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## Article

# The European Union and action on climate change, through the lens of the wine industry

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# The European Union and action on climate change, through the lens of the wine industry

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## 1. Introduction

The primary importance of the wine industry to the EU is financial. The EU accounts for “45% of wine-growing areas, 65% of production, 57% of global consumption and 70% of exports in global terms” (European Commission, 2017b). Furthermore, “the wine sector employs about 200,000 people and, indirectly, approximately 560,000 people” (European Commission, 2008). Wine has also been historically important to the EU (Scholliers, 2001), and as a result of this has arguably also become important for cultural reasons (Comité Européen Des Entreprises Vins, 2016). This is partly as result of the gradual romanticisation of the wine industry (Mitchell et al., 2012), which is probably best characterised by the French notion of *terroir* (Demossier, 2011). As a result of its importance, the EU has consistently acted to try and ensure the preservation of the wine industry and hence its position in the economic, social and cultural landscape. It is therefore of no surprise to note that “More than two thousands regulations, directives and decisions on wine have been published since 1962 in the EU” (Meloni and Swinnen, 2013).

Threats to the EU wine industry are numerous and complex. This author suggests that one of the greatest threats is climate change. This article poses the question: how would the EU, and its citizens, react if it no longer functioned? Either at all or as they are used to? This article posits that not only would the ramifications be economically significant, but that there would also be a more visceral reaction. This article wants the loss of the wine industry in its present form (or potentially forever) in the EU to be kept in mind as a very real possibility resulting from climate change. It posits that by framing the climate

change discussion in terms of the tangible loss of something important, it may result in greater efforts to halt it.

It is argued that one of the ways by which the environment, and thus the wine industry, may receive better protection in the EU is to allow individuals, NGOs and collectives to more easily achieve *locus standi* in the European Court of Justice (the Court) seeking judicial review directly against EU institutions for the measures they disperse in respect of the environment. Whilst the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) is the primary mechanism by which this is meant to occur, this article will demonstrate that it has a number of serious deficiencies. Instead, this article argues that turning to collective rights to the environment as per the Charter of Fundamental Rights of the European Union (EUCFR) may provide an alternative option for achieving *locus standi*.

## 2. Climate change and vineyards

This article does not seek to provide arguments for the existence of climate change. The author of this article considers that climate change is an established and incontrovertible reality. One of the reasons why the wine industry provides such a useful base from which to explore the impact of climate change more generally is because of the specific expression of aroma, colour and flavour profile expressed in a wine as a result of the unique combination of earth and weather based growing conditions (Hannah et al., 2013). As Jones et al. note:

the types of grapes that can be grown and overall wine style that a region produces are a result of the baseline climate,

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while climate variability determines vintage-to-vintage quality differences... growing season length and temperatures are critical aspects because of their major influence on the ability to ripen grapes to optimum levels of sugar, acid, and flavor in order to maximize a given style of wine and its quality. (2005)

It is generally acknowledged that climate change has already begun to affect grape growing for the purposes of wine production (De Orduna, 2010), where “many regions may be at or near their ideal climates” (Jones et al., 2005). In comparison to other wine producing regions of the world, the EU is likely to be affected significantly earlier (perhaps as early as 2020) (Moriondo et al., 2013). In terms of what this might mean for the EU, “Spatial modeling research has indicated potential geographical shifts and/or expansion of viticultural regions with parts of southern Europe becoming too hot to produce high-quality wines and northern regions becoming viable once again” (Jones et al., 2005). Other issues may include “greater pest and disease pressure due to milder winters, changes in sea level potentially altering the coastal zone influences on viticultural climates, and the effect that increases in CO<sub>2</sub> might have on grape quality and the texture of oak wood which is used for making wine barrels” (Jones et al., 2005). Hannah et al. note “Water use for viticulture may increase in traditional wine growing areas, as vineyards use water for misting or sprinkling to reduce grape temperatures on the vine to adapt to climate change” (2013).

