

Why Cities Do Become Vocal and is Law Ready to Hear them?

Exploration through the lens of climate governance

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Keywords

Cities – Climate governance – EU Green Deal – Infra-State public authorities - *Locus standi* - Art. 263 TFUE

1 INTRODUCTION

Cities are among the surprise guests in climate governance policy, where they were not originally supposed to be among the key players. The Paris Agreement on climate change is silent on the duties and powers of cities. In its text, the word “city” is not even mentioned¹. Cities are indeed most often invisible, *unsaid*, in formal legislative texts on climate governance and in environmental law more generally. This is related to constitutional and institutional reasons. States, with their legislative, executive and judiciary powers, take all the light. This is also usual in the multilateral order on treaty making so far, like in the Paris Agreement on climate change which is only open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations. States are approached as a package, with no further details.

Of course, as a pinnacle that only get reached after years of sweat and fears, a multilateral treaty must not be reduced to the content of its sole black and white letters. It also counts and acts as a process that brings together so many more actors, like at the occasion of the Conference of the Parties. Among such other actors, one can observe the active presence of non-governmental organizations (NGO's), the youth, indigenous people, trade unions, the industry, banks and cities.

On the presence of NGO's since long and, more recently, the youth, an explanation can easily be found in the principle of participation, as promoted in the Rio declaration of 1992 and which affirms that environmental issues are best handled with participation of all concerned citizens, at the relevant level, which translate into a necessity or even obligation to promote access to information, participation to decision-making and access to justice must be actively promoted.

The rise of cities in climate governance is studied and explained in social sciences literature since decades.² It raised novel questions as it could at first sight appear at odds with the need to tackle a global problem at world level. H. Bulkeley writes that we know witness “a profound shift in how we understand climate from its initial framing as global problem, to one that is

¹ Funny enough, a search on the word “city” only provides results on “capacity”.

² See for instance Betsill M. and Bulkeley H (2006) ‘Cities and the Multilevel Governance of Global Climate Change’ 12(2) Global Governance 141-159; Bulkeley H. (2010) Cities and the Governing of Climate Change. *Annu. Rev. Environ. Resour.* 35:229-53; Scanu E. and Cloutier G, (2015) « Why do cities get involved in climate governance? Insights from Canada and Italy » *Environnement Urbain / Urban Environment* [Online], Volume 9 | 2015, URL : <http://journals.openedition.org/eue/635>; Brescia R. & Marshall J (2016), *How cities will save the world: urban innovation in the face of population flows, climate change and economic inequality*, Routledge, 282 p.; Hughes S & al. (2018), *Climate Change in Cities: Innovations in Multi-Level Governance*, Springer.

increasingly understood as transnational, personal, urban, networked, and regional”³. She observes that “perhaps the most surprising responses to climate change over the past two decades has been the growing involvement of municipality governments and other urban actors in efforts to reduce emissions of greenhouse gases and increasingly to adopt adaptation measures”⁴. The close relationship cities naturally entertain with concrete people, public opinion, but also concrete problems and possibly concrete solutions through strategic urbanism is abundantly discussed. Cities are approached as a space, as a site⁵, that can prove to be the appropriate scale for delivering on part of the climate change issues.

In its Resolution of 10 March 2020, entitled *The Green Deal in partnership with local and regional authorities* the European Committee of the Regions recalled the relevance of the local and regional authorities which are involved in the making of most of the EU policies⁶. Notably, subnational or infra-State public authorities, including cities, do deliver the European Green Deal on the ground, being responsible for the public expenditure and public investment at the regional level⁷.

However, if cities have recently come more prominently to the fore in relation to climate change governance and policies, we dare to add that it is not only in their classical role of local authorities, humbly aligning on decisions that have been taken at higher level.

The presence of cities on the climate change and adaptation governance scene today results from a much more proactive and challenging approach.

If cities are committed, it is also because they are connected, since long, and benefit from the stimulus of a true commoning, an *agir ensemble*, that can help in transcending scales.

If cities are committed, it is also because they are angry. Some of them demonstrate a need to challenge or even substitute the upper powers, especially where the State itself fails or is paralyzed due to institutional or political reasons, on climate change and adaptation issues. Some of them decide also to directly sue big oil corporations.

