Chapter 2
The *Locus Standi* of the Regions Before EU Courts

Anne Thies

The Regions and other autonomous communities of the Member States arguably form one of the governmental layers of the constitutional legal order of the European Union. As shown by other authors contributing to this book, the transfer of Member States' powers to the supranational level has neither necessarily been accompanied by the provision of adequate forms of participation of the Regions at the EU level nor by the safeguarding of competences reserved for such entities by the Member States' constitutional order. The potential strengthening of the Regions' position within the Community (and later the EU) constitutional legal order has since been subject to extensive political debate and academic discourse. At the same time, questions arose concerning the Regions' access to judicial protection before the EU Courts, in particular with regard to the Regions' entitlement to directly challenge EU measures encroaching upon their prerogatives. Those prerogatives comprise, *inter alia*, Regions' legislative and executive powers allocated by their national legal system, their general interest in economic prosperity and territory, their interest in full judicial protection and the principle of subsidiarity.

This chapter assesses the standing of the Regions before the EU Courts and provides an overview of the potential impact of the Treaty of Lisbon on the current situation. The first section of this chapter analyses the Regions' direct access to EU Courts for challenging the lawfulness of EU measures in annulment actions brought under Article 263 TFEU (former Article 230 EC). The EU Courts have recognised the Regions' capacity to challenge EU measures neither as so-called privileged applicants, in order to enforce the EU institutions' compliance with EU law,[1] nor as

[1] C-95/97, *Région Wallonne* v *Commission*, Order of 21 March 1997 [1997] ECR I-1287; C-180/97, *Regione Toscana* v *Commission*, Order of 1 October 1997 [1997] ECR I-5245; C-406/06, *Landtag Schleswig-Holstein* v *Commission*, Order of 8 February 2007, paras. 3, 8 et seq. (unpublished). According to Article 263 (2) TFEU (former Article 230 (2) EC), the ECJ has jurisdiction in annulment actions brought by Member States and EU institutions challenging an EU measure "on grounds of lack of competence, infringement of an essential procedural requirement, infringement

A. Thies
School of Law, University of Reading, Foxhill House, Whiteknights Road, Earley, Reading RG6 7BA, UK
e-mail: a.thies@reading.ac.uk

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"semi-privileged applicants" in order to defend their prerogatives independently from their Member States.[2] Hence, this section focuses on the Regions' standing as "non-privileged applicants", which requires applicants to be either addressed, or directly and individually concerned by the contested EU measure.[3] In its second part, the chapter provides a short overview of the Regions' capacity to access the EU judicature indirectly. The accessibility and scope of annulment actions brought by the Member States on behalf of the Regions, and the position of the Regions in preliminary ruling proceedings initiated by a national court and concerned with the regions' prerogatives impinged by EU measures, are subject to the procedural autonomy of the EU Member States' legal systems. Since an analysis of 27 distinct legal systems would go beyond the scope of this chapter, the issue is thus addressed only briefly by providing some examples actually brought before the EU Courts. After providing a summary of changes introduced by the Treaty of Lisbon, the chapter concludes with a critical evaluation of the overall scope of judicial protection provided for Regions by the EU legal order, i.e. by the Treaties and the EU Courts.

A. Regions' Direct Access to the EU Courts

According to the case-law of the EU Courts, Regions have no privileged status when challenging EU measures. In other words, regional authorities cannot – like national governments[4] – bring actions before the ECJ to challenge EU measures "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to its application, or misuse of powers"[5] without demonstrating the actual and distinct

of the Treaties or of any rule of law relating to its application, or misuse of powers" without further conditions to be met. According to the Court, Regions are not "Member States" in the meaning of this Article and do thus not belong to the group of "privileged applicants".

[2]According to Article 263 (3) TFEU (former Article 230 (3) EC), the Court of Justice has jurisdiction in actions brought by the Court of Auditors, by the ECB and by the Committee of the Regions "for the purpose of protecting their prerogatives". While with the entry into force of the Treaty of Lisbon, the Committee of the Regions was entitled to bring actions for the purpose of protecting its prerogatives, the Regions themselves were not listed as semi-privileged applicants, see further discussion below Sect. C.

[3]According to Article 263 (4) TFEU (former Article 230 (4) EC), "[a]ny natural or legal person may [. . .] 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".

[4]See for a detailed discussion of the "unlimited right of action of a Member State" Van Nuffel (2001), p. 874 et seq.

[5]See Article 263 (2) TFEU (former Article 230 (2) EC), footnote 1.

impact of the contested EU measure on their own prerogatives and legal situation. In 1997, the ECJ concluded in its Order in *Région Wallonne* v *Commission* that the immediate jurisdiction of the ECJ is limited to actions brought by a Member State or a Community institution.[6] The ECJ held:

> [I]t is apparent from the scheme of the Treaties that the term 'Member State', for the purpose of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the government of regions or autonomous communities, irrespective of the powers they may have. If the contrary would be true, it would undermine the institutional balance provided for by the Treaties, which govern the conditions under which the Member States, that is to say, the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions. It is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established.[7]

Since Regions and other autonomous communities are not considered to be privileged applicants, their capacity to challenge EU measures affecting them is limited in the same way as it is for natural and legal persons. Accordingly, Regions have to address the General Court (the former Court of First Instance, CFI) instead of the ECJ, with a potential appeal to the ECJ challenging the General Court's decision on points of law.[8] When bringing annulment actions, Regions need to meet the conditions of Article 263 (4) TFEU (former Article 230 (4) EC), i.e. they need to have legal personality and be either the addressee of a EU decision or "directly" and "individually" concerned by a decision addressed to another person or a contested piece of EU legislation.[9]

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[6]The Court referred to Council Decision 94/149/ECSC, EC of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, O.J. 1994, L 66/29. In Decision 94/149, the Council clarified that actions brought by natural and legal persons under (now) Article 230 (4) EC fall within the jurisdiction of the CFI.

[7]C-95/97, *Région Wallonne* v *Commission*, footnote 1, para. 6. The ECJ referred the case to the CFI, which dismissed the action as inadmissible; see T-70/97, *Région Wallonne* v *Commission*, Order of 29 September 1997 [1997] II-1513, paras. 21–24. This approach has been confirmed by the ECJ and the CFI since, see e.g. C-180/97, *Regione Toscana*, footnote 1, para. 6; T-214/95, *Vlaamse Gewest* v *Commission* [1998] ECR II-717, para. 28; T-238/97, *Comunidad Autónoma de Cantabria* v *Council*, [1998] ECR II-2271, para. 42; T-609/97, *Regione Puglia* v *Commission and Spain* [1998] ECR II-4051, para. 16; T-32 and T-41/98, *Nederlandse Antillen*, *Nederlandse Antillen* v *Commission* [2000] ECR II-201, para. 43. See Scott (1999).

[8]Articles 56, 58 of the Statute of the ECJ. According to Article 58 of the Statute, "[a]n appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance".

[9]See for more detailed discussion of standing for natural and legal persons in annulment actions Craig (1994), Arnull (2001), Ward (2007), p. 284 et seq., Craig and De Búrca (2008), pp. 509–528, and Tridimas and Poli (2008).

There have been only a few cases in which Regions challenged Decisions addressed to them.[10] In several cases, Regions challenged Decisions addressed to another person, more specifically to a Member State,[11] or legal provisions of general application, which can in principle also be of direct and individual concern to certain applicants, even if not constituting a disguised decision.[12] The following sections provide an overview of the approach taken by the EU Courts in recent years with regard to the applicants' legal personality, and the contested EU measures being of direct and individual concern to the applicants.

I. Legal Personality of Regions

The aim of Article 263 (4) TFEU is to provide appropriate judicial protection for all persons, natural or legal, who are directly and individually concerned by acts of the EU institutions.[13] In the same way as private legal persons, a public legal person should enjoy a certain degree of autonomy under its own national legal order.[14] The EU Courts have recognised the legal personality of regional authorities after having referred to the national legal systems in question.[15]

[10]See, e.g. T-81/97, *Regione Toscana* v *Commission* [1998] ECR II-2889, paras. 21 et seq. In Joined Cases T-392/03, T-408/03, T-414/03 and T-435/03, *Regione Siciliana* v *Commission*, Order of 25 September 2008, paras. 27, 36 et seq., 46, the CFI considered letters addressed to the Region as either not producing legal effect (and thus not being challengeable under Article 230 EC), or being actually addressed not to the Region but the Italian Republic. In T-236/06, *Landtag Schleswig-Holstein* v *Commission*, O.J. 2008 C 142/25, the lack of legal personality under national law made the action inadmissible; the appeal is pending, C-281/08.

[11]See, e.g. Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen* v *Commission* [1999] ECR II-3663; T-341/02, *Regione Siciliana* v *Commission* [2004] ECR II-2877, and C-417/04, *Regione Siciliana* v *Commission* [2006] ECR I-3881, para. 24 (concerning Commission decision closing the financial assistance from the European Regional Development Fund (ERDF) for the Messina-Palermo Motorway major project); T-60/03, *Regione Siciliana* v *Commission* [2005] ECR II-4139 (Commission Decision relating to the cancellation of the aid granted to the Italian Republic by decision concerning the provision of assistance by the ERDF as infrastructure investment, and to the recovery of the advance on that assistance made by the Commission – dismissed as inadmissible); on appeal the ECJ also denied "direct concern" in C-15/06, *Regione Siciliana* v *Commission* [2007] ECR I-2591.

