IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

Case C- ____/19

Armando Carvalho and others[1]

Appellants

v

European Parliament

and

Council of the European Union

Respondents

APPEAL

FROM THE GENERAL COURT OF THE EUROPEAN UNION

- lodged pursuant to Article 56 of the Statute of the Court of Justice -

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The Appellants are represented by: Dr Gerd Winter, Professor of Public Law, University of Bremen; Dr Roda Verheyen, Rechtsanwältin, of Rechtsanwälte Günther, Hamburg; and Hugo Leith, Barrister, of Brick Court Chambers, London.

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The Appellants consent to be served by eCuria.

[1] A list of the Appellants is set out in **Annex A1** to this Appeal.

I. INTRODUCTION AND OVERVIEW

1. This case arises against the background of rising global temperatures (currently more than 1.1°C higher than pre-industrial levels), the ensuing changes in the climate and the devastating effects on humankind and natural resources, including the Appellants' health and livelihoods. It is pursued by children and their parents living in the EU and abroad, who are dependent on small and medium size agriculture and tourism, who are already and will increasingly be adversely affected in their livelihoods and their physical well-being by climate breakdown, including droughts, wildfires, flooding, heat waves, sea level rises and adversely affected weather patterns. They are supported and joined by an association of indigenous Sami youth living in Scandinavia, whose families are equally affected.

2. The Appellants contend that the Union has urgent responsibilities to limit and significantly reduce the emission of greenhouse gases (**GHGs**), and is in breach of its binding obligations under higher rank legal norms, including fundamental Charter rights and the Paris Agreement of 2015. The Respondents as legislators have adopted three legal acts covering different sectors of the economy, which together permit the continued emission of GHGs at levels higher than permitted under these higher rank norms. These are: amendments to the so-called Emissions Trading Directive[2] (the **ETS Directive**); the so-called Effort Sharing Regulation'[3] **(ESR**); and the Land-Use, Land-Use Change, and Forestry Regulation[4] (the **LULUCF Regulation**).

3. The GHG Emissions Acts collectively set a target that would lead to GHG emissions from the EU decreasing over the period 2021-2030, such that by 2030 emissions would be 40% lower than their level in 1990, which means that emissions in 2030 will still be 60% of the 1990 level. The Appellants' case is that these emissions are unlawfully high:

   (1) These emissions will accumulate in the atmosphere and contribute to causing serious damage to the climate and the life conditions of the Appellants. The allowable emission quantities are allocated to emitters on the basis of the GHG Emissions Acts. These Acts thus cause an encroachment on the Appellants' fundamental rights (as protected by the Charter) to life and physical integrity, the rights of children, the right to pursue an occupation, the guarantee of property, and the right to equal treatment. They also grossly exceed the maximum budget of GHG emissions the EU can legitimately and equitably derive from the limitation on temperature increase of 1.5°C and 'well below 2°C' set by the Paris Agreement, which is binding upon the Union as a whole.[5] In the alternative, if

[2] Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ L 76, 19.3.2018): see **Annex A.2**.

[3] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (OJ L 156, 19.6.2018): **Annex A.3**.

[4] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU: **Annex A.4**.

[5] The emissions also conflict with the 'no-harm' rule in customary international law and Article 191 TFEU.

the Acts are construed not as authorising emissions themselves, they are in breach of the EU's positive obligations, based on the fundamental rights of the Appellant, to prohibit those emissions that exceed the limits allowed by those obligations.[6]

(2) Encroaching on these fundamental rights and exceeding the GHG budget is a breach of these higher ranked norms unless the Union can establish a well-founded justification. Any such justification, balancing public and private interests favouring higher emissions, can only apply within strict limits, where emissions at a higher level are necessary to protect those interests. This means that the *prima facie* encroachment or violation of the higher rank norms is permitted only to the extent that the Union has reduced emissions in accordance with its economic and technical capability.

(3) However, the EU has set the 40% reduction (or 60 % allowance) target neither by reference to the protective scope of fundamental rights, nor to its equitable emissions budget under the Paris Agreement, nor to its economic and technical capability but through an arbitrary political process in line with earlier decisions for a 'long term Roadmap' made prior to the more stringent commitments adopted in the Paris Agreement. The Impact Assessment for the 40% target was directed at confirming that the 40% was economically feasible. It manifestly failed to explore the economic and technical feasibility of deeper reductions in line with the EU's duties. The Union was required under higher rank law to develop a suitable methodology of inquiry into the feasibility of emissions reductions measures. Had the Respondents done so, the overwhelming official, scientific, engineering and economic evidence shows that the Union can feasibly and economically go well beyond a 40% reduction (or below a 60% allowance). While it is not for the Appellants to define the precise figure, the evidence shows that the Union's discretion would be limited such that, at the least, a reduction in a range of 50-60% below (or a maximum allowance of 40-50% of) 1990 levels would be required by 2030.

4. **Annulment** The Appellants accordingly brought proceedings in the General Court contending that the emissions targets in the GHG Emissions Acts, which in aggregate comprise an overall reduction of 40% (or an allowance of 60% by 2030), are incompatible with higher ranked law and seek their annulment under Article 263 TFEU, subject to an order that they are kept in force until the Respondents adopt new rules consistent with the Court's judgment.

5. **Non-contractual liability** Further, and in the alternative, the Appellants contend that higher rank law has since 1992 required, and continues to require, the Union to significantly reduce its GHG emissions. The Union has failed to do so sufficiently; the GHG Emissions Acts are the present manifestation of that failure. The Union's past and continuing breach of its duties has materially contributed to dangerous climate change, which has caused and/or will cause damage to the applicants. This breach of duty and the consequent damage engages the non-contractual liability of the Union under Articles 268 and 340 TFEU. Rather than damages,

[6] See for further elaboration of the two constructions of interference with fundamental rights paras 112 - 118 of the Application (see **Annex A.5**) and para 43 of the Reply (see **Annex A.6**).

the Appellants seek an injunction requiring the Union to comply with its obligations by setting deeper emissions reduction targets at the level required by law.

II. ADMISSIBILITY OF THE APPLICATIONS – THE PROCEEDINGS IN THE GENERAL COURT

6. Following a challenge to the admissibility of the applications by the Respondents, the Appellants' case was dismissed by the General Court as inadmissible by the Court's Order notified on 15 May 2019, without consideration of the merits.[7]

7. On the application for annulment, while the parties had made submissions addressing each aspect of the test of admissibility (Judgment, paras 25-32), the General Court focussed on the requirement for 'individual concern' to be shown under the fourth paragraph of Article 263 TFEU (paras 44-55). It reasoned as follows:

   (1) The General Court made clear that it was applying the *Plaumann* test to establish "individual concern": *"natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes that 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 addressee*" (para 45).

   (2) It rejected the Appellants' argument that the effect of climate change and, by extension, the infringement of fundamental rights, is unique to and different for each individual" (paras 46-47). It accepted that every person is likely to be affected by climate change in one way or another, but held the Appellants' arguments would render the requirements of Article 263 TFEU "meaningless" (paras 48, 50).

   (3) The Appellants had argued that the *Plaumann* test of "individual concern" could render Union legislation practically immune from judicial review and had invited the General Court to adapt its requirements. The Court, however, held that Article 47 of the Charter does not confer an "*unconditional entitlement*" to bring a claim before the Courts of the EU. It added that the right to seek redress before national courts (which includes the right to seek a preliminary reference under Article 267 TFEU) provides sufficient judicial protection (paras 52-53).

8. The General Court held in a single paragraph (para 51) that the Saminuorra association had no standing. While an association may be individually concerned because it "represents the interests of its members, who would themselves be entitled to bring proceedings" or because its "own interests as an association are affected", the Court held that the Saminuorra had "not shown that it had satisfied" these conditions. It made no reference at all to the evidence concerning the Saminuorra's organisation, purposes, or membership.

