Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 16 July 2020[1]

Case C-352/19 P

Région de Bruxelles-Capitale
v

European Commission

(Appeal — Regulation (EC) No 1107/2009 — Plant-protection products — Implementing Regulation (EU) 2017/2324 — Active substance glyphosate — Article 263 TFEU — Standing of private applicants — Direct concern — Article 4(2) TEU — Member States' regions — Article 9(3) of the Aarhus Convention — Interpretation in conformity — Individual concern — Regulatory act which does not entail implementing measures)

I. Introduction

1. Is a federated entity of a Member State, that under the constitution of that State has the power to protect the environment, and in the exercise of that power bans the use of glyphosate on its territory, because it considers that active substance to be dangerous, *directly concerned* by Commission Implementing Regulation (EU) 2017/2324[2] renewing the approval of that same active substance, declaring it in effect safe?

2. The General Court came to the conclusion that such a region, in the present case Région de Bruxelles-Capitale (Brussels Capital Region, Belgium), is not directly concerned by such an EU measure. It therefore declared the action for annulment introduced by that region inadmissible.[3] I take the view that, by denying standing to the Brussels Capital Region, the General Court erred in law, misinterpreting the fourth paragraph of Article 263 TFEU, as well as a number of provisions of applicable secondary law.

1 Original language: English.

2 Implementing Regulation of 12 December 2017 renewing the approval of the active substance glyphosate in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2017 L 333, p. 10) ('the contested regulation').

3 Order of 28 February 2019, *Région de Bruxelles-Capitale* v *Commission* (T-178/18, not published, EU:T:2019:130; 'the order under appeal').

II. Legal framework

A. International law

3. Article 2(2) and (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005[4] ('the Aarhus Convention'), which includes the definitions, states:

'For the purposes of this Convention,

…

2. "Public authority" means:

(a) government at national, regional and other level;

(b) natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

…

4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups;'

4. Article 9(3) and (4) of the Aarhus Convention, which concerns access to justice, states:

'3. … Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. … The procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. …'

B. EU law

5. By Commission Directive 2001/99/EC of 20 November 2001 amending Annex I to Council Directive 91/414/EEC concerning the placing of plant protection products on the market to include glyphosate and thifensulfuron-methyl as active substances,[5] the active substance glyphosate was included in Annex I to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market[6] and was therefore approved under that directive with effect from 1 July 2002.

4 OJ 2005 L 124, p. 1.

5 OJ 2001 L 304, p. 14.

6 OJ 1991 L 230, p. 1.

6. Directive 91/414 was repealed, with effect from 14 June 2011 and subject to certain transitional measures, by Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414.[7]

7. Recitals 10, 23 and 29 of Regulation No 1107/2009 read:

'(10) Substances should only be included in plant protection products where it has been demonstrated that they present a clear benefit for plant production and they are not expected to have any harmful effect on human or animal health or any unacceptable effects on the environment. In order to achieve the same level of protection in all Member States, the decision on acceptability or non-acceptability of such substances should be taken at Community level on the basis of harmonised criteria. These criteria should be applied for the first approval of an active substance under this Regulation. For active substances already approved, the criteria should be applied at the time of renewal or review of their approval.

…

(23) … Authorisations for plant protection products should therefore be granted by Member States.

…

(29) The principle of mutual recognition is one of the means of ensuring the free movement of goods within the Community. To avoid any duplication of work, to reduce the administrative burden for industry and for Member States and to provide for more harmonised availability of plant protection products, authorisations granted by one Member State should be accepted by other Member States where agricultural, plant health and environmental (including climatic) conditions are comparable. Therefore, the Community should be divided into zones with such comparable conditions in order to facilitate such mutual recognition. However, environmental or agricultural circumstances specific to the territory of one or more Member States might require that, on application, Member States recognise or amend an authorisation issued by another Member State, or refuse to authorise the plant protection product in their territory, where justified as a result of specific environmental or agricultural circumstances …'

8. Article 20(2), second paragraph, of Regulation No 1107/2009 provides, in the relevant part, that 'in the case of a withdrawal of the approval or if the approval is not renewed because of the immediate concerns for human health or animal health or the environment, the plant protection products concerned shall be withdrawn from the market immediately'.

9. Article 36(3), second paragraph, of Regulation No 1107/2009, in the relevant part, states:

'Where the concerns of a Member State relating to human or animal health or the environment cannot be controlled by the establishment of the national risk mitigation measures referred to in the first subparagraph, a Member State may refuse authorisation of the plant protection product in its territory if, due to its specific environmental or agricultural circumstances, it has substantiated reasons to consider that the product in question still poses an unacceptable risk to human or animal health or the environment.'

7 OJ 2009 L 309, p. 1.

10. Article 40(1) of Regulation No 1107/2009 provides:

'The holder of an authorisation granted in accordance with Article 29 may apply for an authorisation for the same plant protection product, the same use and under the comparable agricultural practices in another Member State under the mutual recognition procedure, provided for in this subsection, in the following cases:

(a) the authorisation was granted by a Member State (reference Member State) which belongs to the same zone;

…'

11. Article 41(1) of the same regulation provides:

'The Member State to which an application under Article 40 is submitted shall … as appropriate with regard to the circumstances in its territory, authorise the plant protection product concerned under the same conditions as the Member State examining the application, except where Article 36(3) applies.'

12. Article 43 of Regulation No 1107/2009 provides:

'1. An authorisation shall be renewed upon application by the authorisation holder, provided that the requirements referred to in Article 29 are still met.

…

5. Member States shall decide on the renewal of the authorisation of a plant protection product at the latest 12 months after the renewal of the approval of the active substance, safener or synergist contained therein.

6. Where, for reasons beyond the control of the holder of the authorisation, no decision is taken on the renewal of the authorisation before its expiry, the Member State in question shall extend the authorisation for the period necessary to complete the examination and adopt a decision on the renewal.'

13. Article 78(3) of Regulation No 1107/2009 provided for the adoption of a regulation containing the list of active substances included in Annex I to Directive 91/414, those substances being deemed to be approved under Regulation No 1107/2009.

14. Commission Implementing Regulation (EU) No 540/2011 of 25 May 2011 implementing Regulation (EC) No 1107/2009 as regards the list of approved active substances[8] adopted the list provided for in Article 78(3) of Regulation No 1107/2009. Glyphosate was included in that list, with an expiry date of the approval period on 31 December 2015.

15. An application for renewal of that approval was submitted within the prescribed period. Subsequently, the Commission extended the approval period for glyphosate twice, on the basis of the first paragraph of Article 17 of Regulation No 1107/2009, as the procedure for renewal had been delayed.[9]

8 OJ 2011 L 153, p. 1.

9 Commission Implementing Regulation (EU) 2015/1885 of 20 October 2015 amending Implementing Regulation No 540/2011 as regards the extension of the approval periods of the active substances … glyphosate … (OJ 2015 L 276, p. 48); and Commission Implementing Regulation (EU) 2016/1056 of 29 June 2016 amending Implementing Regulation No 540/2011 as regards the extension of the approval period of the active substance glyphosate (OJ 2016 L 173, p. 52).

16. On 12 December 2017, the Commission adopted the contested regulation, renewing the approval of the active substance glyphosate, subject to certain conditions, until 15 December 2022.

C. Belgian law

17. According to Article 1 of the Constitution of the Kingdom of Belgium, 'Belgium is a federal State composed of Communities and Regions'. Under Article 3 of the Constitution, 'Belgium comprises three Regions: the Flemish Region, the Walloon Region and the Brussels Region'.

18. Pursuant to Article 39 of the Constitution: 'The law assigns to the regional bodies that it creates and that are composed of elected representatives the power to manage the matters that it determines … within the scope and according to the manner laid down by a law. …'

19. According to the first subparagraph of Article 6(1)(II) of the Loi spéciale de réformes institutionnelles (Special Law on Institutional Reforms of 8 August 1980) ('the Special Law')[10], the matters to be managed by the regions include 'the protection of the environment, in particular that of the soil, subsoil, water and air against pollution and aggression …'. Under that provision, the regions are competent to regulate the use of plant protection products in their respective territory.

20. According to Article 6(1)(II), first subparagraph, of the Special Law, the federal authority is competent to 'establish product standards'. It is therefore the federal authority which examines applications for marketing authorisations for plant protection products and issues such authorisations in Belgium, in accordance with Article 28(1) of Regulation No 1107/2009. However, according to Article 6, paragraph 4, subparagraph 1, of the Special Law, the regions are involved in the exercise of this competence.

21. Article 7 of the Arrêté royal relative à la conservation, à la mise sur le marché et à l'utilisation des pesticides à usage agricole (Belgian Royal Decree of 28 February 1994 on the conservation, placing on the market and use of pesticides for agricultural use) ('the Royal Decree')[11] stipulates that it is prohibited to place on the market, prepare, transport, import, offer, display, offer for sale, hold, acquire or use a pesticide for agricultural use which has not been previously approved by the Minister. According to Article 8 of that decree, 'the Minister or an official designated for this purpose by the Minister shall grant the approval on the advice of the [Approval committee referred to in Article 9]'. According to Article 9 of the Royal Decree, the Approval Committee is composed of 12 members appointed by the Minister, including 'an expert from the Brussels Region, presented by the Minister-President of the Brussels Capital Region'.

22. On 20 June 2013, the Brussels Capital Region adopted the Order on the sustainable use of pesticides in the Brussels Capital Region ('the 2013 Order').[12] According to Article 1, first paragraph, that order transposes Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides.[13] According to Article 1, third paragraph, the Brussels Capital Region 'may identify pesticides whose use is prohibited because of the risks they pose to human health or the environment'.

10 *Moniteur Belge* of 15 August 1980, p. 9434.

11 *Moniteur Belge* of 11 May 1994, p. 12504.

12 *Moniteur Belge* of 21 June 2013, p. 40062.

13 OJ 2009 L 309, p. 71.

23. On 10 November 2016, the Brussels Capital Region adopted, on the basis of the 2013 Order, the Order prohibiting the use of pesticides containing glyphosate in the Brussels Capital Region ('the 2016 Order').[14] Article 1 of the 2016 Order states: 'The use of any pesticide containing glyphosate on the territory of the Brussels Capital Region is prohibited.'

III. Procedure before the General Court and the order under appeal

24. On 8 March 2018, the Brussels Capital Region brought an action for annulment of the contested regulation before the General Court. In support of its action, the Brussels Capital Region relied on two grounds.

25. First, the Brussels Capital Region alleged an infringement of the obligation to ensure a high level of protection of human health and of the environment. It argued that Regulation 2017/2324 is based on a scientific assessment of risks to health and the environment which does not meet the requirements of the precautionary principle. The Commission failed to carry out a policy assessment and risk management that comply with the precautionary principle.

26. Second, the Brussels Capital Region alleged an infringement of the obligation to state reasons and the principle of sound administration. The contested regulation was said to be internally inconsistent. The Brussels Capital Region claimed that the preamble and articles of that regulation suggest that glyphosate does not have any harmful effects on human or animal health or any unacceptable influence on the environment, whereas the specific provisions contained in Annex I to that regulation imply the existence of such effects.

27. On 28 February 2019, by the order under appeal, the General Court declared the action brought by the Brussels Capital Region inadmissible on the ground of lack of standing to bring proceedings. More specifically, that Court held that the Brussels Capital Region was not *directly concerned* by the contested regulation, within the meaning of the fourth paragraph of Article 263 TFEU.