[12]See, e.g. C-452/98, *Nederlandse Antillen* v *Council* [2001] ECR I-8973, paras. 51, 55; C-142/00 P, *Commission* v *Nederlandse Antillen* [2003] ECR I-3483, paras. 59, 64; C-445 and 455/07 P, *Commission* v *Ente per le Ville Vesuviane* and *Ente per le Ville Vesuviane* v *Commission*, Judgment of 10 September 2009, para. 42; T-417/04, *Regione autonoma Friuli-Venezia Gulia* v *Commission* [2007] ECR II-641, paras. 44 et seq., 52; T-37/04, *Região autónoma dos Açores (Portugal)* v *Council* [2008] ECR II-103*, Summ. publ., para. 39.

[13]See e.g. the summary of T-288/97, *Friuli Venezia Giulia* v *Commission* [1999] ECR II-1871.

[14]Van Nuffel (2001), p. 885, referring to the Opinion of AG Lenz in C-298/89, *Gibraltar* v *Council* [1993] ECR I-3605, 3628–3629.

[15]T-214/95, *Vlaamse Gewest*, footnote 7, para. 28; T-238/97, *Comunidad Autónoma de Cantabria*, footnote 7, para. 43; T-288/97, *Friuli Venezia Giulia*, footnote 13, para. 42.

II. Direct Concern of Regions

The Courts have considered a EU measure to be of "direct concern" to an applicant if the contested measure (a) "directly affect[s] his legal situation" and (b) "leave[s] no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the [EU] rules alone without the application of other intermediate rules".[16] The Courts have acknowledged the applicant being directly affected where "it is possible in theory only for addressees not to give effect to the [EU] measure and their intention to act in conformity with it is not in doubt".[17]

1. Decision Being of Direct Concern

Many Commission decisions have been contested by sub-state entities, in particular Regions, in the areas of State aid and the Structural and Cohesion funds.[18] In order to attempt a later evaluation of the differences with regard to the Regions standing identified by the Courts in those areas, they are presented separately by providing some examples of recent case law.

a) State Aid

In *Vlaamse Gewest* v *Commission*, the CFI acknowledged direct concern where a decision "directly prevent[ed the Region] from exercising its own powers, which [...] consist[ed] of granting the aid in question, as it [saw] fit".[19] In *Freistaat*

[16]See e.g. Joined Cases 41/70 to 44/70, *International Fruit Company and Others* v *Commission* [1971] ECR 411, paras. 23–29; Case 92/78, *Simmenthal* v *Commission* [1979] ECR 777, paras. 25 and 26; C-386/96 P, *Dreyfus* v *Commission* [1998] ECR I-2309, para. 43; C-404/96 P, *Glencore Grain* v *Commission* [1998] ECR I-2435, para. 41; T-69/99, *DSTV* v *Commission* [2000] ECR II-4309, para. 24; C-486/01 P, *National Front* v *Parliament* [2004] ECR I-6289, para. 34; C-445 and 455/07 P, *Ente*, footnote 12, para. 45; C-501/08 P, *Município de Gondomar* v *Commission*, Order of 24 September 2009, nyr, para. 25; Joined Cases T-172 and 175-177/98, *Salamander and others* v *European Parliament and Council* [2000] ECR II-2487, para. 52; T-105/01, *SLIM Sicilia* v *Commission* [2002] ECR II-2697, para. 45; T-60/03, *Regione Siciliana*, footnote 11, para. 46.

[17]T-60/03, *Regione Siciliana*, footnote 11, para. 46; the CFI referred to C-386/96 P, *Dreyfus*, footnote 16, para. 44; see also, to that effect, Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paras. 8–10; T-324/06, *Município de Gondomar* v *Commission*, Order of 10 September 2008, nyr in the ECR, para. 38; C-445 and 455/07 P, *Ente*, footnote 12, para. 46; and Gordon (2007), at 3.72, referring to C-298/89, *Gibraltar*, footnote 14, 3634, per AG Lenz.

[18]See for a list of cases submitted in the areas of State aid and Structural Funds by 2000 Van Nuffel (2001), p. 872 at notes 5 and 6.

[19]T-214/95, *Vlaamse Gewest*, footnote 7, para. 29. This was in line with previous cases concerning a decision affecting, *inter alia*, a region's power to grant state aid, in which the admissibility of the action had not been contested by the Commission, see Cases 62 and 72/87, *Exécutif regional*

Sachsen and Volkswagen v *Commission*, the CFI considered the Decision addressed to the Federal Republic of Germany to be of direct concern to the applicant, as the Decision had not left any discretion for Germany when communicating it to the Free State of Saxony.[20] As in *Friuli Venezia Giulia*, the CFI relied in this case on the fact that the decision required the Region to recover the aid from beneficiaries.[21] In 2000, the Region Sicily challenged a Commission decision which stated, *inter alia*, that the State aid established pursuant to a regional law in favour of undertakings operating in the agriculture or fisheries sector was incompatible with the common market and required Italy to withdraw the aid in question; the Commission did not contend the measure's direct and individual concern to the applicant, and the CFI held the action admissible after only assessing whether the applicant had met the time limit for bringing an action.[22] In many cases since, the whole question of admissibility of actions brought by Regions in the area of State aid was not even addressed explicitly by the Courts.[23]

b) Structural Funds

In 2003, the Region Sicily challenged another Commission Decision, this time relating (a) to the cancellation of the aid granted to the Italian Republic by prior Commission Decision, which had foreseen the provision of assistance by the European Development Fund (ERDF) as infrastructure investment, and (b) to the recovery of the advance on that assistance made by the Commission.[24] The defendant had not disputed that the contested decision was of individual concern to the applicant, so the CFI merely examined whether the applicant was directly concerned by the decision. According to the CFI, the revoking of the assistance in its entirety through the contested decision "has had the initial direct and immediate effect of changing the applicant's financial situation by depriving the applicant of the balance of the assistance (approximately EUR 39.8 million) remaining to be paid by the Commission",[25] and demanded the repayment of advances paid to

wallon v *Commission* [1988] ECR 1573, paras. 6, 8. See also Joined Cases T-127, 129 and 148/99, *Diputación Foral de Álava and others* v *Commission* [2002] ECR II-1275, para. 50.

[20]Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen*, footnote 11, paras. 89, 90.

[21]Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen*, footnote 11, paras. 84–86; T-288/97, *Regione autonoma Friuli-Venezia Giulia*, footnote 13 , paras. 31, 32.

[22]T-190/00, *Regione Siciliana* v *Commission* [2003] ECR II-5015, paras. 29–33 (dismissed as unfounded).

[23]See, e.g. Joined Cases T-228 and 233/99, *Westdeutsche Landesbank and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II- 435; T-369/00, *Département du Loiret* [2003] ECR II-1789, and [2007] ECR II-851; T-318/00, *Freistaat Thüringen* v *Commission* [2005] ECR II-4179; Joined Cases T-211 and 215/04, *Gibraltar and the UK* v *Commission*, Judgment of 18 December 2008. Pending is T-394/08, *Regione autonoma della Sardegna* v *Commission*, O.J. 2008 C 285/52.

[24]T-60/03, *Regione Siciliana*, footnote 11.

[25]T-60/03, *Regione Siciliana*, footnote 11, para. 53.

the Italian Republic and passed on to the applicant; the CFI thus concluded that the applicant's legal situation must necessarily have been affected by the contested decision.[26] The CFI also stated that "the contested decision [left] the Italian authorities no discretion, its implementation being purely automatic and resulting from Community rules alone without the application of other intermediate rules".[27] As a consequence, the CFI acknowledged the contested measure being of "direct concern" to the applicant.

In its cross-appeal, the Commission contended that the CFI erred in law by starting its reasoning as to the admissibility of the action from the premiss "that the decision to grant puts the Regione Siciliana directly in the position of a creditor in respect of the assistance granted".[28] According to the Commission, the Region's ability to receive ERDF assistance was dependent on the autonomous decisions of the Italian Republic.[29] Without a provision or decision of national law the Region would never be a creditor of the Community assistance.[30] The approach taken by the CFI, so the Commission, "would have unacceptable consequences from the point of view of the judicial protection of recipients of the Structural Funds" as "any person or entity recognised by law which is an end-beneficiary of Structural Funds would be directly concerned by the Commission decisions regarding the funds granted".[31] According to the appellant, the Regione Siciliana, however, the decision "directly affected its legal position, since it went from being the recipient of assistance to a debtor required to pay back advances received by way of assistance"; "the Italian authorities enjoyed no discretion in implementing the contested decision".[32] Furthermore, the appellant stated that the annex of the contested decision referred to it as "the body responsible for the application for financial assistance" and pointed out that the decision had "prevented it from exercising its powers as it understands them", in particular the decision obliged it to "cease to apply the legislation on the project and to activate the procedure for the recovery of the aid from recipients".[33]

The ECJ reiterated that a measure is only of direct concern to a natural or legal person, if the measure "affect[s] directly the legal situation of the individual and leave[s] no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules".[34] The fact that the

[26]T-60/03, *Regione Siciliana*, footnote 11, paras. 47, 48.

[27]T-60/03, *Regione Siciliana*, footnote 11, para. 48.

[28]C-15/06, *Regione Siciliana*, footnote 11, para. 20.