9. As to the claim alleging non-contractual liability, the General Court reasoned that "*an applicant may not, by means of an action for damages, attempt to obtain a result similar to the result of annulling the act, where an action for annulment concerning that act would be inadmissible*" (para 66). As the Appellants were not seeking financial compensation but rather amendment of the legislative package, but

[7] ECLI:EU:T:2019:324 (**Annex A.7**).

lacked standing to obtain annulment of the emissions targets, this principle was said to apply and the application was dismissed as inadmissible (paras 68-71).

III. GROUNDS OF APPEAL

10. The Appellants appeal against the General Court's decision on the following grounds.

11. **First ground:** The General court erred in finding that the Appellants do not satisfy the principles stated in the *Plaumann* case law for establishing individual concern. The three GHG Emissions Acts allow emissions that affect each Appellant in a distinctive factual way. In addition, the *Plaumann* test is met because the three GHG Emissions Acts infringe personal fundamental rights of the Appellants.

12. **Second ground:** In the alternative, the *Plaumann* test should have been adapted in light of the compelling challenge of climate change and the foundation of the Appellants' case in their individual fundamental rights, including a guarantee of effective legal protection of those rights. The CJEU has held that for a right to be effective it must be accompanied by a remedy and the General Court erred in finding that national courts (and the preliminary reference procedure under Article 267 TFEU) or an action challenging implementing acts by the Commission would provide an adequate system of remedies in this case.

13. This Court should accordingly hold that where (as here) no other effective legal remedy is available to protect an applicant's fundamental rights, the requirement of "individual concern" is established where it is alleged and substantiated that a legislative act encroaches on a personal fundamental right of the applicant to a serious degree, or alternatively, interferes with the essence of the right. This requirement was met here.

14. **Third ground**: Further to grounds 1 and 2, the General Court erred in denying that the Saminuorra had standing, by disregarding (without explanation) the evidence showing that the majority of members of the association are individually concerned and would have standing in their own right. In the alternative, the Court should have relaxed the criteria for establishing the *locus standi* in the case of associations representing an indigenous community.

15. **Fourth ground**: In dismissing the application for non-contractual liability as inadmissible, the General Court applied the wrong legal test, by introducing a new requirement for applicants to establish that they would have standing for the purposes of Article 263 TFEU. This requirement has no support in the text of the Treaty or the case law.

IV. FIRST GROUND OF APPEAL: THE GENERAL COURT ERRED IN FINDING THAT THE APPELLANTS FAILED TO SATISFY THE *PLAUMANN* PRINCIPLES FOR SHOWING 'INDIVIDUAL CONCERN'

16. The *Plaumann* case law states that the criterion of 'individual concern' in Article 263 TFEU, fourth paragraph, is interpreted as requiring the following:

> *"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."*

First error: the Court erred in law in disregarding that the Applicants are factually concerned in distinctive ways

17. The Appellants submit that they meet this standard, as the contested GHG Emissions Acts affect them "by reason of certain attributes that are peculiar to them" and thereby "distinguish them individually". Each of the Appellant families and even each family member has different attributes that are peculiar to them and brings a separate legal claim based on this. Some families suffer from droughts, others from flooding, yet others from snow melting, and still others from heat waves caused or intensified by climate change. Some are farmers or forestry owners, others own a business in the tourism sector, still others do animal husbandry. Some are old, others middle aged, young or small children. All are individuals suffering in distinct ways from climate change. They are also distinguished from people who may rather benefit from climate change.[8] For example, there is significant variation even among individuals living in the same places and affected by the same increases in temperature:

    (1) The lead Appellant, Mr Carvalho, suffered economic loss from the destruction of his forestry holding (and associated buildings and equipment) in a catastrophic wildfire in central Portugal in 2017, (a fire which the Portuguese government attributed to climate change) (see Application, paras 24-25 [**Annex A.5**]).

    (2) The Conceicao family also live in central Portugal. They are also affected by higher temperatures and extreme weather but in a different way. These conditions have led not to the destruction of immoveable property but to the collapse of yields from their beehives and has already necessitated spending to maintain the bee population (see Application, paras 26-27 [**Annex A.5**]).

    (3) Also affected differently is the Sendim family, who own a farm in southern Portugal engaged in cultivating various crops, raising livestock, etc. Higher temperatures and lower rainfall have severely reduced the yield and put the rentability of the farm at risk (Application paras 28-29 [**Annex A.5**]).

    (4) The Feschet family owns a farm in Southern France mainly cultivating lavender. Droughts and heavy rainfall have impoverished the soil and diminished the revenue from its exploitation over a sustained period (Application paras 30-33 [**Annex A.5**]).

18. The range of impacts from climate breakdown is self-evidently very diverse. These impacts can be contrasted with the analysis of the effects of restrictions on greenhouse emissions allowances undertaken by the General Court in the *Arcelor* case. There, the General Court held that undertakings that would be affected by cuts in such allowances were not "individual concerned". This was because those undertakings could reckon the precise quantity of allowed emissions which constitutes "an objectively determined situation" for them.[9] By contrast, those who suffer from the effects of GHG emissions through climate change are exposed to a universe of impacts which are highly diverse, depending on the nature of the climatic

[8] For example, some Europeans may incur certain limited and short-term benefits from climate change (such as a farmer in a cold area benefiting from a longer growing season), albeit these will be outweighed by the broader societal risks of climate breakdown: economic dislocation, migration, and conflict. The point is that the specific effects are different for each individual.

[9] Case C-127/07 *Validity of Directive 2003/87/EC*, ECLI:EU:C:2008:728.

phenomenon, and their own personal circumstances. For emitters the conditions under which they trade and compete are objectively changed for all actors in the same way; while for victims of climate change the conditions of their real life and work are destroyed in myriad, serious and unpredictable ways.

19. The General Court made no reference to the evidence showing the diverse and distinctive ways in which the Appellants are concerned. It simply ruled (para 50) that the fact that persons are affected differently does not confer standing to challenge a measure of general application. This approach mis-states the *Plaumann* test, which requires that an individual shows that she or he is affected in ways that differentiate him or her from all other persons. The General Court wrongly focussed instead on the perceived consequences of the Appellants' case, rather than its merits. The Appellants therefore submit that the General Court erred and should have held that they meet the requirement of individual concern in the *Plaumann* test.

Second error: the Court erred in law by not finding that the Applicants are legally concerned in distinctive ways

20. The Appellants fortify this submission by reference to the effects of climate change on their individual legal positions. Whereas historically the CJEU had focussed on the 'factual' position of an applicant in assessing "individual concern", the more recent practice of the Court acknowledges that the effects of a measure on the individual *legal* position of an applicant may also constitute "individual concern" within the *Plaumann* test. Under this authority, "individual concern" is interpreted to include encroachments on the legal rights. It may therefore follow that a combination of two basic concepts found in many European legal systems, locus standi *de facto* and locus standi *de jure*[10] is emerging.

21. In this context, the CJEU has so far identified three kinds of rights as possibly conferring "individual concern": rights granted by public authorities,[11] rights derived from rules that aim at protecting individuals ("Schutznormen"),[12] and individual fundamental rights.[13] This latter kind of rights is at stake in the present case.

22. It is submitted that that interferences by legislative acts with fundamental rights will establish *individual concern* in the sense of Art 263 TFEU if the right is a personal right of an applicant and substantiated to be infringed to a serious degree. It cannot be relevant that there may be several right holders because the individuality of concern arises from the nature of the right as a personal right of the applicant. The distinctiveness of concern (in the sense of the *Plaumann*

[10] Cf Article 9 para 2 Aarhus Convention where the two concepts are acknowledge as equivalent. The paragraph reads: "Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law […].

[11] Case C-309/89 *Codorniu v Council*, EU:C:1994:197.

[12] Case T-47/00 *Rica Foods v Commission*, ECLI:EU:T:2002:7, para 41; Case 11/82 *Piraiki-Patraiki v Commission*, para 21.

