Implementing Measures

The other term that was introduced by the Lisbon amendments and has caused discussions was "not entailing implementing measures.

The notion of not having implementing measures has sometimes been broadly interpreted by the CJEU and the GC meaning any kind of implementing measures at the EU or national levels.[281] However the *Telefonica*[282] case has been the case in which the term has been clarified. The applicant argued that the measure being challenged was a "regulatory act not entailing implementing measures".[283] The Court has rejected the locus standi of the applicant on the grounds that it entailed implementing measures and due to the implementing measures the applicant could apply to the preliminary ruling procedure. In other words, the Court's reasoning was based on the[284] doctrine of "complete system of remedies". The CJEU has not considered the amendments in Article 263 as a "general broadening of access to justice conditions for private applicants." It added that the Treaty amendment has just given the possibility to the private individuals when their only chance to contest the act was to break the law. The reasoning of the Court was that when there are any kind of implementing measures, judicial protection was not an issue as they could challenge it before national courts or at the EU level. The implementing measures of the EU institutions would make it possible for the applicant to bring actions against the measure in question. The applicant could either plead the illegality or apply to preliminary ruling procedures.[285]With this case, the meaning of implementing measures was clarified. The absence of implementing measures meant "the absence of any measure to be taken

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[280] Türk, op. cit. footnote 6 p 98

[281] Mastroianni & Pezza, op. cit. footnote 199 p. 931

[282] Mariolina Eliantonio, "Annulment Actions after the Lisbon Treaty", 2014, Maaastricht Journal of Eurooean and Comp. Law 487 page 490

[283] Mastroianni & Pezza, op. cit. footnote 199 p. 932

[284]Kucko, op. cit. footnote 141 p. 115

[285] Mastroianni & Pezza, op. cit. footnote 199 p. 932

by the MS which generates consquences for the applicant".[286] *T& L Sugars*[287] case has also been an important case in which the GC decided that, "the contested regulations were not regulatory acts not entailing implementing measures because they did entail measures to be taken by national authorities that could be challenged in the national legal order, the applicants were not individually concerned by the contested measures." The applicant has appealed the case and the Court has made an analysis on Article 263 and on the facts of the case. The Court clearly referred to the history of the action for annulment jurisprudence and referred to the reason why Article contained the "term not entailing implementing measures" which was to avoid the breach of effective judicial protection in the cases when the applicants could not even apply to the preliminary ruling procedure due to the absence of an implementing measure without breaching the law. It stated that the GC had made mistakes during the consideration of the facts and added that it should be checked if there are implementing measures only with regards to the applicant and not to third parties. However finally it concluded that the applicant did not have direct concern. Although the decision of the GC was not reversed with this decision the Court has given more explanations about the term of not entailing implementing measures.

4.1.10. The Effect of the Decision

Article 264 TFEU explains the consequences of the annulled actions. When an action for annulment is accepted and a measure is annulled, it is announced to be void. The institution whose act is annulled will need to make the necessary measures in accordance with the decision of the Court. [288]

If the Union Courts consider the application rightful, they decide for the acts in question or the relevant provisions to be cancelled, annulled (ex tunc) to the date of entry into force and for everyone (erga omnes). For the sake of legal certainty the Union Courts may decide the effects of some of these acts to be in force.[289]

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[286] Kucko, op. cit. footnote p. 115
[287] Case, *T&L Sugars*, C-456/13, [2015], EU: C:2015:284
[288] Türk, op. cit. footnote 6 p.99
[289] Karayiğit, op. cit. footnote 11 p. 53

The authority of the judge in the actions for annulment is limited as with this procedure, the judges may annul a Union act however cannot make up a new one. Opinions and recommendations cannot be the subject matter of this case.[290] When the application of the applicants is found admissible, and the arguments satisfactory the Court decides to annul the act retroactively. [291]If the Court accepts the action for annulment, the act is declared to be null and void. The annulment can be fully or partially. The annulment decision affects everyone (erga omnes) and retroactively.[292]

4.1.11. The Time Limit

The time period for making the relevant application is two months starting from publication or notification,[293] or from the time of having knowledge of the contested act, or from the time that he was notified or the act was regulated. After this time period passes the act becomes definitive. The time limit is regulated in the last paragraph of the article and is also regulated in article 80-81 of the Rules and Procedures of the Court and Articles 101-102 of the Rules and Procedures of the GC. The time limit applies to all the applicants and to all the reviewable acts.[294] The *AssiDoman*[295] case has stated that when an act is not challenged within the time limit, it becomes definite for him, which also means that this decision keeps being valid for that person even when the Court annuls the act. In *Nachi Europe GmbH*[296] case this approach was broadened and stated that the act would not only become definitive against the addresse but also a third person who "would have undoubtedly challenged" the decision too,[297] which refers to the erga omnes effect of another application of validity review .

An act that becomes definitive surely cannot be challenged before Union Courts which means the action for annulment, the application of article 277(ex article 241),the

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[290] Özkan, op. cit footnote 128 p 234
[291] Karayiğit, op. cit. footnote 11 p. 12
[292] Baykal&Göçmen, op. cit. footnote 185 p 456
[293] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu. p. 20
[294] Türk, op. cit. footnote 6 p. 102
[295] Case, *AssiDoman* C-227/95, [1977], ECLI:EU:C:1999:407
[296] Case, *Nachi Europe GmbH*, C-239/99, [2001], ECLI:EU:C:2001:101
[297] Türk, op. cit. footnote 6 p. 105

preliminary ruling procedure under Article 267 (ex-article 234), under Article 258 (ex-article 226), Article 108 (ex-article 88) and Article 340 (ex-article 288) are also blocked.[298]

The expiry period is taken into consideration ex-officio by the Union courts and in case of the expiry time to have been passed the case would be dismissed with procedural grounds. The application time which is 2 months is extended up to 10 days depending on the distance to Luxembourg. The time starts at the earliest 15 days later from the date that it is announced on the official gazette. [299]

4.2 ACTION FOR FAILURE TO ACT

4.2.1. The Remedy

The action for failure to act which is regulated under Article 265 of the TFEU aims to have GC or the CJEU declare the illegal inaction of an institution. The defendants of the case could be EU institutions, body, office or agencies who have acted unlawfully by failing to take a decision or other sort of action required.[300] In a way it is possible to consider the action for failure to act as the determination of a breach. For this case to be initiated there has to be a clear obligation of Union to act in a specific way. [301]

When the EU institution refuses to act, and this inaction violates its duties under EU law, the applicant can proceed with the action for failure to act. [302] The action for failure to act is initiated with the purpose of judicial control against the defendants mentioned above.[303] The subject matter of the action for failure to act is not acting in a specific manner and this procedure has a sui generis character. [304]

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[298] Ibid
[299] Özkan, op. cit. footnote 40 p 94
[300] Lenaerts, Maselis & Gutman, op. cit. footnote 5 p. 419
[301] Kamuran Reçber, **Avrupa Birliği Hukuku ve Temel Metinleri.** Bursa: Dora, 2013 page 350
[302] Inga, Dauksiene and Arvydas Budnikas, " Has the Action For Failure to Act in the European Union Lost its Purpose?", Baltic Journal of Law & Politics, Volume 7 Number 2, 2014 page 13
[303] Baykal&Göçmen, op. cit. footnote 185 p 465
[304]Akgül, op. cit footnote 27 p141

The action for annulment and the action for failure to act are correlated. The action for annulment has the purpose of invalidating a measure and is initiated against the positive situation of the act whereas the action for failure to act is initiated against the negative situation, the situation of non-existence.[305] The Court in the *Chevalley*[306] ruling stated that the action for failure to act and the action for annulment had similarities.[307]

4.2.2. Admissibility

The admissibility criteria of the action for failure to act are very similar to those of the action for annulment. The private parties may also initiate this action but they need to fulfill the criteria of the applicants in the action for annulment.[308] Individuals, just like in the action for annulment, have a limited standing and they can only bring an action when the relevant authority should have addressed the act to them and has failed to do so. If this proceeding did not exist, it would not be possible to seek for a remedy when an institution is in inaction. In my opinion it would be better to consider this direct action as a supplementary proceeding of the action for annulment instead of an alternative, not only because of the difficulty in fulfilling the locus standi criteria but also due to the aim of the proceeding.

The action for failure to act can be brought, if the request submitted to an institution for a specific action to be made is left without answer. This remedy has a secondary character, which means this action cannot be brought when an action for annulment can be initiated. These two proceedings cannot be followed at the same time, parallel to each other. [309]

Dauksiene comments that the action for failure to act is not an effective remedy, and that the CJEU does not explain why this action is interpreted in such a restrictive manner. It was commented before that the applicant could apply for the procedure of the

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[305] Karayiğit, op. cit. footnote 11 p. 55
[306] Case, *Chevalley* C-15/70, [1970], ECLI:EU:C:1970:95
[307]Türk, op. cit. footnote 6 p 171
[308] Akgül, op. cit. footnote 27 p. 142
[309] Tekinalp &Tekinalp, op. cit footnote 20 page 252

action for annulment so that the limitations in this procedure were justifiable. The limitations of this procedure are strictly criticized by the scholars. It is a general belief that this procedure has become an in effective remedy for the individuals. [310]

4.2.3. Procedure

This procedure is applied against breach of the necessary actions to be taken by the authorities in other words the inaction of the authorities. In accordance with Article 266 if the Court declares that the institution has failed to act in breach of the Treaty it cannot adopt the act instead of the institution, but the decision obliges the institution to act in accordance with the judgment. [311] The institution has the power to decide how to take the relevant actions. [312] At the end of the action for failure to act proceedings the Court determines the breach of the Union law. It cannot make any decision or determine what actions have to be taken as on behalf of the institution. [313]

The action of failure to act starts by the relevant authorities being invited to act and this invitation has to be directed to the defendant Union authority, clear and in full with an official notification in written form. This official notification is the preliminary stage and it is important that the notification clearly contains the action that has to be realized by the Union institution. For the initiation of the action for failure to act the time limit of two months should pass without the institution taking the necessary steps. [314] If the authority fails to act the action can be initiated by the individual.At the end of the proceeding if there is a failure to act which results with the breach of the Treaty, the CJEU accepts the case, otherwise the individual may bring an action for annulment against the position of the institution.[315]

The locus standi of natural and legal persons are also restricted in this procedure just like in the action for annulment. "Natural and legal persons can only bring an action

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[310] Dauksiene & Budnikas, op. cit. footnote 286 p13
[311] Baykal&Göçmen, op. cit. footnote 185 p 473
[312] Türk, op. cit. footnote 6 p 201
[313] Akgül, op. cit footnote 27 p143
[314] Türk, op. cit. footnote 6 p.171
[315]Tekinalp &Tekinalp, op. cit footnote 20 page 253

against reviewable omissions if an institution of the Community (Union) has failed to address to that person any act other than a recommendation or an opinion".[316]"In case of the act that is in question is not directed to the individual, the individual will have locus standi if he is directly and individually concerned. [317] The individuals may complain only about failure to act in instances where they claim their rights are violated by failure to act. [318]

The Lisbon amendments have rearranged the failure to act procedure and included the European Council and European Central Bank as potential defendants of this remedy.[319]The time period given to the Union authorities to act in a specific way is two months. [320]

4.2.4. Decision

When the Court decides the case in its merits and the application is accepted, it announces that the relevant institution has failed to act, but cannot give directions or orders to the defendant. The institution who is the defendant of the case is obliged to take the necessary measures in accordance with the decision of the CJEU. It is expected to fulfill its obligation within a reasonable time.

It is commented that the wording of the article is abstract and the term of failure to act is not described. The term was mainly developed by the case-law of the CJEU. The EU courts interpretation of the term has been the failure to adopt a position rather than being a failure to fulfill obligations.[321]

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[316] Türk, op. cit. footnote 6 p.193
[317] Baykal&Göçmen, op. cit. footnote 185 p 473
[318] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu. Page 41
[319] Mengiler, op. cit. footnote 22 p.283
[320] Reçber, op. cit. footnote 285 p. 354
[321] Dauksiene &Budnikas op. cit. 286 p 13

4.2.5. The Relationship Between the Action for Annulment and the Failure to Act

The individuals can use the action for failure to act in case of "an illegal inaction" of an institution. This is an alternative remedy also provided for individuals however as the failure to act and the action for annulment are complementary methods and most of the conditions of both remedies are the same, it cannot be considered as an effective alternative to it.[322] Karayiğit also states that due to the fact that these two actions cannot replace each other, and that the application criteria are similar it is not possible to consider the action for failure to act as an effective alternative to the action for annulment. [323]

A completely different approach has been introduced by Johansson, as he states that although the action for annulment has proven to be more useful for the individuals, he thinks the critics against the failure to act being meaningless are going too far. He adds that it is understandable that the conditions for the proceeding for individuals are very similar this is why in most of the cases except for exceptions the individuals end up with taking the direct action for annulment, however he states that due to the lack of statistics showing the applications of inactions submitted to the instutions it is not possible to know actually how successful the failure to act applications have been, and that he believes that relaxation of the locus standi conditions of both the annulment and the failure to act proceedings may help to close the gap in the judicial protection system. [324]

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[322] Albors-Llorens, op. cit. footnote 17 p. 216

[323] Karayiğit, op. cit. footnote 11 p. 128

[324] Magnus Johansson, "The Action for Failure to Act : Article 175 EC" , Lund University, 1998, page 52

5. INDIRECT ACTIONS

5.1. PRELIMINARY RULING PROCEDURE

5.1.1. The Remedy

The preliminary ruling procedure is an indirect procedure which provides an alternative way to challenge the legality of EU acts, and is also used for the interpretation of the Union law. The preliminary ruling procedure has a very important effect on the uniform application of the Union law[325] and CJEU considers this remedy as an alternative to the action for annulment for the individuals.[326] It has a very important role in the judicial review of the EU especially in the cases where there are no Union level remedies available so that the individuals can apply to the national courts to seek their rights.