[29]C-15/06, *Regione Siciliana*, footnote 11, para. 20.

[30]C-15/06, *Regione Siciliana*, footnote 11, para. 21.

[31]C-15/06, *Regione Siciliana*, footnote 11, para. 22.

[32]C-15/06, *Regione Siciliana*, footnote 11, paras. 24, 25.

[33]C-15/06, *Regione Siciliana*, footnote 11, paras. 26, 27.

[34]C-15/06, *Regione Siciliana*, footnote 11, para. 31, referring to C-404/96 P, *Glencore*, footnote 16, para. 41; C-486/01 P, *National Front*, footnote 16, para. 34; C-417/04, *Regione Siciliana*, footnote 11, para. 28.

Regione Siciliana had been designated as the authority responsible for the implementation of an ERDF project does not imply, according to the ECJ, that it is itself entitled to assistance; the Court held that nothing supports the conclusion that the Region was directly concerned within the meaning of Article 230 (4) EC [now Article 263 (4) TFEU] in its capacity as the authority responsible for the implementation of the project.[35] The Court concluded that the scope of regions' powers according to the national legal order cannot have any effect on whether the appellant is directly concerned.[36]

In 2007, the CFI held again in *Ente per le Ville Vesuviane* v C*ommission* that the applicant was directly concerned by a Commission decision.[37] The applicant was a public-law consortium, comprising the Italian State, the Region of Campania, the Province of Naples and a number of municipalities, whose object is to protect and improve the complex of sites consisting of the Ville Vesuviane (the towns around Vesuvius) dating from the 18th Century. The contested Decision concerned the closure of financial assistance from the ERDF for Ente projects.[38] The CFI had identified differences between the situation in the *Regione Siciliana* cases and this case before concluding on the admissibility of the action.[39] First, the contested Decision had referred to Ente not only as the person responsible for execution of the project but also as beneficiary.[40] Secondly, the Italian State had already announced, prior to the Commission Decision, that it intended to require repayment and not to provide funds itself, it was thus irrelevant that the Decision had provided discretion to the State when deciding whether or not to require repayment of the assistance paid.[41] Thirdly, a right of action was necessary so Ente could ensure protection of its rights of defence.[42]

On appeal, Advocate General Kokott rejected the reasoning of the CFI and suggested to the ECJ that the CFI's decision should be set aside and the action brought by Ente should be rejected as inadmissible.[43] The ECJ followed this suggestion. According to AG Kokott and the ECJ, the differences between the *Regione Siciliana* cases and the present one do not support a different assessment of the applicant's direct concern for several reasons. First, only the Italian State was "entitled" to assistance under the Decision, while Ente was merely designated as the

[35]C-15/06, *Regione Siciliana*, footnote 11, para. 32.

[36]C-15/06, *Regione Siciliana*, footnote 11, para. 35.

[37]T-189/02, *Ente per le Ville Vesuviane* v C*ommission*, not published in the ECR, information at [2007] ECR II-89*.

[38]D(2002) 810111 prot. 102504 of the Commission's Regional Policy Directorate General.

[39]See for this summary (available in English) Opinion of AG Kokott on appeal C-445 and 455/07 P, *Ente*, footnote 12, of 12 February 2009, para. 47.

[40]T-189/02, *Ente*, footnote 37, para. 43 (of the French version).

[41]*Ibid*, paras. 44 et seq.

[42]*Ibid*, paras. 51 et seq.

[43]C-445 and 455/07 P, *Ente*, footnote 12, Opinion of AG Kokott of 12 February 2009, paras. 48 et seq.

"beneficiary".[44] Secondly, while Ente was not entitled to the assistance under EU law, the issue was whether the decision affected the consortium's legal situation as beneficiary.[45] However, AG Kokott reiterated, there is no direct concern where the autonomous will of the addressee interposes itself between the Commission decision and its effect on the applicant.[46] The ECJ agreed with AG Kokott that the Italian Government was under no obligation to require repayment from Ente, and the "subjective announcement" of the Italian State was not binding, AG Kokott adding that it would be unconvincing to leave it to the Member State to decide whether to make the applicant "directly concerned" through announcement and thus decide on the applicant's standing before EU Courts.[47] Accordingly, the CFI erred in law in considering that Ente was directly concerned by the contested decision.[48] AG Kokott had added that the mandatory consultation provided with Ente before a decision on closing the financial assistance from the ERDF placed Ente in a stronger position than the applicants in the Regione Siciliana cases; however, this would not give the basis for an independent right of action against a decision on the merits where an applicant – as in the present case – is not directly concerned by the content of the decision.[49] AG Kokott and the ECJ reiterated that where the admissibility conditions of Article 230 (4) EC [now Article 263 (4) TFEU] are not met, effective judicial protection should be made available by the national legal systems in accordance with the principle of cooperation in good faith laid down by Article 10 EC [replaced, in substance, by current Article 4 (3) TEU] through access to national courts and thereby the prompting of national courts' reference to the ECJ for a preliminary ruling.[50]

c) Cohesion Fund

On 10 September 2008, the CFI dismissed by Order as inadmissible, because of the lack of direct concern, an application brought by the Município de Gondomar (Portugal) for the annulment of Commission Decision on the cancellation of the

[44]C-445 and 455/07 P, *Ente*, footnote 12, para. 51; Opinion of Kokott, para. 50.

[45]C-445 and 455/07 P, *Ente*, Opinion of AG Kokott, para. 51.

[46]*Ibid*., para. 54, with reference to the Opinion of Advocate General Ruiz-Jarabo Colomer in C-417/04 P, *Regione Siciliana*, footnote 11, para. 76.

[47]C-445 and 455/07 P, *Ente*, footnote 12, paras. 52 et seq.; Opinion of AG Kokott, paras. 55, 64, referring to this effect, the Order of the Court in T-105/01, *SLIM*, footnote 16, para. 52, according to which an expressed intention of the Member State is not sufficient.

[48]C-445 and 455/07 P, *Ente*, footnote 12, para. 67; Opinion of AG Kokott para. 65.

[49]*Ibid*. para. 66.

[50]C-445 and 455/07 P, *Ente*, footnote 12, para. 66; Opinion of Kokott, paras. 67, 68, with reference to C-15/06 P, *Regione Siciliana*, footnote 11, para. 39, which refers to C-263/02 P, *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paras. 30–32.

financial assistance granted by the Cohesion Fund for the Project concerning the Redevelopment of Grande Porto Sul – Subsistema de Gondomar.[51] The applicant brought an appeal before the ECJ on the basis that the CFI erred in law when denying the applicant's direct concern. According to the appellant, the Portuguese legislation giving effect to the Cohesion Fund left no discretion to the Portuguese Republic with regard to "whether or not to maintain the assistance allocated by the Cohesion Fund to the Município de Gondomar as the body responsible for the execution of the project, leading thus to the conclusion that the Commission's decision to cancel the aid granted by the Cohesion Fund is of an automatic nature, for the legislation concerned does not permit the bodies responsible for performance to be relieved of the duty to reimburse the sums overpaid"; by refraining from "making any reference to that question" the CFI erred in law; however, the ECJ rejected the appeal as unfounded in its Order of 24 September 2009.[52]

In an Order of 8 October 2008, the CFI rejected as inadmissible, because of the lack of direct concern, an action brought by the Community of Grammatikou (Athens, Greece) against the Commission Decision relating to the grant of assistance from the Cohesion Fund for the project "Construction of a Landfill Site at the Integrated Waste Management Facility of North-East Attica at the location 'Mavro Vouno Grammatikou', in the Hellenic Republic".[53] The applicant had claimed to be directly and individually concerned by the Decision "because it is a public body responsible for the protection of public health and the environment in the area where the project that is being financed is located".[54] No appeal was brought against this decision.

2. Legislative Measure Being of Direct Concern

In addition to those actions challenging decisions, the EU Courts have also dealt with cases concerning legislative measures of the Community. In 1993, the ECJ[55] denied the admissibility of an action brought by Gibraltar challenging a Council Directive provision that suspended the application of the provisions of the Directive (on the development of air services, etc.) to Gibraltar airport until cooperation

[51]T-324/06, *Município de Gondomar*, footnote 17, paras. 37–52.

[52]C-501/08 P, *Município de Gondomar* v *Commission*, see for Application O.J. 2009, C 19/18; Order of the ECJ, nyr.

[53]T-13/08, *Koinotita Grammatikou* v *Commission*, Order of the CFI of 8 October 2008, see O.J. 2009, C 32/35.

[54]See for Application O.J. 2008, C 79/29.