[13] Case T-16/04 *Arcelor v Parliament and Council*, ECLI:EU:T:2010:54, para 102.

test) lies in that fact: that the right is a personal right of the individual claimant, not the right of somebody else.

23. The General Court here failed to grapple with this issue, despite it having been argued. It stated that the Appellants were required to show (para 49): [14]

> *"that the contested provisions of the legislative package infringed their fundamental rights and distinguished them individually from all other natural or legal persons concerned by those provisions just as in the case of the addressee."*

24. This reasoning is flawed as a matter of law because it overlooks the significance of *de jure* effects on an individual applicant, focussing only on the factual effects of the package on the Appellants. At paragraph 50, the General Court went on to address the factual position only (addressed above), rather than considering the *de jure* basis of the Appellants' individual concern. The Appellants submit that had the General Court considered the *de jure* position of an applicant, it would have focused on the holding of an individual right (here, an individual fundamental right). Of course, this concept does have a factual dimension, because it must be alleged that the right has been infringed. But the factual effects are unique because the infringed right is unique. Moreover, as developed further below, to establish *locus standi*, that infringement would need to be shown to be serious (which would itself create an effective filter at the admissibility stage).

25. In the present case each Appellant indeed holds certain fundamental rights and has suffered serious infringements of the same. The Charter itself and the case law of the Court makes clear that the Charter confers individual rights on each person concerned.[15] For example:

(1) The Appellants complain that the GHG Emissions Acts breach their right to equality and non-discrimination under Article 21 of the Charter. The principle of non-discrimination is not simply a general standard to be observed by the Union's institutions; it confers individual rights on each person. The Court of Justice has repeatedly described equal treatment in these terms:

i. In *AMS*, para 47 (emphasis added):[16]

> "…the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, **is sufficient in itself to confer on individuals an individual right** which they may invoke as such."

ii. In *Cresco Investigation*, para 65:[17]

> "Further, in determining the scope of any derogation from **an individual right such as equal treatment**, due regard must be had to the principle of proportionality…"

[14] *Cf* the reasoning in Case T-16/04 *Arcelor v Parliament and Council*, para 104.

[15] The Appellants refer to paragraphs 108-135 of their Application before the General Court [**Annex A.5**].

[16] Case C-176/12 *AMS*, ECLI:EU:C:2014:2.

[17] Case C-193/17 *Cresco Investigation*, ECLI:EU:C:2019:43.

(2) Similarly, the right to pursue an occupation is described in the text of the Charter as a right to pursue an occupation of the person's own choosing: *"to pursue a freely chosen or accepted occupation"*: Article 15(1). The Court of Justice has described this protection as conferring an individual right: "the **individual right** of holders of a pilot's licence aged over 65 to engage in work and to pursue a chosen occupation".[18]

(3) The right to property is provided for in the Charter by reference to the property of the individual concerned, in subjective terms: "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions…: Article 17(1).

(4) Article 24 on the rights of children provides substantive rights to protection and care in paragraph 1: "Children shall have the right to such protection and care as is necessary for their well-being". Paragraph 2 then establishes a procedural requirement that the interests of "the" child are taken into account. On its face, this provision recognises the distinctive interests of each individual child and confers legal protection on them. Advocate General Bot has observed of Article 24(2) (emphasis added):[19]

> *"in accordance with the requirements of that provision, the Member States must make the best interests of* ***the child*** *a paramount consideration when, acting through public or private authorities, they issue a legislative act relating to children."*

First Ground: Conclusion

26. The damage to the Appellants and the consequent serious encroachment on their fundamental rights is present or can be predicted with certainty based on compelling scientific evidence (which was also adduced below but not referred to by the General Court). In summary, therefore, the General Court erred in not finding that the Appellants are "individually concerned" within the *Plaumann* approach because:

(1) The General Court misapplied the test and so failed to find that they are in fact each individually affected by the climate change caused by GHG emissions, in ways that distinguish them from all other persons by reason of certain attributes peculiar to them and circumstances differentiated them from all other persons; and

(2) They have each suffered a serious encroachment on their personal, individual rights. The infringement of rights in each case is serious and even touching on the essence of their rights (which follows from the profound, if not existential, threat posed by climate breakdown), rather than superficial or theoretical. The General Court erred holding that infringements of individual rights do not meet that *Plaumann* standard.

V. SECOND GROUND OF APPEAL: THE *PLAUMANN* PRINCIPLES MUST BE ADAPTED TO ENSURE LEGAL PROTECTION OF FUNDAMENTAL RIGHTS

27. If this Court is not persuaded that the Appellants do meet the requirements of the existing *Plaumann* test, it is submitted that the test itself must be adapted so as to ensure that an

[18] Case C-190/16 *Fries v Lufthansa*, ECLI:EU:C:2017:513, para 78.

[19] Joined Cases C-356/11 and 357/11 *O, S*, ECLI:EU:C:2012:595, para 78.

adequate legal remedy is available to provide redress for serious infringements of fundamental rights.

28. The Appellants submit that in circumstances where no other effective legal remedy is available to protect an applicant's fundamental rights, that person will be individually concerned where an act encroaches on a personal fundamental right of the applicant to a serious degree, or such as to interfere with the essence of that right. As developed below, the Appellants submit that this reading of the test is supported by a range of reasons, which the General Court erred in rejecting.

Alternative interpretations of "individual concern" are logical and consistent with the text of the Treaty

29. At the outset, the Appellants note that the *Plaumann* test – insofar as it requires an applicant to be affected by peculiar circumstances or to show that he or she is differentiated from all other persons – is not specified in the text of Article 263 TFEU, paragraph 4, itself. The wording simply states that a person may bring an action where the act, *"is of direct and individual concern to them"*. The wording is open to accommodate a modification of the test developed in the case law, where an appropriate basis for doing so is shown.

30. The General Court rejected any alternative to *Plaumann* as a possible interpretation of Article 263 para 4 TFEU on the ground that this would render the requirements of Article 263 para 4 TFEU meaningless: paras 48 and 50. This is, with respect, a logical fallacy and the General Court erred in law in so finding. The wording of the Treaty could well accommodate different interpretations (besides the *Plaumann* approach) without rendering the standing requirement meaningless. This is obvious from the principles on standing applicable in national law, and from the instances in which the Court has in specific circumstances adapted the test.

31. Modifications to the *Plaumann* test in a manner responsive to the specific circumstances of this case are not unprecedented and show the breadth of interpretations open on the Treaty text. The Court of Justice has relaxed the *Plaumann* test where appropriate in order to ensure effective judicial protection. In a range of subject areas including the procurement, State aid, and competition contexts, the Commission may adopt a decision concerning a particular undertaking; for example, a decision that an aid measure is not incompatible with the internal market. As Advocate General Wahl has explained, the *Plaumann* test has been "adapted to the specific context of State aid law". A competing undertaking may establish individual concern where it shows "*the substantive impact of the aid on the position of the competitor on the market*".[20] It logically follows that where multiple competitors can establish such a substantive effect, each would have standing, despite the fact that none of them could show that it was distinguished from "all other persons" (given that there are other competitors in a similar position of being substantially affected).

[20] Opinion of Advocate General Wahl in Case C-203/16 *Andres v Commission* ECLI:EU:C:2017:1017, paras 54, 57.

"Individual concern" should be interpreted in accordance with the constitutional traditions of the Member States

32. According to Article 6 para 3 TEU and the fifth clause of the Preamble to the Charter, fundamental rights are to be interpreted in accordance with the constitutional traditions of the Member States. It is also a settled and declared practice of the reasoning of the CJEU to make use of this kind of comparative method, as was stressed by the Hon. President Lenaerts.[21]

33. In providing access to judicial protection against emanations of public power, all Member States impose an individual standing requirement as a filter. However, none requires an applicant to show individual distinctiveness in the narrow sense of the *Plaumann* test.

34. This is so both for jurisdictions which take an 'administrative' approach to judicial protection, and jurisdictions which take a 'constitutional' approach.