While national proceeding is going on at the national court level, the court formulates and refers the problem to the CJEU which is sometimes a request of interpretation or a question on the validity of an act.[327] Review of the EU acts within the preliminary ruling procedure is also so-called the validity review. The preliminary ruling procedure is regulated under Article 267 of the TFEU and it is a ruling on the validity in the proceedings before national courts and that the national court cannot resolve the question on validity on its own and refers it to the CJEU.[328]I n other words, application of the preliminary ruling procedure is realized by the the national courts, which are also considered as the Union courts. [329] In fact, both the CJEU and the doctrine give a duty of applying the EU law to the national courts.

The national courts always have the chance to apply to the Court for a preliminary ruling at any stage of the proceeding, whenever they feel the necessity. If the national court is a court of last instance it is an obligation for it to apply to the CJEU. 3rd paragraph of Article 267 even regulates this referral as being mandatory for the last

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[325] Mengiler, op. cit. footnote 22 p42
[326] Briem, op. cit. footnote 32 p 28
[327] Sjöstrand, op. cit footnote 29 p 26
[328] Lenaerts, Maselis & Gutman, op. cit. footnote 5 p. 456
[329]Ibid p. 456

instance Courts when the validity of an EU law is questioned. This aims to find a solution of the national courts refusing to refer to the CJEU when required.[330]As the preliminary ruling reference can be only made by the national courts, the Member States are the most important actor of the preliminary ruling procedure.[331]

Arbitrators and other tribunals, other than courts cannot apply to preliminary ruling procedure as they are not considered as courts. The court who will make the preliminary rulimg application can be the first instance court, the first degree appeal court, or any supreme court. Judicial, administrative or constitutional courts can also make preliminary ruling applications. [332]

It is possible to see that some national courts send the court file together with the preliminary ruling application and some others refer vague questions which makes it difficult for the CJEU to answer the query. It is important for the national courts to summarize the case and explain briefly and clearly the questions referred and the facts that led to this reference. [333]Although the effect of the result of the preliminary ruling procedure *is inter partes*, the CJEU has stated the other national courts to act in accordance with the ruling. [334]

5.1.2. The Importance of the Preliminary Ruling Procedure for the Protection of Individuals

The preliminary ruling procedure is the procedure that the Court believes to accompany the action for annulment to provide a complete system of remedies to individuals in the EU judicial system. Surely the preliminary ruling system is a very commonly used procedure which has many advantages as well as disadvantages for the individuals. Many of the validity reviews have been done by way of preliminary ruling procedure due to the strict locus standi conditions of the action for annulment.[335] This

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[330]Pernice, op. cit footnote 65 page 390
[331] Baykal&Göçmen, op. cit. footnote 185 p 505
[332] Akgül, op. cit footnote 27 page 92
[333] Ünal, op. cit. footnote 33 p. 108
[334] Karayiğit, op. cit. footnote 11 p. 87
[335] Albors-Llornes, op. cit 17 p. 186

procedure would be worthy mentioned as the main route for the judicial protection of the individuals through cooperation between the national courts and the CJEU. The cooperation between the national courts and the European Courts may be one of the most important points for the CJEU as we know that it wants EU law to be applied by the national courts and the national courts are considered as European courts. In fact this is the way that the national judges from each level gets the chance of getting in contact with the CJEU. Many important principles such as the direct effect and supremacy were developed during the preliminary ruling procedures. [336]

The preliminary ruling procedure allows the courts to declare an act invalid. Although in the action for annulment the decision is declared as null and void, and has effect as it has never existed, in the preliminary ruling procedure the decision is addressed to the national court and the act in question is announced to be invalid. Although this may mean that the effect of the preliminary ruling procedure will be limited to the applicants, the CJEU had ruled that the national courts may depend on the previous preliminary ruling decisions which allows the avoidance of unnecessary workload for the CJEU. [337]

The preliminary ruling procedure, secures the rights of individuals who do not have the chance to initiate an action for annulment against Union institutions, has limited remedies to contest the illegal actions of the Union institutions. [338] So when there are no Union level implementing measures the preliminary ruling procedure gains even more importance.

With the preliminary ruling procedure, the applicants are not bound with the strict locus standi criteria of the action for annulment, there is no restrictive time limit of 2 months as in the action for annulment.

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[336] Claire Kilpatrick, **Turning Remedies Around: A Sectoral Analysis of the Court of Justice. The European Court of Justice,** 1st Edition Oxford: Oxford University Press, 2001, page 143

[337] Albors-Llorens, op. cit. footnote 17 page 182

[338] Mengiler, op. cit. footnote 22 p.41

There are also some disadvantages of the preliminary ruling procedure which is described to have a constitutional review character more than being a direct method of protection individual rights by Albors-Llorens. [339]

First of all, if the action for annulment locus standi conditions are clearly met, the applicant will be bound with the time limit of 2 months. In other words, if the applicant had the chance to challenge the act at the Union level by way direct action and has failed to do so, the preliminary ruling procedure cannot be applied to his/her situation. If the claimant is sure that he has standing at the Union courts, he must apply within 2 months. In the *Tekstilwerke Deggendorf* case, the applicant who did not bring an action for annulment within the 2 months period was declared not to have standing in the preliminary ruling procedure as well.[340] In this decision, the Court has stated that, if there are any doubts about the standing criteria of the applicant than the application is allowed.[341] *Textilwerke* Judgement is also connected to the legal certainty principle. However, this principle of Textilwerke shall be used in cases where the possibility to locus standi is very clear for the applicant. The unclarities in the locus standi conditions shall not be interpreted against the benefit of the individuals.[342]

The preliminary ruling procedure aims to ensure the cooperation between the national courts and the CJEU. It is the national court that makes the decision about referring the preliminary ruling, and the parties of the case have very little or no involvement. The parties cannot determine whether the reference will be of validity or interpretation, they cannot formulate the questions to be referred, and cannot get involved in the summarization of the facts of the case. The exchange of pleadings does not take place and the parties have the chance to present a short petition and do not even get the chance of replying to the other party's view. The procedure requires time and is costly. In some cases where it is not possible to convince the first instance court to make a reference, the parties would have to appeal the decision to be able to succed in the

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[339] Albors-Llorens, op. cit. footnote 17 p 179
[340] Sjöstrand, op. cit footnote 29 p 27
[341] Sjöstrand, op. cit footnote 29 p27
[342] Karayiğit, op. cit footnote 11 p. 136

preliminary ruling procedure as the last instance court has the obligation to submit the questions to the Court. Especially in cases where the act in question is not implemented by a national measure it is not possible for the applicant to apply to the preliminary ruling procedure. In fact, this was the main point of discussion in terms of the effective judicial protection and the Article of the action for annulment, however at least this part of the problem seems to have been sorted partially with the amendments that have taken place in Article 263. Before the amendment of Article 263, the applicant was being forced to break the law in order to be able to bring an action against the measure that he/she wants to claim to be invalid.[343] The action for annulment allows intervention in the case whereas the preliminary ruling procedure does not make this possible. Although it is rare, the Court might refuse to give a preliminary ruling with the reason that the question referred was not clear, the facts of the case were not properly set out, or that the question referred was related to the national law more than the EU law. In some cases, the individuals would only have to wait for the national measures to be implemented so that they could initiate the proceeding of reliminary ruling.[344]

In *Foto-Frost* Judgement the Court had stated that the first instance courts also have the responsibility to apply to preliminary ruling, in order to avoid the Union acts being considered as valid by some national courts and announced to be invalid by the others. The Foto- Frost case has another importance of ruling that the national courts are not entitled to make judgements on the validity of the Union law. According to the same case-law the national courts are allowed to suspend the measures related to that act until the end of the proceeding being run by the Court of Justice. This will be explained below in the relevant section.

In *Rosneft*[345] Case, in which the individual contested a Council act at the national court, the Court considered that it has the jurisdiction to give a preliminary ruling on a matter related to the Common Foreign and Security Policy. [346] This decision is a new

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[343] Albors-Llorens, op. cit, footnote 17 p. 188
[344] Ibid, p. 195
[345]Case, *Rosneft*, C-72/15, EU:C:2017:236
[346] https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170034en.pdf

decision that has clarifies some aspects of the CJEU's jurisdiction over CFSP. It has been clear that the CJEU has jurisdiction to "monitor compliance with TEU 40 and decide on the validity of decisions concerning restrictive measures against natural and legal persons". The decision of Rosneft confirms that "any regulation adopted on the basis of the TFEU Article 215 is within the jurisdiction of the CJEU. With this decision the CJEU has been criticized by the applicant that the decision of the Court contained political involvement.[347]

5.1.3. Interim Measures

As the validity review can be realized both in direct and indirect ways in the EU legal order it is possible to talk about two types of interim measures which are the ones at the EU level and the ones at the national level.

Articles 278 and 279 of the Lisbon Treaty regulate the interim measures that may be granted by the Union Courts. As it is known there are two types of interim measures which are the suspension of enforcement and the other measures which may be necessary for the subject matter of the case. In both cases the aim of the interim measures is to guarantee full effectiveness of the future court order. From this point of view the interim measures are closely related to the principle of effective judicial protection.[348]

The cases initiated before the Court do not have suspensory effect, but according to Article 278 of TFEU the Court can suspend the execution in case of necessity an under some circumstances. In some cases suspension of the execution may not be enough to avoid unbearable damages, and in these cases the Court can decide on interim measures in accordance with Article 279.[349]The interim measures aim to provide "provisional legal protection" to the parties before the decision is made. Article 278 of the TFEU regulates that "actions brought before the CJEU or the GC do not have suspensory effect" for this

[347] Case, *Rosneft*, C-72/15, EU:C:2017:236
[348] Türk, op. cit. footnote 6 p. 298
[349] Özkan, op. cit footnote 128 page 216

reason necessity arises for the interim measures to be used in cases. Interim measures allow the applicants to "safeguard its rights under Union law".[350]

The interim measures are temporary, are in force only for a time period, and do not affect the final decision. The time period that the interim measures will be in force can also be stated in the interim measure decision. If a time period is not stated than can be considered as the interim measures will be in force until the final decision is made. The court can change, extend or remove the interim measures during the proceedings upon the request of one of the parties of ex-officio. The decisions on the interim measure can be made by the President of the Chamber. The decision on the interim measures can be made in written or verbal proceedings.[351]The interim measures are only applicable when the claimant applies with a petition and can only provide a protection within the procedures that are being dealt before the court. The interim measure requested shall be in connection with the subject matter of the case. [352]

The Union Courts will adopt interim measures if the applicant can show urgency and the necessity for the measure to prevent him from having irreparable damages. Interim measures are necessary in order for the final judgement not to lose its effect and will not be accepted if it is clear that the final judgement will be made before the damage occurs. In accordance with the Community courts the damage should be certain, shall be serious and irreparable. The interim relief request can be submitted only after the case is initiated.[353]

The interim measures need to be discussed under the title of judicial remedies as it strengthens the guarantee of effective judicial protection to individuals. It is important for the courts to grant interim reliefs while waiting for the outcome of the CJEUdecision.

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[350]Lenaerts, Maselis & Gutman, op. cit. footnote 5 page 563
[351]Ibid 226
[352]Can &Sarıaslan, op. cit. footnote 12 page 111
[353] Türk, op. cit. footnote 6 p. 308

[354] The way of granting interim measures to the individuals during this time is an issue that needs to be dealt within the legal system of the Member State.

As the national courts are also considered as Union Courts and that an important part of the Union law is being applied by the national courts, the national courts also rule for the interim measures. However the interim measures grated by the national court during the indirect procedures do not provide as strong protection as the ones granted during the direct actions. The interim reliefs that are granted by the national court that has referred the question have affect within the territory of the related Member States whereas the interim reliefs under Articles 278-279 have affect within the full territory. [355]Especially during the preliminary ruling procedure the Court does not have the chance to make decisions on interim measures. At this point the importance of the national courts to grant interim measures gains more importance. The possibility of the national courts to stop applying the Union law due to interim relief is still a developing area. This has been referred to in the *Factortame I, Zuckerfabrick* and *Atlanta*[356] cases.

In *Factortame I* decision the court mentioned the importance of interim measures. In *Foto-Frost* case the court decided that "only the Court itself may decide on the invalidity of Community legislation". O'Keeffe stated that; "In *Zuckerfabrik* Case, the issue was in proceedings for interim relief, whether a national court could suspend the operation of a national measure adopted on the basis of a Community regulation". He adds that in *Factortame I* the court decided that interim measures were necessary for effective judicial protection whereas in the *Foto-Frost* case it stated that only the Court could decide on the invalidity of a Union law, so in the *Zuckerfabrick* case the Court decided that "national courts could suspend the enforcement of national administrative measures" even when not deciding on the invalidity. The *Francovich* case on the other hand was about "the state liability in the light of the principle of effective judicial protection of the individual." With this judgment the Court had introduced the possibility

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[354] Sjöstrand, op. cit footnote 29 p 37
[355] Sjöstrand, op. cit footnote 29 p 30
[356] Case, *Atlanta*, T-521/93, EU:C:1996:184

of the individuals claiming or the compensation for their damages in case of a liability of a Member State. [357]

In the *Arbed* case the Court has explained the content and the purpose of the interim measures. If these measures are legally and or in fact right, urgent, can avoid serious and inevitable damage and does not affect the decision to be given at the end of the proceeding, interim measures can be decided. There is a strong bond between the interim measures and the measures to be taken with the actual case however they do not have the same characteristic. Just like in the domestic legal systems the purpose of the interim measures is to increase the effectiveness of the decision to be made at the end of the case. [358]

In the *Factortame* I decision the national courts were decided to be obliged to provide interim measures. *Zuckerfabrick* case the Court also decided that the provisional suspension of the national acts that were implementing the Union law were necessary. This would result suspension of the Union law in practice but the CJEUin the *Foto-Frost* cases did not close the options for the interim measures. The court has ruled that effective judicial protection required the presence of interim measures. The court added that if the individuals cannot get interim measures that suspend the application of the Union law while waiting for the outcome of the preliminary ruling, the effective judicial protection would be at stake. In *Atlanta* case the right of the national courts to grant interim measures were extended. There are two types of cases in which interim measures may be necessary. The first is when a national act is being challenged on the basis of incompatibility with the Union law and the second when the validity of a Union act is under analysis.[359]

Sjöstrand states that it is important for the national courts to be careful when granting interim measures in order not to damage the uniform application of the EU law within the Union, as the interim measure granted by one Member State cannot be applied in another one. My opinion is that the national courts tend to be too strict on the criterion

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[357]O'Keefe, op. cit. footnote 208
[358] Özkan, op. cit footnote 128 p216
[359] Sjöstrand, op. cit footnote 29 p 39

of interim measures that individuals cannot benefit from this remedy. Applying a restrictive approach to the interim measures may cause irrevocable damages to the individuals. The subject matter and the facts of the case need to be analyzed in detail at an early stage of the proceeding.