[55]The ECJ had jurisdiction over this case as actions under Article 230 (4) EC [now Article 263 (4) TFEU] had not been allocated to the CFI by Council Decision 94/149/ECSC, EC yet; see *supra* note 8.

arrangements for that airport agreed between Governments of the Kingdom of Spain and the United Kingdom had come into operation.[56] The Court held that there was thus an "obstacle of an objective nature to implementation of the directive"; "[i]n view of the differences between the Kingdom of Spain and the United Kingdom [. . .] concerning sovereignty over the territory on which Gibraltar airport is situated and the operational problems resulting from those differences, the development of air services between that airport and the other airports within the Community is conditional on the implementation of the cooperation arrangements agreed between those two States".[57] The Court concluded that the action was inadmissible.[58]

In 1998, the CFI denied the Comunidad de Cantabria (Spain) being directly concerned by the Council Regulation, in which the Council had laid down conditions under which the Commission was to approve state aid to shipyards. The applicant claimed to be directly concerned as the Regulation would lead to a restructuring of an important shipyard and to dismissal of the labour force.[59] Although Cantabria had been listed in the preamble of the regulation, the CFI held that the Region was not directly concerned as "the simple fact of adopting that measure cannot alone entail the consequences [. . .] which it alleges. The creation of such consequences necessarily supposes, first, the adoption of a decision by the Commission [. . .] and, secondly, the adoption by that shipyard of autonomous measures connected with that decision, namely making employees redundant".[60] In 2000 in *Nederlandse Antillen*, the CFI considered a regulation, being of direct concern to the applicant as it "contain[ed] comprehensive rules leaving no latitude to the authorities of the Member States".[61] On appeal, the ECJ did not need to address this issue as it had already denied the applicant's individual concern, which required the action to be declared inadmissible.[62]

3. Summary

In a nutshell – unless they had already denied the measure's individual concern to the applicant (see discussion in the next section)[63] – the Courts have taken the

[56]C-298/89, *Gibraltar*, footnote 14, para. 5.

[57]C-298/89, *Gibraltar*, footnote 14, para. 22.

[58]C-298/89, *Gibraltar*, footnote 14, para. 24.

[59]Van Nuffel (2001), p. 886.

[60]T-238/97, *Comunidad Autónoma*, footnote 7, paras. 51–53.

[61]T-32 and T-41/98, *Nederlandse Antillen*, footnote 7, paras. 60 et seq.

[62]C-452/98, *Nederlandse Antillen*, footnote 12, paras. 59 et seq.

[63]See e.g. C-452/98, *Nederlandse Antillen*, footnote 12, paras. 59 et seq.; T-37/04, *Região autónoma dos Açores*, footnote 12, para. 94; an appeal has been brought on 8 October 2008, C-444/08 P, and is still pending.

condition of the contested measure being of direct concern to the applicant seriously. Both decisions and measures of general application have been considered by the Courts to be of direct concern as long as they (a) directly affect the applicant's legal situation and (b) there is no discretion left with regard to their implementation.

The Courts have in principle considered decisions in the area of State aid to be of direct concern to Regions challenging those decisions in annulment actions [e.g. *Vlaamse Gewest* (1998) and *Freistaat Sachsen* (1999)], as long as the decisions had an impact on the exercise of power by the Regions. The Courts have been more reluctant to acknowledge Regions' direct concern where decisions relating to the ending or restriction of financial assistance or contributions previously granted under the Structural and Cohesion Funds. Although the CFI has recently, even in those areas, been more generous in recognising contested decisions being of direct concern to the applying Regions and has thus considered several actions admissible, the ECJ has taken a more narrow approach on this question. For example, in the *Regione Siciliana* cases (2005/2006), the ECJ denied direct concern: although the Region was responsible for the Decision's implementation, it was not necessarily the person "entitled" to financial assistance purely on the basis of the Decision; the Court emphasised that the internal division of power within the Member State would not have an impact on whether or not an EU measure was considered to be of direct concern.

In the context of an applicant being required to repay financial assistance received prior to the contested measure, the CFI in the State aid case brought by the Region *Friuli Venezia Giulia* (1999), and the ECJ in the ERDF case *Ente* (2009) brought by a public consortium, relied on whether or not the applicant's obligation either existed on the basis of the EU measure itself or could be presupposed because of a clear obligation for the Member State to ask the applicant for repayment.

In *Gibraltar* (1993), the ECJ denied that the contested legislative measure was of direct concern to the applicant as there was an obstacle to its implementation. The CFI followed this approach in *Cantabria* (1998), concluding that further implementation of the contested measure was necessary to create any consequences of it for the Region. In *Nederlandse Antillen* (2001), the CFI acknowledged the contested regulation being of direct concern to the applicant on the basis that no latitude was left to the Member States' authorities; after having already denied the applicant's individual concern, the ECJ did not need to assess whether or not the measure was of direct concern on appeal.

III. Individual Concern of Regions

In order to make an annulment action brought by a Region admissible, the contested measure also needs to be of individual concern to that Region. According to established case law, not only a decision but also a measure of a legislative nature can be of individual concern to some, and thus takes the nature of a decision in this

respect, if it affects the applicants "by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and thus distinguishes them individually in the same way as the addressee of a decision".[64]

As discussed above in the context of direct concern, it has often been relatively easy for Regions to show individual concern in the context of State aid decisions, even where the contested decision was addressed to the Member State.[65] In the context of the cancellation or restriction of financial assistance under the structural funds, such as the *Regione Siciliana* cases brought in 2003, the individual concern of the applicant has also in principle not been questioned.[66] It was rather the identified Region's lack of direct concern, which made the ECJ reject the action.[67] Where public authority requested the aid, it will be individually concerned by the decision even if addressed to the Member State.[68] In cases brought in the context of the cancellation of financial contributions, or granting to others, under the Cohesion Fund, the CFI did not need to address the issue of individual concern after having already denied the action's admissibility due to the lack of direct concern.[69]

In general, the "Community judicature has accepted the right of regional authorities to challenge Community acts which either prevent [sub-national entities] from adopting measures which they may legitimately adopt if there is no Community intervention or require them to withdraw those measures and to take certain action", for example where the contested decisions specifically concerned aid paid by the applicant local bodies, so that the lawfulness of that aid depended on the outcome of the proceedings.[70] The Court has also acknowledged individual concern of applicants challenging a legislative measure where the Commission had been under a duty specifically to take account of the negative effects that the regulations

[64]See, in particular, Case 25/62, *Plaumann* v *Commission* [1963] ECR 95, 107; see also C-358/89, *Extramet Industrie* v *Council* [1991] ECR I-2501, para. 13; C-309/89, *Codorniu* v *Council* [1994] ECR I-1853, paras. 19, 20; Case C-321/95 P, *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, para. 7C-41/99 P, *Sadam Zuccherifici and Others* v *Council* [2001] ECR I-4239, para. 27; C-50/00 P, C-50/00 P, *Unión de Pequeños Agricultores* v *Council (UPA)* [2002] ECR I-6677, para. 36; recently confirmed in the context of an action brought by regions in C-452/98, *Nederlandse Antillen*, footnote 12, para. 60, and T-417/04, *Regione autonoma Friuli-Venezia Giulia*, footnote 12, para. 52.

[65]See, e.g. T-214/95, *Vlaamse Gewest*, footnote 7, para. 29. See footnote 23 for reference to several State aid cases in which the admissibility was taken for granted.

[66]See discussion above in section "Structural Funds".

[67]C-15/06, *Regione Siciliana*, footnote 11, para. 32.

[68]Van Nuffel (2001), p. 887, with reference to C-213/87, *Gemeente Amsterdam and VIA* [1990] ECR I-221, and T-81/97, *Regione Toscana*, footnote 10.

[69]T-324/06, *Município de Gondomar*, footnote 17, para. 52; T-13/08, *Koinotita Grammatikou*, footnote 53.

[70]See T-37/04, *Região autónoma dos Açores*, footnote 12, para. 82, referring, to that effect, to T-214/95, *Vlaamse Gewest*, footnote 7, para. 29; Joined Cases T-346/99 to T-348/99, *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-4259, para. 37; Joined Cases T-366/03 and T-235/04, *Land Oberösterreich and Austria* v *Commission* [2005] ECR II-4005, para. 28.

in question might have on the economy of the countries or territories concerned.[71] The Court thereby recognised the prerogative of public authorities to defend their institutional rights granted by EU rather than national law.[72]

It is not clear, however, to what extent the EU judicature is prepared to take account of national law. The Courts have refrained from identifying individual concern on the basis of the division of legislative and regulatory powers within a Member State, which they considered "solely a matter for the constitutional law of that State and has no effect from the point of view of assessing the possible effects of a Community legal measure on the interests of a territorial body"; accordingly, it is in the EU legal order "for the authorities of the State to represent any interests based on the defence of national legislation, regardless of the constitutional form or the territorial organisation of that State".[73] The Courts have thus remained reluctant to recognise individual concern on the mere basis of powers conferred by the national constitutions.[74]

The Courts have concluded that EU measures which affect specific interests or groups important for the Region, or hinder the EU's political objectives, are not sufficient for establishing individual concern.[75] This has been of particular relevance where legislative measures were challenged. In *Cantabria*, the CFI held that "any general interest the applicant may have, as a third person, in obtaining a result which will favour the economic prosperity of a given business and, as a result, the level of employment in the geographical region where it carries on its activities, is insufficient, on its own, to enable the applicant to be regarded as 'concerned' within the meaning of the fourth paragraph of Article [230] of the Treaty [now Article 263 TFEU], by the provisions of the contested Regulation, nor, *a fortiori*, as being individually concerned".[76] A measure "capable generally of affecting socio-economic conditions within its territorial jurisdiction is not sufficient to render an action brought by that authority admissible".[77] This has been confirmed in several cases since.[78]

[71]Van Nuffel (2001), p. 888, with reference to T-32 and T-41/98, *Nederlandse Antillen*, footnote 7, paras. 50–57; T-310/97 R, *Nederlandse Antillen* v *Council* [1998] ECR II-445, paras. 33–37.

[72]Van Nuffel (2001), p. 889.

