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The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community

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THE *LOCUS STANDI* OF PRIVATE APPLICANTS UNDER ARTICLE 230 (4) EC AND THE PRINCIPLE OF JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITY

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ABSTRACT

The severe interpretation of the notion of 'individual concern' from Article 230 (4) EC by Court of Justice and the restrictions imposed by the Treaty itself on the possibility of challenging Community acts by individuals are criticized as being against the principle of effective judicial protection and leading in many cases to the denial of justice. This paper presents how this restrictive interpretation developed in the case law of ECJ and CFI and how this situation can be assessed in terms of effective judicial protection and the rights to legal remedy. It also analyses recent reactions of both Community courts to the growing criticism of the standing rules. Finally it is discussed whether Convention on the Future of Europe and the draft Constitution for Europe could provide a remedy to the lacuna in the system of judicial protection of individuals in the European Union.

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Introduction

Every developed legal system must have a mechanism for testing the procedural and substantive legality of measures adopted by its institutions. In the European Community it was of an utmost importance to create a system of control over the acts of the Commission and the Council (and later also the Parliament) given the democratic deficit within the Community and limited supervisory role of the European Parliament. The main burden rests on the European Court of Justice and the Court of First Instance, which are the independent bodies entrusted by the Treaties with the task of upholding the rule of law in the Community. The Treaty on the European Community (EC) provides for a system which may be called a system of judicial review. For reasons of peculiarities of the EC legal order it covers both legislative and administrative acts of the Community institutions[1].

The action for annulment, regulated by Article 230 EC, occupies the central position within this system. It has its origins in annulment proceedings against illegal administrative action, as known to the legal systems of the Member States. Paragraph four of article 230 allows the non-privileged applicant (every natural or legal person[2]) to challenge directly the allegedly illegal Community act. This is the result of the direct effect which the Community law has with regard not only to Member States but also natural and legal persons[3]. They can obtain the review of the acts of the Council, the Commission, the European Parliament and the European Central Bank. However, in reality these possibilities have been limited due to very strict requirements concerning the *locus standi* conditions for an action for annulment, which in theory should be a main channel of judicial review open to individuals[4]. These restrictions imposed by the Treaty but also by the severe interpretation of the Court of Justice, represent

[1] ALBERTINA ALBORS-LLORENS, *Private parties in European Community Law. Challenging Community Measures*, Clarendon Press, Oxford1996, p.7, hereinafter, ALBORS-LLORENS

[2] Under Article 230 EC Member States, the European Parliament, The Council and the Commissions are the privileged applicants i.e. they can always bring an action. The Court of Auditors and the European Central Bank are semi-privileged and they only have standing to defend their own prerogatives.

[3] See e.g. cases 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 16/64 *Costa v. ENEL* [1964] ECR 585, 39/72 Commission v. Italy [1973] ECR-101, 41/74 *Van Duyn v. Home Office* [1974] ECR 1337

[4] ALBORS-LLORENS, P.8

an important hindrance to access by natural and legal persons to the European court in contrast to the privileged position of Member States and the Community institutions, and are strongly criticized by scholars and members of the judiciary. The main argument brought up by the opponents of the *status quo* with regard to standing of individuals is that such a restrictive approach is against the principle of effective judicial protection and may lead in many cases to the denial of justice. This situation visibly contradicts with the common constitutional values on which the Community is based, the Charter of Fundamental Rights and the European Convention on Human Rights.

The *locus standi* of individuals under Article 230 (4) and the principle of effective judicial protection are the main concerns of this work. First it will be presented how the restrictive interpretation of the notion of individual concern developed in the case law of the European Court of Justice and then the Court of First Instance. Then it will be discussed how this situation can be assessed in terms of effective judicial protection and the rights to the legal remedy. The following part is devoted to the analysis of the recent reactions of the Community courts to the growing criticism of the standing rules. The last part is devoted to the works of the Convention on the Future of Europe and the Intergovernmental Conference with regard to Article 230 (4) debating over a project of the Constitution for Europe.

CHAPTER I

THE NOTION OF 'INDIVIDUAL CONCERN' UNDER ARTICLE 230 (4) EC IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE AND THE COURT OF FIRST INSTANCE

The requirement of 'individual concern' under the EC Treaty and in the Court's jurisprudence

The rules governing the *locus standi* of non-privileged applicants are to be found in Article 230 (4). This article provides that

> Any natural or legal person may, *under the same conditions*[5], institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The objective of these rules is to restrict access to the judicial review in the Court of Justice only to measures which are individual and not general, and in which applicants have personal interest. Review proceedings can only be brought in three types of cases:

- a decision is addressed to the applicant
- a decision is addressed to third parties and applicants claims that it is of 'direct and individual concern' to him or her
- a decision is 'in the form of' a regulation and is of a 'direct and individual concern' to the applicant.

Article 230 does not speak about the possibility of challenging directives by individuals. There is no reason, however, why they could not do it. It has been held that the choice of a

[5] These are the conditions set up in paragraph one of Article 230 which apply to all categories of applicants. To be subject to review the act must be of and EC institution, producing legal effects. The applicant must meet the 2-months deadline (counted form the publication of a measure or its notification to the applicant) and he must invoke one of the grounds for annulment laid down in paragraph 2 (lack of competence, infringement of an essential procedural requirement, infringement of the treaty or any rule relating to its application, misuse of powers)

legal instrument by the Community institutions does not deprive the applicant of the judicial protection afforded by the Treaties. In the case *Gibraltar v. Council*[6] we read that:

> '(…) the Court has held, since its judgment in Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes v Council* [1962] ECR 471, that the term 'decision' used in the second paragraph of Article 173 of the Treaty has the technical meaning employed in Article 189, and that the criterion for distinguishing between a measure of a legislative nature and a decision within the meaning of that latter article must be sought in the general 'application' or otherwise of the measure in question'.

In case *UEAPME v. Council*[7] the Court referred to *Gibraltar v. Council* and *ASOCARNE v. Council*[8] and stated that

> 'Although Article 173, fourth paragraph, of the Treaty makes no express provision regarding the admissibility of actions brought by legal persons for annulment of a directive, it is clear from the case-law of the Court of Justice that the mere fact that the contested measure is a directive is not sufficient to render such an action inadmissible. (…) In that respect, it must be observed that the Community institutions cannot, merely through their choice of legal instrument, deprive individuals of the judicial protection offered by that provision of the Treaty. (…) [T]he mere fact that the chosen form of instrument was that of a directive cannot in this case enable the Council to prevent individuals from availing themselves of the remedies accorded to them under the Treaty'.

An applicant may then argue that a directive was in fact a decision which was of direct and individual concern. It is nevertheless clear that individual wishing to do so will have very small chances to succeed[9].

Challenging the decisions

Decision addressed to the applicant is relatively the simplest case. For example decisions of the Commission adopted under the Council Regulation 17/62 implementing articles 85 and 86 of the Treaty of 1962[10] are frequently challenged by their addressees (the alleged infringers of competition rules)[11].

An individual can challenge a decision addressed to another party only if he or she is directly and individually concerned by the decision. This involves more then only proving some legal

[6] Case C-298/89 *Gibraltar v. Council* [1993] ECR I-3605
[7] Case T-135/96 *UEAPME v. Council* [1998] ECR II-2335
[8] Case T-99/94 *Asociacion Espanalo de Empresas de la carne (ASOCARNE) v. Council* [1994] ECR II-871
[9] As it can be seen in the cases cited above.
[10] OJ P 013 , 21/02/1962 P. 0204 - 0211
[11] JO SHAW, *Law of the European Union,* 3rd ed., Palgrave Law Masters, 2000, p.506, hereinafter SHAW

interest in the contested measure. Both criteria must be fulfilled, but direct concern is easier to be found**.** A measure is of direct concern if it affects directly the legal situation of the applicant and leaves no discretion to the addressees of the measure who are entrusted with its implementation. This implementation must be automatic and result from Community rules without the application of other intermediate rules[12]. It must be examined whether there was any discretion on the part of Member State, between the decision and the applicant[13].