35. As for administrative jurisdictions, neither Member States which assess standing to the factual (*de facto*) effects of a measure, nor those which do so by reference to encroachments on rights arising from a measure (*de jure* standing) require any measure of distinctiveness in the *Plaumann* sense.

36. As to *de facto* systems, the test for standing is, for instance, termed in France as "affected sufficiently specially" or "direct and certain" ("*affectation suffisamment special*", "*directe et certaine*"),[22] in the UK as a "sufficient interest",[23] and in Denmark as an "individual, significant interest in the outcome of the case".[24]

37. In *de jure* systems the test for standing is, for example, termed in Italy as "legitimate interests" ("*interessi legitimi*")[25], in Spain as a "right or legitimate interest" ("*un derecho o interés legitimo*")[26], in Germany as alleged infringement of a right of the applicant ("*Geltendmachung der Verletzung eines Rechts des Klägers*"),[27] and in Poland as a "legal interest".[28]

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21 K. Lenaerts, Discovering the Law of the EU: The European Court of Justice and the Comparative Law Model, in: T. Perisin, S. Rodin (eds.) The transformation or reconstruction of Europe, Hart Publishing 2018, 61-88: "Logically, for the ECJ the question is whether there is a method of interpretation that prevents the Court from crossing the dividing line between law and politics whilst allowing it to 'discover the law of the EU' by means of non-deductive arguments. […] However, my 28 years on the bench – first at the European General Court (the EGC) and, currently, at the ECJ – tell me to remain optimistic. It is indeed my experience that the comparative law method serves as a crucial interpretative tool that enables the ECJ to resolve particular gaps, conflicts and ambiguities without embarking on judicial legislation."

22 C.E. 29 mars 1901, Casanova, Rec. 333, M. Long et alii (eds.) les grands arrêts de la jurisprudence administrative, 1993, p. 50-51: "spécialité de l'intérêt" is much more broadly conceived than the distinctiveness stipulated by the *Plaumann* test. Infringement of a subjective right is required for full court review (recours de pleine jurisdiction), but such a right does also not have to be distinctive in the *Plaumann* sense.

23 Supreme Court Act 1981 ch. 54 Section 31 (3).

24 Miljobeskyttelsesloven (Environment Protection Act) Article 98.

25 Article 103 Constitution of the Republic of Italy

26 Article 19 para 1 (a) Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa (Law on Administrative Court Process).

27 § 42 sec. 2 Verwaltungsgerichtsordnung (Law on Administrative Courts)

28 Article 50 §1 Law on Proceedings before Administrative Courts.

38. As for 'constitutional' jurisdictions, and in particular those where individuals can challenge legislative acts for an infringement of their fundamental rights, no Member State that provides such a remedy requires distinctiveness in the *Plaumann* sense. They rather require that the infringed right is one of the applicant's rights,[29] or that the right must be directly infringed,[30] or that the applicant must have a justifiable interest in the complaint.[31]

39. The Court of Justice itself has also interpreted the term as not requiring "individual concern" in the *Plaumann* sense of distinctiveness of concern when directing Member States to ensure access to their courts in order to encourage citizens to enforce EU law.[32]

40. The CJEU's adherence to the *Plaumann* formulation is thus at odds with the constitutional traditions of the Member States. The Appellants respectfully submit that this practice disregards the duty to develop EU constitutional principles on the basis of – and not in opposition to – Member States' constitutional principles.

The right of access to courts must be interpreted teleologically to reflect the seriousness of an applicant's concern

41. If standing is denied to the Appellants under the *Plaumann* test, this will be because the Union's breach of its legal duties has such widespread consequences that no individual can establish individual concern. A paradoxical and even perverse situation would arise, which is particularly acute where the Union adopts legislative acts: <u>less</u> legal protection is provided the <u>more widespread and serious</u> the impacts are and hence the <u>more persons</u> are affected.[33]

42. Such a consequence would contradict the very rationale of fundamental rights, which is to grant protection to every single individual holding one, no matter how many others may be affected.

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[29] For example in Spain, see Article 2 sec. 1 (b) Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, consolidated 2015Article 93 sec. 1 (4a); similarly in Germany, see Article 93 para 1 (4a) Grundgesetz (Basic Law); additional requirements have been introduced such as that:the infringement must be personal, direct and present (BVerfGE 1, 97 (101)), but they do not relate to distinctiveness in the *Plaumann* sense.

[30] Austria: Art. 140 sec. 1 sentence 3 Bundesverfassungsgesetz.

[31] Belgium: Art. 2 no. 2 Special Act of 6 January 1989 on the Constitutional Court.

[32] Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para 38: "Thus, the Court has held that, whenever the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives (…)."

[33] See further the illustration set out in para 60 of the Reply [**Annex A.6**]. The General Court was confronted with a similar situation in *Danielsson* where persons claimed to face harm to their livelihoods from a French nuclear test. In that case the Court president rendered an order in which he denied standing on the ground that while the applicants "might suffer personal damage" this was not peculiar to them (Case T-219/95 R *Danielsson* ECLI:EU:T:1995:219, para 71). The order met widespread criticism by its commentators and was called "tragicomic" by one. It is indeed most perplexing and testifies a frightening indifference to suffering in the real world.

The second limb of Article 263 sec. 4 TFEU must in principle allow for direct complaints against legislative acts.

43. The paradoxical effect of the *Plaumann* test is particularly acute in the case of legislative acts. Legislative acts are of their nature likely to affect large numbers of persons, such that the *Plaumann* test is more difficult (if not impossible) to meet. But as amended in the Lisbon Treaty, Article 263 para 4 TFEU undoubtedly provides the possibility of direct access to EU courts to test the compatibility of legislative acts with higher ranking law (since the object of complaint was redefined as an "act", replacing the earlier term "decision"). This is in contrast to many national legal orders that do not provide such remedy. In spite of this explicit guarantee, the Court has practically closed its doors in that respect. On the Appellants' analysis, it appears that there is not a single decision since 2008 – i.e. since before the entry into force of the Lisbon Treaty – in which the General Court has found an individual person to have had standing against a legislative regulation or directive.[34] Wherever individual concern has been accepted in cases of effect of the legal act on many potential claimants the challenged legal act was a decision, such as in cases of procurement, competition and State aid law, or a regulatory act such as an act addressing air pollution.[35]

44. The problem of direct access to the Court to challenge acts of general application was addressed by Advocate General Jacobs in his Opinion in *Union de Pequeños Agricultores*[36] as well as the General Court in *Jégo Quéré*,[37] who proposed to understand individual concern as serious and direct concern of individual persons, removing the element of singularity. This *démarche* was successful insofar as that in Article 263 sec 4 of the Lisbon Treaty, the requirement was entirely removed from regulatory acts not entailing implementation acts.

45. The consequence was that the *Plaumann* criterion continued to be applied by the Court to the three other categories of acts: decisions appealed by third parties, regulatory acts entailing implementation acts, and legislative acts. The reformulation of Art. 263 para 4 TFEU however does not imply that "individual concern" was to be interpreted in a specific way nor that it was to be fortified against any subsequent, better interpretation. Such a result would be against any sound legal methodology, under which indeterminate treaty language should be open for new interpretations in view of new socio-economic or legal developments. Had the treaty-makers wished to maintain the equation of "individual" for "distinctive" permanently it would have been open to them to change the wording. What remained in the Lisbon version of the TFEU is thus the open-ended language, not its earlier interpretation in the case law.

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[34] A possible exception would be where a case was brought against a legislative act that lists the claimant in an annex such as in Case T-306/01 *Yusuf/l Barakaat v Council*. It is submitted that such cases are extremely rare and would not be exemplary of the situation for which the individual action against legislative acts was introduced.

[35] Cases T-339, 352 and 391/16 *Ville Paris v Commission* ECLI:EU:T:2018:927; Cases T-454/10, T-482/11 *Anicav v Commission* ECLI:EU:T:2013:282. In these cases the legal act was considered not to entail implementing acts such that individual concern was not required to be established.