[73]T-417/04, *Regione autonoma Friuli-Venezia Giulia*, footnote 12, para. 62. This has has been challenged on appeal, C-444/08; see for Application O.J. 2008 C 327/15; the appeal is still pending. See also T-37/04, *Região autónoma dos Açores*, footnote 12, para. 82.

[74]See also Dani (2004), p. 192.

[75]Van Nuffel (2001), p. 887.

[76]T-238/97, *Comunidad Autónoma de Cantabria*, footnote 7, para. 49 (the contested regulation concerned State aid to certain shipyards); see also T-609/97, *Regione Puglia*, footnote 7, para. 21 (the contested regulation concerned production aid payable to producers of olive oil).

[77]T-238/97, *Comunidad Autónoma de Cantabria*, footnote 7, para. 50; T-609/97, *Regione Puglia*, footnote 7, para. 22.

[78]C-142/00 P, *Commission* v *Nederlandse Antillen*, footnote 12, para. 69; Order of the President of the CFI of 7 July 2004 in T-37/04 R, *Região autónoma dos Açores*, footnote 12, para. 118; T-417/04, *Regione autonoma Friuli-Venezia Giulia*, footnote 12, para. 61.

In *Região autónoma dos Açores*, the applicant had claimed to be individually concerned by a regulation in the area of fisheries policy as Article 299 (2) EC [now Article 349 TFEU] – i.e. "the obligation for the Council to adopt specific measures for the outermost regions, taking into account the special characteristics and constraints of those regions" – provided "specific protection under Commmunity such as to distinguish [the Region] from all other persons", in particular where it was not certain that the Member State would ensure that the prerogatives of the outermost regions were respected.[79] Also, the contested regulation would have more serious consequences for the environment in the waters of the Azores than in other areas affected, including Madeira and the Canary Islands, and the applicant's dependence on the fishing sector is greater than theirs.[80] The action was dismissed. The CFI held that the fact that a regional authority is entitled to specific protection under Community law is not sufficient to give it standing under Article 230 (4) EC [now Article 263 TFEU]; the Court concluded from the ECJ judgment in *Nederlandse Antillen* that, since it examined whether the regulations at issue were of direct and individual concern to the applicants, the protection granted to them under the Treaty or other provisions of Community law was not considered sufficient to show that the applicants were directly and individually concerned.[81] After assessing the effect of the contested provisions on marine environment, waters, fishing sector, control of fishing activities, research and conservation, etc., the CFI concluded that "the applicant has not put forward arguments which enable it to be held that the contested provisions will entail harmful effects for the fish stocks and for the marine environment in the Azores and, consequently, for the survival of the fishing sector in the region".[82] The appeal brought on 8 October 2008 is still pending before the ECJ.[83]

Many applicants have claimed that their actions, challenging legislative and executive EU measures, should be declared admissible on the ground that the only effective remedy is an action for annulment before the EU judicature. However, the EU Courts have consistently held that the requirement for effective judicial protection "cannot have the effect of setting aside the condition laid down in the fourth paragraph of Article 230 EC [now Article 263 TFEU] that an applicant must be individually concerned".[84] According to the Courts, the Treaties have established a

[79]T-37/04, *Região autónoma dos Açores*, footnote 12, para. 46, with reference to case-law.

[80]T-37/04, *Região autónoma dos Açores*, footnote 12, paras. 48, 49.

[81]T-37/04, *Região autónoma dos Açores*, footnote 12, paras. 54 et seq.

[82]T-37/04, *Região autónoma dos Açores*, footnote 12, para. 78.

[83]See for Application O.J. 2008 C 327/15.

[84]C-50/00 P, *UPA*, footnote 64, para. 44; C-263/02 P, *Commission* v *Jégo-Quéré* [2004] ECR I-3425, para. 36; Order in Case T-417/04, *Regione Autonoma Friuli-Venezia Giulia*, footnote 12, para. 67; T-37/04, *Região autónoma dos Açores*, footnote 12, para. 92; C-15/06 P, *Regione Siciliana*, footnote 11, para. 39; recently confirmed in C-445 and 455/07 P, *Ente*, footnote 12, paras. 65 et seq. See also Order of 24 September 2009 in C-501/08, *Município de Gondomar* v *Commission*, paras. 25 et seq., appeal against CFI Order in T-324/06, *Município de Gondomar*, footnote 17, in which the appellant claimed that the communication of the Commission's decision concerning the demand for reimbursement of financial assistance granted under the Cohesion

"complete system of remedies and procedures intended to ensure control of the lawfulness of the acts of the institutions by entrusting it to the Community judicature. In that system, direct control of the lawfulness of Community acts of general application is entrusted to the Member States and to the Community institutions".[85] Regional authorities are able "either indirectly to plead the unlawfulness of such acts before the Community judicature under Article 241 EC[86] [now Article 277 TFEU] or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures unlawful, to make a reference to the Court of Justice for a preliminary ruling as to lawfulness".[87] If a change was desired, it is for the Member States to reform that system in accordance with [now] Title VI TEU.[88]

B. Regions' Indirect Access to the EU Courts

The EU Courts have held that it falls within the responsibility of the Member States to provide full judicial protection to non-privileged applicants where actions are inadmissible under Article 263 (4) TFEU [former Article 230 (4) EC].[89] Member States have the possibility to bring cases concerning sub-national entities' interests before the EU Courts by either bringing direct legal actions on their behalf (Article 263 (2) TFEU, former Article 230 (1) EC), or by referring questions concerning the interpretation and validity of EU law, which allegedly conflicts with regions' powers granted by national and/or EU law, before the ECJ (Article 267 TFEU, former 234 EC). Although both possibilities are subject to the procedural autonomy of the Member States and can thus not be analysed in detail here, the following sections are meant to give a flavour of what sort of indirect access to the EU Courts Regions might obtain through the representation of the Member States under which legal order they exist.

Fund, "unactionable at domestic level", so an inadmissibility under Article 230 EC (current Article 263 TFEU) would be contrary to the principle of the right to effective judicial protection, see for Application O.J. 2009, C 19/18.

[85]T-37/04, *Região autónoma dos Açores*, footnote 12, para. 92.

[86]According to this article, the validity of legislative measures can be challenged in the context of other proceedings brought before the court.

[87]T-37/04, *Região autónoma dos Açores*, footnote 12, para. 92.

[88]T-37/04, *Região autónoma dos Açores*, footnote 12, para. 92.

[89]C-15/06 P, *Regione Siciliana*, footnote 11, para. 39; C-445 and 455/07 P, *Ente*, footnote 12, para. 66.

I. Annulment Actions Brought on Behalf of REGIONS

Some Member States have established procedures to assure the regional governments that Member States can take action to defend their interests before EU Courts where exclusive regional powers are at stake.[90] In Austria[91] and Belgium,[92] even an individual Region can require the federal government to bring such action. In Germany, the *Bundesrat* has the power to do so.[93] While it would go beyond the scope of this chapter to assess the legal position of the Regions within all Member States with regard to their representation before EU Courts, the examples introduced in the following paragraphs illustrate that there have been cases, in which Member States clearly represented interests of Regions before EU Courts in the areas of State aid, financial assistance under the Cohesion Fund and financial contributions under the ERDF.

In 2003, Portugal brought an action before the ECJ, in which it sought the annulment of the Commission's Decision regarding the fiscal regime adopted by the Azores regional government.[94] This Decision had been one among others by which the Commission had considered fiscal regimes adopted by regional

[90]Van Nuffel (2001), p. 881.

[91]Article 10 of the *Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über die Mitwirkungsrechte der Länder und Gemeinden in Angelegenheiten der europäischen Integration* of 12 March 1992. According to that provision, there is in principle an obligation for the federal Government of Austria (*Bund*) to bring an action before the Community Courts against Community measures concerning the legislative powers of a *Land* requesting such action. However, this obligation does not exist if another *Land* objects this request or in the case of "compelling reasons of foreign or integration policy" (see for full text of the provision: http://www.issirfa.cnr.it/3792,949.html?PHPSESSID=f770435324f14430cd7bc6e720b03913, last visited on 15 June 2010). Van Nuffel (2001), p. 881, refers in this context also to Schweizer and Brunner (1998), pp. 52–53.

[92]Van Nuffel (2001), p. 881, refers to Art. 81, § 7, *BijzondereWet Hervorming Instellingen*, and states that "in all matters that concern regional powers, consultation with the regions is required before the federal government can bring action. According to the *Samenwerkingsakkoord* (Cooperation Agreement) of 11 July 1994 on litigation before international and supranational courts in mixed disputes, action will only be brought when there is a consensus among the federal and the regional governments. However, if a region requests that action be brought in matters of exclusive regional powers, the federal government is obliged to initiate a lawsuit if no consensus can be found (Art. 81, § 7, second paragraph, *Bijzondere Wet Hervorming Instellingen*)". See also Van Nuffel (2000), pp. 551–552.

[93]See Article 7 EUZBLG (*Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*) of 12 March 1993 (*Bundesgesetzblatt Teil I*, p. 313, 1780), lastly changed through the *Föderalismusreform-Begleitgesetz* of 5 September 2006 (*Bundesgesetzblatt Teil I*, p. 2098) (see for full text also http://www.bundesrat.de/cln_099/nn_9740/DE/struktur/recht/euzblg/euzblg-node.html?__nnn=true, last visited on 15 June 2010).