With regard to individual concern, the case *Plaumann v. Commission*[14] was a seminal one. It set the tone of restrictive interpretation for the entire system of the judicial review in the Court of Justice[15]. Plaumann, German importer of clementines, brought an action against the decision of the Commission addressed to Germany, refusing it authorisation of lowering of the duty on the imports of clementines into the European Community from 13 to 10 %. The Court held that in order to have the right to bring an action for annulment of a decision which is not addressed to them, the defendants must show that they are individually concerned if the decision

> 'affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually (…)'[16].

In the Court's view the fact that Plaumann is affected by the decision as an importer of clementines, so by the reason of his commercial activity, which may at any time be practised by any person, does not distinguish him in the relation to the contested decision as in the case of the addressee.

The test from *Plaumann* has been applied in many later cases. This test is very restrictive and very difficult to meet. The Court requires the applicants to belong to a closed category, membership of which is fixed and ascertainable at the date of the adoption of the contested measure[17]. In case *Toepfer v. Commission*[18] an applicant, the importer of cereals, was held to be individually concerned, because the contested decision concerned only those importers,

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[12] PAUL CRAIG & GRAINNE DE BURCA, *EU Law. Text, cases and materials*, 3rd ed., Oxford University Press, Oxford 2003, p.518, hereinafter, CRAIG & DE BÚRCA
[13] Cases 41-44/70, *NV International Fruit Company v. Commission* [1971] ECR 411, case 62/70 *Bock v. Commission* [1971] ECR 897, case 69/69 *Alcan v. Commission* [1971] ECR 385, et al.
[14] Case 25/62 *Plaumann v. Commission* [1963] ECR 95
[15] SHAW, p. 509
[16] *Plaumann v. Commission* at para.107
[17] SHAW, p. 508

who applied for an import license (refused by the decision) on a particular day. Similarly in the case *Bock v. Commission*[19] the Court found the applicant to be individually concerned:

> 'A decision is of individual concern to a person when the factual situation created by the decision differentiates him from all other persons and distinguishes him individually just as in the case of the person addressed. A trader is therefore individually concerned by a decision authorizing a Member State to reject the application for an import license made by the said trader prior to the adoption of the decision if the State makes use of that authorization'.

However in case *Spijker Kwasten v. Commission*[20] there was no individual concern because

> 'a decision addressed to certain Member States with the purpose of authorizing them not to apply community treatment for a fixed period to imports of products originating in a non – member country and in free circulation in the other Member States is not of individual concern to the only importer of the products in question established in the member states to which the decision is addressed since it concerns the importer merely by virtue of his objective status as an importer in the same manner as any other trader who is, or might be in the future, in the same situation'.

The Court concludes that the contested decision is therefore a measure of general application which has an effect on the categories of persons defined in an abstract manner.

It can be observed from the case law that the Court focuses on the particular areas of EC law, like agriculture and customs. The Commission is strongly involved in administering these fields. It is argued that the Court is reluctant to interpret in a less strict manner the concept of individual concern because of the subject matter of the cases. This would be the way to protect the Commission's scope for discretionary determinations, particularly under Common Agricultural Policy[21]. However, the EU has extended the range of its activities and yet the approach of ECJ and CFI has not changed[22].

Challenging the regulations which are in fact decisions

The wording of Article 230 (4) may indicate that individuals may only challenge regulations which are in essence decisions. The applicant would have to prove that a formally general

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[18] Cases 106-107/63 *Toepfer v. Commission* [1965] ECR 405
[19] Case 62/70 *Bock v. Commission* [1971] ECR 897
[20] Case 231/*82 Spijker Kwasten v. Commission* [1983] ECR 2559
[21] PAUL CRAIG, 'Legality, Standing and Substantial Review in Community Law', 14 *Oxford Journal of Legal Studies* 1994, p.507

measure is in fact a bundle of individual measures – decisions, of a direct and individual concern for him. In practice, this appears to be almost impossible. The Court has not always had the same approach to the issue and adopted initially two kinds of tests: closed category test and abstract terminology test[23]. The former applies to cases concerning a completed set of past events, e.g. in case *International Fruit Company BV v. Commission*[24], a group of importers of apples applied for an import license to the relevant national authorities. They informed the Commission who enacted the regulation laying down the rules for those applications. This regulation was applicable only to those who made import applications in the previous week and therefore the Court found that the measure was a bundle of individual decisions.

The general criterion applied by the Court was however the abstract terminology test, which can be explained on an example of a case *Calpak*[25]. The applicants, producers of William pears, sought to annul a regulation which calculated the production aid on the basis of one marketing year, while the previous regulation used as a basis a three-year period. The applicants claimed that they were a close and definable group, the members of which were known to, or identifiable by the Commission. However, the Court held that

> 'The nature of the measure as a regulation is not called in question by the mere fact that it is possible to determine the number or even identity of the producers to be granted the aid which is limited thereby'.

So even in cases where it was possible to identify the exact, small group of persons affected by the regulation, the actions were dismissed[26].

The modern jurisprudence on challenging decisions and regulations

Another important moment is marked by the Court's judgment in *Codorniu*[27] . The applicant sought to challenge the regulation which reserved the word "crémant" as a designation for

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[22] Case T-83/92 *Zunis Holdings S.A. v. Commission* [1993] ECR II-1169, case T-117/94 *Associazione Agricoltori della Provincia di Rovigo et al. v. Commission (Po Delta)* [1995] ECR II-455 (confirmed on appeal by ECJ, case C-142/95 P [1996] ECR I-6669

[23] CRAIG & DE BURCA, p. 495

[24] Cases 41-44/70, *International Fruit Company BV v. Commission*, [1971] ECR 411

[25] Cases 789-790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] ECR 1949

certain sparkling wines produced in some regions of France and Luxembourg. The applicant, a Spanish wine producer, had a trade mark including the word "crémant" for his products, registered since 1924. The Court held that in this case even though the measure was of a general legislative nature which concerned the traders in a general way, it did not prevent it from being of individual concern to the applicant (the reasoning applied previously by the Court in anti-dumping cases, e.g. *Allied Corporation*[28] and *Extramet*[29]*, see* more at page 14). Codorniu was affected by the measure by reference to certain specific attributes, because he has registered his trade mark and used it traditionally before and after the registration, therefore the reservation of a trade mark for France and Luxembourg interfered with his intellectual property right.

This case signalized that ECJ and CFI may view the things a bit differently. Even if the regulation is a 'true' regulation according to the abstract terminology test, an individual may nevertheless be individually concerned by it[30]. In this respect, this judgment went beyond previous approaches to standing questions. It was remarkable for the Court's willingness to allow private applicants to challenge true regulations and its unusually liberal approach to the question of individual concern. It seems that the Court intended to give authoritative guidance on the standing of private applicants to challenge Community acts under Article 230 (4)[31].

Codorniu exemplifies the "infringement of rights" approach to the meaning of individual concern. The applicant was held to be individually concerned because it possessed a trade mark right which would have been overridden by a contested regulation. Another case, *Antillean Rice*[32] is an example of a "breach of duty" approach[33]. The applicants challenged a decision fixing a minimum import price for certain goods. The CFI held that the measure in question was in fact of a legislative nature, but nonetheless the applicants were individually concerned, because the relevant Article on which the contested decision was based meant that

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[26] Case 101/76 *KSH v. Commission*, [1977] ECR 797, cases 103-9/78 *Beauport v. Council and Commission*, [1979] ECR 17
[27] Case C-309/89 *Codorniu SA v. Commission*, [1994] ECR I-1853
[28] Cases 239, 275/82 *Allied Corporation v. Commission*, [1984] ECR 1005
[29] Case C-358/89 *Extramet Industrie SA v. Council*, [1991] ECR I-2501
[30] CRAIG & DE BURCA, p. 495
[31] ANTHONY ARNULL, 'Private Applicants and the Action for Annulment since Codorniu'*,* 38 CMLR 2001, p.51-2, hereinafter, Private Applicants…
[32] Cases T- 480 and 483/93, *Antillean Rice Mills NV. V. Commission*, [1995] ECR II-2305
[33] CRAIG & DE BURCA, p. 496

the Commission was under a duty to take account of the negative effects of such a decision introducing safeguard measures on the position of those such as the applicant.