5.1.4. The Role of the European Courts and the National Courts in the Protection of Individuals

The role of the CJEU in the progress of the European Union law is undeniable. However, the importance of the national courts being involved in the progress is worthy to be mentioned. It would not be wrong to state that there is an allocation of competence between the national courts and the Court of Justice. [360]

According to Akgül, the role of the national courts in the development of the Union law is underestimated. He adds that the national courts have an important role in providing a comple system of remedies in the EU law. The national courts use a general jurisdiction power whereas the power of the CJEU has a specific jurisdiction power.

"The Union legal order has introduced the legal, financial and social integration together with judicial integration." The Union legal system has held the national courts responsible to apply Union law. For this reason, an important part of the protection of the individual rights have to be realized by the national courts. [361]

The national courts are responsible to fulfill the responsibilities arising out of the Treaties and of the acts of the Union institutions, they have to make the application of the Union law easier, and are banned from actions that block the application of Union law. [362]

The CJEU has stated many times that "the national courts must respect the procedural rights guaranteed in international law" "individuals must have a right of access

[360] Özkan, op. cit. footnote 40 p 29
[361] Karayiğit, op. cit. footnote 45
[362] Ibid

to the appropriate court and the right to a fair hearing". *Johnston* case and *Heylens* cases are important examples of this. [363] In fact the CJEU has in many of its decisions stated that EU law shall be applied by the national courts. This may be one of the main reasons why the Court is very protective of the preliminary ruling procedure.

With the jurisprudence of the CJEU it can be understood that judicial review in the EU law term covers the Member States legal systems too.[364] There are some principles that must be respected by the Member States in this matter. Although the principle of the remedies and procedures provided in the national systems should already be sufficient and should aim to extend effectiveness to the Union measures, it should be taken into consideration that the national systems sometimes "fall short of enforcement expected under Union law."[365]The principle of effective protection for individuals requires the national remedies and procedures not to endanger the Union law.[366]Although the EU does not focus too much on private law areas, the national courts are usually the authorities to provide remedies in the situation of a breach in the private law. This makes article 47 of the Charter to have less power than it should have at the Union level. [367]

The *Factortame I* decision has stated that the duty of the national courts was providing "the most appropriate remedy" that is already included in the legal system of the Member State.[368] In the *Unibet* case the national court has wondered if the individual had to be provided with a remedy that was not included in the legal system of the Member State. This was decided to be not necessary by the CJEU as long as other remedies for protecting the Union rights were available. Indirect actions were also considered to be as acceptable remedies. [369]This is not surprising as the CJEU in many of its rulings stated that the European Union legal system did provide a complete system of remedies to the individuals. Sjöstrand states that this decision shows that the Member States do not have to align their national legal system with the European Union system for strengthening the

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[363] Steiner,Woods &Twigg- Fleshner op. cit. 167.page 138
[364] Thorson, op. cit footnote 7 p. 3 page 15
[365] Dougan, op. cit. 131 footnote p 19 p.24
[366] Ibid p. 34
[367] Mak, op. cit. 112, p. 20
[368] Sjöstrand, op. cit footnote 29 p33
[369] Ibid p. 34

legal protection provided to individuals. However, the national courts may have to provide the interim measures during the time the validity of the some acts are under analysis. [370]

National courts are described to be an "integral part of the European judicial system".The European Courts and the national courts are responsible to maintain the judicial review against the EU acts. It is important to mention that these two levels of judicial systems are "bound together" in order to provide the effective judicial protection set out in the CFR article 47.[371] "EU Law is part of the Member States' legal systems and therefore can be invoked in the Member States' courts." "Member States are obliged to apply the EU law in the same fashion as they would apply national law."[372]

The national courts are not entitled to declare the Union acts invalid as it has been clear with the *Foto-Frost* decision. The Court stated that this authority was not given to the national courts in order to maintain uniform application of the Union Law. The idea of transferring the right to review the validity of Union acts are believed to influence the uniformity of the Union Law in negative manner, but some scholars believe that giving some power to national courts does not mean "allocation of authority".[373]

The CJEU, instead of relaxing the rules related to locus standi, has obliged the national courts to develop the remedies access of individuals to justice. In the *Verholen* case the court has stated that although the national rules are entitled to arrange the remedies against Union acts before the national courts, the national rules could not make the challenges of Union law impossible at national level. If the individual's rights before the Union courts are not very strongly protected the national courts shall provide relevant remedies. The *Borelli* case is another example of a similar jurisprudence. Sjöstrand states

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[370] Ibid
[371] Pernice, op. cit footnote 65 page 388
[372] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu. Page 4
[373] Sjöstrand, op. cit footnote 29 p 52

that the success of national courts to provide effective judicial protection for individuals is proportional to their "willingness to reform their legal system".[374]

As the national courts cannot declare the Union acts as invalid, a direct action for annulment is more protective of the individual rights than bringing the claims before national courts unless national courts cooperate. Preliminary proceedings play an important role for the Member States' responsibility to provide effective judicial protection to individuals. The dialogue between the national courts and the CJEU for providing effective judicial protection as set out in article 47 of the CFR. The national courts, in this regard are the general judicial bodies responsible for the application of the Union law, and have the right to bring matters before the CJEU due to preliminary ruling proceedings.[375]

The CJEU has aimed to maintain an effective and correct application of the Union law in the national level. The national courts have played an important role in the preliminary ruling procedures, and in the adoption of the principles set out by the Court as a result of these procedures. According to Baykal, the most important elements of the system the CJEU has formed for assurance of the effective application of the Union law in the Member States are the mechanisms developed to protect individual's rights before the national courts. The compulsory element for the success in this goal is the contributions of the national courts.[376]

Widening the national court's authorities has been a matter of discussion, but was criticized by the scholars. As the national courts do not have full knowledge of the EU law, and that it takes time and requires a budget to train all the national judges on the EU law, it was stated that this would not be very easy. As the Union consists of 29 national legal systems which are different from each other it might "be premature to expect them to embrace and apply a new legal system on their own."As the Member States are resistant

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[374] Sjöstrand, op. cit footnote 29 p 28
[375] Sanem Baykal, "Avrupa Birliği Anayasallaşma Sürecinde Adalet Divanı'nın Rolü: Divanın Ulusal Mahkemelerle İlişkileri ve Yorum Yetkisinin Sınırları Bağlamında Bir Analiz", Ankara Avrupa Çalışmaları Dergisi, Cilt 4, No 1, Güz 2004, page 121
[376] Ibid page 127

to leave their national sovereignty the harmonization of the rules of the national legal systems would not be very easy.[377]

According to Baykal, the national courts are the compulsory factor for the preliminary ruling procedure to be initiated and the sole executor of European Court of Justice's decisions for this reason they are the only authority for the protection of the individual's rights, where the acts which are inconsistent with the Union law to be discussed, and the effective application of the Union law can take place. She also adds that as the Member States are countries who have accepted the rule of law principle, it makes it easier for the national courts to be convinced to apply the Union law.[378]

The *UPA* judgement has been an important milestone for the CJEU's jurisprudence as with this decision the Court stated that the Member States are under the liability of developing a system for providing effective judicial protection to individuals. This has meant that CJEU refuses to accept responsibility to ensure that effective judicial protection is provided to individuals.[379]

In any case article 47 of the Charter, attracts attention to the "constitutionalism in EU law and its impact on private law matters." but also challenges the division of competences between national and EU courts.[380]

5.1.5. A Critical Approach: Is the Preliminary Ruling an Alternative Remedy for the Effective Judicial Protection of Individuals?

Although the preliminary ruling procedure has an important role in the judicial review mechanism of the EU and for the protection of individual rights, there have been strong debates on whether this is an alternative remedy or not. The preliminary ruling procedure is one of the most important tools of the Union legal system. The question of

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[377] Sjöstrand, op. cit footnote 29 p 55
[378] Baykal, op. cit. footnote 420 p. 129
[379] Detailed Analysis of the Courts' Jurisprudence" Appendix 1.
www.unece.org/fileadmin.org/fileadmin/DAM/env/pp/complianee/C2008-32/ communication/ Appendixes doc.pdf page 18
[380] Mak, op. cit. footnote 112, p. 24

whether the preliminary ruling procedure is an alternative remedy to the direct action for annulment has been a topic of academic debates for a long time.

The disadvantages of the preliminary ruling procedure was stated to be by the AG Jacobs in his Opinion in the *UPA*[381] case, that the preliminary ruling procedure did not grant the possibility to national courts to invalidate Union acts, the access to the Court in other words the preliminary reference was not given as a right to the individuals, in case of lack of implementing measures the individuals would not be able to apply to the preliminary ruling procedure and this would leave them without any protection, costs and delays of the proceeding were not favorable compared to the action for annulment, it would not be possible to force the first instance courts to make a preliminary reference and the involvement of the applicant was very limited etc.[382]

Albors-Llorens due to the reasoning of the Court in the *TWD* case states that the preliminary ruling procedure is a parallel system to the action for annulment more than being an alternative to it. He adds that the most favorable characteristic of this procedure is that the individuals do not have to fulfill strict locus standi criteria,[383] he adds that another alternative is that the national court can grant interim relief as it was done in the *Zuckerfabrik* case. On the other hand he states that the fact that the CJEU is not able to "judge the appropriateness of the reference" and the parties do not have the capacity to force the national court to make preliminary references are examples to the disadvantages to the system.[384]

Sjöstrand also points at the same point that the preliminary ruling procedure does not involve a procedure where the applicant can force the national court to make the reference. She adds that the national court does not have the chance to declare the act in

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[381] Opinion of AG, *UPA*, 21 March 2002
[382] Briem, op. cit. footnote 32 p 28
[383] Albors-Llorens, op. cit. footnote 17 p185
[384] Ibid p.188

question as invalid, and that the time it takes for the average preliminary ruling procedure is quite long and the procedure is costly.[385]

In the previous sections the advantages and disadvantages of the preliminary ruling procedure were stated. Although this is one of the strongest and the most commonly used procedure for the individuals it is possible to see that the disadvatages are more than the advantages.

Dougan, the "Article 267 references hinder the full and proper integration of Treaty rules into the domestic legal orders".[386]According to the author the possibility of seeking preliminary ruling cannot be considered as an effective remedy for contesting unlawful Community act as they cannot force the national courts to apply to preliminary procedures to CJEU and that the outcome of this procedure is uncertain and morecostly than a direct action before the CJEU. [387]

Although the parties' right to challenge the legality of EU acts was accepted long time ago in the Treaties in the *Foto Frost*[388] decision the CJEU has clearly stated that the national courts do not have the right to rule on the validity of the EU measures.[389]

Karayiğit states that in order to compensate the strict interpretation of the action for annulment the preliminary ruling procedure which aims the validity review has not been interpreted strictly. He adds that the Court has not rejected any case due to inadmissibility of preliminary ruling procedure for the purpose of validity review.[390]

The national courts are considered as Union courts regarding the application of Union law, but the national courts do not have the right to declare the Union measures invalid as this authorization is not given to them which causes some problems in terms of

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[385] Sjöstrand, op. cit footnote 29 p 28
[386]Dougan, op. cit. 131 footnote p 19,p.2
[387] Case, *UPA*, C-50/00 P, ECLI:EU:C:2002:462
[388] CJEU Case, Foto-Frost, 314/85, [1987], ECLI: EU:C:1987:452
[389] Haakon Roer-Eide and MariolinaEliantonio," The Meaning of Regulatory Act Explained: Are There Any Significant Improvements fort he Standing of Non-Priviledged Applicants in Annulment Actions" German Law Journal, Volume 14 No 9, p. 1852
[390] Karayiğit, op. cit. footnote 52

access to justice and effective judicial protection for individuals. The fact that the national court cannot give the applicant what he/she wants during the preliminary ruling procedure has been expressed by the AG Jacobs in his opinion in the UPA case. The national courts have a limited involvement while challenging validity.[391]

Aygün on the other hand states that the preliminary ruling procedure has a great importance for the protection of the individuals in the Union law with the reason that all the legal measures are covered under the article that regulates the preliminary ruling procedure. She interprets the same procedure from a completely different perspective stating that with this procedure the national courts were granted the chance of referring questions to the CJEU on the validity of the Union law. She adds that the fact that the preliminary ruling procedure aims to maintain a uniform application and application of the Union law, the preliminary ruling procedure aims and succeeds to compensate the breaches of the Union law that affect the private individuals.