[94]C-88/03, *Portugal* v *Commission (Azores)* [2006] ECR I-7115. See for a comment on this case Lindsay-Poulsen (2008); see also Kurcz (2007).

governments to constitute unlawful State aid under the then EC Treaty [current TFEU].[95] The ECJ acknowledged the possibility of sub-state entities exercising autonomous powers within its territory, as long as those are granted under national law and can be exercised without the potential intervention of the Member State.[96] However, the action was dismissed as unfounded. In 2004, not only the British Overseas Territory Gibraltar but also the UK brought actions before the CFI to challenge the Commission Decision on the aid scheme, which the UK was planning to implement as regards the Government of Gibraltar's Corporation Tax Reform.[97] The CFI joined the two cases and delivered its judgment on 18 December 2008, in which it annulled the Commission's Decision.[98] As in previous State aid cases, the admissibility of Gibraltar's action was not even contested and thus not addressed by the Court.[99] The Commission brought an appeal against the CFI's decision, which is still pending.[100]

In 2005, Greece brought an annulment action before the CFI to challenge the Commission Decision reducing the financial assistance granted under the Cohesion Fund for the project concerning the new Athens International Airport at Spata by a prior Commission decision; in November 2008, the CFI rejected the action as unfounded.[101] An appeal has been brought on 29 January 2009, claiming that the CFI had misinterpreted and misapplied Community law in several respects, that its judgment contained contradictory reasoning, and infringed the principle of proportionality.[102]

In 2007, Germany brought an annulment action to challenge the Commission Decision on the reduction of the period of the financial contribution of the ERDF granted to the Operational Programme under the Community initiative INTERREG II in the *Land* Saarland and the Lorraine and Western Palatinate areas in Germany. On 28 January 2009, the CFI dismissed the action as unfounded.[103] No appeal was brought against this decision.

[95]See, e.g. Decision 93/337 Basque Countries, O.J. 1993L 134/25; Decision 2003/442 Azores, O.J. 2003L 150/52; Decision 2005/261 Gibraltar, O.J. 2005L 85/1.

[96]C-88/03, *Portugal* v *Commission (Azores)* [2006] ECR I-7115, paras. 56–58, 62, 65–67.

[97]T-211/04, *Gibraltar* v *Commission*, O.J. 2004 C 179/8; T-215/04, *UK* v *Commission*, O.J. 2004 C 217/29.

[98]Joined Cases T-211 and 215/04, *Gibraltar* v *Commission*, and *UK* v *Commission*, Judgment of 18 December 2008.

[99]See footnote 23 for reference to cases.

[100]C-106 and 107/09 P, *Commission* v *Gibraltar and the UK*, nyr in the O.J.

[101]T-404/05, *Greece* v *Commission*, nyr in the ECR, see O.J. 2009 C 6/21.

[102]C-43/09 P, *Greece* v *Commission*, O.J. 2009 C 69/29.

[103]T-74/07, *Germany* v *Commission*, nyr in the ECR, see O.J. 2009 C 69/36.

II. The Position of Regions in Preliminary Ruling Proceedings

In addition to the Regions' capacity to bring direct legal actions against the Community themselves or through their Member State in the form of annulment actions, the EU Court in the context of preliminary rulings can also consider their interests. A preliminary ruling proceeding can or must be initiated by a national court if there are doubts with regard to the interpretation or validity of EU law, and a decision (by the ECJ) on the question is necessary to enable the national court to give judgment. Article 267 TFEU [former 234 EC] gives all national courts the option, and even compels those national courts against whose decisions there is no judicial remedy under national law available, to stay their proceedings and refer their questions to the ECJ.[104] Once a preliminary ruling is initiated by the national court, a regional authority can present its arguments about the EU measure in question to the ECJ.[105]

In May 2006, the Belgian Court of Arbitration [now Constitutional Court] referred questions to the ECJ, which concerned the interpretation of Treaty and EU regulation provisions and their compatibility with a care insurance scheme such as the one established by an autonomous community (Flemish Community) of a federal State (Belgium).[106] As the parties in the national proceedings were several federated entities – the Government of the French Community, and the Walloon Government on the one hand, the Flemish Community on the other – one could say that those entities' interests and rights under EU law were addressed before the ECJ in the course of this preliminary ruling procedure.[107]

In October 2006, the High Court of Justice of the Basque Country referred seven cases to the ECJ.[108] Those cases again did not concern the validity of EU measures in the light of regional interests as in the cases discussed in the context of direct actions brought by the Regions (see Sect. A). Instead, they had been brought before the Court by the Regions of La Rioja and Castilla y León and the trade union Unión

[104]See for a general discussion of preliminary ruling proceedings Craig and De Búrca (2008), pp. 460–501.

[105]Van Nuffel (2001), p. 873, referring to Article 20 (2) of the Statute of the ECJ and Article 103 ECJ Rules of Procedure.

[106]C-212/06, *Government of the French Community, and Walloon Government* v *Flemish Government*, O.J. 2006 C 178/18.

[107]C-212/06, *Government of the French Community, and Walloon Government* v *Flemish Government* [2008] ECR I-1683.

[108]Joined Cases C-428-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja)* v *Juntas Generales del Territorio Histórico de Vizcaya and Others*, O.J. 2006 C 326/30.

General de Trabajadores de La Rioja (UGT-Rioja), who claimed that tax rules of the three Historical Territories infringed higher-ranking national law and constitute unlawful State aid for the purposes of Articles 87 and 88 EC [now Articles 107 and 108 TFEU]. The three Historical Territories of Biscay (Vizcaya), Álava (Araba) and Guipúzcoa (Gipuzkoa) are independent regional authorities and together form the Autonomous Community of the Basque Country. They have their own legislative powers in the field of tax law, under which they had lowered the corporation tax rate for companies established in their territory.[109] The ECJ had to interpret Article 87 (1) EC [now Article 107 (1) TFEU] "in order to verify whether legislation such as [those tax rules] adopted by the three Historical Territories within the limits of their areas of competence may be termed rules of general application within the meaning of the concept of State aid arising from that provision or whether those laws are selctive in nature".[110] As the boundaries of the Territories' areas of competence are laid down in the national constitution and other provisions, the ECJ considered it necessary to take those provisions into account as interpreted and enforced by national courts; "[i]t is not the review by the national court which is relevant for the purpose of verifying the existence of autonomy, but the criterion which that court uses when carrying out that review".[111] After some detailed elaboration on parameters determining an infra-State authority's institutional, procedural and economic autonomy, the ECJ left the assessment of such autonomy of the Historical Territories and the Autonomous Community of the Basque Country to the national court and held that

> the answer to the question referred must be that Article 87(1) EC [now Article 107 (1) TFEU] is to be interpreted as meaning that, for the purpose of assessing whether a measure is selective, account is to be taken of the institutional, procedural and economic autonomy enjoyed by the authority adopting that measure. It is for the national court, which alone has jurisdiction to identify the national law applicable and to interpret it, as well as to apply Community law to the cases before it, to determine whether the Historical Territories and the Autonomous Community of the Basque Country have such autonomy, which, if so, would have the result that the laws adopted within the limits of the areas of competence granted to those infra-State bodies by the Constitution and the other provisions of Spanish law are not of a selective nature within the meaning of the concept of State aid as referred to in Article 87(1) EC.[112]

Although it was left for the national courts in both cases to render a decision on the substance of the case, the ECJ elaborated on the impact of EU obligations on infra-national entities. The Court was, however, not in a position either to deal with Regions' position in the constitutional order of the EU or to define involved Regions' legislative and executive powers under EU law conclusively.

[109]See summary in Opinion of AG Kokott of 8 May 2008 in Joined Cases C-428-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja)* v *Juntas Generales del Territorio Histórico de Vizcaya and Others* [2008] ECR I-6747, paras. 1–6.

[110]Joined Cases C-428-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja)* v *Juntas Generales del Territorio Histórico de Vizcaya and Others* [2008] ECR I-6747, para. 78.

[111]Joined Cases C-428-434/06, *UGT-Rioja*, footnote 110, paras. 79 et seq.

[112]Joined Cases C-428-434/06, *UGT-Rioja*, footnote 110, para. 144.

C. Changes Through the Lisbon Treaty?

Since the Treaty of Lisbon entered into force, Article 230 EC has been substituted by Article 263 of the Treaty on the Functioning of the European Union (TFEU).[113] The role of the Committee of the Regions (CoR) in the context of annulment actions has been strengthened. The CoR – being one of the Union's Advisory Bodies[114] and consisting of "representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly" (Article 300 (2) TFEU) – is entitled to bring annulment actions for the protection of its own prerogatives. The CoR would be affected in its prerogatives if the institutions did not comply with their obligation to consult the CoR under the Treaties; on its merits, this constitutes a "procedural requirement" within the meaning of Article 263 (2) TFEU.[115] The obligation would not be

[113]The wording of Article 263 of the TFEU is as follows:

"The Court of Justice of the European Union 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 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 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 laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

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".

[114]Article 13 (4) TFEU.