However, the situation of private applicants has not changed significantly after *Codorniu* because the Court will still have applied the *Plaumann* test and the applicants still have to show individual concern. The situation did not change either when the applications under Article 230 (4) were passed to the Court of First Instance. In case *Kik v. Council and Commission*[34] the applicant tried to challenge the language regime instituted by the Council Regulation establishing the Community trademark and the Community trademark office, which excluded his language (Dutch). The Court did not grant him standing and refused to accept the application of Article 6 of ECHR, even though it has done it in several other occasions. The court stated that Article 6 does not preclude the rules for standing under Article 230 (4). There is a number of other cases where CFI recognized that a regulation may be of an individual concern to a trader but it applied the *Plaumann* test in the same manner as above[35].

The case *Greenpeace*[36] (which concerned a decision) confirmed that *Codorniu* did not lead to a test for standing based on adverse impact, judged on the facts of the case[37]. This is an example of a "pure *Plaumann*" approach[38]. In this case the Court did not agree that the residents of Canaries, Greenpeace International and some local environmental organizations showed to be individually concerned by the decision addressed to Spain, granting aid under the regional development programme for the building of two power stations in Canary Islands. The applicants specifically invited the CFI to take a liberal approach on the question of admissibility and to accept that standing could derive, not only from purely economic considerations, but also from the concern for the protection of environment. They claimed that in each Member State associations set up for the protection of environment which were sufficiently representative of the interests of their members, or which satisfied certain formalities, were entitled to challenge administrative decisions alleged to breach rules on environmental protection. The CFI, however, refused to take into account the fact that the interests involved were environmental and not economic, so that the principles of *Plaumann*

[34] Case T-107/94 *Kik v. Council and Commission* [1995] ECR II-1717
[35] Case T-472/93 *Campo Ebro Industrial SA v. Council* [1995] ECR II-421, case T-489/93 *Unifruit Hellas EPE v. Commission* [1994] ECR II-1201 et al.
[36] Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) v. Commission*, [1995] ECR II-2205
[37] ARNULL, Private Applicants… , p.31

should not apply in their full rigour[39]. It concluded that the individual applicants were affected by the contested measure in a same way as anyone living, working or visiting the area concerned and that they could not therefore be considered individually concerned. The same was true for the applicant associations since they had been unable to establish any interest of their own distinct than that of their members, whose position no was different from that of individual applicants. On appeal to the Court of Justice[40] Advocate General Cosmas counselled against any modification of the existing case law which would permit environmental associations to be treated as a special case, because otherwise "natural persons without *locus standi* under the fourth paragraph of article 173 [now 230] of the Treaty could circumvent that procedural impediment by setting up an environmental association. Moreover (…) the number of environmental associations capable of being created is, at least in theory, infinite"[41]. The Court declared that the interpretation of the fourth paragraph of Article 173 of the Treaty, which the Court of First Instance applied in concluding that the appellants did not have *locus standi,* is consonant with the settled case-law of the Court of Justice[42].

Standing for applicants belonging to specific categories or in cases in particular areas

In particular areas (e.g. anti-dumping, competition, state aids) the Court has treated the rules for standing in a different, more generous way. It is argued that after *Codorniu* the difference is not that big anymore, but nevertheless it still exists[43].

In *Piraiki – Patriaiki*[44] some of the applicants who sought to challenge the decision permitting France to restrict imports of cotton yarn from Greece were given standing, because the Greek Act of Accession required the Commission to take into account, before adopting such a measure, the interests of those who were bound by contractual agreements. Those persons were then differentiated from the others who would also suffer prejudice, but did not belong to the category of persons specified in the Act of Accession. The case *Sofrimport*[45] was similar because the Court found that the regulation imposing protective measures which

[38] CRAIG & DE BURCA, p. 498
[39] SHAW, p. 511
[40] Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) v. Commission,* [1998] ECR I-1651
[41] at I-1689
[42] *see* note 40, at para.27
[43] CRAIG & DE BURCA, *p.* 503
[44] Case 11/82 *Piraiki – Patraiki v. Commission* [1985] ECR 207
[45] Case C-152/88 *Sofrimport Sarl v. Commission* [1990] ECR I-2477

restricted the import of Chilean apples to the Community gave some specific protection to importers whose apples were in transit when the measure was adopted.

In *Les Verts*[46] the Court granted standing to the French Green Party on the policy grounds: applicants had a good case on merits and there was no obvious alternative route whereby the applicants could enforce the principle of equality in the context of the Parliament's organization of its own business[47]. The applicant, a political party, sought the annulment of two measures adopted by the Parliament on the reimbursement of expenses incurred by parties taking part in the 1984 elections. It argued that the limitation of the Court's jurisdiction only to the acts of the Commission and the Council under Article 164 (now Article 220) gives rise to a denial of justice. The Parliament did not contest the admissibility of the action, accepting that the Court could review also acts of other institutions. The Court agreed with the parties and made a series of significant statements about the nature of the system established by the Treaty and the importance of the judicial review[48]. It began by emphasizing that

> '[…]the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty'[49]

The Treaty

> 'established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'

and although Article 173 (now 230) only mentioned the acts of the Council and the Commission, the general scheme of the Treaty was to make a direct action available against any measure adopted by the institutions, which was intended to have a legal effect[50]. The reason the Parliament was not expressly mentioned in article 173 was that, in its original form, the Treaty gave it no power to adopt measures intended to have legal effect *vis-à-vis* third parties[51]. The Court concluded that

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[46] Case 294/83 *Partie Ecologiste 'Les Verts' v. Parliament* [1986] ECR 1339
[47] SHAW,, p. 512
[48] ARNULL, *The European Union and Its Court of Justice,* Oxford EC Law Library, 1999, p.35, hereinafter, The European Union…
[49] *Les Verts,* at para.23
[50] *ibidem*
[51] ARNULL, *The European Union,* p. 35

> 'An interpretation of Article 173 [now 230] of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in article 164 [now 220] and to its system'[52].

and admitted that an action for annulment may lie against the measure adopted by the European Parliament. The implications of the judgment in *Les Verts* for private applicants will be discussed below.

In competition law cases the ECJ has also been more liberal with regard to standing. In *Metro*[53] an applicant, disappointed with a decision of the Commission addressed to SABA concerning the legality of the distribution system operated by SABA, was granted standing to challenge this decision. The position of the applicants is often made easier because they are involved in the process and they would normally contest the decisions addressed to them by the Commission[54].

In the area of state aid the applicants are not afforded the same consideration as in the competition law cases, but the Court has proved to be liberal also here (cases *COFAZ*[55], *William Cock*[56], *Phillip Morris Holland*[57]).

In the area of anti-dumping a company which initiated the complaint about dumping, but is unhappy with the resultant regulation may be granted standing as in the case *Timex*[58] , as well as producers of products which are subject to anti-dumping duty (at least insofar as they were identified in the measure adopted by the Commission or involved in the preliminary investigation), e.g. case *Allied Corporation*[59], or finally the importer of the product against which the anti-dumping duty has been imposed as in the case *Extramet*[60]. In this case the applicant was the largest importer of the product forming the subject-matter of the anti-dumping measure and at the same time, the end-user of the product (calcium). The only Community producer of calcium refused to supply raw material to the applicant and also claimed that its supplies from outside the EC were being dumped in the EC. As a result of this

[52] *Les Verts,* at para.25
[53] Case 26/76, *Metro-SB-Großmärkte GmbH & Co KG v. Commission* [1977] ECR 1875
[54] SHAW, p. 518
[55] Case 169/84 *COFAZ v. Commission* [1984] ECR 391
[56] Case C-198/91 *William Cock plc v. Commission* [1993] ECR I-2486
[57] Case 730/79 *Phillip Morris Holland BV v. Commission* [1980] ECR 2671
[58] Case 264/82 *Timex Corporation v. Council and Commission* [1985] ECR 849
[59] *Allied Corporation*, *supra* note 28

a dumping duty was imposed and this was this duty which Extramet then sought to have annulled. In an Opinion in this case Advocate General Jacobs made very clear that he considered that the EU system of judicial review needed to be able to offer a substantive investigation of this type of case. The court ruled that

> 'measures imposing anti-dumping duties may, without losing their character as regulations, be of individual concern in certain circumstances to certain traders who therefore have standing to bring an action for their annulment'[61]

Extramet ruling seemed to herald a new era of a more liberal approach the standing of individuals, especially when it was confirmed three years later in *Codorniu.* However, the Court failed to acknowledge that it represented a departure from earlier case law or to explain its implications outside the dumping context.