In the interests of presenting an un-biased view, the shifts in the wine industry predicted to be associated with climate change will not all necessarily be bad, as Jones et al. note “vintage quality, especially in Bordeaux and Champagne, should improve under the simulated future climates” (2005). And, as was noted above, whilst southern Europe may become less suitable, northern parts of Europe are expected to become viable. The issue, rather, is that there will be a shift in the suitability of significantly historically popular vine-growing regions and uncertainty as to how the consumer public will respond to this. So, whilst it is likely that the EU will, in the coming years, be able to continue to produce wine, it may be that the consumer public will not respond positively to the change. And this uncertainty should be a concern to the EU. As Jones et al. note, “High-quality wine regions create unique physical and cultural landscapes that, through production, processing, trade, and tourism industries, are a vibrant component of local economies” (2005).

### 3. EU climate change efforts

#### 3.1. Internationally

The EU participates in a number of international climate change activities and agreements. The primary mechanism through which climate change is addressed on an international level is the [United Nations Framework Convention on Climate Change](#). The Convention has as its primary goal “to stabilize greenhouse gas concentrations “at a level that would prevent

dangerous anthropogenic (human induced) interference with the climate system”” ([United Nations, 2014a](#)).

The Kyoto Protocol is “is an international agreement linked to the United Nations Framework Convention on Climate Change, which commits its Parties by setting internationally binding emission reduction targets” ([United Nations, 2014b](#)). Whilst “Its first commitment period started in 2008 and ended in 2012”, “In Doha, Qatar, on 8 December 2012, the “Doha Amendment to the Kyoto Protocol” was adopted”, and this includes an amendment which commits “Annex I Parties to the Kyoto Protocol who agreed to take on commitments in a second commitment period from 1 January 2013 to 31 December 2020” ([United Nations, 2014b](#)). This includes the EU.

The Convention also includes the Paris Agreement, which has at its aim to keep “a global temperature rise this century well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 °C” ([United Nations, 2014c](#)).

The EU has ratified the Kyoto Protocol, the Doha Amendment and the Paris Agreement ([Council of The European Union, 2016](#)). The EU also participates “actively in international fora whose decisions or recommendations feed directly or indirectly into the UN process” ([European Commission, 2017a](#)).

Finally, also of relevance internationally is Article 3<sup>1</sup> of the Treaty on European Union (TEU), which recognises “sustainable development as one of the specific policy goals of the EU in its external relations” ([Ballesteros, 2010](#)).

#### 3.2. Internally

The primary articles of the Treaty on the Functioning of the European Union (TFEU) which are concerned with the environment (and thus climate change) are Article 11,<sup>2</sup> and Articles 191–193. Of most relevance to this article is Article 191(1) TFEU which lists the objectives of the policy on the environment, including “preserving, protecting and improving the quality of the environment”. There are principles in addition to the objectives which assist in guiding the EU environmental policies, including, for example, taking preventative measures as soon as credible evidence is given that an activity could pollute the environment ([Ohliger, 2017](#)).

As per Article 4(2)(e) TFEU, the environment is a “Shared competence between the Union and the Member States”. A “shared competence” is one where “the EU and EU countries are able to legislate and adopt legally binding acts. EU countries exercise their own competence where the EU does not exercise, or has decided not to exercise, its own

<sup>1</sup>“The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment...”

<sup>2</sup>“Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.”

competence” (Eur-Lex, 2016). EU environmental law is effected through directives, regulations and decisions (Ohliger, 2017).

### 3.3. Criticisms

There are a number of criticisms of the activity of the EU in relation to climate change and the environment. Firstly, given the shared nature of the environment competency, the EU is arguably not at the helm of the climate change ship because “environmental protection largely happens at national level” which means that “Brussels” is thus a trading and negotiation place for policies rather than the “real initiator” (Scheuer, 2005). This creates the concern that the EU might not have a targeted approach and instead acts in a piecemeal and ineffective way. Furthermore, there is a lack of transparency, whereby “the process of monitoring the application of EU environmental law remains an almost entirely closed business between the EU Commission and the EU Member States” (Krämer, 2014).