[36] Case C-50/00 P *Union de Pequeños Agricultores* ECLI:EU:C:2002:462.

[37] Case C-263/02 P *Commission v Jégo Quéré* ECLI:EU:C:2004:210.

46. It follows that the concern of Advocate General Jacobs and the General Court to adapt the test for standing to acts with a general scope and nature remains unfulfilled in relation to legislative acts. They are lumped together with decisions in spite of their obviously different characteristics. The Appellants therefore submit that it is appropriate for the Court to adapt the definition of "individual concern" to reflect the peculiar nature of constitutional complaints against EU legislative acts, such as the Applicants suggest in their related submission (as set out above, para 28).

The Plaumann test must be modified to meet the legal imperative for effective judicial protection

47. The Court of Justice has observed that the Treaties are intended to (and do) establish,[38]

> *"…a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union."*

48. Moreover, Article 47 of the Charter provides that:

> *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."*

49. While Article 47 of the Charter has not altered the admissibility requirements expressly established by the Treaties, the interpretation of those requirements must be carried out in accordance with the right to effective judicial protection (emphasis added):[39]

> *"Accordingly, the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside the conditions expressly laid down in that Treaty."*

50. In this contested decision, the General Court reasoned that, as to Article 47 of the Charter, that provision, "does not require that an individual should have an unconditional entitlement to bring an action for annulment of such a legislative act of the Union directly before the Courts of the European Union" (para 52). It also held that effective review of the legality of the GHG Emissions Acts can be obtained through the incidental procedure under Article 277 or through a preliminary ruling under Article 267 TFEU: para 53.

51. Neither of these propositions is legally correct and so the General Court erred in law. The Appellants are not contending for an "unconditional entitlement" to bring an action for annulment and it is plainly possible for a test of "individual concern" to be developed that is less extreme than the *Plaumann* standard but is not "unconditional"; the Appellants do propose a test for standing (see above at para 28, further explained in paras 65-71 below).

52. In the circumstances of this case and of the breach of legal norms complained of by the Appellants, recourse against either the implementing acts (*per* Article 277 TFEU) or in national courts (with the capacity to make a reference pursuant to Article 267 TFEU) would not afford effective judicial protection.

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[38] See Case C-583/11 P *Inuit Tapririit Kanatami* ECLI:EU:C:2013:625, para 92; Case 294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166, para 23.

[39] Case C-583/11 P *Inuit Tapiriit Kanatami* ECLU:EU:C:2013:625, para 98.

53. **Implementing Acts** The Appellants note at the outset that the Commission has no power to adopt implementing acts that would reduce the overall level of emissions in the EU below the level set by the GHG Emissions Acts. The Commission is bound by that level as set by the Council and the Parliament. This was not acknowledged by the General Court, leaving this legal avenue purely theoretical.

54. Moreover, it is correct that implementing acts can in principle be challenged before the General Court. This fails to ensure judicial protection, however, for the very reason that the Commission's acts would be implementing acts in the sense of Article 263 paragraph 4 third limb TFEU. The Appellants would, again, need to show that they are "individually concerned", applying the *Plaumann* test. The Appellants would therefore be denied *locus standi* for the very same reasons as were applied by the General Court here. Neither the General Court nor the Respondents addressed this contradiction.

55. **National courts** The General Court held that parties denied standing under Article 263 TFEU are able, "*depending on the case, to plead the invalidity of such acts either indirectly… before the national courts and to ask them, since they have no jurisdiction themselves to declare those acts invalid, to question the Court in that regard through questions referred for a preliminary ruling"* (emphasis added).

56. The Appellants contend that in this case, this analysis is incorrect. Remedies before national courts would not be effective in any meaningful sense. The Appellants note that the Court has signalled that direct access to the Union courts is necessary, "if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law […]." [40]

57. It is submitted that here, several factors structurally exclude an effective remedy through national courts.

Inadmissibility of an application for preliminary ruling on the validity of the GHG Emissions Acts

58. First, let it be assumed that an individual brought proceedings in a national court complaining that the emissions policies of the Member State in question were inadequate and in breach of either national law and/or directly effective higher rank rules of EU law. Even if a national court offered a national law remedy by which the government of the particular Member State could be compelled to adopt deeper emissions cuts, it is difficult to see how any reference could be brought as to the validity of the GHG Emissions Acts and thus the overall EU emission budget for 2021-2030. The GHG Emissions Acts do not prevent Member States from making deeper cuts. As such, a national government could not defend a claim against it by contending that it was required by the GHG Emissions Acts to make only the reductions prescribed by those Acts and as such restrained from making deeper reductions.

59. The validity of the GHG Emissions Acts would thus not affect the determination of the legality of the measures taken by the national government. A ruling on a preliminary reference to the Court of Justice on the validity of the GHG Emissions Acts would therefore (in the

[40] See Case C-583/11 P *Inuit Tapiriit Kanatami*, ECLI:EU:C:2013:625 para. 104.

words of Article 267 TFEU) not be "*necessary to enable [the national court] to give judgment*".[41] A reference on validity could not be given and would be inadmissible if it was somehow made. The General Court was therefore wrong in finding that any of the Appellants could, through proceedings in a national court, obtain an order for a preliminary reference to rule on the validity of the GHG Emissions Acts.

Unreasonable imposition of filing actions in all Member States

60. Second, given that a reference would not be possible, the only option then remaining to an individual complaining of a breach of EU law would be to bring proceedings in the courts of every Member State against every national government. This is because, even if one Member State was to be ordered to (or chose to) impose deeper emissions reductions in line with higher rank law, this would create no obligation on other Member States to do the same. The other Member States could simply continue to use their own shares of emissions as allocated under the GHG Emissions Acts. The breach of higher rank law would continue, unlawful emissions from across the EU would go unchecked, and the encroachment on each Appellant's rights would therefore also continue. Even then, such proceedings could only be against the acts of the national governments and not against the GHG Emissions Acts, for the reasons explained above.

61. Compliance with higher rank law therefore requires action in relation to every Member State, because the emissions of all Member States affect each person, wherever they are located. For this reason, measures on climate change can now be effectively coordinated only at an EU-wide level and thus through the EU's courts. The problem of legal protection against climate change is therefore different from most (if not all) other circumstances in which a breach of EU law arises.

62. It is obvious that a practical requirement for an individual seeking redress against a breach of higher rank law to bring proceedings in the national courts of every Member State is contrary to the requirement for an effective remedy to be provided. Yet that is the outcome compelled by the General Court's approach, contrary to Article 47 of the Charter and the case law cited above.

Unavailability of adequate national remedies

63. Third, the General Court's reasoning is flawed in that it assumes that national courts do provide remedies that would allow the emission targets fixed by a national government to be challenged at all. A cursory review of national remedies proves that this is not true. A more

[41] Accordingly, not one of the Member State courts that have been approached by actions for better climate protection have even considered to apply for a preliminary ruling on the constitutionality or validity of the EU GHG Emissions Acts. See: *Urgenda Foundation v The State of the Netherlands*, The Hague Court of Appeal, Case No. C/09/456689/HA ZA 13-1396, Judgment of 9 October 2018, ECLI:NL:GHDHA:2018:2610 (The Netherlands); *Regina (Plan B Earth & ors) v SSBEI*, High Court of Justice, Queen's Bench Division, Administrative Court, Case No. CO/16/2018, Judgment of 20 July, [2018] EWHC 1892 (Admin) (UK); *Merriman et al v Fingal County et al.*, 2017 Case No. 201 JR, The High Court of Ireland, Judgment of 21 November 2017 (Ireland). See also the application prepared by Phillippe & Partners in the case *Asbl Klimaatzaak et al. v. L'Etat Belge au niveau fédéral et al.* (Belgium). The document can be furnished upon request of the Court and after consultation with the representing lawyers.

detailed analysis of national legal orders can be provided upon request. For the present, the Appellants note the following:

(1) An applicant might try to bring an action requesting that the national court orders the establishment of national GHG emissions targets by legislative act. However, this kind of constitutional complaint would only be available in Germany and, possibly, Spain.[42] Those other countries which allow for a constitutional complaint only provide the annulment of a law as a remedy, not an injunction to make a law.[43] However, those countries do not have laws that fix overall reduction targets that could be declared void.