28. In its appeal before the Court of Justice, lodged on 1 May 2019, the Brussels Capital Region asks the Court to declare the appeal admissible and well founded, set aside the order under appeal, rule on the admissibility of the action for annulment brought by the applicant, refer the case back to the General Court and order the Commission to pay the costs.

29. For its part, the Commission asks the Court to dismiss the application and to order the Brussels Capital Region to pay the costs.

IV. Assessment

30. Under the fourth paragraph of Article 263 TFEU, the admissibility of an action brought by a natural or legal person against an act which is not addressed to him or her may arise in two situations. First, such proceedings may be instituted if the act is of direct and individual concern to that person. Second, he or she may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to him or her.

31. In the order under appeal, the General Court did not examine the appellant's standing under either one of those situations. The General Court's analysis ended when it found the appellant not to be *directly concerned* by the contested regulation, that condition being common to both situations envisaged above.

14 *Moniteur Belge* of 2 December 2016, p. 79492.

32. In its appeal, the appellant contests that finding, raising a single ground of appeal consisting in an alleged error of law in the interpretation and application of the fourth paragraph of Article 263 TFEU. This ground of appeal is divided into two pleas. First, the appellant claims that the General Court erred by misconstruing, and thus not properly take into account, Article 9 of the Aarhus Convention. Second, the appellant argues that the General Court failed to appreciate, through a misinterpretation of the relevant provisions of EU secondary law (in particular, Regulation No 1107/2009), the extent to which the appellant was affected by the contested regulation.

33. This Opinion is structured as follows. I shall start my analysis with the appellant's second plea concerning the alleged misinterpretation of the relevant provisions of EU secondary law, resulting into an erroneous application of the fourth paragraph of Article 263 TFEU (A). Having concluded that the arguments of the appellant in that regard are well founded, I shall then briefly examine the first plea for the sake of completeness (B). Next, I will seize the opportunity to add some general remarks on the unduly restrictive interpretation of the conditions on standing, the automatic and somewhat formalistic application of which to the particular situation of regions or other federated entities of the Member States leads to highly questionable results, as vividly demonstrated by the present appeal (C). Finally, I shall turn to the consequences of the assessment of the appeal (D).

A. Second plea: misinterpretation of the relevant provisions of EU secondary law

34. I shall start the assessment of the appeal with the appellant's second plea. Not only is that part of the appeal discussed in greater depth by the parties in their respective submissions, but it also raises certain issues of constitutional significance.

35. After setting out the arguments of the parties (1), I will first review the case-law on the concept of 'direct concern' (2). Next, I shall focus more specifically on how that concept has been applied with regard to regions and other local entities (3). That will provide the background against which I shall assess the merits of the appellant's arguments (4).

1. Arguments of the parties

36. In its second plea, the appellant maintains that the General Court's finding that it is not directly concerned by the contested regulation stems from an erroneous interpretation of the fourth paragraph of Article 263 TFEU in combination with Article 20(2), Article 32(1), Article 36(3), Article 41(1), and Article 43(5) and (6) of Regulation No 1107/2009.

37. A first and general criticism by the appellant concerns an alleged disregard, by the General Court, of some of the arguments put forward on admissibility at first instance. In essence, the appellant had argued that it was directly affected by the contested regulation in two ways: (i) because of its competence to regulate the use of pesticides on its territory, and (ii) because of its participation in the procedures, carried out at federal level in Belgium, concerning the renewal of authorisations for the marketing of plant protection products. However, in the order under appeal, the General Court largely overlooked the first aspect, by focusing only on the second aspect. Accordingly, some of the appellant's arguments were not addressed.

38. Second, the appellant criticises paragraphs 50 to 55 of the order under appeal: the renewal of glyphosate approval had the immediate effect of *preserving the validity* of existing authorisations to place products containing glyphosate on the market. The contested regulation allowed such authorisations to continue to have effect, whereas, in the absence of a renewal, those authorisations would ipso facto have lapsed.

39. Third, the appellant contends that the General Court erred, in paragraphs 56 to 59 of the order under appeal, in dismissing its argument that it was directly affected by the contested regulation, because it is required to participate in the national decision-making procedures for the renewal of authorisations. The final decision is taken by the competent federal minister after hearing the opinion of the Committee for the Approval of Pesticides for Agricultural Use ('the Approval Committee'), of which the appellant is a member.

40. Fourth, the appellant criticises the grounds on which the General Court rejected, in paragraphs 60 to 63 of the order under appeal, its argument that, having regard to the mutual recognition procedure provided for in Regulation No 1107/2009, the effect of the contested regulation is to neutralise the capacity of the Approval Committee, and consequently its own capacity, to oppose the marketing of any product containing glyphosate, if that product has already been authorised in another Member State. The regulation leaves no room for any discretionary power to the national authorities, regulating exhaustively the issue of whether glyphosate complies with the requirements of Regulation No 1107/2009. Thus, the contested regulation gives rise, automatically, to rights for the producers and corresponding obligations for the public authorities.

41. Fifth, the appellant challenges the grounds, set out in paragraphs 66 to 77 of the order under appeal, for which the General Court rejected its argument based on the effects of the contested regulation on the lawfulness of the 2016 Order. The appellant considers that the General Court confused the criteria to establish 'direct concern' with those to establish 'individual concerned', misapplying the case-law of the EU Courts. The appellant argues that, because of that error, the General Court failed to appreciate that the contested regulation compromises the validity and effectiveness of the 2016 Order.

42. The Commission defends the order under appeal. According to the Commission, the effects produced by the contested regulation on the position of the appellant are not *direct* because a decision of the federal authority is required in order to authorise the placing on the market of products containing glyphosate.

43. The Commission contends that the appellant's participation in the decision-making procedures for the renewal of marketing authorisations stems solely from national law. It is thus irrelevant for the purposes of the present proceedings. At any rate, the contested decision in no way deprives the appellant of its right to participate, in an advisory capacity, in the Belgian authorisation procedures.

44. According to the Commission, paragraph 61 of the order under appeal correctly states that, even in the case of an application for mutual recognition of a marketing authorisation already issued, a Member State is not automatically required to issue the authorisation and is therefore not deprived of all discretion. The appellant's criticism based on Article 43 of Regulation No 1107/2009 is, according to the Commission, also misplaced. That provision requires holders of marketing authorisations to apply for their renewal, and requires Member States to take a decision on such renewal applications within a specified period.

45. The Commission considers, finally, that the General Court correctly interpreted the EU Courts' case-law on standing, and did not confuse the two requirements of direct and individual concern. Moreover, the decisions which national courts might take on the legality of the 2016 Order are not attributable to the contested regulation.

2. General remarks on the concept of 'direct concern'

46. In order to properly assess the arguments put forward by the parties, it is useful to recall that an applicant is 'concerned' by an EU act, within the meaning of Article 263 TFEU, when his or her *legal* position is affected by that act. That is so when the applicant's possession of rights and obligations, of private or public nature, is altered. [15]

47. That said, the present appeal concerns the concept of 'direct concern'. According to settled case-law, 'the condition that a natural or legal person must be directly concerned by the decision against which the action is brought, laid down in the fourth paragraph of Article 263 TFEU, requires *two cumulative criteria* to be met, namely, first, the contested measure must *directly affect the legal situation of the individual* and, second, it must leave *no discretion* to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules'. [16]

48. That means, essentially, that the legal effects of the act challenged must be produced by the act itself, *automatically*, without the subsequent adoption of any other measure, either by the Union or the Member States, being necessary to that effect. [17] Accordingly, the condition of direct concern is satisfied when the existence of a *direct causal link* between the contested EU act and the alteration in the legal situation of the applicant can be established. The condition of direct concern is not satisfied if there is any additional intervention, by the EU institutions or by the national authorities, which is capable of breaking that link. [18]

49. In the application of the considerations set out above, the EU Courts have occasionally, but not always, dismissed an overly rigid reading of the two criteria for direct concern. The EU Courts have sometimes look beyond the veil of appearances, dismissing the sophisms put forward by the defendant institutions, in order to assess *in concreto* the manner in which the EU act challenged had an impact on the legal position of the applicant. [19] Accordingly, their analysis focused on whether the act in question restricted the substantive [20] or procedural [21] rights of the applicants, or triggered certain obligations for them. [22]

15 See, to that effect, judgment of 6 November 1990, *Weddel* v *Commission* (C-354/87, EU:C:1990:371, paragraph 23) and order of 10 September 2002, *Japan Tobacco and JT International* v *Parliament and Council* (T-223/01, EU:T:2002:205, paragraph 50). For a scholarly discussion, see for example Barents, R., *Remedies and Procedures before the EU Courts*, Kluwer Law International, Alphen aan den Rijn, 2016, p. 238. By contrast, the effects of an EU act on the applicant's interests that are not legally protected are not relevant under the fourth paragraph of Article 263 TFEU: see, for example, judgment of 29 June 2004, *Front national* v *Parliament* (C-486/01 P, EU:C:2004:394, paragraphs 35 and 36).

16 Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42 and the case-law cited). Emphasis added.

17 See, for example, judgments of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P, and C-669/17P, EU:C:2019:923, paragraph 103), and of 29 June 2004, *Front national* v *Parliament* (C-486/01 P, EU:C:2004:394, paragraph 34).

18 See, to that effect, judgment of 27 April 1995, *CCE Vittel* v *Commission* (T-12/93, EU:T:1995:78, paragraph 58). In legal scholarship, see, for example, Schermers, H.G., Waelbroeck, D., *Judicial Protection in the European Union*, 6th edn, Kluwer Law International, Alphen aan den Rijn, 2001, p. 914; Albors Llorens, A., *Private Parties in European Community Law: Challenging Community Measures*, Clarendon Press, Oxford, 1996, p. 73; and Mariatte, F., Ritleng, D., *Contentieux de l'union européenne 1: Annulation. Exception d'illégalité*, Lamy, Paris, 2010, p. 179.

19 See, for example, judgment of 5 May 1998, *Glencore Grain* v *Commission* (C-404/96 P, EU:C:1998:196, paragraphs 38 to 54).

20 See judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 50), and of 10 March 2020, *IFSUA* v *Council* (T-251/18, EU:T:2020:89, paragraph 51).

21 See, to that effect, judgments of 24 March 1994, *Air France* v *Commission* (T-3/93, EU:T:1994:36, paragraph 80), and of 3 April 2003, *Royal Philips Electronics* v *Commission* (T-119/02, EU:T:2003:101, paragraphs 284 and 285).

22 See, to that effect, judgment of 30 April 2015, *Hitachi Chemical Europe and Others* v *ECHA* (T-135/13, EU:T:2015:253, paragraphs 29 to 38).