Secondly, Kingston notes that “serious deficiencies remain in implementing the integration obligation in other EU policy areas, particularly where such integration could be viewed as compromising economic aims” (2015), which is demonstrated by the fact that “The Sustainable Development Strategy launched in 2001... recently became marginalised under the Economic Growth Strategy established in Lisbon in 2000” (Scheuer, 2005). Thirdly, there are criticisms of the fact that the EU “seems unable to collect and make available sufficient information to allow us to form a clear picture of the true state of the environment, enabling us to set quantitative targets” (Scheuer, 2005).

Finally sources point to the fact that “enforcement and application of these laws is very poor partly because of their devolved character, because environment does not have its own voice or standing in courts” (Scheuer, 2005) and “National authorities and courts are often unable to interpret EU law and fail to provide citizens and their organisations - and thus the environment for which they are a voice - with their proper rights” (Scheuer, 2005). The environment does not have a voice with which to exercise rights for its own protection. As such, there is a mutually dependent relationship between humans and the environment. With this in mind, it is clear the court system has a crucial role to play in ensuring there is a forum available for any appropriate litigation and also in helping the executive (or executive-like institutions in the case of international organisations such as the EU) to see where gaps might exist in relation to the protection of both humans and the environment.

## 4. Individual claims

There are two main mechanisms by which individuals, NGOs or collectives may have the ability to bring claims in respect of the environment to the Court – the Aarhus

Convention and its implementing Regulation<sup>3</sup> (the Regulation), and the EUCFR.

It is important to outline from the outset that “Standing before the EU Courts is regulated by the Treaty on the Functioning of the European Union” (Marsden, 2012). This means that both the Aarhus Convention and the EUCFR are subject to Article 263(4) TFEU. Since the Lisbon Treaty, there are now 3 ways under which *locus standi* can be achieved under Article 263(4):

1. against an act addressed to that person
2. against an act which is of *direct and individual concern* to a person
3. against a regulatory act which is of direct concern to a person and does not entail implementing measures

The second way is of most relevance to this article.

In relation to *direct concern*, it is noted that “there must be a *causal link* between the act under review and the infliction of harm on the applicant. The second aspect is that the interest affected by the measure must be *legal in nature*: it must be affect his/her legal position directly” (City Colleges, 2016–2017). In relation to *causal link*, “the usual approach is to ask whether the measure taken by the body or institution left Member States any discretion as to its implementation: If it did, then the institution may validly argue that the Member State (and not it) is responsible for any harm done to the applicant...” (City Colleges, 2016–2017). In relation to *legal in nature*, the “interest affected must be one recognised by the Court as being legally protected” (City Colleges, 2016–2017).

In relation to *individual concern*, the test that has consistently been applied is from the *Plaumann* case (European Court of Justice (Grand Chamber), 1963), which requires that:

individuals must be affected, ‘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’. Due to this strict interpretation, the requirement of ‘individual concern’ in relation to directives and regulations has only been met in a very limited number of cases (Peers and Costa, 2012).

The last sentence is of great relevance, and will be explored in greater detail later.

So, in order to achieve standing in front of the Court under the second limb of Article 263(4), the first hurdle that must be crossed for both the Regulation and the EUCFR is meeting the definitions of the elements in it as they have been interpreted by the Court. However, each mechanism also has its own specific requirements.

<sup>3</sup>Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.



#### 4.1. Aarhus convention and regulation

The Aarhus Convention creates obligations for both the member states and the EU institutions themselves. It has the following aspects to it: access to environmental information, public participation in decision-making concerning activities which have an impact on the environment, and access to justice in environmental matters (United Nations Economic Commission For Europe, 1998). As this article focuses on the ability to enforce rights in the case of a suspect or actual violation, the examination of the Aarhus Regulation will focus on the pillar concerning access to justice.