(2) An applicant might try to bring an action asking for the establishment of national GHG emissions targets by sub-legal act. Such an action may be available in some countries but in most of them only as an action for nullification, not for injunction. Once again, however, those countries do not have a practice of fixing reduction targets by a sublegal act that could be declared void.

(3) An applicant might attempt to bring actions seeking specific measures reducing GHG emissions in the different sectors from which emissions originate. However, this would not meet the complaint of the Appellants, which is that the overall aggregate emission reduction targets for the EU are too high and must be specified at lower levels. In any event, the competent courts would most likely regard the multiplicity of possible measures as belonging to the political discretion of the State.

64. It is correct that the CJEU case law appears to regard the limitations in national remedies as irrelevant, referring to the obligation of Member States Article 10 EC (now - in concretised form - Article 19 sec. 2 TFEU) "to implement the complete system of legal remedies and procedures established by the EC Treaty to permit the Court of Justice to review the legality of measures adopted by the Community institutions."[44] However, Article 19 sec. 2 TFEU would be overstretched if it was interpreted as commanding Member States to introduce actions allowing for injunctions against national administrations or legislators; in any event, whatever its interpretation, it has not in practice led to the remedies of the sort described above being created.

Modification of the Plaumann test can avoid 'locus standi for all' and create an effective filter on actions

65. The General Court considered that any departure from the *Plaumann* test would have the result of "creating *locus standi* for all" (para 50).

66. This is wrong as a matter of principle and logic. As set out above, the Appellants' case is that where adequate and effective remedies cannot be provided through national courts and/or action in respect of implementing measures, the requirement for "individual concern" should be regarded as being satisfied where a legislative act:

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[42] Cf. Article 93 sec. 1 (4a) Grundgesetz; Article 55 Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional.

[43] See e.g. Article 140 of the Austrian Federal Constitution (Bundesverfassungsgesetz).

[44] Case T-173/98 *Union de Pequenos Agricultores v Council* ECLI:EU:T:1999:296, para 62.

(1) encroaches on a personal fundamental right of the applicant,

(2) to a serious degree, or alternatively, such as to interfere with the essence of the right.

67. The Appellants submit that a test of this nature would provide a sufficient mechanism for screening potential claims at an initial stage:[45] The General Court was therefore clearly incorrect:

(1) First, any applicant would need to be individually concerned in the sense that a direct interest is affected. This would accordingly exclude the possibility of any person generally bringing proceedings. Hence "*locus standi* for all" would not arise.

(2) Second, and in addition, the Appellants propose that the test requires that the applicant is affected to a 'serious' degree, or such as to interfere with the essence of the right. This is explained further below.

(3) Third, it should also be stressed that the test proposed by the Appellants is one that would be applied only in the unusual circumstance that other effective remedies are not available.

68. The Appellants' criteria have clear parallels in the comparable concepts applied in domestic courts and in other contexts (see paras 32-40 above).

69. For example, an action before the German Constitutional Court (the Bundesverfassungsgericht) requires that the right holder must be affected personally ("selbst"), concretely ("konkret") and presently ("gegenwärtig")[46], the last criterion allowing for future harm if a causal chain is already commenced and the harm is clearly foreseeable.[47] It also bears emphasis that fundamental rights claims may be admitted even before exhaustion of other remedies if the claim is of general importance or if the applicant would suffer serious and unavoidable harm if he was referred to other remedies.[48]

70. At the admissibility stage the infringement of the fundamental right has only to be alleged and substantiated. The actual infringement must only be proven at the merits stage. Moreover, for "reasons of procedural economy, if the same decision is challenged by several applicants and it is established that one of them has locus standi, there is no need to examine the other applicants' standing to bring proceedings."[49]

71. The criterion of seriousness could be specified by case law reacting to different kinds of fundamental rights and factual constellations. For example:

[45] There are also, moreover, other procedural safeguards besides the test for locus standi. These include filing deadlines, the possibility for the Court to focus on a test case (with other cases deferred in the interim) and the obvious practical consideration of the cost of litigation.

[46] BVerfGE 1, 97 (101 f.)

[47] BVerfGE 97, 157 (164).

[48] § 90 para 2 sentence 2 Bundesverfassungsgerichtsgesetz (Law on the Federal Constitutional Court).

[49] Case C-666/16 P *Lysoform* ECLI:EU:2017:569, para 36.

(1) In *Sky Österreich* the ECJ held that the core content of the freedom to conduct a business is that an act must not "prevent a business activity from being carried out as such by the holder of the right.[50]

(2) In relation to the right to property the "very substance" of this right is considered to be affected (or, in the terminology of the European Court of Human Rights[51], will constitute a de facto or indirect expropriation) if the operator has no possibility to utilize his/her property other than for the prohibited use.[52]

72. In this case the Appellants already face being prevented from pursuing their livelihoods, and have been indirectly expropriated because their land is drying out, flooded, or covered with impermeable snow. Moreover, the core of the Appellants' right to health, as well as the welfare of children, is harmed at extreme temperatures, such as temperatures of 50°C. Finally, the essence of the right of younger people to equal treatment is seriously prejudiced if their future use of natural resources is barred by over-exploitation by present adult generations. Similarly, the essence of the right to equal treatment of families living in developing countries such as Kenya and Fiji is affected if their natural resources are devastated by the GHG emissions from industrialised countries.

Conclusion

73. For the reasons set out above, the General Court thus erred in declining to adapt the *Plaumann* test. The Appellants invite this Court to do so and to find that the requirement of "individual concern" is established.

VI. THIRD GROUND OF APPEAL: THE COURT ERRED IN FINDING THAT THE SAMINUORRA DO NOT HAVE STANDING

First error: The Court erred in law in disregarding the evidence showing the Saminuorra to be individually concerned

74. The General Court cited settled case law on the "individual concern" of associations (para 51):

> *"it is settled case-law that actions for annulment brought by associations have been held to be admissible in three types of situation: firstly, where a legal provision expressly grants a series of procedural powers to trade associations; secondly, where the association represents the interests of its members, who would themselves be entitled to bring proceedings; and, thirdly, where the association is distinguished individually because its own interests as an association are affected, in particular because its negotiating position has been affected by the act in respect of which annulment is sought."*

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[50] Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28, para 49. See for another example of determining the essence of fundamental rights Case C-293/12 *Digital Rights* ECLU:EU:C:2014:238, paras 39-40 where the Court held that the essence of the right to privacy would be affected if the retention of private data by the State did not protect the data against accidental or unlawful destruction, accidental loss or alteration, or against appropriation.

[51] ECtHR judgment of 23.09.1982, 7151/75, 7152/75 (Sporrong) para 63.

[52] Case C-44/89 *van Deetzen II* ECLI:EU:C:1991:401, paras 28-29 ; Case C-177/90 *Kühn* ECLI:EU:C:1992:2, para 17.

75. The Court then held, in a single sentence, that, *"the association Sáminuorra has not shown that it satisfied one of those conditions"* (para 51). The Court made no reference at all to the pleadings as to the factual background of the Saminuorra. It therefore erred in law distorting the evidence presented by the Applicants.[53] The Application before the General Court relied on the second limb of the test for the standing of associations, i.e. the circumstance in which an association represents the interests of its members who would themselves be entitled to bring proceedings.

76. The Application had alleged and substantiated (including in supporting evidence) the basis on which the Saminuorra had standing. This was on the basis that the members themselves would be entitled to bring proceedings because (see: Application paragraphs 100, 102 [**Annex A.5**]; Applicants' reply, paragraph 65 [**Annex A.6**]; and Annexes to the Application A 24.3 – 24.9, pp.2597, 2618, 2654, 2666 [**Annex A.8**]):

(1) the majority of the Saminuorra members (either themselves or their families) own and/or herd reindeer, and

(2) that climate change, such as the rain on snow effect, has caused them serious harm and is continuing to threaten reindeer husbandry as a whole.