[115]For a discussion with respect to the same situation under the Draft of the Constitution see J. Ziller, "The Committee of the Regions and the implementation and monitoring of the principles of subsidiarity and proportionality in the light of the Constitution of Europe", Chap. 9, para. 538; see also para. 557 for a list of mandatory consultation under the Draft Constitution. Those are now comprised in the Lisbon Treaty in the fields such as transport policy (Article 91 (1) TFEU), sea and air transport (Article 100 (2) TFEU), employment policy (Articles 148 (2), 149 (1) TFEU), social policy (Article 153 (2) TFEU), the European Social Fund (Article 164 TFEU), education, vocational training, youth and sport (Articles 165 (4), 166 (4) TFEU), culture (Article 167 (5) TFEU), public health (Article 168 (4), (5) TFEU), trans-European networks (Article 172 (1) TFEU), economic, social and territorial cohesion (Article 175 (2), (3) TFEU), Structural Funds, i.e. European Agricultural Guidance and Guarantee Fund, Guidance Section, European Social

infringed if opinions issued by the CoR were not accepted except where no opinion was requested at all, or insufficient time was given to the author of the opinion or for taking the content of the opinion into account.[116]

Individual Regions of the Member States are, however, not among the applicants listed in Article 263 (2) or (3) TFEU and will therefore continue to be considered as non-privileged applicants within the meaning of Article 263 (4) TFEU.[117] The wording of this paragraph has been slightly modified. According to the new provision, natural and legal persons can institute proceedings against (a) "an act addressed to that person", (b) an act of "direct and individual concern" to them, and (c) "a regulatory act which is of direct concern to them and does not entail implementing measures". The first two scenarios, here (a) and (b), were well known under the former Article 230 (4) EC. However, the last scenario, here (c), seems to introduce some change. The new provision seems to suggest that it suffices to demonstrate that a contested "regulatory act" is of direct concern in order to establish admissibility of an annulment action, without the necessity to show the act's individual concern to the applicant. It is emphasised, however, that this provision was drafted in the context of the Constitutional Treaty, which would have made the distinction between European laws, European framework laws, European regulations, European decisions, recommendations and opinions.[118] In this context, EU laws would have replaced "regulations", EU framework laws would have replaced "directives" (see Article 249 of the EC Treaty), EU regulations and decisions would have been non-legislative acts and binding at least to some extent, and recommendations and opinions would have had no binding force.[119] According to Craig and De Búrca, Article I-33 (1) CT defined the hierarchy of norms and classified "regulatory acts" as secondary norms, which had to be differentiated from EU laws, framework laws, decisions, and implementing acts; "the only way to avoid this conclusion would have been to read the phrase 'regulatory act' to mean something broader than the term European Reg. within Article I-33(1). This might have been possible, but it would have been difficult both textually and historically".[120]

The Treaty of Lisbon did not keep the classification of legislative and non-legislative measures as suggested by the Constitutional Treaty. Instead, the

Fund and European Regional Development Fund (Article 177 (1) TFEU), Cohesion Fund providing a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure (Article 177 (2) TFEU), ERDF implementing regulations (Article 178 (1) TFEU), environmental policy (Article 192 (1), (2), (3) TFEU), energy policy (Article 194 (2) TFEU).

[116]For a discussion with respect to the same situation under the Draft of the Constitution see Ziller, "The Committee of the Regions and the implementation and monitoring of the principles of subsidiarity and proportionality in the light of the Constitution of Europe", Chap. 9, para. 539.

[117]See *supra* note 113.

[118]See Article I-33(1) of the Draft Treaty establishing a Constitution for Europe.

[119]*Ibid*.

[120]Craig and De Búrca (2008), p. 527 at note 70.

distinction between regulations, directives, decisions, etc., was retained under Article 288 TFEU [former Article 249 EC].[121] It remains to be seen how the Courts are going to interpret "regulatory act" in the context of annulment actions brought under the TFEU.[122] The Courts might come to the conclusion that it can only be interpreted as referring to regulations, which do not require further implementation. This would have the consequence that measures of general application of such sort could be challenged without the necessity to show individual concern. The applicant in *Regione autonoma Friuli-Venezia Giulia* v *Commission* had already claimed that account should be taken of the draft Treaty establishing a Constitution for Europe, which would also have waived the condition of applicants being individually concerned by the contested Community regulation.[123] The CFI did not take cognisance of this argument as the draft Treaty was not yet in force.[124]

The Treaty of Lisbon made the Charter of Fundamental Rights[125] legally binding on, *inter alia*, the EU institutions.[126] Craig and De Búrca questioned already in the context of the potential entry into force of the Constitutional Treaty whether this would have any impact on the scope of the access to judicial protection for natural and legal persons in the context of annulment actions.[127] They came to the conclusion that, given no explicit mentioning of standing rules and the Courts' approach on standing hitherto, it is unlikely that EU Courts would regard the right to good administration under Article 41 and the right to an effective remedy before a tribunal under Article 47 of the Charter necessitating a broader approach. Also, the memorandum stated in relation to Article 47 that there was no intent for this provision to make any change on standing rules other than those embodied in the revised provision on annulment actions itself. They added that "[t]here is however an uneasy tension between the Charter rights and the standing rules for direct actions. The Charter accords individual rights, yet the application of the standing rules means that a person who claims that his rights have been infringed by Community law would normally not be able to meet the requirements of individual concern.[128] There is something decidedly odd about the infringement of an individual right not counting as a matter of individual concern".[129]

While this aspect is covered in detail in a different chapter of this edited collection (see Chap. III for detailed discussion), it can be mentioned here that

[121]See Articles 288 et seq of the Treaty of Lisbon.

[122]Only Article 207 (6) TFEU (ex Article 133 EC) makes the distinction between legislative and regulatory provisions. However, this is in reference to provisions of the Member States, which are not in question in an annulment action before Community Courts.

[123]T-417/04, *Regione autonoma Friuli-Venezia Giulia*, footnote 12, para. 41.

[124]T-417/04, *Regione autonoma Friuli-Venezia Giulia*, footnote 12, para. 68.

[125]O.J. 2000, C 364/01.

[126]Article 6 (1) TEU.

[127]Craig and De Búrca (2008), p. 527 et seq.

[128]C-258/02 P, *Bactria* [2003] ECR I-15105, paras. 48–51.

[129]Craig and De Búrca (2008), p. 528.

the Treaty of Lisbon is accompanied by a new Protocol on the Application of the Principles of Subsidiarity and Proportionality, which is based on the Member States' wishing to "ensure that decisions are taken as closely as possible to the citizens of the Union", and resolved "to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on the European Union, and to establish a system for monitoring the application of those principles". According to Article 8 (1) of the Protocol, the Court of Justice has jurisdiction for annulment actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought "by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof". According to Article 8 (2) of the Protocol, "the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty [...] provides that it be consulted".[130] On the one hand, one could consider the principle of subsidiarity being one of the CoR's prerogatives in the interest of "decentralisation" (i.e. less EU action) as well as one of the ECB's and the Court of Auditor's prerogatives in the interest of "centralisation" (i.e. more EU action).[131] On the other hand, one could conclude that "*Protocol No 8 merely defines a specific case of an action for protection of prerogatives brought by the Committee of the Regions*. The fact that it has the possibility to bring an action for annulment to review compliance with the principle of *subsidiarity* therefore means that monitoring this *principle is a general prerogative of the CoR*".[132]

D. Critical Evaluation

There are a variety of regional and local entities within the Member States. Many have been granted certain legal status and competences by their national legal order before their joining the EU, which have been affected by the growing competences of the EU institutions.[133] Their interests are manifold, and it would be difficult for them to speak with one voice. Hence, despite the establishment of the Committee of the Regions as an advisory body to the European institutions, Regions and other autonomous communities have a continuous interest in defending their powers and interests at the EU level. This also becomes manifest in the context of the Regions' standing in direct actions before the EU Courts.

[130] See footnote 115.

[131] See Ziller (2006) published by the EC in 2006, see for full text of this study www.cor.europa.eu, under Opinions and Publications, Publications 2006.

[132] *Ibid*., para. 532 [emphasis added].

[133] An indication of the powers enjoyed by the Regions within the national legal orders can be inferred from the areas in which the CoR now needs to be consulted by the Community institutions, see footnote 115.

The Courts' position, established in *Région Wallonne*, to consider Regions as non-privileged applicants only has been criticised by some. Van Nuffel claimed that the vague notion of "government authorities" used by the ECJ in this case indicates that not only "central government" but also other authorities authorised to represent a Member State can bring actions on behalf of the Member States.[134] What should be decisive for the admissibility of such actions is the conferral of the power to represent the Member State, independent of any specific interest of the authorised authorities.[135] Arnull also claimed that a legal person governed by public law should in some circumstances rather be equated with the Member State to whose law they are subject than being treated in the same way as a legal person governed by private law.[136] The reasons for this were that (a) Member States could also be represented by competent regional ministers rather than national ministers at relevant meetings of the Council (see Article 16 (2) TEU; former Article 203 (1) EC), (b) regional authorities were also responsible for the implementation and application of EU directives, and could be the addressees of related enforcement actions before national courts, and (c) Member States could be brought before the ECJ for their Regions' non-compliance with EU law.[137]

Over the last decade, several proposals have been made to strengthen the Regions' position before EU Courts. At the Inter-Governmental Conference in Nice in 2000, the Belgian Government suggested the insertion of a new paragraph – to follow Article 230 (2) EC – to give federal entities the right to bring an annulment action under the same conditions as Member States to counterbalance their obligation to implement directives and monitor compliance with Community law within their jurisdiction; however, this proposal did not find support from many Member States.[138] Subsequently, as part of the post-Nice debate on the future of Europe, a "Political Declaration of the Constitutional Regions Bavaria, Catalonia, North-Rhine Westphalia, Salzburg, Scotland, Flanders and Wallonia on the Strengthening of the Role of the Constitutional Regions in the European Union" was published, which demanded semi-privileged status for Regions, so that they could bring actions "when their prerogatives are harmed".[139]

Those suggestions were followed neither by the Member States (through a modification of the Treaty) nor the EU Courts. Instead, the Courts have confirmed their approach established in *Région Wallonne*. They reiterated the necessity for Regions to show their "direct and individual concern" by the contested EU measure in order to establish the admissibility of the annulment action.[140] As a consequence,

[134]Van Nuffel (2001), p. 880.