The preliminary ruling procedure is considered as an alternative channel in which individuals can challenge the validity of Union acts. According to Sjöstrand, when there is no remedy for direct actions the individuals have the right to enforce their rights before a national courts.[392]

Another problem which causes some hesitations on whether the preliminary ruling procedure is an effective alternative to the direct action for annulment is because when the legality of a Union measure becomes a matter of discussion, the reference is made by the national court and the referral questions are formed by the national court, so the contribution of the individuals in the preliminary ruling procedure is not so effective. The reason why it is not possible to consider the preliminary ruling application as a right granted to the individuals is because not all the national courts are under the obligation to refer the question to the CJEU under the article. However it is difficult to consider the preliminary ruling procedure as being a remedy that grants effective judicial protection

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[391] Briem, op. cit. footnote 32 p 29
[392] Sjöstrand, op. cit footnote 29 p 29

to individuals just because the courts of last instance are under the onligation to refer the question to the CJEU.[393]

In my opinion, it cannot be considered as an effective alternative due to the fact that it is not a direct action and having access to a court by way of direct action should be considered as a fundamental right regardless of the result of the case being positive or negative. In case of direct action for annulment as explained above in may cases, the applicant does not even have the change to defend his case as his case is dismissed at the stage of admissibility criteria not being fulfilled. However most of the academic debates consider the preliminary ruling procedure as an alternative remedy to the direct action for annulment, and the CJEU believes that it is a very effective alternative.

Whatever the outcome of this discussion is, it clear that the CJEU and the Treaties accept the preliminary ruling procedure as an alternative to the direct action for annulments to challenge the Union acts for the individuals. The CJEU has in many occasions stated that the preliminary ruling procedure is an alternative to the direct action for annulment. Apart from serving as an alternative to the direct action for annulment, the preliminary ruling procedure ensures the uniform application of the Union law.[394]

5.2 THE PLEA OF ILLEGALITY

5.2.1. The Remedy

The plea of illegality which is regulated under Article 277 TFEU is not an independent action. "It is an incidental plea in law intended to avoid the application of unlawful Union acts of general application" by the parties who are "no longer entitled to challenge them." The plea of illegality for this reason is not a remedy that can be used alone, but can be "raised in the context of one or more direct actions lodged before the Union Courts."[395] The CJEU has not been interpreting this remedy in a very restrictive manner however, aims to restrict the kind of acts to be reviewed to regulations. It was

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[393] Briem, op. cit. footnote 32 p 30
[394] Briem, op. cit. footnote 32 p 30
[395] Lenaerts, Maselis & Gutman, op. cit. footnote 5 p. 441

commented by the academicians that this can be due to the fact that the CJEU wanted to give a chance to the individuals in challenging normative measures.[396] This procedure is usually used when there is an on-going action for annulment. It can also be used during the damages actions in which the applicant claims that a damage has occurred from an implementing measure of a regulation. [397]

The plea of illegality does not aim to invalidate the act, only aims for the act not to be applied to the applicant.[398] Even when the Treaty provisions restricted the actions initiated by the private individuals against regulatory acts the private individuals had the chance to have indirect applications against these regulatory acts with this method.[399] The plea of illegality against a regulation does not invalidate the regulation but only stops its effect for the applicant, it can be considered that this remedy has been drafted to protect the interests of private individuals,[400] It is important to mention that Article 277(ex-article 241) can be only applied in the proceedings brought before CJEU and not before the courts of the Member States.[401]

The plea of illegality is told to form a balance between legal certainty and legality principles, as the Article states that any party may plead grounds specified in Article 263 in order to invoke the inapplicability of the regulation.[402]This proceeding is not an independent action, it can be invoked incidentally.The CJEU has made it clear that the regulation whose illegality is being questioned

5.2.2. The Relationship Between the Action for Annulment and the Plea of Illegality

The main advantage of the plea of illegality is that it allows the individuals to challenge acts of general application without being subject to very strict locus standi criteria of the action for annulment which is in favour of the individuals. However, on the

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[396] Albors-Llorens, op. cit. footnote 17 p. 198
[397] Albors-Llorens, op. cit. footnote 17 p. 198
[398] Karayiğit, op. cit. footnote 65
[399]Arsava, op.cit footnote 115
[400] Lenaerts, Maselis & Gutman, op. cit. footnote 5
[401] EU Constitutional Law Chapter VIII. Judicial Review and Protection of Rights in the EU, 2000-2010. www.cvce.eu. Page 38
[402] Türk, op. cit. footnote 6 p 205

other side the fact that this procedure states that the individuals can only challenge the regulations or regulations with similar effects which can be considered as a disadvantage of the procedure. If the measure is addressed to the applicant, or there is direct and individual concern, the claimant will be bound with the strict time limit of 2 months.[403] The other limitation is that the article can be applied when there is an implementing measure of the contested act. However usually the Union does not address the implementing measures to individuals as this is usually done by the national authorities. This shows that in fact this procedure is also limited in some ways.[404] Karayiğit states that as the plea of illegality is not an independent procedure, it cannot be put forward in the absence of an implementing EU measure, even if there is in the absence of a court proceeding, and this makes the discussion of the effectiveness of this remedy worthy to be taken into consideration. He adds that the result of the plea of illegality does not have an *erga omnes* effect and that it has an *inter partes* effect. It also has an *ex nunc* effect starting from the date of the decision and the effect is not back dated.[405]

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[403] Albors-Llorens, op. cit. footnote 17 page 203
[404] Albors-Llorens, op. cit. footnote 17 page 203
[405] Karayiğit, op. cit. footnote 11 p. 143

6. DAMAGES ACTIONS

6.1. THE REMEDY

In all the developed legal systems the administration is responsible to compensate the damages of the individuals under some circumstances as a requirement for rule of law. It is not a coincidence that Article 41 of the Charter regulates the right to a good administration.[406] In the EU legal system it has also been necessary to have a remedy for compensating the damages caused by government institutions and determination of the responsibilities.[407] The damages action is not a direct remedy for the validity control of Union acts, it is a mechanism that makes it possible to compensate the damages that has been caused by the Union.[408] In the presence of an action for annulment, the damages caused by the act that is declared to be void later on can be also compensated by the action of damages before the CJEU.

Articles 268 and 340 state that the CJEU shall have jurisdiction over disputes caused due to the non-contractual liability of the Union institutions and servants due to the performance of their duties and provides a judicial protection to the parties for the compensation of the damages caused.[409]

In order for the Union to be liable to pay compensations there has to be three conditions which are, there has to be an action which is against the law, there has to be a damage and there has to be a correlation between the damage and the action. The action has to be attributable to the Union.[410]

The restrictive criterion in the action for annulment and action for failure to act are not applicable in the damages actions. However, although the locus standi conditions

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[406] Hacer Soykan Adaoğlu, "Avrupa Birliği Hukukunda Tam Yargı Davaları: AB Kurumları ve Üye Devletlerin Sorumluluklarının Karşılaştırılması" page 80 http://www.todaie.edu.tr/resimler/ekler/90ab8dbbec94a94ek.pdf?dergi=Amme%20Idaresi%20Dergisi

[407] Özkan, op. cit. footnote 40 p 109

[408] Karayiğit, op. cit. footnote 11 p. 63

[409] Katleen Gutman, " The Evolution of the Action for Damages Against the European Union and its Place in the System of Judicial Protection", Common Market Law Review, 2011, UK page 314

[410] Akgül, op. cit. footnote 27 p. 146

are not strict as the annulment, providing the case for the applicant is also difficult. Although the unlawfulness of an act can be immediately brought before the Court by the action for damages, due to the difficulty in proving the case, most of the times, the applicants first bring an action against the implementing measures before the national courts and when the invalidation takes place within the preliminary ruling procedure, they start the action for damages. In the cases where the applicants had directly brought an action for damages, not many of the cases were successful.[411]

Article 340 does not specify any restrictions for the persons who can initiate an action under this article.[412] For this reason, private persons can initiate actions against any regulatory or individual act of the Union. The applicant does not have to be the national of a Member State. The question of whether or not a Member State can also be the claimant of this case has not been answered yet, but the majority of the opinions in the doctrine answer this question positively. The damages actions are not subject to restrictive criterion and the *Schöppenstedt* judgement states out this fact. Any legal or natural person who had damages due to the actions of or due to the failure of the Union institutions can initiate the action for damages. The applicant does not need to be European citizen and the defendant of this action is the Union. The Union is under the obligation to compensate the damages that its institutions and staff have caused if the judgement is in favor of the applicant. [413] It can be initiated within a time limit of 5 years.

The damages action has three stages which are the admissibility, the review and decision. Regarding the actions to be initiated by the legal persons, the applicant will be under the obligation to prove that the damage was caused directly to itself. In other words, legal persons cannot initiate this action for the damages of some natural persons related to the legal person has had. As an examples, an association cannot initiate this case for the damages its associates has had.[414]

[411]Albors-Llorens, op. cit. footnote 17 p. 198
[412] Baykal, op. cit. footnote page 38
[413]Özkan, op. cit. footnote 40 p113
[414] Baykal, op. cit. footnote 38 page 46

The system that Article 340 regulates refers to the general principles of law that are common in the legal systems of the Member States instead of clearly defining, directly referring to the national law of any specific Member State or by stating the principles about its application.[415]

Although there are many cases initiated in accordance with Article 340, the Court applys a strict formula when checking if the acts have caused damages. The service failure, the failure of the administration, and the damages that are caused by the servants of the Union are grounds of the actions initiated under Article 340 of the Treaty.[416]

The *Lambert* Case has an interesting chain of facts as the applicant had tried to sue the Ombudsman who has made an investigation about his request of delaying or repeating an exam. The Court stated that the Ombudman could be considered as a Union body and a damages action can be initiated against him.[417]

Since the establishment the GC has acted as a first instance court in the compensation actions initiated by private parties against the Union and the CJEU has acted as an appeal court. [418] The real and legal persons who have damages due to the faulty behavior of the Union Officials can initiate this action before the CJEU or the GC.[419]When the decision is made an amount of payment is determined for the Union to pay together with interest, for this reason the decision contains the payment of a debt.

In *Plaumann* case which was initiated a short while after the other decision, the CJEU has made a different judgement. In this case the claimant had initiated both action for annulment and damages actions against a Commission act. The Court refused the action for annulment with the reasoning that the standing criterion were not fulfilled. It refused the damages action with the reasoning that the Union institution could not have obligation to compensate damages arising out of a valid act which was not declared to be

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[415] Ibid 37
[416] Akgül, op. cit footnote p. 148
[417] Baykal&Göçmen, op. cit. footnote 185 p 382
[418] Baykal, op. cit. footnote 38 page 51
[419] Ünal ,op. cit. footnote 33. page 99

void. According to the Court the claimant was trying to reach the result with this case to the result that he could not reach with the action for annulment. This shows that before an application is done and a decision is obtained for the annulment of an act, the action for damages could not be initiated. Some authors have criticized this decision stating that the Treaty does not specify that the action for damages is conditional to the invalidation of the act and that the two cases serve for different purposes. Baykal states that if the Court had continued in line with the judgment of the *Plaumann* case, it would be very difficult to have a protection from action for annulment and action for failure to act due to the short expiry periods of both of these remedies. She adds that it should not be forgotten that the purpose of the action for annulment and the damages actions are very different from each other. The action for annulment aims to invalidate the act that is against the law whereas the other one aims to compensate the damages caused due to an illegal or legal action. The Court in the *Lütticke* decision has changed its jurisdiction and stressed the independent nature of the action for damages. If the Union Courts decide that according to Article 340 of the Treaty the Union has a liability, they decide for the defendant to pay an amount to the claimant.[420]

In the *Vloeberghs* [421]case the Court has discussed if the action for annulment, action for failure to act and the damages actions had any correlation for the first time. In this case the defendant has initiated the case action for failure to act together with the damages actions. The Court has refused the action for failure to act, and the defendant has stated that the damages actions could also not be initiated under these circumstances. The CJEU did not accept this approach and stated that both actions were separate.[422]

The decision made at the end of the damages actions is the ruling on the compensation of the damages that was caused. This decision is different from a determination decision which cannot be directly enforced. The decision made at the end

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[420] Baykal, page 143
[421] Case, *Vloeberghs*, C-9-12/60, [1961], EU:C:1961:18
[422] Baykal, op. cit. footnote 38 page 139

of this proceeding can be executed in accordance with its special enforcement mechanism.[423]

The burden of proof is on the claimant. The evidence, the presence of the damage, the amount of the damage all have to be proven by the claimant. [424]Even when the Court rules in favour of the applicant the decision of this action does not invalidate the act that was in question.[425]

6.2. THE RELATIONSHIP BETWEEN THE ACTION FOR ANNULMENT AND THE DAMAGES ACTIONS

The purpose of the action for damanges is different than the action for annulment. When the individuals bring an action for annulment and the action is found admissible, the Court makes a decision on the substance of the case. The result may be either the act to be found void or the case to be refused. In case of a compensation action, there are no locus standi conditions, and the applicant has 5 years time to bring an action. The outcome of the case is a financial compensation for the damages that he has had. However, it would not be wrong to state that this action could be brought by individuals who could not fulfill the annulment action's criteria, when there are no implementing measures so that he cannot apply for the preliminary ruling procedure and has financial damages due to the act in question.[426] It is of course a useful remedy however in my opinion it is neither an alternative or a supplement of the action for annulment. It is a completely different procedure with the only purpose of recovering the damages of the applicant who might have had damages due to the illegal measure in question or simply the lack of effective judicial protection in the Union. Karayiğit states that the chances of individuals winning the compensation actions are quite low due to the additional criteria that the Article brings apart from the substance of the matter.[427] This procedure is not

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[423] Özkan, op. cit. footnote 40 p 128
[424] Ibid , page 129
[425] Karayiğit, op. cit. footnote 45 p 72
[426] Albors-Llorens, op. cit. footnote 17 page 208
[427] Karayiğit, op. cit. footnote 11 p. 144

only concerned about the illegality of the action and additionally requires the criteria similar to tort actions.