77. The Application specifically addressed the position of archetypal members of the Saminuorra, who exemplified the position of the membership as a whole, as well as the situation of the members at large. The factual basis for these submissions – that the majority of the Saminuorra members owned or herded reindeer, and climate change had caused them serious harm - were not disputed by the defendants.

78. If this Court finds that the individual Appellants were "individually concerned" and had standing, it must therefore also follow that the Saminuorra also had standing on the basis of the second criteria cited by the General Court.

Second error: The Court erred in law in not considering a fourth kind of association action: the action of a collective defending a collective good.

79. CJEU jurisprudence to date developed criteria for the standing of associations that represent the sum of the interests of the individual members, with economic interest groups as common examples.[54] Associations of the kind of Sáminuorra – while meeting the current test where members are affected individually – are also structurally different from other kinds of associations. They represent a whole that is more than the sum of the individual interests of its members. The common good is the right of the Saami people to make use of public and private lands for their reindeer herds. It is enshrined in Article 1 of the Swedish Reindeer Herding Act of 1971, as amended in 1993, which reads:

> "A person of Saami descent (a Saami) may according to the provisions in this Act make use of land and water for sustenance needs for himself and his reindeer. The right following from this paragraph one (the reindeer herding right) is held by the Saami people and is

[53] See Case C-413/08 P *Lafarge v Commission* ECLI:EU:C:2010:346, para 15-16.

[54] Case T-173/98 *Union de Pequenos Agricultores v Council* ECLI:EU:T:1999:296, para 47.

founded on immemorial prescription. The reindeer herding right may be exercised by a member in a Saami village."

80. Another common good the association cares for is the culture of the Saami. That culture has reindeer herding at the core of the economic, social and cultural life of the whole people. If reindeers are lost, the whole of Saami culture is lost.

81. A third common good about which the association is particularly concerned is the common interest of the Sami youth to "create spaces that motivate them to engage with their future and situation of life".[55] CJEU case law has not to date accommodated the possibility that indigenous communities are based on such a conception of the common good and should have standing on that basis. To insist that "individual concern" is shown in respect of each of the members of such an association impedes access to justice if the common goods are endangered. Where a community shares resources and income, it may be alien to the members to act as individuals. Their concern is therefore *per se* a concern as a member of the community.

82. It is therefore submitted that the collective itself must be given access to the Court. "Individual concern" should – in this instance – be defined as the concern of an identifiable collective.

83. Such an interpretation of an existing legal term in Art 263 para 4 TFEU also corresponds to the obligations of the EU, such as enshrined in the 2007 United Nations Declaration on the Rights of Indigenous Peoples, as well as in the Convention on Biological Diversity (**CBD**), binding on the EU (see Article 8, para(j)).

VII. FOURTH GROUND OF APPEAL: THE GENERAL COURT ERRED IN HOLDING THAT NON-CONTRACTUAL LIABILITY IS PRECLUDED IF THE APPLICANTS DO NOT HAVE STANDING TO BRING AN ACTION FOR ANNULMENT

84. It is settled case law that the two actions – application for annulment of the illegal measure and claim for compensation – are remedies autonomous from each other. The General Court rightly accepted this (para 65), but went on to note that this principle is subject to the prohibition on abuse of proceedings. Citing the Judgment in Case 59/65 *Schreckenberg v Commission*, the General Court stated (para 66):

> *"An applicant may not, by means of an action for damages, attempt to obtain a result similar to the result of annulling the act, where an action for annulment concerning that act would be inadmissible."*

85. This proposition of law is not, however, contained in the reasons for the Court's order in *Schreckenberg*; rather, it is set out in the head note summary of the case. The actual reasons in that case describe the principle in much narrower and more stringent terms (emphasis added):[56]

> *"Although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage, he may not by this*

[55] Statute of Saminuorra, Article 3 (Annex 24.1 to the Application, p.2584 [**Annex A.8**]).

[56] Case 59/65 *Schreckenburg* ECLI:EU:C:1966:60; [1966] ECR 543, at page 550 of the English version of the report.

means circumvent the inadmissibility of an application which concerns the same illegality and has the same financial end in view."

86. The General Court therefore misstated the applicable legal test and the principle stated in *Schreckenberg* and thereby erred in law. In any event, the conditions in *Schreckenberg* are not met here.

87. First, the principle concerns "circumvention", which entails a subjective default on the part of applicant. In the *Schreckenberg* case, the applicant's complaint concerned a decision as to his employment under the Staff Regulations, but he had failed to bring an application for annulment of that decision within the limitation period. He then made a claim for compensation. Even then, as the Court held, he was "*not claiming that damages be assessed in light of the actual damage he claims to have suffered*", but rather the difference in salary between the position he held and the position to which he contended he should have been appointed.[57] The applicant in that case was therefore clearly seeking to avoid the operation of the time bar on applications for annulment which had passed through his own failure to bring proceedings, justifying the finding of 'circumvention'.

88. The General Court's reasoning in this case would necessarily extend the scope of the principle well beyond circumstances of subjective default and circumvention. If the action for annulment is inadmissible in this case, this is not due to any default by the Appellants, and the Appellants are not therefore seeking to "circumvent" that inadmissibility.

89. The General Court's approach is, moreover, contrary to the principle that applications for annulment, and based on the non-contractual liability of the Union, are autonomous. It would also be contrary to the practice of the General Court, which has repeatedly examined the validity of legal acts as part of the preconditions for non-contractual liability without regard to whether the act had been subject to annulment proceedings or not.[58]

90. Second, the two applications in this case do not – contrary to the findings of the General Court – concern the "same illegality". While the principles on which the two applications are brought are related, there is a critical point of difference:

(1) The application for annulment contends that the specific acts of the Union legislature in adopting the GHG Emissions Acts were legally flawed based on rules of higher rank law;

(2) The application invoking the non-contractual liability of the Union relies on a much broader breach of duty of higher rank law, beginning in 1992. That breach is a continuous one. The Union's failure to adopt adequate emissions reductions in the GHG Emissions Acts is but one aspect of that continuous breach of duty.

91. The "illegality" complained of is therefore not the same in the two applications.

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[57] See [1966] ECR 543; English version of the report, at p.550.

[58] See eg the cases in which actions for damages were brought complaining of acts by the Community concerning bovine spongiform encephalitis: Case T-138/03 *É. R., O. O., J. R., A. R., B. P. R. v Parliament and Council*; Case T-304/01 *Perez v Parliament and Council*. There is no suggestion that the admissibility of these actions depended on the *locus standi* of the applicants to challenge the measures themselves.

92. Third, the principle in *Schrekenberg* applies where an applicant has "the same financial end" in view. On its terms, that requirement is clearly not met here, as the Appellants do not seek any financial compensation.

93. The apparent basis for the General Court's reasoning is that the Appellants are in each application "*seeking to obtain the same result, namely the replacement of the contested provisions of the legislative package at issue with new measures that will have to achieve a greater reduction in greenhouse gas emissions than is laid down currently*" (para 69). Even if the principle in *Schreckenberg* were extended beyond cases involving "financial ends", the General Court's reasoning would be flawed in any event.

94. The Appellants have, in their application invoking the Union's non-contractual liability, sought relief focussing on the GHG Emissions Acts, but (as noted) the underlying basis of the Union's liability is much broader. That liability is based on a continuing breach (beginning in 1992) of higher rank law. It was open to the Appellants to seek damages for the losses caused by that continuing breach, and it remains open to them to make such a claim now, notwithstanding the General Court's order. For example:

(1) The Carvalho family, the lead Appellants, suffered the total destruction of a forestry holding and its associated buildings and equipment (quantified at €15,000): Application, paras 24-25 [**Annex A.5**].