50. To begin with, the criterion relating to the absence of implementing measures does not mean that *any* act of implementation whatsoever would immediately and necessarily exclude direct concern. In particular, the EU Courts have found the condition of direct concern to be satisfied where an EU or national implementation measure did exist but, in reality, the EU or national authorities had no genuine discretion as to the manner in which the main act had to be implemented. [23]

51. For example, the Court has accepted direct concern in circumstances where the EU act in question exhaustively regulated the manner in which the national authorities were required to take their decisions [24] or the result to be attained, [25] where the role of the national authorities was extremely minor and of a clerical nature [26] or purely mechanical, [27] and where Member States were mainly adopting ancillary measures additional to the EU act in question, [28] even when those measures were expressly provided for in the EU act in question. [29]

52. In addition, the EU Courts have also stated that the question whether an applicant is directly concerned by an EU measure which is not addressed to it must also be examined 'in the light of the purpose of that measure'. [30] That means that it is irrelevant whether *other* effects of the EU act challenged can come into existence only through the adoption of implementing measures, to the extent that the effects invoked by the applicant stem directly and automatically from that act. [31]

53. A similar approach was embraced with regard to the criterion that the implementing authorities have no discretion when implementing the EU act in question. That requirement too was often appraised with a healthy dose of realism. For example, the Court has consistently accepted that direct concern exists 'where the possibility for addressees not to give effect to the [EU] measure is *purely theoretical* and *their intention* to act in conformity with it is not in doubt'. [32] That principle requires, in each case, an assessment of all the specific circumstances, in order to verify whether implementation of the EU act in question is certain. [33]

54. The General Court captured the logic underpinning that case-law rather well in one of its decisions: 'where a Community measure is addressed to a Member State by an institution, if the action to be taken by the Member State in response to the measure is automatic or is, at all events, a *foregone conclusion*, then the measure is of direct concern to any person affected by that action. If, on the other hand, the measure leaves it to the Member State whether or not to act, it is the action or inaction of the Member State that is of direct concern to the person affected, not the measure itself. In other words, the measure in question must not depend for its effect on the exercise of a *discretionary power by a third party, unless it is obvious that any such power is bound to be exercised in a particular way*.' [34]

23 See, among many, judgment of 17 September 2009, *Commission* v *Koninklijke FrieslandCampina* (C-519/07 P, EU:C:2009:556, paragraph 49).

24 See judgment of 6 November 1990, *Weddel* v *Commissio*n (C-354/87, EU:C:1990:371, paragraph 19).

25 See, to that effect, judgment of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159, paragraph 62).

26 See judgment of 13 May 1971, *International Fruit Company and Others* v *Commission* (41/70 to 44/70, EU:C:1971:53, paragraphs 23 to 26).

27 See, to that effect, judgments of 26 September 2000, *Starway* v *Council* (T-80/97, EU:T:2000:216, paragraphs 61 to 65), and of 1 July 2009, *ISD Polska and Others* (T-273/06 and T-297/06, EU:T:2009:233, paragraph 68).

28 See, to that effect, judgment of 29 June 1994, *Fiskano* v *Commission* (C-135/92, EU:C:1994:267, paragraph 27).

29 See, to that effect, judgment of 25 October 2011, *Microban International and Microban (Europe)* v *Commission* (T-262/10, EU:T:2011:623, paragraph 29).

30 Judgment of 3 April 2003, *Royal Philips Electronics* v *Commission* (T-119/02, EU:T:2003:101, paragraph 276).

31 Ibid., paragraphs 277 to 281.

32 See, to that effect, judgments of 10 September 2009, *Commissio*n v *Ente per le Ville vesuviane* and *Ente per le Ville vesuviane* v *Commission* (C-445/07 P and C-455/07 P, EU:C:2009:52, paragraph 46), of 5 May 1998, *Dreyfus* v *Commission* (C-386/96 P, EU:C:1998:193, paragraph 44), and of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission* (11/82, EU:C:1985:18, paragraphs 8 to 10). Emphasis added.

33 See, to that effect, judgments of 23 November 1971, *Bock* v *Commission* (62/70, EU:C:1971:108, paragraphs 6 to 8), and of 31 March 1998, *France and Others* v *Commission* (C-68/94 and C-30/95, EU:C:1998:148, paragraph 51).

34 Order of 10 September 2002, *Japan Tobacco and JT International* v *Parliament and Council* (T-223/01, EU:T:2002:205, paragraph 46). Emphasis added.

55. In a similar vein, the EU Courts have accepted that direct concern is not excluded by the fact that the applicant can bring the matter before the national courts having jurisdiction, where national implementation is purely automatic and in pursuance not of intermediate national rules but of EU rules alone.[35] Likewise, the condition of direct concern is not excluded by the fact that the legal position of the applicant is affected by the EU act in question is also the result of certain choices made by the addressee of the act.[36]

56. Those principles are, obviously, valid with regard to all physical and moral persons that, for the purposes of Article 263 TFEU, are 'non-privileged' applicants. That includes, therefore, any regional or local entity, provided that it has legal personality under national law.[37]

57. At the same time, however, it is fair to acknowledge that federated entities of the Member States are, by their nature, simply not just any (private) natural or legal person in their capacity as non-privileged applicants. At this stage, it is therefore useful to examine how those principles have been applied, by the EU Courts, in respect of regions or other local entities.

3. Direct concern in the case of regions or other local entities

58. In *Vlaams Gewest*, the General Court found that a Commission State aid decision had a *direct and individual* effect on the legal position of the Flemish Region. That decision directly prevented the region from exercising its own powers, which consisted in granting the aid in question as it saw fit, and required it to modify a contract entered into with the aid beneficiary.[38] Similar statements can also be found in other decisions of the EU Courts, such as *Diputación Foral de Guipúzcoa*: 'the applicants are directly and individually concerned by the contested [Commission] decisions [in so far as they] relate to tax measures of which the applicants themselves are the authors. Moreover, they prevent the applicants from exercising, as they see fit, their own powers, which they enjoy directly under Spanish law'.[39]

59. In *Freistaat Sachsen*, the General Court found that the Free State of Saxony was directly concerned by a Commission decision, addressed to the Federal Republic of Germany, in so far as the latter did not exercise any discretion when communicating it to the former.[40] Similarly, in *Regione Friuli-Venezia Giulia*, the Court pointed out that a Commission decision prevented the applicant region from continuing to apply the legislation in question, nullified the effects of that legislation, and required it to initiate administrative procedures to ensure compliance with the Commission decision. The applicant region thus had standing to act before the EU Courts.[41] By the same token, in *Nederlandse Antillen*, the General Court held that two Commission regulations on imports of rice originating in the overseas countries and territories were of direct concern to the applicant, mainly on the ground that those regulations contained comprehensive and binding rules that left no latitude to the authorities of the Member States.[42]

35 Judgment of 29 March 1979, *NTN Toyo Bearing* v *Council* (113/77, EU:C:1979:91, paragraphs 11 and 12). After all, it cannot be for the EU Courts to examine and interpret national procedural law in order to determine whether the applicant has, conceivably, other legal remedies in order to assert its rights under national law: see judgments of 9 June 2016, *Marquis Energy* v *Council* (T-277/13, not published, EU:T:2016:343, paragraph 108), and of 6 June 2013, *T & L Sugars and Sidul Açúcares* v *Commission* (T-279/11, EU:T:2013:299, paragraphs 70 to 72).

36 See, to that effect, judgments of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159, paragraphs 49 to 52); of 15 December 2005, *Infront WM* v *Commission* (T-33/01, EU:T:2005:461, paragraphs 133 to 135, and 138 et seq.); and of 25 October 2011, *Microban International and Microban (Europe)* v *Commission* (T-262/10, EU:T:2011:623, paragraph 28).

37 See, to that effect, judgment of 2 May 2006, *Regione Siciliana* v *Commission* (C-417/04 P, EU:C:2006:282, paragraph 24).

38 Judgment of 30 April 1998, *Vlaams Gewest* v *Commission* (T-214/95, EU:T:1998:77, paragraph 29).

39 Judgment of 23 October 2002, *Diputación Foral de Guipúzcoa* v *Commission* (T-269/99, T-271/99 and T-272/99, EU:T:2002:258, paragraph 41).

40 Judgment of 15 December 1999, *Freistaat Sachsen and Others* v *Commission* (T-132/96 and T-143/96, EU:T:1999:326, paragraphs 89 to 90). Similarly, judgment of 5 October 2005, *Land Oberösterreich* v *Commission* (T-366/03 and T-235/04, EU:T:2005:347, paragraph 29).

41 Judgment of 15 June 1999, *Regione Autonoma Friuli-Venezia Giulia* v *Commission* (T-288/97, EU:T:1999:125, paragraph 32).

42 Judgment of 10 February 2000, *Nederlandse Antillen* v *Commission* (T-32/98 and T-41/98, EU:T:2000:36, paragraphs 60 and 61).

60. The line of cases just outlined suggests that a regional or local entity is concerned by an EU act when it is entrusted with powers that are exercised autonomously within the limits of the national constitutional system of the Member State concerned, and the EU act prevents that entity from exercising those powers as it sees fit.[43] The EU Courts seem to have used this test (often referred to as 'the *Vlaams Gewest test*') to determine both direct *and* individual concern for regions and other local entities.

61. Although the two conditions should, in theory, be kept distinct, the *Vlaams Gewest* test does not seem to distinguish between measures which affect a regional entity *directly* (by altering its legal position automatically) and *individually* (because of specific circumstances that differentiate that entity from all other moral and physical persons). Both of the conditions appear to be placed under one heading: preventing the regional entity from exercising their specific powers given under national law. Thus, in practice, although perhaps not openly acknowledged, the regional and local entities fulfilling the *Vlaams Gewest* test are in fact not being treated in the same way as any other non-privileged private applicant.[44]

62. That said, the mere fact that a region has *some competence* — as a body competent for economic, social or environmental matters in its territory — with regard to the matter regulated by an EU measure of general application cannot, of itself, be sufficient for that region to be regarded as 'concerned' within the meaning of the fourth paragraph of Article 263 TFEU.[45] In other words, regions are precluded from taking action against EU acts which affect their interests in a general manner.[46] Something more than that is required: a direct restriction in the exercise of *a specific power* attributed to the region at the constitutional level in the Member State.[47]

63. It is in the light of those principles that I shall now assess the arguments put forward by the parties to these proceedings.

4. The present case

64. Several arguments put forward by the applicant are, in my view, well founded. Indeed, there is an automatic and direct relationship, of a causal nature, between the contested regulation and the changes in the legal position of the appellant.

(a) A direct restriction in the exercise of specific powers attributed to the region at constitutional level

65. First, I take the view that the general criticism levied by the appellant against the order under appeal, concerning the fact that some of its arguments on the admissibility of the application were misconstrued, is well founded.

43 Similarly, Barents, R., op. cit., p. 275; Lenaerts, K., Maselis, I., Gutman, K., *EU Procedural Law*, Oxford University Press, Oxford, 2014, p. 330; and Lenaerts, K., Cambien, N., 'Regions and the European Courts: Giving Shape to the Regional Dimension of Member State', *European Law Review*, 2010, Vol. 35, pp. 609 to 635.

44 Which is only plainly visible when the same test is applied to an ordinary private applicant. For example, any company could claim that, because of a given piece of EU legislation, it is prevented from exercising, as it sees fit, its own powers, which it enjoys directly under national law. It cannot conclude contracts, trade, or conduct its business as it otherwise could. But, such claims, in the case of an ordinary non-privileged applicant would in no way fulfil the conditions of direct and individual concern for that applicant.

45 See order of 19 September 2006, *Benkö and Others* v *Commission* (T-122/05, EU:T:2006:262 paragraph 64).

46 See also Van Nuffel, P., 'What's in a Member State? Central and Decentralised Authorities before the Community Courts', *Common Market Law Review*, Vol. 38, 2001, p. 871, at 887.