7. THE INDIRECT REVIEW OF ECtHR AND THE POSSIBLE ACCESSION INTO THE ECHR

7.1 THE INTERRELATIONSHIOP BETWEEN THE CJEU AND THE ECtHR

As the EU is still not a party to the ECHR, the review mechanism of the ECtHR on the EU law matters are very limited and indirect. The ECtHR cannot admit the direct complaints against the EU in the current situation as the EU is not a Member of the ECHR.[428] However the ECtHR has in some cases provides its opinion on the effective judicial protection of the individuals in the EU.

The ECtHR and the CJEU have some similarities and differences. "Both of the Courts are supranational, international and have compulsory jurisdictions". The ECtHR's main duty is to ensure that the Convention is respected by the contracting parties whereas the CJEU has not been a human rights court at any stage and that it mainly aims to be the guardian of the application and interpretation of the Treaty. The ECtHR aims to provide "a minimum level of human rights to the contracting parties, and the CJEU is mainly focused on protecting economical rights. The main duty of the CJEU is "to act like a supreme court of the EU" and "to guarantee the primacy of the Union law."[429]

The ECtHR and the CJEU do not follow the same goals, and are separate courts with different perspectives as Topaloğlu suggests. The priority of the Union is to protect the Common Market with the free movement, free competition having an important role, and the accession of the Union into the Convention may mean chances in the goals of the Union in the long term. [430]

Unlike the proceedings of the CJEU, the cases brought before ECtHR are initiated when the rights granted by the ECHR are violated and the domestic remedies are

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[428] Naeye, op. cit. footnote 13 p.18
[429] Dean Spielman, "The Judicial Dialogue between the European Court of Justice and the European Court of Human Right or How to Remain Good Neigbours after the Opinion 2/13", Bruıssels, page 3
[430] Topaloğlu, op. cit. footnote 125 page 26

exhausted. Petrescu states that this would not be affected even when the EU becomes a signatory of the ECHR, due to the lack of institutional interaction between the two courts.

When one asks the question of whether it is only the CJEU that is the guardian of the fundamental rights and the right provided under Article 47 of the CFR, the relationship between the CJEU and the ECtHR needs to be analyzed. Mak states that the ECHR up to some point allows effectiveness review of CJEU judgements regarding fundamental rights especially on Articles 6 and 13 of ECHR and that cases like this are not very often and that it requires the presence of an implementing measure and the national courts to refer in accordance with the preliminary ruling procedure.

The CJEU can receive applications on breaches of fundamental rights by the European Institutions and national authorities during the application of the Union law. However contradictory decisions have been made by the ECtHR and the CJEU expecially on Article 8 of the Convention. In order to avoid contradictory decision and to ensure the uniformity in the application of the Convention accession to the ECHR would be an effective solution.[431]

In order to have a better understanding of the approach of both courts to the fundamental rights a short comparison may be useful. As stated earlier the CJEU has started to refer to the fundamental rights in its case-law starting from 1970's *Internationale Handelgesellshaft* and *Nold* were the leading decisions of the time. As stated in the *Nold* decision clearly the Court was inspired by the Constitutional traditions that are common to the Member States. The development of the fundamental rights in the Member States' domestic system was supported by the CJEU.[432]

Briem states that the ECtHR has not made a decision on whether the Treaty is compatible with the Convention system. [433]The dialogue of the two Courts has been developed in a more superior manner since the entry into force of the Lisbon Treaty. The

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[431]Fetahagic, op. cit. footnote 123 page 9
[432] Petrescu, op. cit. footnote page 109
[433] Briem, op. cit. footnote 32 p 18

first explicit reference made to the CJEU's case-law by the ECtHR was the *Marckx v. Belgium*[434] case.

According to the current status, as the Union is not a party to the Convention, no complaints against it can be brought before the ECtHR, but Member States who breach the Convention can be brought before the ECtHR. Naeye comments that Charter alone will not provide the expected protection on the fundamental rights, however, if the Union becomes a party to the Convention, the CJEU will need to follow the jurisdiction of the ECtHR on fundamental rights which may conflict with the status of the CJEU.[435] In any case although not being binding for the CJEU, the interpretation of the ECtHR of the ECHR is an important source for the CJEU.[436] Defeis comments that the CJEU has successfully "incorporated the decisions of the ECtHR into the human rights jurisprudence"most of the fundamental rights were taken from unwritten law of the Union and that the CFR aimed to codify these laws.[437]

According to an author if the accession into the ECHR takes place the "Questions on human rights" and "interpretation of the ECHR could be brought before the ECtHR. They add that "this would minimize the risk of CJEU misinterpreting the ECHR".[438]

If the ECtHR starts to determine whether the EU or the Member States shall be responsible for breaches of fundamental rights this will mean that the ECtHR would interpret the Union law and this would mean to damage the sovereignty of the Union law.[439]

Bosphorus decision of the ECtHR allows the indirect review of EU law.[440] It is suggested by Topaloğlu that as in the *Bosphorus* case the secondary acts of the Union can be exempted from the review or the discreation interpretation of the Convention can be

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[434] ECtHR case, 6833/74, [1979]
[435] Naeye, op. cit. footnote 13 p.17
[436] Tekinalp &Tekinalp, op. cit footnote 20 page 759
[437] Defeis, op. cit. footnote 127, 1115
[438] Steiner,Woods &Twigg- Fleshner op. cit. 167.page 138
[439] Topaloğlu, op. cit. footnote 125 page 24
[440] Mak, op. cit footnote 112, p. 22

distributed between the CJEU and the ECtHR. [441] Another view is that although being two judicial bodies, both courts have "similar organizational structure" and that they have a common aim which is to protect the fundamental rights.[442] Taking into consideration the case-law of the CJEU the protection of fundamental rights seems to be a secondary aim for the Court. The fact that the main aim of the Court has always been protecting the uniformity of the EU law is not a disputable matter anymore. For this reason, I am of the opinion that protection of the fundamental rights is not one of the main aims of the CJEU. "The impact the *Bosphorus* judgment had on the relationship between Strasbourg and Luxembourg is not to be underestimated." The ECtHR decided that "the Convention did not prohibit the signatory states from transferring powers to international or supranational authorities." However, this would not release the signatory states from their responsibilities arising out of the Convention. If a state has discretion on a situation like this, it would be fully responsible under the Convention. Applying the equivalent protection principle, the ECtHR decided that Ireland had not violated its obligations arising out of the Convention "as the protection of fundamental rights by the Union could be considered as equivalent to the system of the Convention." Gragl comments that with the *Bosphorus* decision the ECtHR has been precautious enough to refuse to be involved in a power game with the CJEU.[443]

The *Michaud* Decision has a great importance in the relation ship between the CJEU and the ECtHR which proves that the the Strasbourg Court has finally started to be involved in the jurisprudence of the EU law. Both of the Courts have been careful about keeping their jurisprudence separate from each other and not crossing the limits into each other's area, however at some points both courts have passed these limits which has caused some conflicting judgements to be made. The *Michaud*[444] decision is commented to be the first time that the ECtHR has entered into the competence area of the CJEU.

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[441] Topaloğlu, op. cit. footnote 125 page 26
[442] Snezana Bardarova, "Comparison Between the European Court of Justice and European Court of Human Rights", University Goce Delcev-Stip page 9
[443] Paul Gragl, **The Accession of the European Union to the European Court of Human Rights.** 1st Edition, **Oxford:** Hart Publishing, 2013, page 1031
[444] Decision of the ECtHR, *Michaud vs. France*, 12323/11, [2012]

[445]The *Michaud* decision is considered to a milestone as it has changed the *Bosphorus* jurisprudence of 2005. With this decision the fundamental rights protection system of the EU was critized to be insufficient and the French law that implemented the EU directive was reviewed.[446]

In the *Michaud* decision, a French lawyer, has claimed that the duty of notifying the authorities in case of discovering money laundering as a reach of the Article 8 of the ECHR. As according to the French law the lawyers had to inform the bar association under these circumstances. France has based this law on the EU directive on money laundering. A preliminary ruling procedure was required during the proceeding in the French Conseil d'Etat, however the national court has refused this request and stated that the EU directive was consistent with the ECHR. The applicant has stated that the *Bosphorus* doctrine could not be applied in this specific case. The ECtHR has decided that the Bosphorus doctrine could not be applied to this case and with this case the ECtHR has extended the limits of its own competence. This decision has not focused on the broad application of the acte Claire doctrine but has focused on the degree of fundamental rights protection provided to the individuals.[447] This is the first case that the ECtHR has made a detailed review of the secondary norms of the EU. In any case, the ECtHR has still not focused on the point of whether the France has fulfilled the obligations arising out of the EU law and did not review the EU directive in the light of the Convention. The Michaud decision has great importance for being the first decision in which the ECtHR has entered into the competence area of the CJEU.[448]

Surely when the accession into the ECHR takes place, the ECtHR will have the chance to make decisions in the absence of a CJEU jurisprudence. Although this may cause some conflicting jurisprudence, I am quite confident that the ECtHR and CJEU will

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[445] Fusün Arsava, "AİHM'nin AB Divanı'nı İkame Etmesi" www.studylibtr.com/doc/2139961/aihm-nin-abdivanınıikameetmesi,

[446] Ibid

[447] Decision of the ECtHR, *Michaud vs. France,* 12323/11, [2012]

[448] Tobias Lock, "Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of the International Organisations under the European Convention on Human Rights", 2010, Oxford University Press, www.corteidh.or.cr/tablas/r26536.pdf

be able to balance their limits and will be able to avoid conflict and will use all their resources to develop the level of protection for fundamental rights.

The *Ullens* [449]jurisprudence of the Strasbourg Court has questioned whether the Belgian Conseil d'Etat and the Cour de cassation had violated the obligations "under article 6 of the ECHR when refusing to refer a prelimary question to the CJEU"[450] The outcome was that the CJEU accepts the refusal under certain circumstances. The *CILFIT*[451] decision of the ECtHRhas become a milestone for the referral to the Luxembourg court and stated that the national courts shall justify their reason for not applying to CJEU.[452]

According to the Article 1 of the Convention, Member States are responsible for the acts of their organs which violate the Convention. [453] Although the Convention does not prohibit the contracting parties to transfer powers to international organizations, the State's responsibility continues in terms of being a signatory state.[454]

ECtHR had made an analysis on the EU law in the *Bosphorus* [455]Case. The Court has stated that the standing rules related to the individuals were restrictive however decided that the alternative remedies of damages actions and the preliminary ruling procedures were providing an effective protection. The ECtHR decided that the restrictions on the Article 263 were not a breach of the ECHR.[456]

7.2. THE POSSIBLE ACCESSION TO THE ECHR

The discussion on the accession to the ECHR is closely related to the principle of effective judicial protection. The Union's accession to the ECHR would mean the Convention being legally binding in the Union, which obliges all the acts of the Union to

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[449] ECtHR Decision 222/84, *Bosphorus* [1982]
[450] Pernice, op. cit footnote 65 page 390
[451] Case, C-283/81, *CILFIT* , [1982], ECLI:EU:C:1982:335
[452] Pernice, op. cit footnote 65 page 390
[453] ECHR article 1
[454] Petrescu, op. cit. 160, page 115
[455] ECtHR Casei [2016]
[456] Sjöstrand, op. cit footnote 29 p 31

be in line with the Convention. This will also allow the ECtHR to be involved in the judicial review mechanisms of the Union, which will for sure have a positive effect on the development of the dialogue between the CJEU and the ECtHR[457]

The accession to the ECHR has been a topic of academic debates and especially the Court had hesitations on this development. With its opinion numbered 2/94 it has stated that the Union did not have competence to join the Convention. It added that the membership to the Convention could only be realized with a series of amendments in the Union law and that this would lead to all the provisions of the Convention to be incorporated into the EU system. The CJEU has been of the opinion that a developing a system for the protection of fundamental rights in the EU system would introduce changes to the Union and to the Member States in terms of constitutional law,[458] and was concerned that the accession to the ECHR would endanger the autonomy of the EU law.[459]

With the Lisbon amendments a new step has been taken towards the accession into the ECHR. The Article 6 of the TEU brings an obligation to the EU in acceding to the ECHR and that now the Article 59 of the Convention states that EU may become a signatory of the Convention.[460] This way Charter has gained binding legal value, and the possibility of joining the ECHR has been introduced which may make it possible for the EU acts being reviewed directly outside of the European Union, which means that the EU acts can also be subject to an "external review" if the EU accedes to the ECHR and the individuals will also be able to seek protection before the Strasbourg Court.[461] According to an opinion the EU's accession to the Convention will have positive impact on "the authority and credibility of both" ECtHR and CJEU.[462] Still the Lisbon Treaty has been an important step in the development of a fundamental rights protection system within the EU. The membership to the ECHR has been included in the Article 6 of the Treaty.