[135]Van Nuffel (2001), p. 880.

[136]Arnull (2001), p. 11.

[137]Arnull (2001), pp. 11, 12, with reference to relevant case-law; see also Van Nuffel (2001), p. 880 et seq. for a discussion of the meaning of Article 203 EC in this context.

[138]Burrows (2002), p. 45 et seq.

[139]Burrows (2002), p. 46.

[140]See footnote 7 for reference to case-law.

the Courts' interpretation of Article 263 (4) TFEU [former Article 230 (4) EC] with regard to the Region's standing has become crucial.

The analysis of case law delivered in the context of actions brought by Regions in their capacity as non-privileged applicants under Article 230 (4) EC [now Art. 263 (4) TFEU] has arguably shown inconsistencies in approaching the conditions of direct and individual concern. Where decisions were challenged, the Courts held actions in the context of State aid admissible relatively easily, while often rejecting those in the context of the cancellation or reduction of financial assistance under the Structural and Cohesion Funds as inadmissible. All cases concerned, at least *inter alia*, the financial interests of the Regions. A regional entity is not only in the context of State aid cases but also in the context of the cancellation of structural funding, under an obligation to adjust the granting or to recover aid. This has been recognised by the CFI in *Regione Siciliana*.[141] Subsequently, the ECJ overruled the CFI's decision by holding that the Region's responsibility to implement the ERDF project did not imply its own entitlement to assistance, and that nothing supported the conclusion that the Region was directly concerned in its capacity as the authority responsible for the implementation of the project.[142]

While it is true that Regions' financial interests are concerned both in State aid and Structural and Cohesion Fund assistance, there have probably been political reasons for the Courts to distinguish between those categories. First, the position that Regions have been entitled to defend in annulment actions in the context of State aid relates to their vested power to grant State aid as long as they act in compliance with the legal constraints imposed on them by the EU legal order, in particular the common market. The Courts' acknowledgement of the Regions' standing in this context can be seen as respect for "decentralised powers", i.e. the autonomy of sub-national entities. The Regions' interests claimed in the context of the cancellation of financial assistance granted by Structural and Cohesion Funds are of a different nature. The financial assistance previously received by or allocated to them "privileged" the Regions in question in the interest of EU objectives pursued by the Funds. Hence, Regions will always have an interest in defending this privilege, whether or not EU interests justify its continuation; the number of cases before the Courts could be high. Secondly, the financial privileges enjoyed by the Regions in the categories of State aid and Structural and Cohesion Funds have been constituted on the basis of different sources and in the light of different objectives. While the Regions and Member States grant State aid from their own budget in the interest of industries, the EU pays for the financial assistance granted under the Structural and Cohesion Funds in the interest of EU policies.

A different matter involves those cases in which Regions' actions were brought to challenge legislative measures of the EU in the interest of their prerogatives such as powers in the area of education, environmental policy and the principle of

[141]T-60/03, *Regione Siciliana*, footnote 11, para. 53.

[142]C-15/06, *Regione Siciliana*, footnote 11, para. 32; see also C-445 and 455/07 P, *Ente*, footnote 12, and discussion at footnote 43 et seq.

subsidiarity (see also Chap. III).[143] Measures of general application have been considered by the Courts to be of direct concern as long as they (a) directly affect the applicant's legal situation and (b) there is no discretion left with regard to their implementation. Individual concern was denied where Regions relied on their general socio-economic interests[144] but was acknowledged where the EU institutions had been under a duty specifically to take account of the negative effects that the regulations in question might have on the economy of the countries or territories concerned.[145] It is welcomed that the Court thereby recognised the prerogative of public authorities to defend their institutional rights granted by EU law.[146] This might be as far as it has got so far with the Courts' contribution to the process of "discovering the proper place for the regions in the form of EU government".[147]

It remains unclear to what extent the Courts should take cognisance of the national division and allocation of legislative and executive powers, which has so far been refrained from.[148] The respect for regional autonomy in the context of annulment actions not only with regard to direct but also individual concern would also mirror the Court's approach with respect to preliminary rulings, which had at their core the scope of rights and interests of Regions. In those cases, the ECJ, while interpreting the scope of EU law, took account of national provisions providing powers to regional entities, developing parameters for the national courts' assessment of the Regions' institutional, procedural and economic autonomy.[149]

Regions have often claimed the necessity to make actions admissible by referring to the need for effective judicial protection.[150] Instead of adapting their interpretation of the admissibility criteria to widen Regions' access to the EU judicature, the EU Courts have held that where the admissibility conditions of Article 230 (4) EC [now Article 263 (4) TFEU] are not met, effective judicial protection should be made available by the national legal systems in accordance

[143]See also Scott (1999).

[144]T-238/97, *Comunidad Autónoma de Cantabria*, footnote 7, para. 50; T-609/97, *Regione Puglia*, footnote 7, para. 22. C-142/00 P, *Commission* v *Nederlandse Antillen*, footnote 12, para. 69; Order of the President of the CFI of 7 July 2004 in T-37/04 R, *Região autónoma dos Açores (Portugal)* v *Council* [2004] ECR II-2153, para. 118; T-417/04, *Regione autonoma Friuli-Venezia Giulia*, footnote 12, para. 61. See discussion at footnote 77.

[145]Van Nuffel (2001), p. 888, with reference to T-32 and T-41/98, *Nederlandse Antillen*, footnote 7, paras. 50–57; T-310/97 R, *Nederlandse Antillen*, footnote 71, paras. 33–37.

[146]Van Nuffel (2001), p. 889.

[147]Dani (2004), p. 181.

[148]T-417/04, *Regione autonoma Friuli-Venezia Giulia*, footnote 12, paras. 62, 63. See for discussion of the current regime linking the admissibility of actions to restrictions made to their autonomous exercise of national powers and to rights or institutional interests guaranteed by Community law already Van Nuffel (2001), p. 891.

[149]Joined Cases C-428-434/06, *UGT-Rioja*, footnote 110, para. 144; see discussion above at Sect. B.II.

[150]See footnote 84.

with the principle of cooperation in good faith laid down by Article 10 EC [see now Article 4 (3) TEU] through access to national courts and thereby the prompting of national courts' reference to the ECJ for a preliminary ruling.[151] It is doubted that, where annulment actions are inadmissible, adequate judicial protection with regard to EU law clashing with regional powers can be provided through alternative routes at the national level. It would have gone beyond the scope of this chapter to analyse a representative number of Member States' legal systems with regard to both the Regions' rights (under national law) to compel their States to represent them before EU Courts, and the procedural rights of applicants before national courts. It is difficult to draw any conclusion from the few examples of cases, of which some have been introduced above (see Sect. B). It can be concluded, however, that the possibility for Regions – and other non-privileged applicants – to defend their interests in such an action can hardly be considered a substitute for their direct access to the EU judiciary as there is neither a right under EU law for applicants to request the referral of a question to the ECJ,[152] nor to compel States to bring direct legal action on behalf of Regions. It would require detailed analysis of the Member States' jurisprudence to assess whether the obligation for States under Article 4 (3) TFEU to provide effective judicial protection has been made enforceable for Regions, and which actual effect that had on Member States' bringing actions on behalf of Regions before the EU Courts.

Even with the entry into force of the Treaty of Lisbon, there are not many changes concerning the Regions' access to judicial protection before EU Courts. Although the Committee of the Regions is now a "semi-privileged" applicant, the Regions themselves still remain "non-privileged" applicants who need, in principle, to be directly and individually concerned by the contested EU measure. It should be added that the standing of the CoR will also not necessarily be of direct benefit for individual Regions with regard to their access to EU Courts. According to Article 300 (4) TFEU, the members of the CoR "shall not be bound by any mandatory instructions", "[t]hey shall be completely independent in the performance of their duties, in the Union's general interest". In other words, although the CoR might be able and willing to represent interests of *all* their members (agreed upon), it would not be in a position to "defend" specific interests of sub-national entities before the EU Courts. With regard to the Regions' standing as non-privileged applicants, it remains to be seen whether Courts will acknowledge "concern" of applicants without assessing the element of individual concern where "regulatory acts" are challenged, which could make it easier for applicants to bring admissible action challenging regulations that do not require further implementation.

[151]C-15/06 P, *Regione Siciliana*, footnote 11, para. 39; C-445 and 455/07 P, *Ente*, footnote 12, paras. 65 et seq.

[152]See in particular Opinion of AG Jacobs of 31 March 2002 in C-50/00 P, *UPA*, footnote 64, paras. 37 et seq.; see also Arnull (2001), p. 50.

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