47 This can be illustrated by the judgment of 2 May 2006, *Regione Siciliana* v *Commission* (C-417/04 P, EU:C:2006:282). In that judgment, the Court held that the region was not directly concerned by a Commission decision cancelling assistance by the European Regional Development Fund (ERDF) to a project in Sicily since there was *no direct relationship* between the financial assistance (formally provided to the Member State) and the designation of a regional entity (such as the Regione Siciliana) as the authority responsible for the implementation of an ERDF project. That designation did not imply that the region was itself entitled to assistance: there was no direct restriction in the exercise of some specific power attributed to the region at the constitutional level.

66. Indeed, before the General Court, the appellant put forward *two sets of arguments* to support the proposition that it was directly affected by the contested regulation. On the one hand, the appellant emphasised the effects of the contested regulation on its competence to regulate the use of pesticides on its territory. On the other hand, the appellant pointed to the effects that the contested regulation had on the powers that it exercises in the context of the authorisations procedures for the marketing of pesticides.

67. In the light of the first set of arguments, and in accordance with a consistent line of case-law,[48] the General Court should have examined whether the contested regulation, because of its legal effects, prevented the applicant from exercising some specific powers, entrusted to it at the constitutional level, as it saw fit.

68. However, the General Court did not do that. It downplayed, if not entirely omitted, the first set of arguments (those relating to the power of the appellant to regulate the use of pesticides on its territory under the heading of protection of the environment), and then quickly shifted its analysis to the examination of whether the appellant's participation in the authorisation procedures could be deemed sufficient for a finding of direct concern. Thus, the General Court failed to apply the correct legal test in that context. Furthermore, had it applied that test, it would, in my view, have found it to be satisfied for the following reasons.

69. Pursuant to the first subparagraph of Article 6(1)(II) of the Special Law, read in conjunction with Article 39 of the Belgian Constitution, the applicant has a *general* and *autonomous* competence in the field of *environmental protection*. That competence includes the power to *regulate the use of plant protection products* in its territory. The existence of that competence, flowing from the federal constitution, has recently been confirmed as belonging to the regions of the Kingdom of Belgium in two judgments of the *Cour constitutionelle* (Constitutional Court, Belgium).[49]

70. Does the contested regulation limit the capacity of the appellant to exercise those powers?

71. Of course it does. In the exercise of those powers, the appellant wished to ban the use, in its territory, of *all plant protection products* containing a specific active substance: glyphosate. In that regard, the appellant considers glyphosate to be a harmful substance which does not meet the requirements set out in Regulation No 1107/2009.

72. However, the contested regulation manifestly limits the power of the appellant to take such a decision. Indeed, that regulation is, first and foremost, an act that certifies the fact that the *substance* glyphosate meets the requirements of Article 4(2) and (3) of Regulation No 1107/2009: the substance is considered, in the light of current scientific and technical knowledge, not to have any harmful effect on human health and unacceptable effects on the environment.[50] There can be no doubt that that aspect is definitely and exhaustively decided by the contested regulation.

73. Could the clash between the appellant's capacity to regulate the use of pesticides on its territory and the legal effects stemming from a regulation such as the one challenged in these proceedings be more direct and apparent, given that the position at EU level is that 'glyphosate is safe', while at local level it is maintained that 'glyphosate is not safe'? In the absence of the contested regulation, the appellant could have lawfully made use of its specific powers to ban any product containing glyphosate on its territory.

48 See supra, points 58 to 62 of this Opinion.

49 See judgment of 28 February 2019, case No 32/2019, paragraphs B.16. to B.19.1. (concerning the ban on pesticides issued by the Walloon Region on its territory), and of 28 February 2019, case No 38/2019, paragraphs B.13.1. to B.14. (concerning the ban adopted by the Flemish Region on its territory).

50 See especially recital 17 of the contested regulation: 'It has been established with respect to one or more representative uses of at least one plant protection product containing the active substance glyphosate that the approval criteria provided for in Article 4 of Regulation (EC) No 1107/2009 are satisfied. Those approval criteria are therefore deemed to be satisfied.'

74. The General Court's reasoning focused on the role of the applicant in the *authorisations procedures* for plant products, thus putting aside the *environmental aspect* of the issue. Under a certain, rather questionable construction, it could indeed be suggested that Regulation No 1107/2009 is an internal market measure, concerned solely with goods and product authorisations, but not with the environment. Thus, the fact that the appellant has specific and autonomous competence in the area of environmental protection would have no bearing for its standing before the EU Courts.

75. I must admit that, to me, the degree of instrumental formalism contained in such a proposition is indeed striking.

76. First, as far as the area of law is concerned, Regulation No 1107/2009 is clearly not just a product authorisation measure pertaining exclusively to the regulation of the internal market. It has public health and environmental protection written all over it: not just at the level of the objectives and considerations,[51] but also the legal bases.[52] The repercussions, which the system of authorisation of active substances has on the protection of public health and environment, are obvious.

77. Second, as far as the specific mechanism is concerned, the authorisation of active substances is, in the logic of Regulation No 1107/2009, a preliminary step in the authorisation procedure for products. But, it also clearly produces significant legal effects on its own, independently of any national decision authorising specific products. The fact that decisions on the *renewal* of the specific authorisations for products containing glyphosate are not automatic, and will be taken by the federal authorities, does not detract from the fact that the determination as to the safety of that substance does not need any implementing measure to deploy legal effects.[53]

78. The distinction between those two aspects is also expressly reflected in the text of Regulation No 1107/2009. Article 1(1) and (2) thereof makes clear that the regulation lays down *both* 'rules for the authorisation of plant protection products in commercial form and for their placing on the market, use and control within the Community', *and* 'rules for the approval of active substances … which plant protection products contain or consist of'. In a similar vein, as to the level of regulation, recital 10 of Regulation No 1107/2009 states that 'the decision on the acceptability or non-acceptability of *substances* should be taken at *Community level* on the basis of harmonised criteria', whereas recital 23 indicates that 'authorisations for plant protection *products* should … be granted by *Member States*'.[54] Yet again, different procedures are not only reflected by different criteria, but are also carried out at different levels of governance.

51 See, in particular, Article 1(3): 'The purpose of this Regulation is to ensure a high level of *protection of both human and animal health and the environment* and to improve the functioning of the internal market through the harmonisation of the rules on the placing on the market of plant protection products, while improving agricultural production.' See also, for example, recitals 7, 8, 10, 23, 24, 29 and others. My emphasis.

52 The stated legal bases of Regulation No 1107/2009 were not just the then Article 95 TEC (now Article 114 TFEU — approximation of laws in the internal market), but also ex Article 37(2) TEC (now Article 43(2) TFEU — agriculture and fisheries) and former Article 152(4)(b) TEC (now Article 168(4)(b) TFEU — public health).

53 For example, see by analogy judgment of 11 May 2017, *Deza* v *ECHA* (T-115/15, EU:T:2017:329, paragraphs 30 and 31).

54 Emphasis added.

79. Third, the 2016 Order 'saga', involving two disputes on the lawfulness of that order brought by companies involved in the marketing of related products before the Belgian Council of State;[55] repeated litigation before the Belgian Constitutional Court brought against similar orders adopted by the Walloon Region and the Flemish Region respectively;[56] and the Commission's formal opposition to an equivalent draft order meant to repeal the 2016 Order,[57] all give an illustration of the immediate, significant, and independent impact that the contested regulation has on the appellant's regulatory powers.[58] It also illustrates rather well that it is not possible to dissociate the 'internal market' dimension of the system introduced by Regulation No 1107/2009 from its agricultural, environmental, and public and animal health dimensions and implications.

80. For those reasons, I consider the overall structure of the argument of the General Court, which simply spirited away the other dimensions of the contested regulation and Regulation No 1107/2009, and just singled out the authorisation procedure for plant protection products, in order to deny standing to the appellant, highly questionable and somewhat instrumental. Loyal and sincere cooperation, that is required of the Member States and any of their components, including federated entities, in making sure that EU law is applied correctly and observed, must cut both ways. It cannot exist only when imposing limitations and obligations, but then oddly disappear when it comes to standing and access to the EU Courts.

81. In sum, the appellant is correct in that the General Court did not engage with its arguments concerning the fact that the contested regulation, in and of itself, prevented it from exercising its autonomous powers in the manner it saw fit. The appellant is also correct as to the merits of those arguments.

82. Those errors of law are in themselves sufficient to set aside the order under appeal. However, for reasons of completeness and in order to fully assist the Court in this appeal, I will also address other arguments put forward by the appellant within the second plea.

(b) Pro tempore *preservation of the validity of existing authorisations*

83. In paragraphs 50 to 55 of the order under appeal, the General Court excluded any automatic effect of the contested regulation over the existing authorisations. The General Court stated essentially that the existing authorisations are not renewed automatically, by virtue of the contested regulation. Indeed, renewal can only be granted, following a specific request made by the holder of the authorisation, by the national authorities. In Belgium, those authorities are the federal authorities.

55 According to the information in the file, that decree is the subject of two actions for annulment brought before the Belgian Council of State. The actions concern, inter alia, an alleged infringement of certain provisions of Regulation No 1107/2009 and Articles 34, 35 and 36 TFEU. In those cases, the applicants (companies involved in the marketing of glyphosate-based products) consider that the Union-wide approval of glyphosate and the authorisation of certain plant protection products containing that substance by the Belgian federal authority cannot be compromised by a total ban on the use of those products on the territory of the Brussels Capital Region. To my knowledge, those cases are still pending.

56 Quoted above at footnote 49. In those judgments, the Belgian Constitutional Court essentially ruled that the competence for the protection of the environment includes the competence to take measures to prevent and limit risks connected to pesticides. As the legislation in the different regions does not stipulate the standards to be met in order for the pesticides to be put on the market, but simply regulates the use of the pesticides, the legislation is not considered to set product standards. The regions are thus competent. However, such legislation cannot amount to (de facto) the authorisation of products or setting a product standard. That would infringe the federal loyalty.

57 Observations submitted in the context of procedures for notification of technical standards — Communication of the Commission of 29 August 2018, TRIS/(2018) 02325. Curiously, in those observations the Commission essentially took the view that an act providing for a total ban of products containing glyphosate would run counter to the system put in place by Regulation No 1107/2009. It is then perhaps somewhat surprising to see the Commission's arguments in the context of the present proceedings suggesting essentially that such a total territorial ban has nothing to do with that same system, thus not allowing for standing of the region in question.

58 It may be interesting to note, in this context, that the General Court has consistently stated that an interest in bringing proceedings under the fourth paragraph of Article 263 TFEU may be inferred from a genuine risk that the applicant's legal position will be affected by existing legal proceedings, or even from the fact that the risk of legal proceedings is vested and present on the date at which the action was brought before the EU judicature: see, for example, order of 25 March 2019, *Solwindet las Lomas* v *Commission* (T-190/18, not published, EU:T:2019:205, paragraph 44 and the case-law cited). I take the view that similar circumstances may, *mutatis mutandis*, be of some relevance also when assessing whether an EU act challenged under the fourth paragraph of Article 263 TFEU concerns the applicant individually.

84. However, the appellant never argued that the existing authorisations would, as a result of the contested regulation, be automatically renewed or confirmed.[59] The appellant merely indicated that the validity of the existing authorisations would be automatically *maintained* during the period in which the Member State was required to complete the national procedures on the renewal of those authorisations.