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[457] Mak, op. cit. footnote 112
[458] Can, Hacı. **Avrupa Birliği Hukuku. Ankara:**Adalet 2017, Ankara page 100
[459] www.europarl.europa.eu
[460] Gragl, op. cit. footnote 441, preamble
[461] Leczykiewicz, op. cit. footnote 61 p18
[462] Spielman, op. cit footnote 427 page 20

It is a very clear point that the accession to the ECHR by the Union would improve the effectiveness of judicial protection provided to individuals in the EU, as the individuals would also be able to apply to the ECtHR in case of a Union violation of the human rights. This would be step further and more effective compared to the protection that the CFR provides to the individuals. The accession to the ECHR is believed to be able to "close gaps in legal protection" to the citizens, and "all European legal systems being subject to the same supervision" in terms of the protection of human rights. Accession to the ECHR is believed to proceed towards "harmonious development of case-law of the CJEU and the ECtHR in human rights matters". Which may mean that the CJEU not only will deal with more cases of human rights but also the jurisprudence of CJEU and the ECtHR would be more consistent with each other. According to this approach, the accession to the ECHR would also make it possible for the "EU to be party to the proceedings before the ECtHR."[463] Although being a party to the ECHR does not automatically mean the signature of the additional protocols EU may also be a party to the protocols with further decisions. The topic of whether the connection of the Union with the ECHR is directly or through the Member States has been long discussed. It was stated that the international agreements could only be binding on the parties, and that it would be necessary to make necessary amendments with the Convention to make it possible for organizations to become a signatory.[464]

At the current situation complaints against the acts of the EU are being indirectly reviewed by the ECtHR. However, if the EU becomes a signatory, the ECtHR will have jurisdiction over the acts of the EU and will have the chance to review the decisions of the CJEU. The Convention has been created for states to be signatories, so according to the current status of the Convention, it would not be possible for EU to become a signatory of the ECHR.[465]

As the EU is not yet a part to the ECHR, the fundamental rights mentioned in the Convention cannot be a criterion in the judicial review of the acts of the European

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[463] Accession by the European Union to the European Convention on Human Rights" http://eur-lex.europa.eu/ pg 3
[464] Belin, op. cit. footnote 103 117
[465] Petrescu, op. cit. footnote 160 page 121

Union. However, the Member States have already accepted the presence of many fundamental rights in the light of their constitutional traditions. [466] In other words, the accession would formalize the relationship between the two courts and extend the ECtHR's competence over the CJEU. "As judicial dialogue on the effective remedies in the EU law is concerned, the primary focus thus for now remains on the division of tasks amoung EU courts and Member States."[467] In current situation the application to ECHR is conditional upon all existing national remedies to be exhausted. As not being a party to the ECHR, EU cannot be held responsible by the ECtHR due to violation of fundamental rights. Even when the violation is caused due to the effect of the EU Law, only the Member States can be held responsible due to these breaches. *The Bosphorus Airways v Ireland* case dated 30th of June 2005 is an example to this. [468]

According to Gragl, "it is contradictory that the Union is not a party to the ECHR system when all the Memer States are already subject to it". He adds that accession to the ECHR would solve this "increasing contraction" in the field of fundamental rights.[469]Önüt comments that, unless the EU becomes a party of the ECHR, it is not possible to have an effective judicial review of the Union legislation related to the fundamental rights. [470] According to Topaloğlu, the EU which even takes into consideration of respect to fundamental rights as an accession criterion to its Member States need to be a signatory of the Convention in order to be in line with its own values. She adds that being subject to the outer review of the Strasbourg court will bring more responsibilities to the Union. In this case the ECtHR will have the chance to make the last ruling and that as the individuals cannot easily apply for the action for annulment, finally that they can initiate the action for failure to act and infrigment actions, the accession into the Convention has a more critical importance.[471]

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[466] Ahmet Güneş, M"Lizbon Antlaşması Sonrası Avrupa Birliği", Gazi Üniverstitesi Hukuk Fakültesi Dergisi C. XII, y.2008, Sa 1-2 page 749
[467] Mak, op. cit. footnote 112
[468] Accession by the European Union to the European Convention on Human Rights" http://eur-lex.europa.eu/ pg 5
[469] Gragl, op. cit. footnote 441, preamble
[470] Önüt, op. cit. footnote 39 p. 71 p 69
[471] Topaloğlu, op. cit. footnote 125 page 11

Although the accession of the ECHR will not change the judicial review system in the EU, the individuals will be able to apply to Strasbourg Court after exhausting these remedies. [472]

It is clear that the EU is not concerned about fundamental rights and wishes to form a complete system in which the individuals are protected. If the EU becomes a signatory of the Convention, this will mean a big step for the protection of the individuals.

[472] Accession by the European Union to the European Convention on Human Rights" http://eur-lex.europa.eu/ pg 5

8.A NEVER ENDING DISCUSSION: DOES/CAN THE EU LEGAL SYSTEM PROVIDE A COMPLETE SYSTEM OF REMEDIES FOR PRIVATE INDIVIDUALS?

The discussion on whether there is a gap in the system of remedies and procedures provided to individuals in the EU legal system has been on-going for a few decades. Except for some specific points, a very high majority of the Scholars are of the opinion that the gap actually exists and the progress that is taking place with the developing jurisprudence of the CJEU and the Treaty amendments are not fast enough to catch up with the current needs of the system. Many different theories can be invented to explain why, but focusing on the problem is more important than the cause of it especially in such a fragile point which can easily be affected by political powers.

Although the European Union Legal order is still a developing legal order towards integration, the jurisprudence of CJEU and GC, the efforts of the Scholars and the courage of the individuals for fighting for their rights may convince any researcher that the EU Legal System *can* provide a complete system of remedies, however the question of whether it *does* provide this in the current situation is not question to be answered easily for anyone. Scholars have commented on the mechanisms that are present in the EU in terms of effectiveness, and the majority is of the opinion that there is a gap in the system even after the Lisbon amendments. The fact that the CJEU believed that in fact there was a complete system of remedies even before the Lisbon amendments and that no matter what happens it keeps on stating that the system is complete and in line with the CFR 47 makes me believe that for several more decades the European Union legal system *will not* be providing the effective judicial protection that the individuals are looking for.

The CJEU explains the alternative remedies to the action for annulment are adequeate, the preliminary ruling procedure can be used in many occasions. The Court also adds that the restrictive interpretation of the individual concern does not create a gap, because the individuals have the right to bring cases against national implementing measures in which the national courts may refer preliminary ruling questions about the

validity of EU law. The court referring to the complete system of remedies making reference to the *Les Verts* case, explained that main alternative to the direct action for annulment would be indirect challenges such as the preliminary ruling procedure, action for damages and plea of illegality. CJEU also added that the interpretation of the Treaty against its wording was not possible and that the Treaty should be amended by the Member States if needed. [473]

With the possibility to invalidate the action that is being challenged, and the strength of the result of the case compared to the other remedies, it is beyond doubt that the action for annulment is the main remedy provided for the individuals as the action for annulment is a formative action and the Court decides to annul the act retroactively if the application is accepted.[474] In fact the CJEU does not deny this fact, but only states out that the restrictions that are taking place in the wording of the article do not damage the effective judicial protection, the alternative remedies are adequate, it is not entitled to extend the interpretation of the article, and if the MS wish to amend the Treaty they are free to do so.

The CJEU following its classical approach to the effective judicial protection in the EU for individuals confirmed in the *UPA* judgement that the European Union is based on rule of law, and its institutions are subject to judicial review. It stated that the individuals are entitled to have effective judicial protection for the rights that are provided by the Union and the right to such protection is one of the general principles in accordance with the "constitutional traditions common to Member States", as was stated also in the This right which is also stated in the *Johnston and Commission vs Austria* case. The CJEU argues that the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to Union Courts. It adds that when the natural and legal persons cannot directly challenge a EU measure of general application due to the admissibility criteria of the action for annulment they have the right to plead the invalidity of the acts

[473] Sjöstrand, op. cit footnote 29 p 22
[474] Tekinalp &Tekinalp, op. cit footnote 20 page 246

before EU courts indirectly or before national courts to ask these measures to be referred to the CJEU by way of preliminary ruling.

The Court holds the Member States responsible for establishing a system of legal remedies and procedures for providing effective judicial protection to individuals.[475] The CJEU finally states out in its jurisprudence that broadening the interpretation of the article for allowing the individuals to have access for seeking remedies against regulatory acts would be acting against the wording of the article and that would be passing the limits of the power that the Treaty granted the CJEU. [476]

In my opinion, the Court clearly stating that broadening the interpretation of the locus standi conditions would be against the wording of the Treaty articles shows that it is also not very convinced by the four-staged reasoning that it has formed on the presence of the effective judicial protection. This explanation, sounds like a complete defense statement more than a legal explanation. First of the reasoning of the Court has different stages which are not in the same line, hoping that if the one of the reasons stated does not convince the scholars than the rest will be. Just to be more precise, the Court states that the Treaty has established a complete system of remedies, but the opposite has been proven by many scholars and even a short research would be able to make one understand that the remedies provided are not an alternative of each other and that they are different remedies designed for different purposes. If this is not convincing, than the Court wishes the reaserchers to believe that the alternative routes are adequate, however it is a well known fact that the preliminary ruling procedure has lots of disadvantages and it is a court to court proceeding more than a remedy provided to individuals. The next reasoning of the Court is that the Member States shall create a complete system of remedies to individuals, but how if they are strictly binded with the Union law, and the general principles of the EU especially keeping in mind that all the national legal systems have differences? The final one which is the most convincing one in my legal opinion is that if

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[475] Detailed Analysis of the Courts' Jurisprudence" Appendix 1. www.unece.org/fileadmin.org/fileadmin/DAM/env/pp/complianee/C2008-32/ communication/ Appendixes .doc.pdf page 17

[476] Jürgen Schwarze, "Judicial Review of European Administrative Procedure", Law and Contemporary Problems Volume 68:85 Page 86

the Member States wish to amend the Treaty articles they should use this power and do so. Although being realistic I must state that I cannot completely agree with this point too, because the CJEU has been known to be an activist court in many sectors especially when it is about protecting the interests of the Union, and we know that it has been generous while interpreting the locus standi of the semi-priviledged Parliament, and that more than that it has been more flexible with the locus standi in the anti-trust cases etc. So this brings the question of whether the CJEU is under the influence of judicial politics or not?

AG Jacobs in his Opinion in the UPA judgement stated that the restrictive interpretation does create a gap, as the preliminary ruling procedure is not a replacement of the direct action for annulment, the individuals do not have the chance to benefit from the preliminary ruling procedure in the absence of an implementing measure, and that the individuals have very little or no control over the procedure as it is the national court that control the procedure.[477] The AG Jacobs has added that" the effective judicial protection can only be provided by the action for annulment which takes place at the Community Courts and allows a normative control". According to him the validity control made by the preliminary ruling procedure of the secondary law will not fill in the gaps of the judicial protection for individuals. [478]I believe that this opinion summarizes the problems that the individuals have been facing with since many years.

According to Schwarze, "The Treaty has established a complete system of legal remedies and procedures designed to permit the CJEU and the GC to review the legality of measures adopted by EC's institutions" as stated in the *UPA* case. He adds that the ex-article 230 of the Treaty has made it possible "for individuals to have access to European Courts only if the act in question directly and individually concerns the complainant. For this reason, the system of legal remedies has often been criticized as being too narrow, particularly regarding direct legal protection of individuals against general legal acts." [479]

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[477] Directorate –General For Internal Policies Policy Department Citizen's Rights and Constitutional Affairs" "Standing up for Your Rights in Europe Locus Standi" Study 2012 ,page 29
[478] Arsava, op.cit footnote 115
[479] Schwarze, op. cit. footnote 475 Page 86

Although the admissibility conditions for Member States and Union institutions are relaxed with the Lisbon amendments these conditions are still quite strict for private parties as non-privileged applicants.[480] Although harsh critics were made for many years, the amount of changes that have done in the wording of the article that regulates the action for annulment supports this opion. One opion states that when taking into consideration of the formulation of the new Article 263, it is clear that the Member States do not wish to change the individual and direct concern interpretations.[481]

Most of the commentators mainly compare the preliminary ruling procedure with the action for annulment. The reason for this is probably because the presence of the preliminary ruling procedure is one of the most consistent reasons why the CJEU states that there is an effective judicial protection, and that the preliminary ruling procedure is the only procedure that somehow challenges the act in question in terms of the validity point of view. It is a well known fact that the Court is protective over the preliminary ruling procedure as it believes that the national courts are also Union courts and an important part of the the application of the Union law shall take place at the national court level.

Albors-Llorens states that the disadvantages of the preliminary ruling procedure makes it a less favorable remedy and this makes it a weak alternative for the action for annulment.[482]The procedure is a court to court and judge to judge procedure which means the individuals who can be the party of the case at the national court cannot be very involved. It is not possible for the preliminary ruling procedure to replace the action for annulment. [483] Both of these procedures with their restrictions and the current protection they are able to provide, seem to be unsatisfactory in terms of providing effective legal protection to individuals.[484]

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[480] Türk, op. cit. footnote 6 p 8
[481] Mariolina Eliantonio and Nelly Stratieva, "From Plaumann, through UPA and Jego-Quere, to the Lisbon Treaty", Maastricht Working Papers Faculty of Law, Maastricht, 2009 page 11
[482] Albertina, op. cit. footnote 17 page 188
[483]Sjöstrand, op. cit footnote 29 p 30
[484] Arsava, op.cit footnote 115

According to Karayiğit, preliminary ruling procedure is about the national courts referring the questions to the CJEU more than the individuals being provided with the right to refer. He adds that for this reason this remedy is a mechanism introduced as a cooperation between the judges more than a tool for the individuals' rights to be protected, and that the preliminary ruling procedure being the alternative of action for annulment is a risk factor for the protection of individual rights for providing an effective judicial system. He states that the individual not having the power to enforce the national courts to apply to the preliminary ruling procedure is another weak point. If the national court refuses to refer the question as a preliminary ruling procedure, the individuals can file a complaint to the Commission about the Member State with the request of an infringement action to be initiated.[485] In the preliminary ruling procedure the national courts cannot apply to the Court with the reason of failure to act. Although the action for annulment and failure to act are similar to each other and look like the complements of the same remedy, the preliminary ruling procedure is not an alternative to the failure to act.[486]

The action for annulment is faster than the preliminary ruling procedure and gives more control to the individuals. The action for annulment allows the individual to have control over the judicial review of the act in question. However the strict locus standi conditions have caused the private parties not to be able to benefit from this procedure all the time. Harding has argued that "a direct action before the CJEU would be faster and cheaper," and adds that this would solve the problem of the national court's unwillingness to refer to CJEU.[487]