Altogether, cities do not have the easiest task if they choose to follow their own ambition on climate litigation and adaptation. They do face institutional hurdles that need to be properly appraised and understood, like in a context of litigation, in order not to expect too much from them, but also not too little.

The present contribution draws exploratory lines on such factors, as discussed at the conference of 4 December 2020 in Brussels, and explains into more details the hurdles cities are facing when bringing a direct case before the General Court of the European Union (General Court), as they are not explicitly taken into consideration in the Lisbon treaty in the context of legal standing requirements for the purpose of direct, annulment action under Article 263 TFEU. There also, they are not specifically foreseen, not noticeable.

³ Bulkeley, H. (2021) 'Climate changed urban futures: environmental politics in the Anthropocene city.', *Environmental politics*, 30 (1-2). pp. 266-284.

⁴ Idem.

⁵ H. Bulkeley, *Cities and the Governing of Climate Change*, p. 230.

⁶ 2020/C 79/01

⁷ <https://cor.europa.eu/en/events/Pages/European-week-of-regions-and-cities-EWRC.aspx>

This contribution is only an introduction to the other chapters in the present book which are specifically dedicated to most of the matters here evoked.

2 CITIES

What is actually a city? The term is here approached in a generic way, cumulating the criteria of “non-state level”, local, urban, densely populated. The notion of city also calls upon the allegory of “la cité”, as the antique political community that is apt to govern itself, through its citizens, and therefore to demonstrate a certain autonomy in pursuing certain goals.

If we take environmental law texts as a reference, definitions of “cities” are strangely quite hard to find. Even the 7th Environmental Programme of the European Union, which frames as a priority the need to enhance the sustainability of the Union’s cities, does not define the term⁸. Environmental law rather tends to refer to the useful notion of “agglomeration”, characterized by features like density of population or concentration of economic activities.

In ambient air quality regimes under EU law, an agglomeration means a zone that is a conurbation with a population in excess of 250 000 inhabitants⁹. In urban waste water treatment regimes in the European Union, an agglomeration means an area where the population and/or economic activities are sufficiently concentrated for urban waste water to be collected and conducted to an urban waste water treatment plant or to a final discharge point¹⁰.

The notion of cities tends to evoke urban areas, urbanized areas, peri-urban areas. A feature becoming slightly paradoxical when one knows that one of the trends in nature policies in a context of climate change is to bring nature back to the heart of cities, and to bring back trees and vegetation. Urban does not need no mean mineral. The city is a concept in mutation.

The notion of city also spontaneously relates to the notion of “local”, as a reference to the governance level (cities also have their own form of government), not to the size of the territory - cities tend to become gigantic in some countries. City does not necessarily mean municipal. The governance structure of a city in its generic meaning can indeed be plural, like in Brussels¹¹.

3 NETWORKS FOR ADVANCING OR CAPTURING

In “Agenda 21” - one of the main texts of soft transnational governance adopted at the 1992 Rio Summit, specific goals were assigned to the international community for the dynamization and empowering of local authorities on sustainable development.

⁸ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’, OJ L 354, 28.12.2013, p. 171–200.

⁹ Or, where the population is 250000 inhabitants or less, with a given population density per km² to be established by the Member States. Directive 2008/50/ of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1–44, Art.2.17°.

¹⁰ Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, OJ L 135, 30.5.1991, p. 40–52, Art.2.4°

¹¹ Brussels must be approached as a Region with full legislative powers (The Brussels Capital Region), governing a reunion of 19 communes (boroughs) in due respect of their own constitutionally guaranteed autonomy, among which one of the 19 is called the “City of Brussels”– the confusion between the city and the Region is easy to make for the external observer, while they do not have the same kind of powers and while both will be considered as subnational

Those goals show that the effort of cooperation and networking between and within local authorities is not new and was even actively favored and promoted by the international community and the United Nations. By 1996, most local authorities in each country had to undertake a consultative process with their populations and achieved a consensus on "a local Agenda 21" for the community; by 1993, the international community had to initiate a consultative process aimed at increasing cooperation between local authorities; by 1994, representatives of associations of cities and other local authorities had to increase levels of cooperation and coordination with the goal of enhancing the exchange of information and experience among local authorities; all local authorities in each country were encouraged to implement and monitor programmes which aimed at ensuring that women and youth are represented in decision-making planning and implementation processes.