Critical analysis of the strict interpretation of the notion of 'individual concern' in Article 230 (4) EC

The Plaumann test

The test for individual concern applied by the Court since *Plaumann* has been strongly criticised because it is a real hurdle in gaining access to the Court, preventing private cases from being heard. The exceptions to the rule are few and casuistic, e.g. retroactive legislative measures, certain procedural rights accorded to a party by virtue of its participation in the formal procedure leading to the adoption of a contested act and protection of previously acquired rights, which the institution has to take into account when adopting an act. The problem arises especially with regard to self-executing acts of general application which have direct legal effects without the adoption of national legal measures (act of transposition) or Community legal measures (act of implementation). Such an act may concern an individual directly and if individual alleges its illegality, he would have to breach the Community law and then appeal against the sanction which the national courts could impose on him by reason of that breach in order to contest the validity of an allegedly illegal measure before the national court. The situation where an individual affected by a Community measure, in order to contest its validity, has to breach the rules invoked by the measure and invoke their legality

[60] *Extramet, supra* note 29

in the framework of the procedures open to him, is perceived by many as the denial of adequate judicial protection[62].

The *Plaumann* test can be criticised on both pragmatic and conceptual grounds[63]. First of all, it is economically unrealistic, because if there is a limited number of firms pursuing certain activity, this is not fortuitous and their number will not grow suddenly. The firms that are established in the market can satisfy its current demand, and if the demand rises rapidly, they will normally import more of the product. Therefore an argument that the activity of importing clementines (as in Plaumann's case) can be undertaken by any person and that for this reason the applicant is not individually concerned, is unconvincing[64]. The applicant is most likely never to succeed, except in a very limited category of retrospective cases, because it can always be argued that others may engage in the trade at some moment. Moreover, the applicant in *Plaumann* case was not granted standing because he belonged to an open category of applicants and therefore he was not individually concerned. Open category is the one in which the membership is not fixed at the time of a measure, as opposed to the closed category, the membership of which is fixed, and those who belong to it are individually concerned. This argument is subject to criticism both in practical terms – because it rules out the standing for any applicant, even if there is only a very limited number presently engaged in this trade, on the grounds that others may undertake the trade thereafter, and in conceptual terms – if we regard a category as open merely because others might notionally undertake the trade at issue, then any decision with a future impact would be unchallengeable because the category would be regarded as open[65].

The rationale behind the Court's approach - critique

The restrictive application of standing rules under Article 230 has long been subject to debate. It seems that the court has been influenced by a number of factors, some connected with the perceived intentions of the authors of the Treaty and some with the Court's own view of the needs of the Community system[66]. Several authors attempted to explain the Court's approach.

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[61] *Extramet*, *supra* note 29 at para.14
[62] *ibidem*
[63] CRAIG & DE BÚRCA, p.489
[64] *ibidem*
[65] *ibidem*
[66] ARNULL, *The European Union…*, p.47

One of the arguments can be found in the early case *Producteurs de Fruits*[67] where the Court stated that:

> 'the system (…) established by the Treaties of Rome lays down more restrictive conditions then does the ECSC Treaty for the admissibility of applications for annulment by private individuals.'

Therefore the answer can be found in the language of the Treaty – Article 230 (4) is based on the assumption that it would not be a good policy to allow private parties to challenge measures such as regulations and decisions addressed to the Member Sates[68]. However, this consideration seems unconvincing today, when the Community has developed in a way unforeseen by the authors of the Treaty[69]. The question is not whether the Treaty imposes limits on standing, but whether the interpretation of those limits could be considered to be overly restrictive. The judgement in *Codorniu* gave some hope to the applicants, and therefore the idea that the Court's case law in this area is simply an application of the intent of the Treaty, and that it renders further evaluation of the policy issues underlying this case law unnecessary, does not suffice[70].

In any case, whatever the intent of the authors of the Treaty, the Community has moved on. There is a need for a control of illegality by and through individual actions, and it is as important in the Community context as in the national legal systems. The Court has proved to be capable of adapting the Treaty articles to meet the current needs of the Community in other areas and it is difficult to see why it would not be able to do the same with regard to Article 230 (4).

Another explanation may be that the Court's ultimate goal is to 'function as a kind of supreme appellate court for the Community' and therefore the apparently restrictive interpretation of Article 230 (4) is a 'part of a far-reaching plan to bring about a modification of the Community's judicial system'[71]. However, it is difficult to accept it as a main motivation of the Court, because the restrictive case law was developed in the 60's at the time when the Court was not faced with severe work-load problems[72]. Moreover, it is not

[67] Case 16/60, *Producteurs de Fruits v. Council,* [1962] ECR-901
[68] CHRISTOPHER HARDING, 'The Private Interest in Challenging Community Action', (1980) 5 ELRev., p.354, hereinafter, HARDING
[69] *ibidem*
[70] CRAIG & DE BURCA, p.513
[71] HJALTE RASMUSSEN, 'Why Is Article 173 Interpreted Against Private Plaintiffs?', (1980) 5 ELRev., p.112
[72] HARDING

convincing that the Court would like to limit the range of applicants who can challenge a measure under Article 230 with the intention of forcing claims through Article 234, when it would have very little control over the range of applicants using the latter Article, or the types of norms challenged thereby (as the individual can for example base his claim on the fact that the norm in question is contrary to a directly applicable Treaty article)[73].

Hartley[74] has proposed another explanation, focusing on the subject matter of the cases involved. Almost all cases in which the Court rejected the claim as inadmissible, concerned challenges to norms made pursuant to Common Agricultural Policy. In this field the Commission and the Council have to make difficult discretionary choices. The Court has accepted that the Community institutions have a considerable degree of choice as to how to balance the objectives which are to be pursued. The choice will not always please all those concerned and therefore countless claims are possible, given the number and scope of decisions and regulations made by the Community in the context of the CAP. The Court wanted to avoid the situation in which it would have to second-guess the discretionary choices made by the other institutions, and in order to do it, it could either adopt a restrictive standard of review (overturn choices made by the original decision-makers only in case of manifest error) or use strict tests of standing to limit the number of such cases heard under Article 230[75], which engages less of its time. The argument, that the Court did not wish to be overloaded with large number of cases where the applicants seek to challenge the way that the Commission and the Council have exercised their discretion to make policy choices in the CAP is reinforced once one looks at the post-*Codorniu* case law, where the strictest interpretation of the *Plaumann* test of individual concern has been in the CAP cases, or other areas where discretionary choices are being made[76].

The subject-matter argument helps to explain the more liberal case law in the context of dumping, state aids and competition. First, the procedure in these areas does explicitly or implicitly envisage a role for an individual complainant, who can alert the Commission. The complainant may play a prominent role in the quasi-judicial assessment[77] of whether the alleged breach has actually occurred. Second, the interests of the Community in these areas

[73] CRAIG & DE BÚRCA, *p.511*
[74] T.C. HARTLEY, *The Foundations of European Community Law*, Oxford University Press, Oxford 1998, p.333-41, hereinafter, HARTLEY
[75] CRAIG & DE BURCA, p.514
[76] See e.g. *Greenpeace International v. Council*, *supra* note 36

can be stated less equivocally and this can be contrasted with the mainline cases in the CAP, where there are conflicting claims within the Community.