Article 11(2)<sup>4</sup> of the Regulation requires that an NGO must fulfil certain requirements in order to have *locus standi* under Article 10. Article 10(1) requires NGOs to meet this criteria before being able to “make a request for internal review to the **Community institution or body** that has adopted an **administrative act** under **environmental law** or, in case of an alleged administrative omission, should have adopted such an act”. Emphases have been added as definitions are provided for these phrases in the Regulation<sup>5</sup> and provide further limitations on the request for an internal review as per Article 10(1). Furthermore, as per Article 10(1), it is only NGOs who have the right to make the noted request. Article 12(1) then outlines that “The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty” depending on the outcome of that request.

##### 4.1.1. Weaknesses

The Court has consistently maintained in response to arguments that there are incompatibilities between the Regulation and the Aarhus Convention, such that the Regulation creates heavier burdens, it is not prepared to invalidate EU secondary legislation (such as the Regulation) (European Court of Justice(Second Chamber), 2015a, European Court of Justice(Grand Chamber), 2015b, European Court of Justice(Grand

Chamber), 2015c), despite the fact that this apparently puts the EU in violation of its obligations. The Court noted in *Joined Cases C-401/12P to C-403/12P* that a failure of the Regulation to fully and properly implement the Convention did not nullify the Regulation (European Court of Justice(Grand Chamber), 2015b).<sup>6</sup> Furthermore, ClientEarth, in a communication with the Aarhus Convention Compliance Committee, has also argued that the Regulation is deficient “because the right of review is only available to certain NGOs, is not granted to individuals or entities such as regions and municipalities, and its scope is limited to administrative rather than legislative acts” (Marsden, 2012).

In terms of addressing these weaknesses, it is argued that “it is up to the Court of Justice itself to amend its restrictive jurisdiction and grant enlarged access to the Court in environmental matters, for example by accepting that an environmental organisation is directly and individually concerned where an act complained of contradicts EU environmental law” (Krämer, 2014). It has been argued that the opportunity for the Court to take this path could potentially be provided by Article 47 of the EUCFR, whereby “In regard to the Charter being accorded legal status, the communicant believed Article 47 (the right to an effective remedy and a fair trial) could result in the European Courts giving a broader interpretation to Article 263(4) TFEU...” (Marsden, 2012). However, given the rigidity with which the Court has continued to apply the *Plaumann* test despite criticisms of this (City Colleges, 2016–2017), it is considered unlikely that the Court will alter its stance in this regard.

Furthermore, there is a question mark over whether the Court could abandon this test, even if it wanted to. As is noted, “Both the principle of legal certainty and equal treatment are... reflected in the practice of the Court... In the vast majority of cases, the Court follows its own judgments and considers them applicable to future cases if the factual situation is similar or identical” (Szabados, 2015). However, Szabados also notes that “the Court is not bound by its previous decisions. The Court may reconsider a previous decision if it finds it subsequently erroneous or otherwise not appropriate” (Szabados, 2015). Whilst it may not happen often, the overruling of a previous judgement is entirely possible (Szabados, 2015), even a well-established one such as *Plaumann*.

Whilst this may indicate that it is possible, though unlikely, the Court could/would overrule *Plaumann*, Szabados critically goes on to note that:

In *Bidar*, the amendment of the EC Treaty led to a change in the Court's practice... In the *Lair and Brown* cases, the

<sup>4</sup>“it is an independent non-profit-making legal person in accordance with a Member State's national law or practice”; “it has the primary stated objective of promoting environmental protection in the context of environmental law”; “it has existed for more than two years and is actively pursuing the objective referred to under (b)”; “the subject matter in respect of which the request for internal review is made is covered by its objective and activities”.

<sup>5</sup>Article 2(1)(c) defines “Community institution or body” to mean “any public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity”. Furthermore, Article 2 (2) relevantly provides that “Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body”; As claims may only be brought in respect of “environmental law”, this has been defined to mean “Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty”; Article 2(1)(g) defines “administrative act” (the only act subject to judicial review) to mean “any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects”; Article 2(1)(h) notes that “ ‘administrative omission’ means any failure of a Community institution or body to adopt an administrative act as defined in (g)”.