In such context, the rise of cities on sustainable development and environmental issues must not be seen as a surprise, more than thirty years later.

At the time of writing this contribution – July 2022, very high temperature hit Europe. Fires destroy forests where it rarely happened before. Brussels air outside in the streets is burning hot. Temperatures have never been so high in the United Kingdom, where a 40.3°C is measured for the first time - a conference for representatives of large global cities is taking place in London, at the initiative of the Mayor of London, with the purpose to accelerate city-led action related to the triple threat of congestion, air pollution and the climate emergency. The Mayor of London convened the meeting in its quality of chair of an association called the "C40 Cities". The president of the C40 Board and 108th Mayor of New York City declared at the same occasion that "cities are laboratories of innovation, and by sharing what works with others around the world, they can dramatically increase the pace of progress on the toughest global challenges, including air pollution and climate change"¹².

Cities have been for a long time interconnected via myriads of networks, either generalist or specialized *réseaux*, through which they already dialogue, share experience, build assistance, even transnationally.

Such networks already installed in relation to other fields on environmental matters, such as waste management. Some of them were dedicated to general issues (Eurocities, 1986; United Cities and Local Government (UCLG), 2004, gathering 240000 cities); others flourished in the aftermath of the sustainable development concept as promoted in the early 90's (ICLEI, Local Governments for Sustainability, 1991), also in relation to energy (Energy Cities, 1990, gathering 1000 cities). A "climate alliance" emerged in 1990, with 1700 Cities, municipalities, districts, and also NGO's. A more select "C40" (Cities Climate Leadership Group) was created in 2006, targeting only the big cities (with 97 members today). A Covenant of Mayors for climate and energy (2006, with 9000 local and regional authorities) and a Compact of Mayors (2014, with 447 cities) recently merged in a Global Covenant of mayors, the coalition of coalitions with about 10 0000 members on board.

The cooperation landscape is thus very dense. Sharing knowledge, capacity-building, gaining visibility and possibly financing are among the main purposes.

It is important to observe that such networks are not per se disconnected from the capacities of the United Nations or of the European Union. They entertain close relations. The latest

¹² Michael R. Bloomberg, UN Special Envoy for Climate Ambition and Solutions, Press release of C40, 19 July 2022.

environmental programme of the European Union mentions that the Union should further promote and, where appropriate, expand existing initiatives that support innovation and best practice in cities, networking and exchanges and encourage cities to showcase their leadership with regard to sustainable urban development. Examples include the European Innovation Partnership on Smart Cities and Communities, the European Green Capital Award and the research Joint Programming Initiative Urban Europe.

Moreover, a so-called “non-Party” stakeholder engagement was concluded in 2016 at COP22 to support implementation of the Paris Agreement “by enabling collaboration between governments and the cities, regions, businesses and investors” that must act on climate change. The aim of such Marrakech Partnership for Global Climate Action is to “capture the breadth of climate action globally”.¹³

4 SUBSTITUTION

If some cities have happened to pop up and show the way, it was sometimes due to peculiar circumstances where the State itself was paralyzed for institutional or political reasons on climate change issues. They substituted themselves somehow to the failed central powers, like demonstrated by several American cities under the Trump presidency¹⁴. In April 2022, US federal appeals court ruled that California’s local governments can proceed with lawsuits against major oil companies for their sale of fossil fuel products and allegedly deceiving the public about the products’ effects¹⁵. “Cities provide space for political and social change”, where the promises of high-polluting nations have fallen short as they rarely contradict corporate interests, wrote an opinion-maker in March 2022 in a contribution called “it’s cities, not nations, that can challenge corporations and tackle climate change”¹⁶.

Their closeness to public pressure and public opinion might make them proner to be vocal, including by getting to Courts where needed and try to claim damages from big oil companies, especially when legal advice tends also to circulate now transnationally.