More recent work critiquing the approach taken by the Court has placed it within a framework of the broad-based challenge which standing poses for modern administrative law[78]. According to Arnull[79], any modern polity, which purports, like the European Community, to be based on the rule of law, must provide a mechanism for subjecting the activities of its legislative and executive bodies to judicial review. The effectiveness of such a mechanism depends to a large extent on the ease with which it may be used by private applicants. The more relaxed approach to standing rules promotes the proper functioning of the democratic process because it facilitates public participation in decision-making. The standing of an individual to challenge the acts affecting him may be considered a fundamental right and therefore an aspect of citizenship[80]. This should be especially relevant in case of the European Union, trying to get closer to citizens. The question of standing cannot be separated from the question of the EU's democratic deficit and consequently the role of the Court in the institutional structure[81].

Standing is also linked to broader questions of participation and intervention in the decision-making process. The greater the participation afforded to parties, when the initial decision was made, the greater the likelihood that such parties should be granted standing to challenge the resulting decision before the Court via the judicial review[82]. Participation is recognized as a way to legitimize the decision. It makes the decision-making more accessible to those affected and enables them to have a direct input into the decision reached. Finally, participation ensures transparency[83]. In this respect we have to note that the ECJ generally resists the connection between the fact of participation in the making of a legislative measure and standing, with an exception of the areas of dumping, state aids and competition. The participation does not lead to standing where a relevant Treaty Article does not provide for any intervention rights in the making of the original measure. Neither there is any general right to be heard before the adoption of Community legislation, the only obligations to

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[77] HARTLEY, p.364-9
[78] SHAW, p.520
[79] ARNULL, *The European Union…,* p.47
[80] *ibidem*
[81] C. HARLOW, 'Towards a Theory of Access for the European Court of Justice', (1992) 12 YEL 213
[82] CRAIG & DE BURCA, p. 516
[83] *ibidem,* p.517

consult are those laid down in the relevant Treaty Article on which the Community act is based[84]. Due to the nature of the link between the standing and participation it is difficult to expect the radical change in the approach to standing in the absence of a form of arrangement for administrative procedures which located the individual more centrally within those processes[85].

Importantly, the Court has continuously justified its restrictive approach on standing of individuals by reference to what the Court coins the 'complete system of remedies' created by the EC Treaty. The complexity of means for redress available under the Community law has for the first time been affirmed in a judgment in *Les Verts*[86]. Accordingly, no Community measure can escape judicial control as to its conformity with the Treaty as a measure may be controlled either through a direct action based on Article 230 (4), or through a preliminary ruling according to Article 234[87].

The Court argues that the restrictive interpretation of Article 230 (4) does not create a real lacuna in judicial protection since individuals have the possibility to file actions against national application or implementation measures of the Community before the national courts, which have the obligation, according to Article 234 and the courts case law since *Foto-Frost*[88], to refer questions concerning the validity of EC acts to the ECJ. This way to attack the allegedly illegal Community acts can be very useful for private applicants, given the number of actions lodged before the national courts by private parties. In case of the preliminary ruling procedure, the Court has enlarged the limits of its jurisdiction beyond those established by the provisions of the Treaty, in order to attain a system of judicial protection without any gaps. This contrasts with the Court's approach in the area of actions brought by private parties under Article 230 (4), where the Court has preferred to abide by the restrictive wording of that legal provision[89]. The shortcomings of the Court's approach will be discussed below together with the evaluation of the extent to which the principle of effective judicial protection is in reality ensured in the European Community.

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[84] *ibidem*
[85] SHAW, p.520
[86] Case 294/83, *Les Verts v. Parliament* [1986] ECR-1339
[87] DOMINK HANF, 'Facilitating Private Applicants' Access to the European Courts? On the Possible Impact of the CFI's Ruling in *Jégo – Quéré',* GLJ vol.3 No.7 1 July 2002
[88] Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR-4199
[89] ALBORS-LLORENS, p.182,

CHAPTER II

THE ALTERNATIVE WAYS OF REDRESS FOR INDIVIDUALS – IS THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION ENSURED?

The principle of effective judicial protection in the European Community

The notion of effective judicial protection

The principles of effective judicial protection and effectiveness of EC law are one of the main notions in the jurisprudence of the European Court of Justice. The Court sees them as fundamental for the legal system of the Community and often uses them as an explanation of its reasoning or as an argument in its judgments. They justify directly or indirectly the principle of primacy and direct effect of EC law, the obligations imposed on the national courts to interpret the law in accordance with EC law and to apply the interim measures not provided by national legal systems, the non-contractual liability of Member States and the obligation to ensure the judicial means of protection of the rights of individuals[90].

ECJ does not define the notion of effective judicial protection. It states only that this is one of the fundamental principles of the Community legal order, derived from the common constitutional traditions of the Member States and confirmed in the European Convention on the Protection of Human Rights and Fundamental Freedoms. The principle was first enunciated in 1986 in a case *Johnston*[91]. On the basis of the case law of the ECJ it can be

[90] NINA PÓŁTORAK, 'Kto jest związany zasadą efektywnej ochrony prawnej – uwagi na tle orzecznictwa Trybunału Sprawiedliwości w sprawie „Unión de Pequeños Agricultores'*, Kwartalnik Prawa Publicznego* 3/2002, p.187-204 (Who Is Bound By the Principle of Effective Judicial Protection – Some Remarks to The Judgment of the ECJ In the Case *Unión de Pequeños Agricultores*) text available in Polish; hereinafter PÓŁTORAK

[91] Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651 at para.18: The principle of effective judicial control laid down in article 6 of Council Directive 76/20, a principle which underlies the constitutional traditions common to the Member States and which is laid down in articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms , does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purposes of protecting public safety are satisfied to be treated as

concluded that this principle means the obligation to protect and safeguard all the rights conferred upon individuals by EC law[92]. The principle of effective judicial protection should be respected both by the institutions of the Member States and of the Community. All the institutions applying EC law should take into account this principle with regard to individuals and the particular role is that of the national courts and the European Court of Justice. ECJ ensures that the institutions of the Community enforce the rights of individuals but it also controls the way in which the Member States fulfil the obligations imposed on them by the Treaty, among others the enforcement of the rights of individuals. However, these are mainly the national courts that are responsible for the protection of the rights of private persons, because they can seize them directly (and they are not able to seize ECJ against the institutions of the Member States.

Double standards in the realization of the principle of effective judicial protection by the European Community?

Despite the fact that the principle of effective judicial protection should be ensured both by the Member States and the institutions of the Community, it can be seen from the case law of the Court, that in reality this applies only to the obligations of the Member States[93]. In fact the Court has been very strict with Member States' courts whenever they did not comply with the requirement of effective judicial protection. It is therefore striking that the judicial protection of private parties in the EU today appears to be worse then in the judicial systems of the Member States. This means that the more Member States transfer sovereign powers to the Community, the less the guarantees of judicial protection are. Combined with the lack of complete parliamentary control of EC acts, the difficulty of exercising judicial control on these acts puts the action of EC institutions to some extent outside the traditional system of "checks and balances" characteristic of democratic states[94].

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conclusive evidence so as to exclude the exercise of any power of review by the courts . The provision contained in article 6 to the effect that all persons who consider themselves wronged by discrimination between men and women must have an effective judicial remedy may be relied upon by individuals as against a Member State which has not ensured that it is fully implemented in its internal legal order.

[92] PÓŁTORAK

[93] *ibidem*

[94] HENRY G. SCHERMERS AND DENIS F. WAELBROECK, *Judicial Protection in the European Union,* Kluwer 2001, p.451, hereinafter, SCHERMERS & WAELBROECK

It can be affirmed that the subjects of EC law enjoy actual judicial protection which allows them to assert their legitimate rights thanks to one of the procedures provided for by the Treaty. Nevertheless, the actual protection is not the same as the effective judicial protection. The latter goes further then the former and presupposes the voluntary and dynamic move, which ensures the effectiveness of the protection and allows the beneficiary of the right to initiate the action, gives him the possibility to institute and carry the proceedings within the coherent system characterized by the respect of justice. This requires an effort and constant attention to interpret the texts in a way which serves best the recognition of this principle[95].