(2) The Conceicao family have suffered from a drastic decline in yields in their beekeeping enterprise due to droughts and higher temperatures (quantified at €8,000 in 2017), and necessitating additional expenditure (quantified at €2,450 annually): Application, para 26 [**Annex A.5**].

(3) The Feschet family have experienced a significant decline in yields from their lavender farming, and losses of crops requiring replanting (quantified in part as costing €3,300 on each occasion, in addition to losses from lower yields): Application, para 32 [**Annex A.5**].

95. However, while the Appellants could have sought relief providing redress for all their losses, they voluntarily chose not to pursue such broad remedies. They instead focussed on one narrower and more practical form of relief, in the form of an order requiring changes to the GHG Emissions Acts. This can hardly be characterised as an abuse of proceedings, given that it would have been open (and it remains open) to the Appellants to bring proceedings alleging the same breach of law as in their existing application, but seeking damages instead.

96. There are other fundamental differences between the relief sought in the application for annulment and the application invoking the non-contractual liability of the Union, not addressed by the General Court. Critically, the former results in a decision *erga omnes,* rendering the acts null and void, while the second leads to a decision *inter partes* which leaves the act in force.

VIII. CONCLUSION: UPHOLDING THE APPEAL AND DECISION ON ADMISSIBILITY

97. In the event that this Court finds that the General Court erred, the question arises as to the appropriate steps that should then be taken. The General Court did not address the question as to whether, as regards the application for annulment, the contested GHG Emissions Acts

are of "direct concern" to the Appellants. This point was, however, contested below by the Respondents.

98. The Application respectfully submits that in the event the appeal is upheld, this Court should also decide on the question of the "direct concern" of the Appellants and find the applications to be admissible. The state of the proceedings permits this course,[59] because this Court has before it all the information necessary for it to give final judgment on the plea of inadmissibility raised by the Defendants in the proceedings at first instance.[60] In particular, no further factual evidence is necessary to render a final judgement on admissibility. A decision by this Court on "direct concern" would also shorten the proceedings.[61]

99. The related allegations of the Application (paras 69-87 [**Annex A.5**]) and the Reply (paras 30-45 [**Annex A.6**]) can be summarized as follows:

Direct legal concern

100. The GHG Emissions Acts are of direct legal concern to the Appellants because those acts directly affect the legal position of the Appellants, for the following reasons:

101. The GHG Emissions Acts authorise the emission of GHGs. The Acts speak explicitly of the "allocation" of emissions. The ETS Directive refers explicitly to the allocation of emissions: recital 6, Article 9. Similarly, the ESR refers to quantities allocated to the Member States, that are then subjected to reduction requirements: Article 1. The LULUCF Regulation in effect allows GHG emissions that exceed the quantity removed by sinks: Article 4.

102. Properly construed, the GHG Emissions Acts (which could be described as the 'active norms') therefore provide that the implementing institutions and undertakings engaged in emitting GHGs shall be entitled to emit certain quantities of GHGs - quantities the Appellants deem to be unlawfully excessive. By implication this entitlement is also a burden on the Appellants. In legal terms it obliges the Appellants to accept the resulting damage and constitutes an interference with the enjoyment of their fundamental rights.

103. The Application contends that part of the 60% of the 1990 level of emissions that will still be permitted in 2030 under the GHG Emissions Acts is unlawful under higher rank law because such excess emissions violate fundamental rights and the emissions budget calculated in the Paris Agreement (see Figure in Applicants' Reply, para 34). The Appellants are directly legally concerned in that regard because they are put under obligation to accept the burden of that excess (ie, the difference between the level of emissions permitted by higher rank law, and the level of emissions permitted by the GHG Emissions Acts).

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[59] Article 61 para 1 Statute of the ECJ.

[60] See for a comparable case Case C-193/01 P *Athanasios Pitsiorlas v Council* ECLI:EU:C:2003:281, paras. 31–36.

[61] In the event that the Respondents seek to raise other issues concerning admissibility in response to this appeal, the Appellants reserve their rights to seek to answer those points in reply. The Appellants address "direct concern" in particular in this Appeal given the importance of the point and the fact it was argued below.

No discretion in implementation

104. **Commission**: While the Commission is empowered to introduce a variety of delegated and implementing acts, it does not have any discretion to reduce the allocated quantities by more than what is precisely determined by the three GHG Emissions Acts.

(1) As to the Emissions Trading System, the yearly quantities available for the relevant industry is exhaustively determined by Article 9 of Directive 2003/87/EC (as amended by the ETS Directive [**Annex A.2**]). The Commission does have the possibility of placing an amount in the market stability reserve, but that quantity is by far smaller than the emission quantity that the Application contends exceeds the requirements of higher rank law. The Commission is otherwise only empowered to act in technical functions such as registration of emissions and supervision of correct emissions management by Member States (Articles 19 para 3, 21 para 2 of Directive 2003/87/EC).

(2) In the Effort Sharing Sector, the quantities available to the Member States are also precisely determined by law, namely Article 4 together with Annex I of Regulation (EU) 2018/842 [**Annex A.3**]. The Commission does have powers to adopt implementing acts setting out the annual allocations for each year but without any discretion, at least not in the form of reducing the quantities further (Article 4 para 3 Regulation (EU) 2018/842). An example would be Commission Implementing Decision (EU) 2018/1855 of 27 November 2018 on greenhouse gas emissions covered by Decision No 406/2009/EC of the European Parliament and of the Council for the year 2016 for each Member State. The Decision shows that it is taken retroactively, and for the year 2016 in that case, which means that legal recourse against allocations will not be available before the allocated quantity has already been spent.

(3) In the LULUCF sector, the allowable emission quantities (i.e. no more than removals) are once more precisely determined by law, namely Article 4 Regulation (EU) 2018/841 [**Annex A.4**]. The major task is adequate accounting. The pertinent rules are for the various land use categories laid out in Articles 5 to 10 of the same Regulation. The Commission has only residual powers to specify certain aspects (Articles 5 para 6 , 6 para 6, 9 para 2, 10 para 3 of the Regulation, to exert supervisory functions (Article 14 of the Regulation) and to register the quantities of emissions and removals (Article 15 of the Regulation).

105. **Member States:** The Member States do not have discretion to allow more emissions than allocated to them in the ETS, ESR and LULUCF regimes.

106. They do have discretion to reduce emissions further. This is however irrelevant to the admissibility of the Application because the application challenges EU legal acts, not omissions of the Member States.

107. In the alternative, if this court deems the discretion of Member States to go further to be relevant, it is submitted that the existence of the discretion does not alter the fact that the Member State is **entitled** to make use of the entire quantity allocated to it, including the part that the Applicants claim to be unlawful. This entitlement applies through all stages of the regulatory regime, and finally reaches the Appellants in form of real emissions and related damage affecting their legal rights. The Appellants must reckon with the entitlement of the

Member States to exploit their allocated emissions in full, and realistically speaking they will most likely do so. It is that very entitlement which is challenged by the Appellants.

108. In the further alternative, if the ECJ was to find that the Appellants should have recourse to national remedies instead, it is submitted that these remedies are not a viable tool to reach a judgement about the legality of the emissions reduction targets of the three GHG Emissions Acts in light of higher rank law. Effective legal protection would be denied by a need to bring proceedings in the courts of every Member State. In that regard full reference is made to the arguments presented above at paras 60-64.

IX. CONCLUSION AND FORM OF ORDER SOUGHT

109. For the above reasons, the Appellants respectfully request that the Court:

(1) Set aside the Order of the General Court;

(2) Declare that the applications are admissible;

(3) Refer the case back to the General Court to determine the merits of the application for annulment;

(4) Refer the case back to the General Court to determine the merits of the application invoking the non-contractual liability of the Union; and

(5) Order the Respondents to pay the costs of the appeal and the costs of the proceedings before the General Court.

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11 JULY 2019