Even the “C40” published in 2021 a report on “Legal interventions: how cities can drive climate action”¹⁷, in which one can read daring assumptions such as “cities can use these legal interventions to remove barriers, enabling them to undertake more ambitious climate action and empowering other cities in the same jurisdiction that face similar legal hurdles. They can allow mayors to tackle key emission sources beyond their remit, either by helping city governments to obtain the powers they need to do so or by acting as the mechanism through which cities influence national or regional government policy or corporate activities”¹⁸.

If litigation before the EU Courts is understood as a process enabling ambitious climate and environmental protection related objectives of the European Union, a true commitment of the

¹³ <https://unfccc.int/climate-action/marrakech-partnership-for-global-climate-action>

¹⁴ See the contribution of I. Alogna.

¹⁵ As mentioned in <https://www.governing.com/now/local-governments-can-sue-oil-companies-over-climate-change>.

¹⁶ S. Rushton (2022), Equal Times

¹⁷ How cities can use the law to advance climate action, August 2021, available via https://www.c40knowledgehub.org/s/article/How-cities-can-use-the-law-to-advance-climate-action?language=en_US

¹⁸ Legal interventions: How cities can drive climate action, July 2021, available via https://www.c40knowledgehub.org/s/article/Legal-interventions-How-cities-can-drive-climate-action?language=en_US

cities to the fight against climate change means that, similarly to the non-governmental organisations¹⁹, cities might also play a significant role in the enforcement of EU environmental law though getting to courts.

Major European capitals or even smaller cities are gradually gaining confidence and know-how of the intricacies of the litigation before the EU Courts deriving from their urban mission and experience in the field of a climate change and environmental protection. However, they face institutional hurdles on admissibility conditions that constrains their role as environmental actors within EU law, as observed in the next section.

5 CITIES AND *LOCUS STANDI* UNDER ARTICLE 263 TFEU

5.1 *The European Union context and paradox*

European cities have been appearing in judicial proceedings before the European Courts indirectly as a natural background of environmental cases, both in the context of the preliminary ruling cases including those triggered by environmental organisations and inhabitants of urban areas²⁰, and also in the context of infringement cases under Article 258 TFEU due to the breach of the EU protective environmental standards in a given Member State²¹. Yet, in recent years, major EU capitals have made multiple, unsuccessful attempts of challenging legality of the EU measures directly before the EU General Court. Cities seem to go to the *barricades*, without even trying to ask for assistance of their own Member State in order to bring their case before the EU Courts.

Thus, whilst there has not yet been a city climate change case as such before the EU Courts, this chapter briefly explores a growing phenomenon of urban litigation activism in a framework of legality review of the EU acts before the EU Courts²².

Understanding a role of the cities in a context of a judicial review under the Lisbon Treaty means understanding the ins and outs of Article 263 TFEU, stating that the Court of Justice of the European Union shall have jurisdiction in actions brought by a Member State (and also the European Parliament, the Council or the Commission) on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers (§2) and that any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of *direct and individual concern* to them,

¹⁹ *Elia Antonio*, [753]

²⁰ Judgement in Case C-237/07, *Janecek*, EU:C:2008:447 (city of Munich); judgement in Case *ClientEarth*, C-404/13, EU:C:2014:2382 (city of London); judgment in Case C-645/15, *Bund Naturschutz in Bayern and Wilde*, EU:C:2016:898 (*city of Nuremberg*); judgement in Case C-723/17, *Craeynest e.a.*, EU:C:2019:533 (city of Brussels); judgement in Case C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, (city of Munich); judgement in Case C-671/16, *Inter-Environnement Bruxelles ASBL*, (city of Brussels); judgement in Case C-43/21, *FCC Česká republika s.r.o.*, EU:C:2022:425, (city of Prague).

²¹ See ex multis, judgement in Case C-488/15, *Commission v Bulgaria*, EU:C:2017:267; judgement in Case C-142/16, *Commission v Germany*, EU:C:2017:301; judgement in Case C-644/18, *Commission v. Italy*, EU:C:2020:895; judgement; judgement in Case C-638/18, *Commission v Romania*, EU:C:2020:334; judgement in Case C-286/21, *Commission v France*, EU:C:2022:319.