Individuals enjoy the actual protection of their rights in the Community but the appreciation of the Court, especially with regard to requirements for admissibility of actions, have contributed to the sometimes excessively narrow interpretation of the provisions of the Treaty, and therefore some of the judgments seem to be more bold or less innovatory then the others. The details which distinguish between the implications of particular cases, even these which highlight the differences between them, prove that the passage from the actual to effective protection should be ameliorated in the perspective of security and efficiency of law[96].

The necessity to achieve the effective judicial protection is an objective attributed to the Community judges. This is an obligation imposed on them by the human rights legislation, which applies in all Member States. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that

> In the determination of his civil rights and obligations (…), everyone is entitled to a fair and public hearing (…) by an independent and impartial tribunal established by law.

Article 13 of the Convention further provides that

> Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy, even against public authorities.

On the basis of these articles, the European Court of Human Rights has on several occasions condemned unduly restrictive legal systems in relation to actions for annulment brought by

[95] GEORGES VANDERSANDEN, 'La protection juridictionnelle effective: une justice ouverte et rapide?', *in* Marianne Dony & Emmanuelle Bribosia (eds.), *L'avenir du système juridictionnelle de l'Union Européenne*, Institut d'Etudes Européennes, Brussels 2002, p.119-154 , hereinafter VANDERSANDEN

individuals against normative acts. Article 13 ECHR can be considered as a part of the Community legal order in application of Article 6.2 of the Treaty on the European Union (TEU) according to which

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Since fundamental rights are an integral part of the general principles of which the Court ensures observance, an effective review of the legality should also be guaranteed in the Community[97].

The *ubi ius ibi remedis* principle envisaged in Article 47 of the Charter of Fundamental Rights of the EU also calls for the opening of the conditions on admissibility. Article 47 recognizes that

> Everyone whose rights and freedoms guaranteed by the Union are violated has the right to an effective remedy before a tribunal (…).

The notion of a "tribunal" should be interpreted largely to comprise both the national and Community jurisdiction. This makes the requirement of effective judicial protection more difficult to realize because of the autonomy which these systems enjoy, being nevertheless linked together by the principle of subsidiarity. This principle is, as it has been said, an objective to be achieved by the dynamic application of the ways of redress, which takes into consideration the specifics of the Community legal order and the respect of the fundamental rights. The Community jurisdiction has been aware of that and it has aimed to remove the obstacles, existing in the national legal orders with regard to ways of redress or procedural rules, in order to safeguard the rights conferred upon individuals by EC law in an enlarged and – to the extent in which it is possible – unified national procedural area[98]. In its case law ECJ has affirmed *inter alia* the right to access to justice, the development of the internal ways of redress (even the creation of the new procedures) of which the best example may be the liability of the Member State in case of violation of EC law[99], the development of the

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[96] *ibidem*
[97] SCHERMERS AND WAELBROECK, p.450
[98] VANDERSANDEN, p.123
[99] Cases C-46/93 and C-48/93, *Brasserie du Pêcheur* and *Factortame,* [1996] ECR I-1029

procedural laws of the Member States in a way which ensures the most complete application of EC law.

The same principle applies, when the Community legal order is itself subject to the control of the Court. However, the approach is not the same. From the perspective of the enforced effectiveness of judicial protection the interpretation by the Community courts of the conditions for admissibility of actions brought by individuals under Article 230 (4) seems to be overly restrictive. Many applicants faced almost insurmountable difficulty in proving direct and individual concern and therefore some of them invoked the lack of effective judicial protection. Unfortunately, this argument has been constantly rejected by ECJ and recently by CFI. In an order in case *Molkerei Großbraunshain and Bene Nahrungsmittel v. Commission*[100] CFI stated that it was not

> 'legally impossible for an applicant to address himself to a national court which could, if appropriate, make a reference to the Court of Justice for a preliminary ruling under Article 177 of the Treaty [now Article 234] on the validity of the regulation'

and declared the action on annulment inadmissible. In an order in another case, *UPA v. Council*[101] CFI decided that the applicant

> 'cannot be regarded as individually concerned by Regulation No 1638/98 by reason of lack of effective legal protection, that is to say, because there are no legal remedies under national law which make it possible, if necessary, to review the legality of the contested Regulation by means of a reference for a preliminary ruling under Article 177 of the Treaty (now Article 234 EC). The principle of equality for all persons subject to Community law in respect of the conditions for access to the Community judicature by means of the action for annulment requires that those conditions do not depend on the particular circumstances of the judicial system of each Member State'.

The same principle was announced by the CFI in its judgment in the case *Salamander and others v. Parliament and Council*[102] :

> '[T]he action for annulment brought by the applicants cannot be declared admissible because of the lack of adequate judicial protection which is said to follow from the absence of national remedies which might allow the validity of the directive to be reviewed by means of a reference for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), since the principle of equality of conditions of access to the Community judicature by means of an action for annulment requires that those conditions do not depend on the particular circumstances of the legal system of each Member State, and from the fact that a reference for a preliminary ruling is less effective than a direct action for annulment, since that circumstance, even if proved, could not entitle the Court of First Instance to usurp the function

[100] Case T-109/97 *Molkerei Großbraunshain and Bene Nahrungsmittel v. Commission*, [1998] ECR.II-3533
[101] Case T-173/98, *UPA v. Council*, [1999] ECR II-3357
[102] Cases T-172/98, 175-177/98 *Salamander and others v. Parliament and Council,* [2000] ECR II-2487

> of the founding authority of the Community in order to change the system of legal remedies and procedures established by Articles 173 and 177 of the Treaty and by Article 178 of the EC Treaty (now Article 235 EC) and designed to give the Court of Justice and the Court of First Instance power to review the legality of acts of the institutions'.

In addition the Court finds that it does not appear that the applicants are deprived of all right of recourse against the possible consequences of a directive in question. They may in any event, if they consider themselves to have suffered damage flowing directly from that measure, challenge it in proceedings for non-contractual liability under Article 288 EC.

The recent orders of ECJ are of particular importance here. In joint cases *Area Cova v. Council* and *Area Cova v. Council and Commission* [103] the applicants dispute the effectiveness of a system of judicial protection requiring individuals first to choose a domestic remedy, coupled with the possibility of a reference for a preliminary ruling as to validity, in order to challenge the application of a Community regulation. Since such a reference is extremely hypothetical and the procedure provided for is very cumbersome, the remedy does not satisfy the requirements of effective judicial protection in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in conjunction with Article 6(2) of the Treaty on European Union. According to applicants, they could be guaranteed such protection only by a direct action brought under Article 230 of the EC Treaty[104]. ECJ answered in a way very similar to CFI underlining that

> 'it must be stated that the possibility for individuals to have their rights protected by means of an action before the national courts, which have the power to grant interim relief and, where appropriate, to make a reference for a preliminary ruling, as explained in paragraph 85 of the order under appeal, *constitutes the very essence of the Community system of judicial protection* [105]. Alongside the possibility, for those who comply with the conditions of admissibility laid down in the Treaty, of challenging a Community measure by bringing an action for annulment before the Community judicature, individuals have access to the legal remedies available in the Member States in order to assert their rights under Community law and the preliminary reference procedure enables effective cooperation to be established for that purpose between the national courts and the Court of Justice'.

According to the Court

> 'the circumstance that one of those remedies would not be effective in the present situation, even assuming it to be established, cannot constitute authority for changing, by judicial action, the system of remedies and procedures established by Articles 230, 234 and 235 of the EC Treaty which is designed to give the Community judicature the power to review the legality of acts of the institutions. It cannot in any event allow an action for annulment brought by a natural or legal

[103] Cases C-300/99 *Area Cova and others v. Council* [2001] ECR I-983 and C-301/99 *Area Cova and others v. Council and Commission* [2001] ECR I-1005
[104] *Area Cova, supra,* at para. 53
[105] emphasis added

person who does not satisfy the conditions laid down by the fourth paragraph of Article 230 of the Treaty to be declared admissible'[106].