It can be stated that the preliminary ruling procedure is the supplementary remedy of the action for annulment as suggested by many scholars. The preliminary ruling procedure can be described as a remedy that protects public interest more than a remedy that is granted to the parties of the court case. It has been designed as a constitutional review mechanism more than a direct method to protect the rights of the individuals. As the national courts are entitled to refer the question and to form the

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[485] Karayiğit, op. cit. footnote 45 p 92
[486] Karayiğit, op. cit. footnote 11 p. 129
[487] Constantin &Xanthaki op. cit. footnote 24 p. 8

questions that will be referred, this method does not appear to be a remedy that grants too many options to the individuals. The fact that the national courts can refuse to refer the question as a preliminary ruling procedure is a clear obstacle for protecting an effective legal system for individual rights. As the time limit for applying to the action for annulment is quite short, preliminary ruling procedure appears to be the most important mechanism for the protection of individual rights. [488]

The preliminary ruling procedure is an effective way of maintaining uniform application of the Union Law in the EU territory, but it was already stated in the Court of Justice's decisions that the validity of the EU acts can only be carried out by the Union courts at the Union level.[489] There are also disadvantages in the interim measures of the preliminary ruling procedure when compared to the direct action for annulment. In the preliminary ruling procedure, the national judge decides to stop the execution of the national act which is in force for the application of the Union measure that is being contested if there is an urgency and if the application would cause irreparable and irreveresable damage to the individuals, however these interim measures would only be applicable in that Member State.[490]

In accordance with the jurisprudence of the Court, the private parties who cannot initiate a direct action for annulment because of the standing rules need to be secured by effective judicial remedies before the national courts. However, in the absence of an implementing measure the applicant will not have the chance to go against that Union act by the preliminary ruling procedure, for this reason the applicants need to have the chance to initiate action for annulment against the acts that do not require implementing measures.[491]

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[488] Karayiğit, op. cit footnote 11 p. 139
[489] Sjöstrand, op. cit footnote 29 p 50
[490] Karayiğit, op. cit. footnote 45 p 95
[491] Baykal&Göçmen, op. cit. footnote 185 p 382

Although the Lisbon amendments were not enough to finalize the academic discussions about the protection of individuals in the EU, they have been enough to be considered as a reform although being a conservative one.[492]

Although the *Inuit* and *Microban* cases have been helpful in describing the term regulatory act and the *Telefonica* case in describing the acts not entailing implementing measures, surely the *Microban* has been the first case that has proven that the Lisbon amendments have helped the individuals to have easier admissibility conditions for the action for annulment. Sjöstrand states that the amendments that have taken place in the wording of Article 263 is consistent with the jurisprudence of the CJEU and adds that Lisbon amendments in this article may be considered as an effort to fill in the gaps within the scope of this article and *the Jego-Quere and UPA* judgements. Now with the amendmentsArticle 263 allows the individuals to challenge regulatory acts that do not require implementing measures without needing to prove individual concern and only needing to prove direct concern.[493]

According to Pernice as with Lisbon Treaty the word Article 263 TFEU was amended and made possible for natural and legal persons to initiate action for annulment "against regulatory acts which are of direct and individual concern to them"[494] surely a step further was taken. On the other hand Elintonio& Kaş comment that, although it is a fact that the standing rules of the action for annulment have been revised in the Lisbon Treaty "the basic policy underlying the system of judicial review has not been changed: individuals wishing to challenge acts that are not addressed to them still have to prove individual and direct concern."[495]

Eliantonio and Kaş suggest that two options could be possible to improve judicial system provided to individuals. Either a system of applying to directly to the constitutional court could be developed for the infringement of a constitutional right or

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[492] Lenaerts, Maselis & Gutman, op. cit. footnote 5 page 282
[493] Sjöstrand, op. cit footnote 29 p 24
[494] Pernice, op. cit footnote 65 page 386
[495] Eliantonio& Kaş op. cit. footnote p 127

to improve the system of national remedies so that a more decentralized system is provided for the individuals. As the authors remind us the obligation of providing a system of remedies and procedures was given to the national courts with the UPA decision and the new Article 19 of the TEU also gives this obligation to the Member States. However, this proposal does not contain any details of how this system could be developed.[496]

Safian suggests that Articles 47 of the Charter and Article 19 (1) ,(2) of the TEU help to provide an effective judicial protection to individuals. He adds that there are some factors that help to increase the level of protection at national legal orders which are, a correct interpretation of Article 47 of the Charter, a successful application of it in line with Article 51 of the Charter, "promotion of effective judicial protection by means of interpreting the judicial cooperation legislation and "the use of the principle effectiveness." He adds that remembering the spirit of *Van Gen den Loos* Case will be helpful in attaining a progress in the effective judicial protection to individuals.[497]

According to Arsava, "the legal protection system for securing subjective rights against regulations which are against primary law can be attained in two ways" These are counted to be the action for annulment, the plea of illegality and preliminary ruling procedure. The conditions for the applications to be made to the CJEU and GC are very restricted due to the EU regulations. The non-privileged individuals which are the persons not covered by the clauses 2 and 3 of the ex-article 230 can only contest the EU measures by way of annulment action only with the conditions that the measures are directed to them or to other people, but causes direct and personal effect on them. Article 230 regulates judicial protection principally against decisions and exceptionally against regulations.[498] Her statements were from a time before the Lisbon amendments but still says a lot about the action for annulment.

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[496] Eliantonio& Kaş op. cit. footnote p 126
[497] Marek Safian," A Union of Effective Judicial Protection " page 12
http://www.kcl.ac.uk/law/reasearch/centers/european/Speech-KINGS-COLLEGE.pdf
[498] Arsava, op.cit footnote 115

Karayiğit states that due to the fact that the validity review is only possible for secondary acts of the Union, there is a visible gap in the area of protection of individual rights for any possible breaches of individual rights arising out of the primary sources of Union law. He adds that although a specific proceeding may not be able to provide a complete remedy according to article 13 of the European Convention on Human Rights, the combination of the national remedies, and all the other remedies may be providing an effective system to the individuals. He adds that rights can only be present as long as they are effective and the rights are effective when there is a mechanism to compensate the situation in case of a breach.[499]

According to the GC, the fourth paragraph of the TFEU article 263 aims to open the conditions for direct actions. If the aim was to exclude regulatory acts from judicial review, this would have been clearly mentioned in the text. However, in the *Inuit* case the CJEU has stated that the "legistative acts, regulations adopted by a legislative procedure are excluded from the content." Legislative acts are still subject to strict criteria.[500]

Arsava states that the jurisprudence introduced in the *Jego Quere* case which tried to extend the limits of action for annulment with the condition that effective judicial protection not being possible to be provided in the national court cannot be a valid reasoning and that this was also confirmed by the AG Jacobs in the *UPA* case. According to Arsava this kind of application of a procedure hinders the uniform application, effective protection and also causes negative effects on the legal safety.[501]

Skouris comments that, with the new article that regulates the action for annulment after the Lisbon amendments "although the conditions of direct and individual concern are in principle maintained, the new article 263, paragraph 4" requires for "challenging a regulatory act that does not entail implementing measures" the individual needs to be only directly concerned and not individually.[502]

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[499] Karayiğit, op. cit. footnote 45 p. 70
[500] Pernice, op. cit footnote 65 page 388
[501] Arsava, op.cit footnote 115
[502] Vassilios Skouris, "The EU System of Judicial protection After the Treaty of Lisbon: A First Evaluation"

"The plea of illegality is designed to prevent the application of an illegal act from being used as a legal basis for further action. It can be invoked before the CJEU when the validity of such further action is disputed." states Naeye, and adds that alhough this remedy is important, it does not provide an independent remedy for challenging the Union measures.

The plea of illegality is not an independent remedy and cannot be brought forward in the absence of a court case. This remedy does not realize the invalidation of an act, and only aims to reach the inapplicability of the act between parties. For these reasons Karayiğit states that it does not provide an effective protection. Finally, he adds that as the effect of the decision will start from the date of the decision it is not possible to mention this as an effective remedy to compensate the strict rules of action for annulment. The author adds that the plea of illegality has an advantage when compared to the prelimanry ruling procedure which is, the individual being able to access to Union justice about EU acts of general application without needing national courts.[503]

Naeye states that the action for failure to act does not give the option to challenge the validity of measures, so that it does not require too much attention on discussing whether or not the remedies provide an effective judicial protection to individuals. She adds that the preliminary ruling procedure can be brought when there is a doubt about the validity of a Union act. He adds that the preliminary ruling procedure is not a "true judicial remedy" and that it is only a cooperation between the judges. The applicant does not have any direct access to Court and has to depend on the national judge. [504]

The role of the national courts are also important in the effective judicial protection. When a fundamental right is violated by a legislative act where the national judge cannot directly make a decision, the national judge would need to apply to the

[503] Karayiğit, op. cit. footnote 45 p. 103
[504] Naeye, op. cit. footnote 13 p.32

procedure described in article 267 of the Treaty. *Foto Frost* Judgment is important in this regard. [505]

The national courts can only be considered as an EU Court in the interpretation, application and execution of the EU law. According to article 267 of the Treaty the national courts are obliged to apply to the European Court of Justice. However, she also states in case of a Union regulation being in question the preliminary ruling could be considered as an effective procedure. [506]

Another point is that although the standing rules for the damages actions are not strict, the success of the individuals in getting a compensation is very low. The Schöppenstedt jurisdiction has made it complicated to claim damages against the Union. Karayiğit describes the damages action not as a mechanism not as a part of the judicial review of Union acts but as a way to be compensated in case of having a damaged caused by the Union institutions. [507]

Karayiğit states that as the standing rules of the action for annulment and the failure to act are the same and strict a gap in the protection of individuals is caused. The author adds that the Lisbon Treaty improved the protection of individual rights which can be considered as a positive development. [508]

Arsava states that the obligation of the national courts to provide an effective judicial protection has not been discussed too much until now and that the CJEU has not shared its opinion on this subject in many occasions. She states that the national courts need to provide a system in the light of European Human Rights Convention articles 6 and 13.

The changes that have taken place with the Treaty of Lisbon might be considered to have partially solved the problems related effective judicial protection. According to

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[505] Arsava, op.cit footnote 115
[506] Ibid
[507] Karayiğit, op. cit. footnote 45 p 104
[508] Ibid 168

Pernice the answer depends on the interpretation of the "term regulatory act" He adds that the interpretation will need to be made by "the judiciary which may be inspired by the objectives of the new provision as well as by the fundamental right laid down in article 47 of the CFR"[509] As the term "regulatory act" is not described in the Treaty, the Inuit judgement has played in important role in explaining this term, however new jurisprudences may take our knowledge to a different level in the following years.

Arsava not defending that the judicial review system provides a system of effective protection states that the gaps cannot be filled with instruments against the wording the of the Treaty. She adds that the GC by accepting the case brought before it with the reasoning that there is not an effective legal protection in the French Courts in the *Jego Quere* case has diverted from the principles accepted by the article. She adds that the legal gap caused due to the incapacity of initiating a direct action could be filled by the Plea o illegality regulated under article 241. As explained above some scholars consider the system of judicial protection provided to individuals to be effective. However, they believe that in case of the national protection system does not provide an effective legal protection or when the secondary law of the Community does not require an implementing measure to be contested in the national level, the action for annulment should be possible to be applied.[510]

The question of who will be determining if the national court or the CJEU have fulfilled their obligations arising out ofarticle 47 of the CFR needs to be answered. According to Pernice the national courts taking Article 19 TEU seriously and using the Article 267 whenever the rights of the individuals are at risk, could help solving this problem. [511]

It is argued that although the lack of remedies at the national level should not be enough for the admissibility for the opportunity to contest Union acts before the Union Courts, the national courts do not have the right to declare community acts as being

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[509]Pernice, op. cit footnote 65 page 386
[510]Arsava, op.cit footnote 115
[511] Pernice, op. cit footnote 65 page 388

invalid, and seeking preliminary ruling from CJEU does not provide an effective judicial protection to individuals.[512] The Court had stated in the *UPA* case that the only way "to relax the standing rules was to reform the current system", which requires amendment in the Treaty.[513]

It is also argued that the CJEU refers to the system as being complete, there are many ways for the individuals to find a remedy to be protected by Union acts. It is added that the national legal system "is more familiar "with the individual than the court in Luxembourg. [514]It is important to always remember that national courts have some duties for the application of the EU law. The national courts are under the obligation to provide extensive remedies and to allow the applicant. [515]

Safian states that with the presence of articles 19 (1), (2) of TEU and article 47 of the Charter the effective judicial protection to individuals is provided. According to him as per the wording of Article 19 of TEU, the Member States are under the obligation to provide effective judicial protection to private individuals the duty given to the Union is a "complementary task". He adds that AG Jacobs stated in the *UPA* case that "the combined system of EC and national remedies" did not provide an effective judicial protection to individuals. However, he adds that article 263 of the Lisbon Treaty aims to close the gap in the direct action for annulment. He states that the article now allows the natural and legal persons to bring an action for annulment against a regulatory act which is of direct concern to them and does not entail implementing measures."[516] Safian adds that with the *Inuit* case the court has clarified the content of this amendment. He states that the GC's interpretation of a regulatory act should be understood covering all kinds of acts with general application apart from legislative acts were confirmed by the Court