85. In that respect, the appellant is correct. According to Article 43(6) of Regulation No 1107/2009, Member States '*shall extend* the authorisation for the period necessary to complete the examination and adopt a decision on the renewal'.[60] In the absence of the contested regulation, the existing authorisations would have immediately lapsed. Indeed, as Article 20(2), second paragraph, of Regulation No 1107/2009 states, 'in the case of a withdrawal of the approval or if the approval is *not renewed* because of the immediate concerns for human health or animal health or the environment, the plant protection products concerned shall be *withdrawn from the market immediately*'.[61]

86. The effect of *pro tempore* preservation of the validity of existing authorisations stems, therefore, directly from the contested regulation. Any act that the Member States are required to adopt to that end is purely automatic, since they do not enjoy any leeway in that regard. Therefore, the General Court's reasoning — apart from misconstruing the argument put forward by the appellant — is also tainted by a *non sequitur* fallacy: the fact that authorisations are not automatically *renewed* by no means implies that their validity is not automatically *preserved pro tempore*.

87. Consequently, the General Court erred in law by misinterpreting Article 20(2) and Article 43(6) of Regulation No 1107/2009.

(c) Participation of the appellant in the federal procedures for the renewal of the authorisations

88. In paragraphs 56 to 59 of the order under appeal, the General Court considered irrelevant the appellant's compulsory participation in the national procedures for the renewal of authorisations. The General Court pointed out that the Approval Committee, in which the appellant participates, only gives a non-binding opinion, since the final decision lies in the hands of the federation. Second, it stated that the appellant's argument is, in practice, calling into question the validity of Regulation No 1107/2009, rather than that of the contested regulation.

89. While I do not think that the participation in the Approval Committee would, in and of itself, be a conclusive argument, I am bound to agree with some of the appellant's criticisms of the order under appeal.

90. To begin with, I fail to see why the fact that the opinion of the Approval Committee is *non-binding* in nature would be decisive in this context. It is not disputed by the parties that the adoption of that opinion is an *essential procedural requirement* under the Belgian constitutional rules. Indeed, without that committee's opinion, the federation simply cannot proceed in one sense or another. The non-binding nature of the opinion does not mean, therefore, that that opinion is devoid of relevance.[62]

59 According to Article 43(1) to (5) of Regulation No 1107/2009, an authorisation is renewed, by the Member States' authorities, upon application by the authorisation holder.

60 Emphasis added.

61 Emphasis added.

62 See, inter alia, Article 8, Article 19, Article 24(1), Article 25, Article 27(2) and Article 29 (1) and (2) of the Royal Decree.

91. The General Court's reasoning on this point is even more puzzling as it can hardly be reconciled with the Court of Justice's case-law regarding similar procedures at EU level. According to that case-law, if the intervention of a given institution or body is required by law, then its participation is essential for the lawful development of the procedure. The fact that that institution or body has, by its very nature or because of the specific features of the procedure in question, a purely consultative or advisory role is immaterial. The Court's approach has been consistent, regardless of the type of institution or body that was required to participate in the procedure.[63]

92. The adoption of the contested regulation sets in motion, at national level, a procedure for the renewal of the authorisations in the Member States. In Belgium, that procedure requires the participation of the appellant. Therefore, the contested regulation triggers an obligation, of a procedural nature and constitutional relevance, for the appellant.

93. Moreover, that obligation goes further than merely requiring the appellant to sit on the Approval Committee. It is certainly correct, as the Commission argues, that the contested regulation does not deprive the appellant of its right to participate in that committee. However, that objection misses the point. What is crucial, in that connection, is that the contested regulation very much restricts the exercise of the appellant's prerogatives within the Approval Committee.

94. The appellant — a region of the Kingdom of Belgium — is, in accordance with Article 4(3) TEU, required to take any appropriate measure to ensure fulfilment of the obligations arising from the contested regulation and refrain from any measure which could jeopardise the attainment of the objective pursued by that regulation.

95. Consequently, the Approval Committee and its members have no real margin of manoeuvre with regard to the decisions to be taken following the adoption of the contested regulation. To the extent that the contested regulation has declared glyphosate to be a 'safe' substance, the outcome of those national procedures is largely a *foregone conclusion*,[64] on which the appellant's participation can have no real influence. Any opposition or objection in that context could arguably amount to a breach of Article 4(3) TFEU which could lead, inter alia, to an infringement procedure against Belgium under Articles 258 and 259 TFEU,[65] and/or to actions for State liability by the holders of authorisations under the *Francovich* case-law.[66]

96. Nevertheless, the Commission further argues that the appellant's participation in the committee is irrelevant for the purposes of these proceedings because it stems solely from national law.

97. That objection is untenable. EU law does not and cannot regulate the internal allocation of competences within the Member States, such as the one between central, regional or local authorities.[67] When EU law provisions confer powers or impose obligations upon the Member States for the purposes of the implementation of EU law, the question of how the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State.[68] Article 4(2) TEU requires the Union to

63 Whether it was the case of the Parliament (see, for example, judgment of 10 May 1995, *Parliament* v *Council* (C-417/93, EU:C:1995:127, paragraph 9)) or other bodies that intervene in legislative procedures, such as the European Economic and Social Committee (see, to that effect, judgment of 9 July 1987, *Germany and Others* v *Commission* (281/85, 283/85 to 285/85 and 287/85, EU:C:1987:351, paragraphs 37 to 39)). The same principle was applied in cases which concerned advisory bodies that intervene in administrative procedure, for example in the fields of competition law (see judgment of 21 September 2017, *Feralpi* v *Commission* (C-85/15 P, EU:C:2017:709, paragraphs 23 to 48)), or staff matters (see, for example, judgment of 21 April 1983, *Ragusa* v *Commission* (282/81, EU:C:1983:105, paragraph 18)).

64 In the sense of the case-law quoted above in point 54.

65 See, for example, judgment of 16 January 2003, *Commission* v *Italy* (C-388/01, EU:C:2003:30, paragraphs 26 and 27).

66 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

67 See, to that effect, judgment of 8 September 2010, *Carmen Media Group* (C-46/08, EU:C:2010:505, paragraphs 69 and 70).

68 See judgment of 12 June 2014, *Digibet and Albers* (C-156/13, EU:C:2014:1756, paragraph 33).

respect, inter alia, the Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.[69] In these proceedings, the Commission thus appears to suffer from 'regional blindness'[70]: its objection entails a disregard for the Belgian constitutional structure and thus is at odds with Article 4(2) TEU.

98. Finally, I must add that paragraph 58 of the order under appeal is, as the appellant points out, incorrect. In the present proceedings, the appellant is by no means contesting the framework laid down in Regulation No 1107/2009. The appellant does not argue, for example, that the procedure laid down in that regulation is unlawful or inapplicable in the case at hand. The appellant is in fact challenging the result which that procedure led to in *one specific case*, on the grounds of certain alleged errors, deriving from an incorrect application of the provisions of Regulation No 1107/2009.

(d) Mutual recognition

99. I also find the appellant's arguments with regard to paragraphs 60 to 64 of the order under appeal to be persuasive. Essentially, in those passages the General Court failed to take into account the automaticity inherent in the procedure for mutual recognition set out in Articles 40 to 42 of Regulation No 1107/2009. The interpretation given to those provisions by the General Court is, in my view, erroneous.

100. Pursuant to Article 40(1) of Regulation No 1107/2009, a Member State may refuse to recognise the authorisation given by another Member State but, if the latter belongs to the same zone,[71] the Member State *shall* (in imperative terms) authorise it under the same conditions as the reference Member State.

101. True, under Article 36(3) of that regulation, the possibility exists for the Member State to refuse to recognise the authorisation of Member States belonging to the same zone. However, that is possible *only if* (i) other measures are ineffective, and (ii) 'due to *its specific environmental or agricultural circumstances*, it has substantiated reasons to consider that the product in question still poses an unacceptable risk to human or animal health or the environment'.[72]

102. Therefore, Regulation No 1107/2009 does not authorise any Belgian authority, be it central or regional, to oppose the application of the mutual recognition system in cases, such as that at issue, where they believe that the product in question is *inherently* harmful for human or animal health or the environment (as opposed to the specific environmental or agricultural circumstances prevailing in their territory). According to Annex I of Regulation No 1107/2009, Belgium belongs to 'Zone B — Centre', which does not appear to be a particularly small one, including also the Czech Republic, Germany, Ireland, Luxembourg, Hungary, Netherlands, Austria, Poland, Romania, Slovenia and Slovakia (and until 31 January 2020, that zone also included the United Kingdom).

103. Therefore, to oppose mutual recognition when an authorisation has been granted by a Member State belonging to the same zone, the Belgian authorities would effectively have to circumvent the provisions of Regulation No 1107/2009. They would have to invent a bogus argument and argue that glyphosate is not safe because of some particular agricultural or environmental circumstances in Belgium, in the knowledge that the argument is untrue and artificial. In short, those authorities would

69 See, to that effect, judgments of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 40), and of 12 June 2014, *Digibet and Albers* (C-156/13, EU:C:2014:1756, paragraph 34).

70 The expression is borrowed from Weatherhill, S., 'The Challenge of the Regional Dimension in the European Union', in Weatherill and Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe*, Hart, Oxford, 2005, p. 1.

71 In order to facilitate the mutual recognition of authorisations, the Union has been divided into different zones where agricultural, plant health and environmental (including climatic) conditions are considered comparable. See especially recital 29, Article 3(17) and Annex I to Regulation No 1107/2009.

72 Emphasis added. See also recital 29 of Regulation No 1107/2009.

have to breach EU law so that the interested parties would start proceedings before national courts,[73] and those courts could in turn make a reference under Article 267 TFEU on the validity of Regulation No 1107/2009. That is precisely the situation which the drafters of the Treaties wanted to avoid when they decided to amend (now) Article 263 TFEU, expressly with regard to non-privileged applicants.[74] It is perhaps safe to assume that, if breaking the law was not believed to be a good course of action for private physical or legal persons, it is even less so for public authorities of the Member States.

104. The importance of the legal consequences for the conduct of Member States' authorities, stemming from the mutual recognition mechanisms provided for in EU legislation, cannot be overlooked, as the General Court did in the order under appeal. When faced with similar mechanisms of mutual recognition, the EU Courts have in fact duly taken those consequences into account when assessing whether an applicant was directly concerned by an EU act triggering those mechanisms.[75]

(e) Interim conclusion

105. In the light of the above, I am of the view that the General Court has interpreted and applied wrongly the fourth paragraph of Article 263 TFEU when assessing the condition of direct concern.

106. In sum, the contested regulation produced legal effects which altered the legal position of the appellant in at least four regards. *First*, the appellant could not exercise, in the manner it saw fit, its autonomous powers to regulate the use of plant protection products in its territory. *Second*, the contested regulation required the Belgian authorities — including the appellant — to preserve the validity of existing authorisations for the entirety of the time required to complete the procedures for the renewal of those authorisations. *Third*, the contested regulation triggered a procedure in which the appellant was required to participate, and in which it could neither *de jure* nor de facto make use of the prerogatives granted to it under the Belgian constitution. *Fourth*, the contested regulation also required the appellant to recognise, under the mutual recognition system, any authorisation granted by a Member State belonging to the same zone. Despite the appellant's doubts about the harmful nature of glyphosate in general, it is not entitled to refuse recognition, unless it acts in disregard of its EU law obligations.