The shortcomings of the Court's traditional approach: does the EC Treaty provide for a complete system of remedies?

The preliminary ruling procedure under Article 234 EC

The question is whether private parties can really choose between these two procedures or can they only bring proceedings before the national courts, with an objective to have a question about the validity of a Community act raised by these courts, when the procedure under Article 230 (4) is not available for them. Since the decision of the Court in the *TWD Textilwerke*[107] in 1994 the role of the system of preliminary rulings appears more then ever to be an alternative to annulment proceedings rather then a parallel method of review[108]. The litigants have been precluded form bringing Article 234 validity proceedings before national courts if they "without any doubt" would have been entitled to bring Article 230 (4) nullity review within the two month time-limit supplied by that provision. However this is not always clear for private parties to determine if they are among the class of litigants bound to act expeditiously and seek an Article 230 (4) remedy (because of the nature of the test for standing, which has changed over time)[109].

The advantage of the procedure set out in Article 234 is that the conditions for standing are less strict then in annulment proceedings. There are many examples in the case law of the Court where preliminary references from national courts have allowed individuals and undertakings to obtain a ruling on the validity of EC regulations and decisions that they could not possibly have challenged by means of direct action before the ECJ (or CFI), owing to their lack of *locus standi*[110]. The regulations concerned were general market regulations, and

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[106] *Area Cova, supra* note 103, at para.55
[107] Case C-188/92 *Textilwerke Deggendorf v. Germany,* [1994] ECR I-833
[108] ALBORS-LLORENS, p.185
[109] ANGELA WARD, 'Judicial Architecture at the Cross-Roads: Private Parties and Challenge to EC Measures Post – *Jégo – Quéré'*, *The Cambridge Yearbook of European Legal Studies*, vol.4, 2001, p.424, hereinafter, WARD
[110] See for instance case 101/76, *Koniklijke Scholten Honig v. Council and Commission* [1977] ECR-797 and case 125/77, *Koninklijke Scholten-Honig NV and others v. Hoofdproduktschaap voor Akkerbouwprodukten* [1978], ECR-1991, case 97/85, *Deutsche Lebensmittelwerke v. Commission* [1985] ECR-1331 and joint cases 133-136/85 *Walter Rau Lebensmittelwerke and others v Bundesanstalt für landwirtschaftliche Marktordnung,* [1987] ECR-2289

actions by non-privileged applicants would most probably have been declared inadmissible. These regulations infringed the general principles of law or Treaty provisions, or reflected the situations where the Community institutions have exceeded their powers. As the Community is based on the rule of law, they ought to have been reviewed by the Court of Justice[111].

The advantages for private parties of the Article 234 procedure and the creative role of the Court in this field do not however justify the statement, that this procedure not only provides for a suitable alternative to Article 230 (4) but is the main remedy available to private parties to protect themselves against the action of the EC institutions, and therefore the restrictive approach of the Court of Justice to the interpretation of Article 230 (4) has been a deliberate move to divert all applications to Article 234 of the EC Treaty[112]. Despite of all the advantages it is necessary to identify those situations, in which the proceedings under Article 234 are not a suitable alternative to a direct action, and where the parties may be left without a remedy[113]. First, the parties have no guarantee that the national court finds it necessary to refer the question to the Court of Justice, and cannot compel the national court to make that reference[114]. Second, for the applicants to be able to bring proceedings before the national court, with an intention of obtaining the ruling on the validity of a Community measure, there must be a national measure implementing the Community measure. In cases where the EC measure is directly applied to individuals and undertakings, without any intervention by the Member States, the applicants cannot bring proceedings before the national courts and the possibility of a reference to the Court of Justice is ruled out[115].

Finally, national court cannot declare the EC measure invalid, it can at the most issue an interim order suspending the application in the instant case of the EC measure in question, pending the ruling to the ECJ.

Additional problem arises in the field of new Community competences: a measure adopted under Title IV EC (visas, asylum and immigration) may only be a subject of preliminary ruling by the courts from whose decisions there is no judicial remedy. Therefore the hands of lower courts are tied and if we take into account time to wait for an appeal and time necessary

[111] ALBORS-LLORENS, p.187
[112] RASMUSSEN, *supra* note, p.114 and 122-7
[113] ALBORS-LLORENS, p.188
[114] Case 93/78, *Mattheus v. Doego* [1978] ECR-2203
[115] Case 30/64, *Sgarlata v. Commission,* [1965] ECR-215

for Article 234 procedure, we may see that there is a problem with the compliance of art 68 (1) with article 47 of the Charter and article 6 and 13 of ECHR (fundamental right to effective judicial review)[116].

The procedure under Article 234 is alleged to be insufficient in comparison with the review by the CFI under Article 230. It has been recently criticised by the Advocate General Jacobs in his Opinion in case *Union de Pequeños Agricultores*[117], which will be discussed in details later.

The action for damages under Article 288 (2) EC

The second action which may be regarded as an alternative to Article 230 (4) is the damages procedure under Article 288 (2). An individual can seek compensation before the CFI for any loss suffered, which was caused by the EC institutions. In cases *Lütticke v. Commission*[118] and *Zuckerfabrik Schoeppenstedt v. Council* the Court acknowledged the autonomy of the action for damages. The act which allegedly infringed applicant's rights does not have to be annulled before the action for damages can be brought. However, if the action concerns the regulation, the illegality needs to be of special gravity[119]. In *Zuckerfabrik Schoeppenstedt* the Court formulated the "*Schoeppenstedt* formula" according to which there is no liability of the Community "unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred". The Court has applied this formula in later cases and as it is not easy to meet the test, the action has been successful in very few cases. It seems that the Court has followed a very restrictive approach in the access of non-privileged applicants to the action for annulment and to the action for damages[120]. In the latter case, however, the cases are admitted and examined with regard to merits, but then they are dismissed as unfounded. Moreover, in principle the applicants should first seek redress before Member State courts via the Article 234 validity procedure, but this requirement only applies if such national proceedings would have afforded the applicant with an effective remedy[121].

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[116] WARD, p.416
[117] Opinion of Advocate General Jacobs, delivered on 21 March 2002 in case C-50/00, *Union de Pequeños Agricultores v. Council* [2002], ECR I-6677
[118] Case 4/69, *Lütticke / Commission,* [1971],ECR-325, case 5/71 *Zuckerfabrik Schoeppenstedt v. Council*, [1971]ECR-975
[119] ALBORS-LLORENS, p.205
[120] *ibidem*
[121] Case 281/82, *Unifrex v. Council and Commission* [1984], ECR-1969

The CFI has recently shed light on the circumstances in which litigants will not be bound to exhaust Member State remedies before instituting Article 288 (2) review[122], but the precise content of the rule is not yet determined.

When considering whether action for damages can be an alternative to action for annulment, one should not forget that the former has an essentially different purpose[123]. Although the finding of the illegality of the measure at issue is one of the conditions for a successful action for damages, a private applicant obtains the compensation and not a formal ruling on the validity or legality of the Community act. In special circumstances, when the individual has suffered an economic loss and there are no national implementing measures, which makes an action before national courts impossible, procedure under Article 288 (2) may be a suitable alternative. The advantages of this procedure are that there is no requirement of individual and direct concern and the limitation period is five years (in 230 (4) – 2 months).

It can be concluded that both on the side of ECJ and CFI there is a tendency to send the applicants back to the national judge, increasing the number of cases decided by him and reinforcing his responsibility, in the name of the 'global' system of community jurisdictional protection. At the same time, in absence of the national means of redress, the Community courts do not provide in return for admissibility of actions on annulment because they claim that they cannot put themselves in the position of the Community legislator. In saying so they entrench themselves behind their own restrictive interpretation of direct and individual concern, which is in essence exceptional in the entirety of national and international administrative jurisdiction and therefore it could – and even should – be changed. It seems that the Community jurisdiction has achieved its limit by rejecting constantly all the arguments in favour of wider opening of direct actions for individuals[124].