<sup>6</sup>“the provisions of an international agreement to which the European Union is a party can be relied on in support of an action for annulment of an act of secondary EU legislation or an exception based on the illegality of such an act only where, first, the nature and the broad logic of that agreement do not preclude it and, secondly, those provisions appear, as regards their content, to be unconditional and sufficiently precise...”

With regard to Article 9(3) of the Aarhus Convention, that article does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore does not meet those conditions”.

Court answered the question so that assistance given to students for their maintenance and training, such as a student loan, falls outside the scope of Article 7 EEC Treaty... However, in *Bidar* the Court reconsidered these judgments taking into account the legal developments that occurred since *Brown and Lair* (Szabados, 2015).

While this may or may not impact on the *ability* of the Court to overrule *Plaumann*, when the EU failed to amend to address the narrow interpretation in the Treaty of Lisbon when given the opportunity (Albors-Llorens, 2012), they may have been (even, were likely to have been) sending a message to the Court that they did not see the need for, or encourage, a review of the *Plaumann* test. Given this, it is questionable whether the Court feels, despite the criticism of it, there has been enough of a shift in circumstances to warrant it overruling this test.

#### 4.2. Article 37 of the EUCFR

The EUCFR applies, for the purposes of this article, to “the institutions and bodies of the EU with due regard for the principle of subsidiarity” (European Commission, 1995–2017). It is the “role of the Commission is to ensure that its legislative proposals respect the Charter. All EU institutions (and notably the European Parliament and the Council) are responsible for respecting the Charter throughout the legislative process” (European Commission, 2017c). The next sections will discuss the potential ways in which Article 37 might provide a cure for the deficiencies of the Aarhus Regulation in terms of the ability of members of the public to bring claims in front of the Court in respect of environmental matters. The first section will address matters of general interpretation concerning the importance of the EUCFR in the EU, and the second section will address the ways in which Article 37 might cure the *locus standi* requirements of Article 263(4) TFEU.

##### 4.2.1. General interpretation

Article 37 of the EUCFR states “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”. Kingston notes:

While broadly similar in its terms to Article 11 TFEU, Article 37 EUCFR is a stronger formulation of the integration obligation: a duty to integrate a “*high level of environmental protection*” clearly goes further than a duty to integrate “*environmental protection requirements*”. Indeed, it is arguable that the very inclusion of the integration obligation within the EUCFR, and its consequent characterisation as a fundamental human right within the EU, denotes a recognition that environmental protection constitutes one of the core values upon which the Union is founded, within the meaning of Article 2 TEU. The concept of a *value* of the Union is, it is reasonable to conclude from the post-Lisbon structure of the TEU, something distinct

from (and perhaps even more fundamental than) an *aim* or *task* of the Union (Kingston, 2015).

Lenaerts notes “Since 1 December 2009, when the Treaty of Lisbon entered into force, the Charter of Fundamental Rights of the European Union... stands on an equal footing with the TEU and the TFEU. Stated differently, the Charter is primary EU law” (Lenaerts, 2012). This is as opposed to the Aarhus Regulation, which is secondary EU law. This gives the EUCFR power beyond that of the Aarhus Regulation – it puts it at the same level as the Aarhus Treaty, but as it is EU law, means, according to the case law explored above, the Court cannot refuse to apply it as it is meant to be applied (European Court of Justice (Grand Chamber), 2015b, European Court of Justice (Grand Chamber), 2015c, European Court of Justice (Second Chamber), 2015a).

The above sets the foundation for the application of the first part of Article 52(1) EUCFR, which states, “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law *and* respect the essence of those rights and freedoms” (emphasis added) *and*, as Laenarts notes, “comply with the principle of proportionality” (Lenaerts, 2012) (“limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others” (Article 52(1) EUCFR)).

Using statutory interpretation, the use of “and” means that the criteria for any limitation to “high level of environmental protection and the improvement of the quality of the environment” must cross all three hurdles in order to be valid. Any failure in this task should provide grounds for judicial review. Furthermore, it means, when weighing up environmental versus economic policy, or environmental against any other policy, environmental law must be considered on an equal footing with other areas of competence such that a high level of the principle of proportionality is required.