107. Importantly, all of those effects are imputable to the contested regulation. There is no 'intermediate' measure of implementation which breaks the causal link between the contested regulation and the alteration of the legal position of the appellant.

B. First plea: misinterpretation of the Aarhus Convention

108. In so far as I have come to the conclusion that the General Court has erred in its interpretation of the fourth paragraph of Article 263 TFEU and the provisions of Regulation No 1107/2009, there would be no need to delve into the issues raised by the appellant's first plea. However, in the event that the Court were to disagree with me on that point, I will offer some brief considerations on the appellant's arguments based on the Aarhus Convention.

73 Article 36(3), fourth subparagraph, provides: 'Member States shall provide for the possibility of challenging a decision refusing the authorisation of such products before national courts or other instances of appeal.'

74 See infra, point 168 of this Opinion.

75 See, to that effect, judgments of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159, paragraph 51), and of 17 February 2011, *FIFA* v *Commission* (T-385/07, EU:T:2011:42, paragraphs 40 and 41).

1. Arguments of the parties

109. By its first plea, the appellant criticises the General Court for not taking into account, in paragraphs 34 to 37 of the order under appeal, Article 9 of the Aarhus Convention when examining the admissibility of the action. The appellant considers that, since its action falls within the scope of that convention, the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU *must* be interpreted in the light of Article 9 of the Aarhus Convention, which relates to access to justice. In that connection, the appellant relies on two reports issued in 2011 and 2017 by the Compliance Committee (a United Nations Committee charged with the task of reviewing compliance with that convention), according to which the case-law of the Court, as far as standing is concerned, would not be compliant with Article 9(3) and (4) of the Convention. [76]

110. In the appellant's view, the General Court erred in considering the two concepts of 'public' and 'public authorities' under Article 2(2) and (4) of the Convention to be mutually exclusive, and considering the appellant to fall within the latter. The appellant is of the opinion that such a rigid distinction is contrary to the wording and the spirit of the Convention. That interpretation would also be confirmed, indirectly, by Article 2(2)(b) and (c) which extends the concept of public authority to some private subjects: so, the appellant argues, the reverse must also be true.

111. Finally, the appellant contends that, contrary to what is stated in the order under appeal, it had sufficiently explained how an interpretation of the fourth paragraph of Article 263 TFEU in the light of the Aarhus Convention could, in the present case, have an impact on whether the appellant is directly concerned by the contested regulation.

112. The Commission, for its part, considers that the conditions of admissibility of an action for annulment cannot depend on their interpretation in the light of the provisions of the Aarhus Convention. In any event, the Commission agrees with the General Court that, at first instance, the appellant had not adequately and concretely explained how the provisions of the Aarhus Convention could have an impact on the assessment of admissibility in the present case.

113. Furthermore, the reliance on the two Reports of the Compliance Committee is, the Commission contends, misplaced. First, those reports have never been formally adopted by the Parties to the Convention. Second, their scope *ratione materiae* is narrower than that described by the appellant. Third, the reports do not contain any specific requirement to extend the prerogatives, which are to be granted to non-governmental organisations (NGOs) and other associations, to local authorities.

2. Analysis

114. The Court has consistently stated that Article 9(3) of the Aarhus Convention does not have direct effect. [77] However, in the present case, the EU Courts have not been asked to verify the validity of an EU act against the Aarhus Convention, but merely to interpret the FEU Treaty rules on standing *in the light of* that convention. Thus, (the duty of) conform interpretation is not subject to the fact that the provision at issue is directly effective.

76 Report of the Compliance Committee, Addendum, Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, Adopted on 14 April 2011; and Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union, Adopted by the Compliance Committee on 17 March 2017.

77 See, for example, judgment of 13 January 2015, *Council and Others* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 55 and the case-law cited).

115. The Court has held that *national courts* must 'interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable [environmental protection organisations] to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law'.[78] In some cases, the Court went so far as to declare certain requirements limiting access to courts under national law to be in breach of provisions of EU law, as interpreted in the light of the Aarhus Convention.[79]

116. Although the Court has not yet had an opportunity to make similar statements with regard to the EU judicial procedures, I see no reason why those principles should not be equally valid. The Commission is right that international treaties cannot derogate or prevail over EU primary law. However, primary law can and should be interpreted, where appropriate and as far as possible, in conformity with international law.[80]

117. I thus cannot help but agree with the position expressed by Advocate General Jääskinen who has stressed the need for a consistent approach on this matter.[81] What is required of the national courts must also be required of the EU Courts. Article 263 TFEU is a manifestation of the principle of effective judicial review enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). Article 9(3) of the Aarhus Convention is also, within its specific field, an expression of the same principle. The Court has expressly made the link between those provisions in its case-law.[82]

118. However, I do not see how that would have much bearing in the present case, for a rather simple reason.

119. The Aarhus Convention makes a clear distinction between right bearers ('the public' or 'the public concerned', as defined in Article 2(4) and (5) thereof), and 'public authorities' (defined in Article 2(2) thereof) that have certain corresponding obligations.

120. It is indeed possible for some parts of the 'public' to occasionally *cross over* and be regarded, in specific situations, as 'public authorities' for the purposes of Article 2(2)(b) or (c) of the Convention. One can, for example, imagine the situation of a (physical) person to which an environmental protection agency has delegated certain tasks. That person might be, at the same time: (i) a 'public authority' when performing, on a professional basis, the tasks delegated by the public power, and (ii) the 'public concerned' when acting as a private individual in environmental matters unrelated to his or her official functions.

121. However, contrary to what the appellant argues, that does not mean that the reverse scenario is equally possible. I do not see any basis, in the Aarhus Convention, to take the view that, in some specific situations, a public authority — let alone a government at regional level, clearly falling under Article 2(2)(a) thereof — could also become the 'public concerned'.

78 Judgments of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraphs 50 and 51), and of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C-470/16, EU:C:2018:185, paragraph 57).

79 See, for example, judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289).

80 See, for example, judgments of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 22); of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632, paragraph 49); and of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraphs 70 and 71).

81 Joined Cases *Council and Parliament* v *Commission* and *Commission* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, EU:C:2014:310, point 132).

82 See, for example, judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others* (C-197/18, EU:C:2019:824, paragraph 33).

122. That is especially the case with regard to a matter in which the authority acts as a person of public law, as is clearly the case in the present proceedings, issuing prohibitions and imposing obligations on other persons on the same subject matter. I shall leave aside the no doubt intriguing debate on whether a legal person of public law could, by definition, ever be 'the public (concerned)' with regard to matters where it cannot act with the prerogatives of the public power.[83] What is, in my view, in any case axiomatically excluded is that a public authority could, at the same time, be 'the public concerned', with regard to the subject matter falling within its competence where it acts as the public power.

123. The latter is exactly the case of the Brussels Capital Region with regard to the protection of the environment, the regulation of the use of pesticides, and the banning of glyphosates on its territory. In those matters, as was acknowledged in the previous section, the region is the competent public authority. It thus cannot be, at the same time, the public (concerned).

124. Thus, although there is no doubt that the drafters of the Aarhus Convention had indeed in mind the widest participation in environmental decision-making and access to justice in environmental matters, I do not think that that aim was also meant to include public authorities suing each other or even themselves.

125. In conclusion, I take the view that, unlike the appellant's second plea, the first plea should be dismissed.

C. An intermezzo, a step back, and the (dissatisfying) bigger picture

126. I consider that the appellant's first plea clearly cannot prosper. That argument is nonetheless indicative of a broader predicament. Indeed, at first sight, the attempts of a public authority, that is tasked with implementing and applying EU law at its level of governance (that is to say, it is the public power), to suddenly invoke an instrument that was designed for individuals and NGOs (namely those that, in a way, wish to protect themselves against that power) is bizarre.

127. On a second and more reflective thought, that idea stops being odd. It becomes rather worrying. Where does that leave such a region which, when faced with mechanical and formalistic application of rules on standing which were designed a long time ago for (primarily private) physical and legal persons, falls essentially between two stools: it is not a Member State *stricto sensu*, which for the purpose of access to EU Courts always meant just the central government, and it is also not the public (concerned).

128. I would use this opportunity to pause and to ponder briefly on the broader issues emerging from this appeal. The 'technical' arguments discussed in the previous sections should not detract from some broader issues that merit discussion: what then ought to properly be the rules on access of regions and other federated entities of the Member States to the EU Courts (1) and how would this, arguably broader access, fit into the present structure of the EU Courts (2).

1. Regions and other federated entities as litigants before the EU Courts

129. Article 4(2) TEU solemnly declares that 'the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

83 In particular in the Member States where the *principle of legality* of the exercise of all public power is applied rigorously, meaning that the State and public authorities may act only on the basis of, and in accordance with, the law.

130. It is thus not surprising that, pursuant to a number of other specific provisions of primary law, the specific characteristics of the various European regions, apart from being at the very heart of the European Union's policy of economic, social and territorial cohesion,[84] must be taken into account by the EU institutions when dealing with a broad range of EU policies, including the environment.[85]The European regions have an important role to play within the European project. Their participation in the EU legislative process through the Committee of the Regions is only one example of that. In addition, regions or any other federated entities of the Member States may be responsible for implementing EU law in areas which fall within their competence.

131. It is not suggested that on this basis, regions or other national sub-state entities should be automatically equated with a Member State. In the eyes of the Treaties, they are not the Member States. There remains, however, the issue of those entities of a Member State that under the national constitution represent for all practical purposes and with regard to the exercise of certain powers, in effect the Member State. What about specific, concrete competences delegated to those entities, which they exercise in an autonomous manner, and by means of which those very entities exercise EU public power? Can such a national constitutional choice be accommodated within the Treaties as far as the access to EU Courts is concerned?

132. Of course it can. In fact, such a choice has, to some extent, already been accepted. The answer is, to my mind, remarkably simple: the *Vlaams Gewest test*[86] applied in an open spirit of loyal and sincere cooperation. Whenever, at the first sight, a federated entity of the Member State is given, under the national constitution, specific autonomous powers on a given matter which it cannot exercise as it sees fit as a direct consequence of an EU measure, that entity should have standing to challenge the act at issue.

133. Two elements are worth stressing clearly: at first sight and in an open spirit of loyal and sincere cooperation.

134. *At first sight* means simply determining that there exists a competence in the matter, the exercise of which is directly impeded: can the federated entity validly adopt legislation on the given matter? There is no need, nor would it be appropriate, for EU Courts to enter into a detailed discussion on the division of competence within a Member State, engaging in a minutiae dissection of matters which are in fact for a national (constitutional) court to decide. Moreover, in comparative and structural terms, there always tends to be something strange about a system of judicial review in which considerably more energy is spent on issues of admissibility than on merits.

135. In an *open spirit* means seeing such types of challenges for what they really are: a *sui generis* type of intra-Union *Organstreitigkeiten*, in which a unit of the public power of the Member State tasked with the transposition and implementation of EU law — that is, the effective regulator, not (just another) addressee of Union legislation — seeks to voice its discontent. Thus, the mechanical and formal(istic) application of the restrictive case-law on standing of non-privileged applicants to such entities is conceptually wrong.