²² Judgement in Cases C-352/19 P, *Région de Bruxelles-Capitale v Commission*, EU:C:2020:978 and judgement in Case C-177/19P, *Allemagne - Ville de Paris and Others v Commission*, EU:C:2022:10.

and against a regulatory act which is of direct concern to them and does not entail implementing measures (§4).

It implies emphasising that, as rightly argued in the literature "environmental protection does not correspond to a specific individual interest"²³. Indeed, legal protection in environmental matters, "generally serves not only the individual interests of claimants, but also, or even exclusively, the public. This public interest has great importance in the European Union, since a high level of protection of the environment is one of the European Union's aims under Article 191(2) TFEU and Article 37 of the Charter of Fundamental Rights".²⁴

One of the major paradoxes of environmental litigation under Article 263 TFEU lies therefore in an inadequacy of a current model of judicial protection, focusing on the protection of individual rights of the EU citizens, while public interest litigation on climate and environmental issues is meant to vehicle protection of both individual and societal rights. This is also the case when triggered by cities enjoying a status of infra-State public entities, but nevertheless assimilated to individuals for the sake of locus standi under Article 263 TFEU.

5.2 Two recent cases brought forward by cities

In the light of the case-law of the EU Court of Justice of the European Union (EUCJ), the term 'Member State', for the purposes of the institutional provisions and, in particular, those relating to proceedings before the EU Courts, refers only to government authorities of the Member States of the Union and cannot include the governments of regions or autonomous communities, irrespective of the powers they may have²⁵.

Consequently, for the purposes of Article 263 TFEU, cities belong to the "non-privileged" applicants' category of physical and moral persons which encompass any regional or local entity, provided that it has legal personality under national law²⁶. Against this background, under a settled case-law national constitutional rules which confer powers cannot determine the standing of regional bodies to bring proceedings for the purposes of Article 263 TFEU.²⁷ As a result, the mere fact that a regional authority retains certain powers in the area within the scope of which the contested EU law act has been adopted does not equate with conferring upon such a regional authority a legal standing under Article 263 TFEU if the challenged act is not of direct, or, as the case may be, individual, concern to it.²⁸ It is nevertheless worth emphasising that EU Courts have recognised in a number of instances the condition of direct and individual concern as being fulfilled in case of regional authorities, especially in the field of State aid.²⁹

²³ *Epiney*, [418].

²⁴ See Opinion of AG Kokott in Case C-260/11, *Edwards*, EU:C:2012:645, point 40.

²⁵ Orders in Cases C-95/97, *Région Wallonne v Commission*, EU:C:1997:184, para 6 and C-180/97, *Regione Toscana v Commission*, EU:C:1997:451, para 6.

²⁶ See, judgment in Case C-417/04 P, *Regione Siciliana v Commission*, EU:C:2006:282, para 24 ; orders in Cases C-95/97, *Région wallonne v. Commission*, EU:C:1997:184, para 11, and C-180/97, *Regione Toscana v. Commission*, EU:C:1997:451, para 11; see also Opinion of AG Lenz in Cases 62/87 and 72/87, *Exécutif régional wallon and SA Glaverbel/Commission*, EU:C:1988:18.

²⁷ Order in Case C-444/08 P, *Região autónoma dos Açores v Council*, EU:C:2009:733, para 63.

²⁸ Order in Case T-66/19, *Vlaamse Gemeenschap*, EU:T:2019:848, para 27.

²⁹ See Opinion of AG Bobek in Case C-352/19 P, *Région de Bruxelles-Capitale v Commission*, EU:C:2020:588, paras 58-63.

Major European cities have recently undertaken judicial actions challenging before the EUCJ various EU law acts of general scope in the field of environmental protection.

The most recent examples demonstrate the difficulty for cities to demonstrate their *locus standi* in challenging the legality of European Union (legislative or non-legislative) acts under Article 263 TFEU.

The recent cases equally demonstrate a limited relevance of a plea based on the hypothetical effect of an EU law measure on a national law measure in the field of environmental protection. They equally illustrate a broader substantive phenomenon of a competence tension between the higher level of environmental ambition subnational entities of the EU Member States might want to pursue and the lack of response at State level. One must ask the question why cities or subnational entities decide to directly contest the legality of an act of the European Union without requesting its own Member State to more comfortably voice its concerns via Article 263 TFEU, article 2. A close scrutiny might reveal, as in the first case discussed below, a tension between the political position of a subregional authority (in charge of protecting the environment) and that of the federal State (in charge of decisions on the access to the market of plants protection substances), or, to be even clearer, between the political affiliation of each of the concerned Ministers.