##### 4.2.2. *Locus standi* issues

Arguably we are at the beginning of the consideration of the third generation of rights – known as “collective” rights or rights involving solidarity (Algan, 2004). Collective rights are unique in comparison to first and second generation rights because they change the dynamic between individuals, the state, and the thing to which the “collective” has rights. It is this dynamic shift that provides the potential cure for standing under Article 263(4) TFEU. Take, as an example, a collective of vineyard owners who are concerned that “the 20% CO2 reduction commitment of the EU responding to the Copenhagen Accord does not promote the adoption of an ambitious International Agreement that would effectively mitigate the impact of climate change” (Ballesteros, 2010, United Nations Framework Convention on Climate Change). They are concerned because their crops are in the part of the EU already at in its optimum temperature range and any shift over the coming years is likely to see them producing wine of lower quality, or ceasing to produce viable wine-making crops at all. As such, they want to challenge the (hypothetical

for the purposes of this article) EU regulation concerned with implementing this target. Article 263(1) TFEU allows review of this category of act. As is noted above, the focus will be on the second limb of Article 263(4), which requires that, in order to achieve *locus standi*, a person must be claiming against an act which is of direct and individual concern to them. It will be argued that using the notion of collective rights in interpreting this limb may assist in allowing standing for the collective of vineyard owners.

From the outset, it must be noted the right to the environment as it is expressed in Article 37 of the EUCFR is listed, with other rights, under a heading labelled “Solidarity”. As a matter of statutory interpretation, this clearly demonstrates the way in which this right was meant to be interpreted, which is confirmed by the wording of the text which fails to mention any individual rights to the environment. And so, for the purposes of this analysis, it will be interpreted that for a claim to be brought using Article 37 of the EUCFR, such a claim must be collective, as well as complying with Article 263(4) of the TFEU. Secondly, there is no issue with the “natural and legal person” requirement of Article 263(4), as this can refer to one or many people acting together (Adriano, 2015).

And so, the crucial part then becomes, does the collective have a “direct and individual concern” in the regulation they are seeking to combat? It is here that the notion of collective rights may provide assistance. It should be noted that this is a controversial and unsettled area in many ways (Fitzmaurice, 1998). This author takes the view that collective rights may be simplified by the way in which they are designed to protect

the individual. It is argued that collective rights do away with the individual such that the collective effectively becomes one person, one individual, and the collective holds the right (singular). In this case, in respect of the environment, it is argued that it is a misconception to even attempt to designate the right to the environment on an actual individual. There must be a separation in the way first and second generation rights, compared to third generation rights, are considered. It is not possible to apply the framework of first and second generation rights, which are inherently about protecting the individual, to third generation rights, which may protect many, but also place obligations on many in respect of others and the “thing” (in this case, the environment), to which many have a right. For example, there is an argument to be made that the individual style of human rights does not work when applied to Indigenous cultures because of the third element in the relationship between individuals and the state – the third element being the land. In Indigenous cultures, the land is a source of many life-protecting and cultural elements including food, shelter and stories. Groups of indigenous people, as collectives, have rights to these elements. In return, there are obligations on these collectives towards the land (both culturally and practically). To apply an individual human rights framework to this situation, one which insists that one person has the right to the land, but that all individuals hold this right (in an attempt

to address the collective element) is almost inconceivable. It is the group who holds the right, as one, and it is the group who exercises the right, as one, and it is the group who holds the obligations, as one. Only in such a conceptualisation may resources be effectively taken and distributed, and only in such a shared obligation may resources continue to be available in the future. Any other conceptualisation leaves open the possibility of individuals acting in such a way that is contrary to the needs of the group as a whole, which risks the survival of everyone. But this is not only possible, but encouraged, in an individualist conception of rights. It is the conceptualisation of the collective as one which is the initial benefit of it in terms of *locus standi* requirements, because of its impact on the way “direct and individual concern” may be viewed.