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[512] Detailed Analysis of the Courts' Jurisprudence" Appendix 1.
www.unece.org/fileadmin.org/fileadmin/DAM/env/pp/complianee/C2008-32/ communication/ Appendixes .doc.pdf page 18
[513] Detailed Analysis of the Courts' Jurisprudence" Appendix 1.
www.unece.org/fileadmin.org/fileadmin/DAM/env/pp/complianee/C2008-32/communication/ Appendixes .doc.pdf page 18
[514]Sjöstrand, op. cit footnote 29 p 51
[515] Ibid
[516] Marek Safian, " A Union of Effective Judicial Protection " page 2
http://www.kcl.ac.uk/law/reasearch/centers/european/Speech-KINGS-COLLEGE.pdf

of Justice. He adds that the Court of Justice, is not of the opinion that this creates a gap in the judicial protection, and that granting immunity to legislative acts would be incompatible with Article 47 of the Charter, and Article 47 of the Charter and Article 13 of the ECHR require the direct actions to be initiated by the individuals. He also comments that the Court of Human Rights in the *Bosphorous* Case mentioned the EC's standing criterion to be strict although not directly criticizing them. He also refers to the indirect review possibility. According to Safian the Member State's autonomy is not limited with the principles stated out in the *Rewe* Case. In the *Agrokonsulting* case the Court was referred the question of "whether article 47 and the Rewe principles preclude a rule of national procedure which has the consequence of concentrating before single court disputes concerning decisions of the national authority responsible for paying agricultural aid under the common agricultural policy." The Court examined the disputed rules in the light of equivalence and effectiveness and concluded that the applicant was not provided an effective remedy. In this case it was shown that "the right and principles can be treated harmoniously"[517] In the *DEB* case the Court answered the question whether the individuals can be refused to be granted legal aid under article 47 and concluded that "legal persons cannot be as a rule denied legal aid, but the courts must take into account, inter alia, of their financial capacity". In the *Texdata Sofware* case the CJEUdecided that the expiry period of 14 days of challenging the failure to disclose accounting documents was compatible with the right to an effective judicial protection because the Austrian law also provided a period of 9 months in unforeseen and unavoidable conditions. [518]

One of the most important cases that has brought the question of how to balance the public security with the effective judicial protection were the Kadi II and ZZ Cases. The Court has used the principles to use confidential information in the cases of terrorism. With reference to Article 52(1) of the Charter which allows to restrict limitations on the respect to fundamental rights if it is necessary for the general interest. It was stated that the criterion on the limitations should be carefully analyzed in each case separately. In

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[517] Safian, Marek " A Union of Effective Judicial Protection " page 3
http://www.kcl.ac.uk/law/reasearch/centers/european/Speech-KINGS-COLLEGE.pdf
[518] Ibid.

the Kadi I case it was established that EU Courts must ensure the review, of all Union acts in the light of fundamental rights, including review of measures giving effect to resolutions adopted by the United Nations Security Council." The Kadi II, "ensures the coherence among the direct review by the EU Courts and the national procedural safeguards regarding the implementing secondary law". [519]

Both the European GC and the AG Jacobs have criticized the jurisprudence of the CJEU which restricts individuals from initiating the action for annulment in line with the opinion of many scholars.[520] This is a correct critic according to my knowledge and considerations as well, when taking into consideration the general principles of the administrative law in almost all the legal systems. It is understandable the proceedings that are covered in the administrative law area to be subject to strict rules, however it is not understandable why the standing rules are kept so strict for all these years. This brings a question to minds: Are the Treaty making power and the CJEU concerned about the workload the requested amendments would bring to the Union Courts, or are they simply hesitating to damage their power on controlling the EU legal system, or in other words are they not generous enough to give more chances to individuals for policital, technical etc reasons?

As many scholars mention the action for annulment is the most important remedy in the protection of individuals. It is true that the preliminary ruling procedure and some other remedies that are complementary to the action for annulment are able to provide a level of judicial protection to individuals however, it is difficult to be convinced with the statement of the CJEU in which it repeatedly states that the EU legal system has a complete system of remedies. Although the Lisbon amendments have sorted out some part of the problems related to the effective judicial protection for individuals some of it still stays unsolved.

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[519]Ibid.
[520] Arsava, op.cit footnote 115

The action for annulment has always been the most dicussed remedy due to effect of the decision that is obtained at the end of the proceedings. The individual who is affected by a measure shall be able to contest it and ask for the invalidation of it, regardless of the decision being positive or negative. In other words, the access to justice in the action for annulment would be a very important criterion for the presence of an effective judicial protection system. However, in European Union law, the admissibility criteria and the standing rules for private parties have always been very restrictive. More than that the CJEU as not been very generous in interpreting the wording of the article and in most of its jurisprudence. The direct and individual concern criterion, the Plaumann test have been obstacles for the individuals.

Although the Lisbon amendments have been a very important step for the standing criterion to be relaxed, most of the scholars are of the opinion that the amendments have not been enough to provide the necessary protection to the individuals in terms of this procedure. The CJEU on the other hand even before the Lisbon amendments has been stating that there is a complete system of remedies provided by the Treaties to the individuals. The GC and the AGs from time to time conflicted with the opinion of the Court. In most of the times, the Court had the last word to say and the progress in the action for annulment remedy did not progress as much as it was hoped by the scholars and individuals.

In order to assume that the European Union legal system has a complete system of remedies, it would be required for the Court to adopt a more flexible understanding on the individual concern criteria so that the private individuals who need to contest the Union acts could apply to the direct action for annulment procedure, and preliminary ruling procedure could supplement this remedy.

It is easy to say that providing an effective judicial system to individuals is consistent with the logic behind European Union and this has been one of its aims for a long time. Although the idea behind European Union is in consistency with rule of law and effective judicial protection it is important to mention that the European Union is not only a legal order but it also have financial and political aspects which at some points stops the European Union from succeeding in the progress aimed in the legal system.

In order to stop the discussions that are only being resolved with baby steps, my proposal would be the amendment of the Treaty article on the locus standi conditions of the failure to act, and the action for annulment, to create a more objective criterion for the obligation of the national courts to refer to preliminary ruling, and to increase the involvement of this procedure and maybe give part of this duty to the GC so that the time that is required for the preliminary ruling procedure is reduced. Another option would be developing a better database for the preliminary ruling of similar cases so that all the judges can apply and have access to the previous judgements easily including the parties of the case. Finally the CJEU should explain in its jurisprudence how the national courts can provide a complete system of remedies and how can they adapt legal system to this principle. I am sure that the MS which are all modern countries ruled by law, will be more than happy to cooperate but this obligation given to the MS is so vague that it sounds nothing more than an excuse from the side of the CJEU. Maybe committees who will work on this at national and EU level can be formed, however in any case this final proposal will not be able to be realized in the middle and short term.

Unfortunately, the position of the private parties in direct access to the Court has still not been liberalized enough, and even the Lisbon Treaty amendments have not been able to bring this subject to a point, where one can easily comment that the judicial system of the EU provides a complete system of remedies and procedures to individuals. Despite the fact that the CJEU has stated in many of its jurisprudence that the EU legal system does have a complete system of remedies,[521] and adds that even when *locus standi* is not granted to private individuals in direct actions, the supplementary methods are satisfactory, very few commentators would agree with this opinion. The scholars have always discussed whether the effective judicial protection can only be guaranteed through direct actions before the European Courts or could it be possible to reach this goal indirectly through legal actions before national courts.[522]

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[521] Case C-294/83, *Les Verts v. European Parliament.*EU:C:1986:01339.
[522] Constantin Stefanou, and Helen Xanthaki, " The Principle of the Effective Protection of the Individual in the EC Law and the Dialectic of European Integration Theory". http://sas.space.sas.ac.uk page 2.

Although the action for annulment has always been the center of the remedies provided to the individuals in EU law, it is ironic that it always contained strict criteria which stopped the individuals at the admissibility analysis even before the subject matter of the case was reviewed. The struggle that the individuals had has started while trying to fulfill the strict criteria which resulted may times with the dismissal of the case at this stage. It is not only the Member States that have the right amend the Treaty articles but also the CJEU who has refused to be innovative and open minded in the interpretation of the articles. This fact may make one think that the EU legal order hesitates to give the individuals the right to challenge the acts through a direct action, as if it was concerned that the uniformity of the Union would be damaged by giving this option so freely to the individuals.

The CJEU has made a lot of important decisions which cannot be underestimated in the judicial protection of individuals, and it has put great effort to balance its roles as the supervisor of the Union legal order and the guardian of fundamental rights. The case law of the CJEU has helped the judicial protection of individuals to be improved. The case law has "developed rights and remedies" on this field. The first cases related to this area focused on the direct effect, primacy and autonomy of the legal order principles in the jurisprudence. The latter cases were including notions such as the relationship between the national courts and Union law, and the enforcement of the Union law. [523] However, the case-law of the CJEU on the effective judicial protection has long been discussed especially due to the fact that the Treaty article regulating the action for annulment and the interpretation of the CJEU on this Treaty article were restrictive.

I am unsure if the Member States are willing to relax the standing rules of direct action for annulment in the future, taking into consideration how slow the progress is in this area. Regarding the CJEU I have less hesitations that the Court is not willing to

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[523] David O'Keefe, " Judicial Protection of the Individuals by the European Court of Justice" Fordham International Law Journal, Volume 19, Issue 3, 1995 Article 5, page 902.
http://pdfs.semanticscholar.org/d976/fde18e22acb46b533a285efd337084f3740d.pdf

increase the workload, and to face with so many direct actions which it may consider as a threat to the uniformity of the legal order, so that it will not use its activism in this field.

Although the chances of winning a direct action for annulment against a Union measure may not really increase, at least the admissibility criteria should be relaxed in order to protect the fundamental rights of effective judicial protection. Unless the individuals are not granted the right to defend their rights before a court, the rule of law of the EU does not protect the individuals and this may make the EU look like a Union formed solely for Member States and not for the citizens that make up the Member States.

9. CONCLUSION

The explanation of the CJEU on why there is no gap in the effective judicial protection of individuals in the EU and the counter opinion of the AG Jacobs summarize a lot of problems although the Lisbon amendments have partially reformed the situation. I am of the legal opinion that a gap does exist although the standards are being progressively improved, however with baby-steps.

Most probably the easiest and the fastest solution of sorting out the current problems would be asking for the CJEU to change its strict interpretation, however in the past decades the Court has proven that it has hesitations on doing so. To be realistic, I would not seek the solution on this option.

It is beyond doubt that the Lisbon amendments have made a change in the status of the individuals by removing the individual concern ciretion from the regulatory acts and the new formulation of the article seems at least to eliminate the clear breach of effective judicial protection of individuals who could not apply to the preliminary ruling procedure due to the non-existence of the implementing measures. However, it is still very clear that the CJEU will still continue promoting the individuals to apply to the preliminary ruling procedure, as it wishes the involvement of the national courts and the cooperation between the national courts and the strong cooperation between the national court and the CJEU.

On the other hand, it is clear that the CJEU is not going to interpret the term regulatory acts in a more relaxed manner and will keep on with its attitude of taking the wording of the Treaty literally as it has been doing in the field of individual protection expect for some pecific fields. However, the Court in this specific matter has given very clear signals that it will not be the actor of the revolution on the effective judicial protection. At least until the MS tend to give more felexibility to the individuals.

We all know the importance of Articles 6 and 13 of the ECHR and 47 of the CFR for the Union and for the Court. Especially the CFR gaining legal power and the possibility of acceding to the ECHR may and has already had a positive impact on the effective judicial protection of individuals. In the last 25 years many improvements have

been introduced in the effective judicial protection of individuals. The changes made with the Lisbon Treaty have become a very important stage in this principle. [524]

It would not be wrong to state that the European Union legal system is a well-thought and organized legal order. The role that the CJEU was given by the Treaty and later on continued voluntarily and the contributions of the Member States as all being countries who are ruled by law have helped the European Union legal order's evolution. The fact that the European Union legal system is neither a domestic nor an international legal order shall always be kept in mind during critics.

It is understandable why and how the individuals have not been at the centre of attention in the judicial remedies system. Many theories could be developed however, the first few that come to mind are that the European Union was first developed with economical aims, the Members of the Union are Member States and not the individuals,so that the Member States hesitate to agree on developments that they feel their sovereignty being threatened, focusing too much on the individuals could result of an unbearable work load so that the CJEU cannot act as the guardian of and more importantly the creator of the legal order in some aspects, and while concentrating on the individuals it might not be possible to realize all the policy purposes of the Union etc.

I believe that the EU legal order aims to provide a complete system of remedies, however neither the CJEU nor the Member States are ready for this. Although the skeleton of the complete system of remedies is ready, the EU needs to be more integrated in order to realize this. I also believe that the EU still has some doubts about whether or not completing the system or remedies for individuals is a priority.

Although there are different opinions most of the authors are of the opinion that the European Union legal system does not contain a complete system of remedies for the individuals. It is probably only the CJEU who has confidently stated that the system of remedies provided by the Union is complete. However, for the reasons explained above I

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[524] Sjöstrand, op. cit footnote 29 p 58

would not choose to be so critical and would state that the EU legal system provides a fairly complete legal system or at least has the capacity to provide a fairly complete system of remedies to individuals at a point of integration.

The current status is that the EU legal order does have a gap in providing effective judicial protection to individuals. As explained above, the action to failure to act is not an alternative route and that it is only a supplementary route which aim to reach a different goal than the action for annulment. The plea of illegality is not an independent procedure and can be pleaded during an existing procedure, the damages action is neither a direct or an indirect procedure whose purpose is not invalidating the acts in question and only aims to compensate the damages that the individual might have had. The preliminary ruling procedure which is closer to be an alternative remedy has lots of disadvantages, although the individuals do not have to be subject to the strict locus standi conditions during this procedure. The advantages and the disadvantages were explained in the previous sections in details. However a successful action for annulment can result with the measure in question being declared null and void, but the preliminary ruling procedure does not have the chance to invalidate the measure in question as if it has never existed. It is time and money consuming and the involvement of the parties of the case is very weak in order to be able to provide a complete system of remedies to the individuals. In other words, I can confidently state that right now the EU legal order does not provide a complete system of remedies, but whether it can provide in the future depends not only on the Treaty amendment n favour of the individual application but also on a more liberal case-law developed for the admissibility criteria for the action for annulment.

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