136. In sum, extrapolating a little the main concepts of a rather well-known work of social theory: if *loyalty* is required (or, in effect, *agency*), *voice* must be given, or *exit* is likely to be considered.[87]

84 Part Three, Title XVIII, of the TFEU.

85 See, in particular, Article 39(2) TFEU (common agricultural policy), Article 46 (internal market), Article 91(2) and Article 96(2) TFEU (transport), Article 107(3) TFEU (State aid), Article 167(1) TFEU (culture), Article 170(2) TFEU (trans-European networks), and Article 191(2) and (3) TFEU (environment).

86 Outlined above, points 58 to 62 of this Opinion.

87 Hirschman, A.O., *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, Harvard University Press, Cambridge, MA, 1970.

2. Direct and individual concern and the art of traffic control

137. There is, finally, the overall picture of access to the EU Courts. I am far from suggesting that the categories of direct and individual concern should be radically reinterpreted and the gates suddenly opened. Indeed, a number of legal systems, including those of the Member States, impose certain conditions requiring proof that individuals are affected in order for them to be able to challenge generally applicable legislation.

138. What is, however, a cause for concern is the overly restrictive tendency in interpreting and applying those rules, especially 10 years after the Treaty of Lisbon, which was supposed to alleviate at least some of those concerns. Reading the case-law of the EU Courts with a critical eye, in particular the numerous orders of the General Court, one cannot help but be surprised by the zeal and creativity with which the absence of direct concern, or even any interest to act, will be detected. The present appeal offers yet another example of that overall approach and spirit. It raises the following question: if even the Member States' regions are not concerned by EU measures that they are tasked to implement and to uphold, then who will ever be?

139. Certainly, the traditional answer has been that the EU legal order offers a complete system of remedies. Thus, the absence of standing under the fourth paragraph of Article 263 TFEU does not prevent the matter from being brought eventually before the Court via a preliminary ruling on validity submitted by a national court.[88]

140. I will not reiterate the arguments as to why that is conceptually not entirely warranted.[89] I shall also not single out individual cases in which that dogma regularly turns out to be incorrect. Equally, I do not wish to reopen the debate on double standards and how far such interpretation of the fourth paragraph of Article 263 TFEU lives up to the right of access to a court under Article 47 of the Charter and the principle of effective judicial protection under Article 19(1) TEU.

141. Instead, I shall just conclude with two structural points which plead in favour of more open interpretation of the criteria of direct and individual concern, at least for certain categories of *atypical* non-privileged applicants, such as the regions in cases like the present one.

142. First, there is the new architecture of the EU Courts. Jurisprudentially restricting direct access, while generously allowing for the indirect one via the preliminary ruling procedure, was perhaps a good recipe in the early 2000s. However, with the radically changed structure of the EU Courts some 20 years later,[90] the insistence that there still be limited access through the door which has capacity, while allowing for unfettered access on the same issues through the other door which, by now, has limited capacity, is bound to lead to congestion and an evident lowering of the quality of the traffic.

143. Second, that should be the case, in particular, with complex, regulatory and technical issues, which require a rather extensive collection of evidence, expert opinion, or (scientific) data. The issue of safety of certain pesticides is a prime example within that category. Would it not be better for such an issue first to be litigated on the merits in depth before a first-instance jurisdiction, the General Court, with all the evidence and data collected and interested interveners heard, before potentially proceeding to the Court of Justice on appeal? Would that avenue not be preferable to having to face similar issues which, in the end, concern the validity of EU regulatory measures, in a preliminary rulings procedure?

88 See recently, for example, judgments of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraphs 66 to 68 and the case-law cited), and of 13 March 2018, *European Union Copper Task Force* v *Commission* (C-384/16 P, EU:C:2018:176, paragraphs 112 to 114 and the case-law cited).

89 With a number of the convincing arguments delivered in the Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores* v *Council* (C-50/00 P, EU:C:2002:197) still holding true today.

90 Following the implementation of the Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

144. It is particularly in such complex cases that the standard dogma of the fully operational alternative avenue, in the form of a request for a preliminary ruling, runs into serious difficulties. It might be recalled that in preliminary rulings, the Court will not collect any evidence, virtually never hear any expert witnesses, with facts being exclusively for the referring court to establish (or rather frequently, in such complex technical cases, unfortunately not to establish). As a result of restrictions on the number of potential interveners, the Court is often left to adjudicate on deeply scientific, factual matters with little data from either the intervening parties or the referring court.

145. Would it, therefore, not be more reasonable to allow for similar cases to start before the General Court, with all the necessary evidence and science properly collected and heard, instead of indirectly opening the issue of glyphosate through a preliminary ruling? [91] Beyond the issue of expertise and necessary depth of the argument, there are also broader issues of access and legitimacy: how could a region tasked with competences in environmental matters have no standing to challenge the Union's authorisation for glyphosates, whereas individuals destroying shop windows and display cases have both interest and standing? [92]

146. Certainly, these are two different types of proceedings. However, it is precisely that bigger picture, including the interplay between the types of proceedings before this Court and access to it, which is troubling. Would the Brussels Capital Region be better served if, instead of duly filing an action before the General Court, it (naturally, entirely hypothetically) instructed some of its employees to go out and vandalise a few shops in Brussels? [93]

147. In conclusion, connecting the two general points made in this section, rather than waiting for the attainment of the faculty provided for in Article 256(3) TFEU, the complexity of which makes it an unlikely scenario for the immediate future, [94] the short- and mid-term viable alternative is to channel, via a more reasonable interpretation of the criteria of the fourth paragraph of Article 263 TFEU with regard to at least some non-privileged applicants, like those in the present proceedings, those types of cases before the General Court.

D. Consequences of the assessment: disposition of the present case

148. I have come to the conclusion that the General Court erred in declaring the action at first instance inadmissible on the ground that the appellant was not *directly concerned*. Should the Court come to the same conclusion, it would have to examine whether the other conditions for the appellant's standing under the fourth paragraph of Article 263 TFEU are fulfilled. Indeed, should the other conditions for standing set out in that provision not be satisfied, the order under appeal would have to be upheld, and the appeal dismissed, notwithstanding the errors of law made by the General Court. [95]

91 See, in this regard, the (quite succinct) reference made by the *tribunal correctionnel de Foix* (Criminal Court of Foix, France), which gave rise to the judgment of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800). In that case, the fact that Mr Blaise and other individuals entered shops in the department of Ariège (France) and damaged cans of weed killer containing glyphosate, as well as glass display cases, led to criminal proceedings being brought against those individuals on charges of defacing or damaging the property of another. On that basis, the Court assessed a number of rather complex issues of the validity of Regulation No 1107/2009 in the context of authorisation of glyphosate as active substance.

92 It is perhaps not immediately obvious what effect a review of the validity of Regulation No 1107/2009 would have in the national *criminal proceedings for wilful destruction of property*, especially since the authorisation for plant protection product containing glyphosate at issue was given by the French Republic and clearly does not stem directly from any act of EU law. Cf. judgment of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraphs 31 to 39).

93 In this regard, the argument of 'no one should be required to break the law in order to get to a court', discussed in the already cited Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores* v *Council* (C-50/00 P, EU:C:2002:197, point 43) makes a full and rather unexpected circle.

94 See Court of Justice of the European Union, Report submitted pursuant to Article 3(2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, pp. 4 to 7 (online at: https://curia.europa.eu).

95 See for example, to that effect, judgment of 26 January 2017, *Mamoli Robinetteria* v *Commission* (C-619/13 P, EU:C:2017:50, paragraph 107 and the case-law cited).

1. Admissibility of the application at first instance

149. The appellant argues that it was both directly and individually concerned by the contested regulation. It further claims that such a regulation constituted a regulatory act that did not entail implementing measures. The Commission, for its part, contests both arguments.

150. I shall assess those two situations in turn.

(a) Act of direct and individual concern

151. I have already recalled the case-law according to which a regional or local entity is concerned — both directly and individually — by an EU act when it is entrusted with powers that are exercised autonomously within the limits of the national constitutional system of the Member State concerned, and the EU act prevents that entity from exercising those powers as it sees fit (the *Vlaams Gewest* test). [96]

152. I have also explained why that test appears satisfied in the case at hand. I have then highlighted how the impact on the appellant's prerogatives stemmed *automatically* from the contested regulation. [97]

153. In so far as that would not be sufficient for the purposes of the *Vlaams Gewest* test, which I believe it ought to be, the only potentially outstanding element would be how the contested regulation alters the legal position of the appellant *because of the specific situation* of the latter (namely the criterion of *individual* concern).

154. The powers granted to the regions in Belgium to regulate the use of pesticides in their respective territory are, obviously, specific to the Belgian constitutional order. The situation is different in (at least some) other Member States. Not all regions or other local entities in the other Member States have comparable autonomous powers. The regional or local entities with specific powers to regulate the use of pesticides in their respective territories constitute a closed, predetermined, and certainly quite small, group of (moral) persons.

155. The same logic holds true with regard to the other types of effects produced by the contested regulation on the appellant's position. In particular, the legal position of the appellant is equally altered by the fact that the contested regulation confers certain rights on companies or individuals (inter alia, the producers and associations of producers of the active substance, and the authorisation holders). For example, authorisation holders that apply for the renewal of their authorisations have the right to obtain a decision from the authorities within 12 months and, where necessary, have the validity of their authorisations preserved for the period required to that end. [98] Those rights can, in all evidence, be invoked against the responsible Belgian authorities that, unlike in other Member States, include the regional entities because of their specific competence in the regulation of pesticides.

156. Moreover, the contested regulation also triggers a procedural obligation on the part of the appellant. The federal government *cannot* rule on authorisations without hearing the Approval Committee, of which the appellant is a member. Again, the need for the authorities of the Brussels Capital Region to, inter alia, start follow-up action, instruct the relevant files, and participate in the decision-making procedures, is a result of Belgium's constitutional structure.

96 See above, points 58 to 62.

97 See above, points 65 to 81.

98 Article 43(6) of Regulation No 1107/2009, in detailed discussed above in points 83 to 87.

157. In so far as this entire structure and logic could in fact be applied to regulators, instead of addressees of legislation, for whom it was designed,[99] these elements, both individually and (even more) when taken together, clearly distinguish the appellant from all the other regional or local authorities in the Union which may be affected only indirectly, in so far as they are charged with the mission of looking after the general well-being of their citizens or the integrity of their territory. A fortiori, those elements differentiate the appellant from other moral or physical persons that act in the environmental field, or are potentially affected by the contested regulation (such as citizens who are exposed to the substance).

158. Accordingly, I take the view that the appellant is both directly and individually concerned by the contested regulation, and thus has standing to challenge the contested regulation under the fourth paragraph of Article 263 TFEU. That said, for reasons of completeness, I shall also assess its standing under the situation envisaged in the third limb of the fourth paragraph of Article 263 TFEU.

(b) Regulatory act that does not entail implementing measures

159. First, it is rather clear that the contested regulation is a 'regulatory act' within the meaning of the fourth paragraph of Article 263 TFEU.

160. According to settled case-law, that concept 'extends to all non-legislative acts of general application'.[100] The contested regulation clearly fulfils that requirement. It is not a legislative act, but an implementing act within the meaning of Article 291 TFEU, adopted by the Commission with a view to implementing Regulation No 1107/2009. In addition, the contested regulation covers situations which are determined objectively, and produces legal effects for categories of persons envisaged in a general and abstract manner.[101]

161. Second, I am also of the view that the contested regulation does not 'entail implementing measures' within the meaning of the fourth paragraph of Article 263 TFEU.