In case T-178/18, *Bruxelles Capital v. European Commission*³⁰, Brussels Capital Region brought an action for annulment of the Commission's Implementing Regulation 2017/2324 renewing the approval of the active substance glyphosate subject to certain conditions in accordance with applicable legal framework³¹. The Brussels Capital Region detains full and exclusive legislative powers under Belgian law, and the competence for 'the protection of the environment, in particular the protection of the soil, subsoil, water and air against pollution and aggression[...] ', which include a regulation of the use of plant protection products in its territory – but not on the access to the market for such products or substances.³² Regarding the *locus standi*, the Brussels Capital Region argued it was directly concerned in so far as adoption of the contested implementing regulation affected the exercise of the powers conferred on it by Belgian constitutional law in the field of environmental protection. In its order of 28 February 2019, the General Court declared the annulment action as inadmissible on the ground of lack of standing to bring proceedings by the Brussels Capital Region,³³ the Brussels Capital Region was not directly concerned by the contested implementing regulation. Under appeal, Advocate General Bobek convincingly argued 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,³⁴ which led him to suggest to set aside the order General Court in case T-178/18. However, in its judgement of 3 December 2020, the Court of Justice confirmed that the action brought by the Brussels Capital Region was inadmissible on the ground of lack of standing to bring proceedings.³⁵ The EUCJ recalled that

³⁰ Order in Case T-178/18, *Bruxelles Capital v. Commission*, EU:T:2019:130.

³¹ Commission Implementing Regulation (EU) 2017/2324 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 L 333, p. 10–16.

³² See first subparagraph of Article 6(1)(II) of the Special Law on institutional reforms of 8 August 1980 (Moniteur belge of 15 August 1980, p. 9434). For further details, see order in case T-178/18, *Bruxelles Capital v. Commission*, EU:T:2019:130, paras 9-17.

³³ Order in Case T-178/18, *Bruxelles Capitale v. Commission*, EU:T:2019:130.

³⁴ See Opinion of AG Bobek in Case C-352/19 P, *Région de Bruxelles-Capitale v Commission*, EU:C:2020:588.

³⁵ Judgement in Case C-352/19 P, *Région de Bruxelles-Capitale v Commission*, EU:C:2020:978.

the condition of ‘direct concern’ must be assessed only with regard to the legal effects of the measure, the possible political effects of that measure not having any bearing on that assessment.³⁶

A second meaningful judicial attempt is illustrated by the *Ville de Paris v Commission* set of cases lodged unusually jointly by three European capitals, Paris Brussels and Madrid³⁷, against the Commission's regulation concerning the additional requirements for testing vehicles to measure pollutant emissions prior to the authorisation being given to place new vehicles on the market, as adopted in order to provide some much needed regulatory reaction to the dieselgate.³⁸ Unlike the previous case, one of the applicants was the city of Brussels, and not the region of Brussels. The General Court (in first instance thus) accepted the *locus standi* of the three cities and decided that the legal situation of the applicants was indeed affected by the regulation at issue and that that regulation was therefore of direct concern to them, within the meaning of the fourth paragraph of Article 263 TFEU. Whilst the General Court argued that cities fulfilled the admissibility conditions in the case at hand, this assessment was not shared by the Court of Justice under appeal.

As rightly argued by Advocate General Bobek, the General Court erred in law, when endorsing far-fetched and much risky reasons for concluding that the three cities were directly affected by the contested regulation.³⁹ It was not indeed appropriate to give a broad scope to an isolated expression in a directive in order to support the conclusion that that provision precludes certain local restrictions (and therefore the competence of cities) on circulation which are intended, *inter alia*, to protect the environment. Such interpretation could have had a detrimental effect in the long term on the competence of public authorities in regulating the use of goods that were previously admitted on the EU market.⁴⁰