Remembering the tests for “direct and individual concern”, the first limb of the “direct concern” test is satisfied in the fact that in the hypothetical scenario provided (where a regulation is being contested and so there is no discretion left to the member states) the institution itself must accept responsibility (European Court of Justice(First Chamber), 1985).

It is in relation to the “legal in nature” limb of the “direct concern” test in which the notion of collective rights proves useful. Remembering from above that a legal interest is one where the “interest affected must be one recognised by the Court as being legally protected” (City Colleges, 2016–2017). Article 37 EUCFR requires “a high level of environmental protection”. This provides a concrete claim for a legally protected right to this as per Article 263(4) TFEU, especially in the context of a collective, and the discussion concerning third generation rights above, which inherently require a recognition of the *legal* link between the right of the “many” to a thing (the environment), on the basis of the “many’s” group nature. Environmental protection becomes a legally protected thing because it is a group right. It cannot be effectively conceptualised any other way. These rights must attach to a group/collective, thus inherently creating a legally protected space for them when the collective seeks to challenge the extent to which the rights are in fact protected.

#### 4.3. Individual concern

It is this limb that continues to provide the greatest stumbling block. In relation to the previously mentioned *Plaumann* test, it is noted that:

the Court was in effect drawing a distinction between fixed and open categories: An open category is one where the membership is not fixed and determined when a measure comes into force (and vice versa).

...

The open/closed category analysis was applied by the Court more recently, in, for example, *Commission v Koninklijke Friesland Campina*, an example of a case in which the *Plaumann* test was satisfied.



...

As Chalmers et al. note, the result of *KFC* is that an applicant must seemingly have had a pre-existing legal relationship, which was disrupted by the measure under review. Thus the Court has held that applicants were individually concerned in the case of traders who had signed contracts which could not be carried out, due to a Commission Decision; and also where applicants were part of a small group who had benefited from a tax scheme which was withdrawn because of a Commission Decision. (City Colleges, 2016–2017)

Arguably, a collective of vineyard owners constitute an open category such that the *Plaumann* test rather than the *KFC* (European Court of Justice (Third Chamber), 2009) exception would apply. Furthermore, the argument about the ability of the Court to now overrule *Plaumann*, as discussed above, applies here as well.

## 5. Conclusion

As can be seen, there are a number of issues with the way in which the EU seeks to halt climate change and protect the environment, despite the fact that EU is arguably one of the most proactive international actors in this regard. The Aarhus Regulation, the primary mechanism by which judicial review against the EU institutions is meant to be sought in relation to environmental matters, is significantly hindered by its numerous inherent limitations, as well as further limitations found in the TFEU, and finally by an unwilling judiciary. This last point is arguably of the greatest significance. Because even if we turn to the EUCFR and Article 37, something that this author believes will become increasingly more considered as the scholarship on collective rights develops, and if the EUCFR even at this point in time helps cure some of the *locus standi* issues as per the TFEU, the unwillingness of the Court to move away from the strict *Plaumann* interpretation of “individual” concern will continue to plague applications by collectives.

However, as was further explored, there is likely to be a link between the fact that the strict *Plaumann* interpretation was not remedied in the Treaty of Lisbon, and the unwillingness of the Court to depart from the test. When the Treaty of Lisbon was negotiated, there was a clear opportunity to address this issue and it was ignored. The Court is unlikely to overrule such a well-established precedent without good reason, and where there has been no change to the fundamental standing requirements, they may not see that there is a good reason. This author does not fully accept that. It is clear from the literature that if there is a pressing need for change as a result of new circumstances or information, the Court is able to change its precedents. The concerning effects of climate change amount to both a new set of circumstances for the modern world, and something we are increasingly becoming better informed about, and it is time for the Court to recognise this.

It is not only the Court's responsibility however, and especially in light of new threats to the environment, such as the promise by President of the United States of America, Donald Trump, to withdraw from the Paris Agreement, it is time for Article 263(4) of the TFEU to be amended so as to ensure a great level of environmental protection. Otherwise, the EU might lose something of great importance to it – its wine industry. And so, if for selfish reasons if nothing else, it should act.

## Conflict of interest

none

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