162. The Court made it clear that the question whether a regulatory act entails implementing measures should be assessed by reference to the *position of the person* bringing the action and the *subject matter* of that action.[102] That means that it is immaterial whether the act in question entails implementing measures with regard to *other persons*,[103] and whether *other parts* of the challenged act, which are not contested by the applicant, entail implementing measures.[104] What is crucial, in that context, is whether the specific legal effects which alter the position of the applicant materialise vis-à-vis that person as a result of the EU act challenged, or of any other act adopted by the Union or the Member State in question.[105]

99 As outlined above in points 129 to 136.

100 See, inter alia, judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 60), and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 28).

101 See, for example, judgments of 11 May 2017, *Deza* v *ECHA* (T-115/15, EU:T:2017:329, paragraphs 32 to 34), and of 13 March 2018, *European Union Copper Task Force* v *Commission* (C-384/16 P, EU:C:2018:176, paragraph 95).

102 Judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraphs 30 and 31).

103 See judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraphs 63 to 65), and of 13 December 2018, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid* v *Commission* (T-339/16, T-352/16 and T-391/16, EU:T:2018:927, paragraph 40).

104 See, for example, judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraph 31).

105 Judgment of 13 March 2018, *European Union Copper Task Force* v *Commission* (C-384/16 P, EU:C:2018:176, paragraphs 43 and 45), and of 18 October 2018, *Internacional de Productos Metálicos* v *Commission* (C-145/17 P, EU:C:2018:839, paragraphs 56 and 57).

163. Against that background, in view of the *position* of the appellant and of the *subject matter* of the present proceedings, the contested regulation does not entail implementing measures for the purposes of the third limb of the fourth paragraph of Article 263 TFEU. As repeatedly mentioned in this Opinion, the appellant is not contesting any specific authorisation that could be given (or renewed) to one or more products which contain glyphosate. The appellant is contesting the safety of the substance under Article 4(2) and (3) of Regulation No 1107/2009, an aspect on which the contested regulation provides a final determination. No measure of implementation is necessary or provided for in that respect.

164. The fact that measures of implementation of the contested regulation must be adopted vis-à-vis other persons (for instance, authorisation holders and producers of glyphosate) or in respect of other aspects of the contested regulation (in particular, the safety of the specific products containing glyphosate) is, in accordance with the case-law referred to above, of no relevance.

165. The Commission contests these arguments. It argues that the recent case-law supports a particularly restrictive reading of the expression 'does not entail implementing measures'.

166. I agree with the Commission's starting point, but I do not read the case-law mentioned by the Commission in the same manner and thus disagree with the consequences that the Commission draws from it for this case.

167. First, I agree that that condition, according to which the challenged act must not 'entail implementing measures', should not be confused with that of 'direct concern'.[106] The two conditions indeed share the same objective: avoiding unnecessary litigation before the EU Courts while ensuring effective judicial protection to all persons directly affected by an EU measure.[107] Their scope and meaning are nonetheless not identical.

168. According to settled case-law, the expression 'does not entail implementing measures' must be interpreted *in the light of the objective of that provision*, which, as is apparent from its drafting history, is to ensure that individuals do not have to break the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he or she did not have a direct legal remedy before the EU Courts for the purpose of challenging the lawfulness of the regulatory act. In the absence of implementing measures, a natural or legal person, although directly concerned by the act in question, would be able to obtain judicial review of the act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national court.[108]

169. I also agree with the Commission that a key difference between those two concepts is the following: unlike for direct concern, the mere existence of implementing measures of the EU act, even where those measures are of a purely mechanical nature and no discretion is left in that regard to the addressees of the EU act, is sufficient to conclude that the condition under third limb of the fourth

106 Order of 14 July 2015, *Forgital Italy* v *Council* (C-84/14 P, not published, EU:C:2015:517, paragraph 43).

107 See, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 93).

108 See, for example, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 58 and the case-law cited).

paragraph of Article 263 TFEU is not satisfied.[109] In other words, the contested EU act must, in and of itself, give rise to the legal effects which are the subject of the complaint.[110] Accordingly, the condition relating to the absence of implementing measures follows the logic underpinning the condition of direct concern, but makes that condition to some extent more stringent.[111]

170. The reason behind the constitutional choice to include this condition in the third limb of the fourth paragraph of Article 263 TFEU is, probably, to balance the fact that (i) a direct action before the EU Courts becomes admissible against all *acts of general application* (thus affecting potentially a very large number of individuals) and (ii) standing is extended to *any* person directly concerned by those acts (since the condition of individual concern was repealed in those situations). The need to avoid an *actio popularis* before the EU Courts thus led the drafters of the Treaty of Lisbon to strengthen the requirement that the legal effects of the act challenged by an applicant flow exactly and immediately from the EU act challenged.

171. However, that condition cannot now be turned on its head and (re)interpreted in a way as to actually lead to even less access than before, thus depriving this explicit amendment of the Treaty of any content. That would go against the clear will of the EU constitutional legislature.[112]

172. I therefore disagree with the Commission's proposed reading of the Court's recent case-law. Instead, I fully subscribe to the view of Advocate General Cruz Villalón who argued that 'non-substantive or ancillary measures' should not constitute implementing measures. The EU Courts should rather consider whether the contested act is 'fully and autonomously operational' in the light of its purpose, content and effects on the applicant's legal situation.[113]

173. The case-law largely reflects, I believe, that position. The Court made clear that it is immaterial whether the challenged act in question entails implementing measures with regard to other persons, and whether other parts of the challenged act, which are not contested by the applicant, entail implementing measures.[114] In addition, in *Montessori*, the Court found the applicants had standing under the third limb of the fourth paragraph of Article 263 TFEU in so far as they could not be expected to create an artificial litigation in order to challenge national acts that, if it were not for the breach of law, would have never come into existence, thus triggering a reference on the validity of the basic EU act.[115]

174. The same logic has been followed, in a number of recent cases, by the General Court. In *Gazprom Neft* the General Court stated that it would be artificial or excessive to demand that an operator request an implementing measure merely in order to be able to challenge that measure in the national courts, where it is clear that such a request will necessarily be refused and would not, therefore, have

109 See judgment of 13 March 2018, *Industrias Químicas del Vallés* v *Commission* (C-244/16 P, EU:C:2018:177, paragraph 47 and the case-law cited), and order of 4 June 2012, *Eurofer* v *Commission* (T-381/11, EU:T:2012:273, paragraph 59).

110 See, to that effect, judgment of 10 December 2015, *Canon Europa* v *Commission* (C-552/14 P, not published, EU:C:2015:804, paragraph 48).

111 Judgment of 7 July 2015, *Federcoopesca and Others* v *Commission* (T-312/14, EU:T:2015:472, paragraphs 34 to 37).

112 See, in particular, Cover Note from the Praesidium to the European Convention (CONV 734/03) of 12 May 2003, p. 20: '… the Praesidium recommends that the conditions for instituting direct proceedings *be opened up*'. Emphasis added. See also judgment of 13 December 2018, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid* v *Commission* (T-339/16, T-352/16 and T-391/16, EU:T:2018:927, paragraph 40). In legal scholarship, among the many cautions against an overly restrictive reading of the Treaty amendment, see, for example, Wildemeersch, J., 'Standing Requirements of Private Parties in Actions for Annulment Concerning Regulatory Acts: The State of Affairs 10 Years After the Entry into Force of the Lisbon Treaty', in Sarmiento et al (eds), *Yearbook on Procedural Law of the Court of Justice of the European Union: First Edition — 2019*, MPILux Research Paper 2020, pp. 49 to 73, at 62 to 64; or Rhimes, M., 'The EU Courts stand their ground: why are the standing rules for direct actions still so restrictive?', *European Journal of Legal Studies*, Vol. 9, No 1, 2016, pp. 103 to 172, at 116.

113 Opinion of Advocate General Cruz Villalón in *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2014:2283, point 32). See also judgment of 25 October 2011, *Microban International and Microban (Europe)* v *Commission* (T-262/10, EU:T:2011:623, paragraph 29).

114 See above, points 162 to 164.

115 Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 66). See also Opinion of Advocate General Wathelet in the same cases (EU:C:2018:229, point 71).

been made in the ordinary course of business.[116] Furthermore, in *Tilly-Sabco* and *Doux*, the General Court found that only measures which EU or national authorities adopt in the *normal course of business* may constitute implementing measures within the meaning of the third limb of the fourth paragraph of Article 263 TFEU. If, in the normal course of business, those authorities do not adopt any measure to implement the regulatory act, and to specify its consequences vis-à-vis the applicant, that act does not entail implementing measures.[117]

175. In sum, the third limb of the fourth paragraph of Article 263 TFEU was included in the Treaty in order to fill the gap in the system of judicial remedies with regard to all those cases where the indirect review of EU acts (that is, via the preliminary ruling procedure) is: (i) impossible because the EU act is self-executing (as in *Microban*[118]), or (ii) purely artificial and unreasonable because there are no measures of implementation vis-à-vis the applicant (such as in *Montessori*, *Gazprom*, *Tilly-Sabco* and *Doux*[119]), and/or with regard to the effects contested by the applicant (situation envisaged in *Telefónica*[120]).

176. Essentially, the present case either falls within the first group described in the previous point (with regard to the determination as to the safety of glyphosate there is no implementing measure) or, at any rate, within the second group (the appellant would have to artificially contest some decision of the federation adopted in this context in order to have the opportunity to raise the issue of validity of the contested regulation in the national proceedings, in the hope that the referring court makes a reference on that issue under Article 267 TFEU).

177. For those reasons, I take the view that the appellant also has standing to challenge the contested regulation under the third limb of the fourth paragraph of Article 263 TFEU: the contested regulation is a regulatory act that does not entail any implementing measure.

E. Referral to the General Court

178. Having concluded for the admissibility of the action, and in so far as the merits of that action were not examined at first instance, the case must be referred back to the General Court pursuant to Article 61 of the Statute of the Court of Justice of the European Union, and the costs reserved.

179. I consider, however, that the Court has all the necessary material before it to be able to give a ruling rejecting the preliminary plea of inadmissibility raised by the Commission at first instance. In the interests of efficiency and economy of procedure, I propose that the Court take that route.

V. Conclusion

180. I suggest that the Court of Justice:

– set aside the order of 28 February 2019, *Région de Bruxelles-Capitale* v *Commission* (T-178/18, not published, EU:T:2019:130);

– declare the appellant's action for annulment admissible;

116 Judgment of 13 September 2018, *Gazprom Neft* v *Council* (T-735/14 and T-799/14, EU:T:2018:548, paragraph 102).

117 Judgments of 14 January 2016, *Tilly-Sabco* v *Commission* (T-397/13, EU:T:2016:8, paragraph 43), and *Doux* v *Commission* (T-434/13, not published, EU:T:2016:7, paragraph 44).

118 Judgment of 25 October 2011, *Microban International and Microban (Europe)* v *Commission* (T-262/10, EU:T:2011:623). See also judgments of 27 February 2013, *Bloufin Touna Ellas Naftiki Etaireia and Others* v *Commission* (T-367/10, not published, EU:T:2013:97), and of 12 June 2015, *Health Food Manufacturers' Association and Others* v *Commission* (T-296/12, EU:T:2015:375).

119 See supra, points 173 to 174 of this Opinion.

120 See supra, point 162 of this Opinion.

– refer the case back to the General Court for a decisions on merits; and

– order that the costs be reserved.