However, regarding *locus standi* under Article 263 TFEU, Advocate General claimed other reasons for which the three European cities should indeed be considered as being directly concerned by the contested regulation. “To suggest, in such a situation, that the position of the local entities is affected only in fact and not in law by the contested regulation is extremely formalistic, if not outright cynical. The reality is that an alleged failure of the Commission to ensure compliance with the NOx emissions limits is bound to have a direct and significant impact on the manner in which entities such as the respondents have to exercise their autonomous legal powers in the fields of environmental protection and the regulation of traffic.”⁴¹ The Municipality of Madrid also noted that the objective of opening up the conditions for bringing direct actions and the fact that the development of the approach taken as regards the admissibility of annulment actions brought by infra-State entities, especially in matters relating to environmental law, might be seen as a corollary to the principle of sincere cooperation laid down in Article 4(3) TEU; “ Thus, it might be accepted that infra-State bodies,

³⁶ Judgement in Case C-352/19 P, *Région de Bruxelles-Capitale v Commission*, EU:C:2020:978, para 64.

³⁷ Judgement in Cases T -339/16, T-352/16 and T-391/16, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v European Commission*, EU:T:2018:927.

³⁸ Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6), OJ L 109, p. 1–22.

³⁹ See Opinion of AG Bobek in Case C-177/19P, *Allemagne - Ville de Paris and Others v Commission*, EU:C:2022:10, para 70. See *Misonne* [162].

⁴⁰ See Opinion of AG Bobek in Case C-177/19P, *Allemagne - Ville de Paris and Others v Commission*, EU:C:2022:10, para 59: “were Article 4(3) to be read in such a way, its impact on environmental policy – especially on the capacity of the Member States to combat pollution – would also be quite significant”.

⁴¹ See Opinion of AG Bobek in Case C-177/19P, *Allemagne - Ville de Paris and Others v Commission*, EU:C:2022:10, para 99.

such as the respondent cities, which by their actions incur the liability of the States to which they belong with regard to the European Union, enjoy a presumption of admissibility, the onus being on the author of the contested act to demonstrate that they are not affected by the contested provisions”.⁴²

In its judgement of 13 January 2022, the Court of Justice set aside the judgement of the General Court and considered that the applicants at first instance, the three European cities of Paris, Brussels and Madrid, could not *in casu* be regarded as being directly concerned by the contested regulation for the purpose of an annulment action under Article 263 TFEU. However, the Court confirms its case-law according to which an act of EU law that prevents a public legal person from exercising its own powers as it sees fit has a direct effect on the legal position of that legal person, with the result that the act in question must be regarded as being of direct concern to that legal person, within the meaning of the fourth paragraph of Article 263 TFEU.⁴³

5.3 *Cities must be heard*

Since the legal standing requirements are of a horizontal nature, cities as non-privileged applicants must comply with Article 263 TFEU admissibility conditions in order to consolidate their role as environmental actors within EU law. The concept of a direct concern is not carved in stone, but rather an evolving one, liable to cover new hypotheses opening access to the EU Courts to non-privileged applicants under Article 263 TFEU as recently demonstrated by the Court of Justice in the field of State aid.⁴⁴ Whilst unfolding slowly, widening access to the EU Courts requires multiple attempts. This could constitute an inspiration for the judicial actions triggered by the cities before the EU Courts.

EU environmental litigation is raising environmental awareness of the cities and citizens whilst triggering fascinating legal test cases. Yet, it seems equally important to involve the cities more at the stage of the legislation making. Indeed, the EU legislation, especially after the EU Green Deal is one of the most ambitious legal frameworks based on the high level of environmental protection and do not significant harm concept. As noted by the European Commission in 1998 Communication on sustainable urban development "Many EU policies have, de facto, an important urban relevance that the EU cannot ignore".⁴⁵

In order to perform their role as environmental actors, cities seem ready to make their voice heard.

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⁴² Judgement in Case C-177/19P, *Allemagne - Ville de Paris and Others v Commission*, EU:C:2022:10, para 63.

⁴³ *Ibid*, para 73.

⁴⁴ Judgement in Case C-99/21P, *Danske Slagtermestre v Commission*, EU:C:2022:510.

⁴⁵ Sustainable Urban Development in the European Union : A Framework for Action, COM 1998) 605 final.

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