[122] CaseT-30/99, *Bocchi Food Trade International v. Commission* (Rec.2001,p.II-943), case T-18/99, *Cordis v. Commission* (Rec.2001,p.II-913), case T-52/99, *T. Port v. Commission* (Rec.2001,p.II-981)
[123] *ibidem*

CHAPTER III

A "REVOLUTION WHICH HAS NOT YET TAKEN PLACE"? RECENT JUDGMENTS OF COURT OF FIRST INSTANCE IN *JÉGO-QUÉRÉ* AND EUROPEAN COURT OF JUSTICE IN *UNIÓN DE PEQUEÑOS AGRICULTORES*

The judgment of the Court of First Instance in *Jégo-Quéré* – a revolution in the Community system of judicial protection?

On 3rd of May 2002 the Court of First Instance delivered a judgment in case *Jégo-Quéré & Cie v. Commission*[125]. This judgment was seen by many as a revolutionary step with regard to the conditions on admissibility of action on annulment by private parties. As stated in a press release after the judgement, CFI, conscious of the need to ensure effective protection of legal rights for European citizens and businesses, redefined the rules governing individual access to Community courts[126]. In doing so, CFI adopted to a big extent the Opinion delivered by Advocate General Jacobs in case *Unión de Pequeños Agricultores (UPA)* pending at the same time before the ECJ[127].

Jégo-Quéré & Cie S.A. is a French fishing company operating on a regular basis in the waters south of Ireland. It owns four fishing boats over 30 meters in length and uses nets having a mesh of 80 mm, which have been banned by a new Community regulation[128]. It applied to the Court of First Instance for annulment of two provisions of the regulation in question, which require fishing vessels operating in certain defined zones to use nets having a minimum mesh for beam trawling. The Commission argued that the Court of First Instance should declare the action inadmissible on the basis of lack of individual concern, required under Article 230 (4) EC. Whilst not denying that the contested provisions are of direct concern to Jégo-Quéré, it

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[124] VANDERSANDEN, p.134
[125] Case T-177/01 *Jégo-Quéré & Cie v. Commission,* [2002] ECR II-2365
[126] Court of Justice, Press and Information Division , Press Release No 41/02, http://www.curia.eu.int/en/actu/communiques/cp02/aff/cp0241en.htm
[127] Case C-50/00 *Unión de Pequeños Agricultores*, [2002] ECR I-6677
[128] Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture, OJ 1992 L 389, p. 1 (as amended)

claimed that the applicant is not individually concerned, inasmuch as the rules governing mesh sizes apply equally to all operators fishing in the Celtic Sea and not just to that operator.

CFI first stated that the contested regulation was a measure of general application because its provisions are "addressed in abstract terms to undefined classes of persons and apply to objectively determined situations"[129] and not a "bundle of individual decisions" as argued by the applicant. Second, the Court applied the "Plaumann test" and found that the applicant is not individually concerned by the regulation according to this test. Neither did it qualify for special rules on standing established in cases *Extramet* and *Codorniu*. For these reasons the Court concluded that the applicant could not be individually concerned within the meaning of Article 230 (4), as interpreted in the case law.

However, Jégo-Quéré argued that if it were not given standing under Article 230 (4), it would be deprived of its right to access to a court, as guaranteed by Articles 6 and 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights. The CFI examined different aspects of the right of individuals to access to the Community courts. In this respect, the CFI recalled that the Court of Justice had itself confirmed that access to courts was "an essential element of a Community based on the rule of law"[130]. Therefore, CFI deemed it "necessary to consider whether, in a case such as this, where an individual applicant is contesting the lawfulness of provisions of general application directly affecting his legal situation, the inadmissibility of the action for annulment would deprive the applicant of the rights to an effective remedy"[131]. The Court answered this question in affirmative for three reasons. First, there was no national implementing measure required, which meant that the applicant could not make use of the validity procedure under Article 234. CFI cited AG Jacobs at this point:

> The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice[132].

Secondly, CFI did not find action for damages under Article 288 (2) adequate, because it would not result in the removal of measures attacked by Jégo-Quéré. Moreover, this action

[129] *Jégo-Quéré, supra* note 125, at para.23
[130] *ibidem,* at para.41
[131] *ibidem,* at para.43
[132] *ibidem,* at para.45

has a different character – the Court has to establish whether there was a sufficiently serious breach of rules of law intended to confer rights on individuals, while proceedings under Article 230 aim only at the review of the legality of an act. Thirdly, CFI agreed with AG Jacobs that there was

> 'no compelling reason to read into that notion [of individual concern] a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee'[133]

CFI decided that neither Article 234 nor Article 288 (2) guarantee the right to an effective remedy, at least with respect to Community measures of general application directly affecting applicant's legal situation. However, the CFI rightly pointed out, that in no case could these circumstances result in an action being considered admissible, without being covered by the conditions of Article 230 (4). Consequently, the CFI concluded that the notion of individually concerned must be reconsidered and proposed a new test for "individual concern":

> '[I]n order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard'[134].

On this basis claim was declared admissible.

The wording of *Jégo-Quéré* indicates that the CFI deliberately took the possibility to reconsider the notion of individual concern in an attempt to widen the possibilities for individuals to challenge Community measures, and thereby further increase the legitimacy and credibility of Community law. This was most probably a carefully prepared step. CFI has always put emphasis on individual procedural guarantees and legal remedies[135]. *Jégo-Quéré* clearly falls in the tendency of the Community Courts to enhance the protection of procedural and substantial fundamental rights, what has recently been exemplified by the case *Carpenter*[136].

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[133] Opinion of Advocate General Jacobs in *UPA*, *supra* note 117 at para.59
[134] *Jégo-Quéré,supra* note 125, at para.51
[135] KRONENBERGER & DEJMEK
[136] Judgment of 11 July 2002, Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, [2002] ECR-I-06279: the principle of freedom to provide services laid down in the EC Treaty, read in the light of the fundamental right to respect for family life, precludes a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

It is also important to remember that judges of the Court and its Advocates Generals has for a long time expressed their concern about the restrictive interpretation of the wording of Article 230 (4)[137]. In a report prepared before the Intergovernmental Conference, which led to the adoption of the Treaty of Amsterdam, ECJ explicitly addressed the issue whether the right to bring an action for annulment under former Article 173 EC (Article 230), which individuals enjoy only with regard to acts of direct and individual concern to them, could be considered as sufficient to guarantee effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the Community institutions[138]. This was clearly a signal sent by the Court to the Member States that it is aware of a lacuna in the system of judicial protection and yet it is not able to undertake the reform on its own. Unfortunately, Member States did not endorse this initiative and the rules concerning standing were left unchanged after the Treaty of Amsterdam.

The Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores* – why is it possible and desirable to modify the *Plaumann* test?

The departure from the *Plaumann* formula in *Jégo-Quéré* is particularly clear[139]. The new definition was apparently inspired by the Opinion of Advocate General Jacobs in *UPA*, which goes somewhat further then the ruling of CFI in *Jégo-Quéré.* In the very outset of this opinion, AG Jacobs underlined that the issue at stake in *UPA* was whether the notion of individual concern laid down in Article 230 (4) needed to be reconsidered. He expresses the broader sentiment, that the Article 230 (4) procedure is manifestly more appropriate for examining the validity of all EC measures of general application than reference proceedings under Article 234, because the institution which adopted the impugned measure is a party to the proceedings from beginning to end and because a direct action involves a full exchange of pleadings, as opposed to a single round of observations, followed by oral observations before the Court. The availability of interim relief under Articles 242 and 243 EC, effective in all

[137] See for example MANCINI & KEELING, 'Democracy and the European Court of Justice' 57 (1994) MLR 175, 188.
[138] Report of the Court of Justice on certain aspects of the application of the Treaty on the European Union, Luxembourg, May 1995, http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/
[139] VINCENT KRONENBERGER & PAULINA DEJMEK, 'Locus Standi of Individuals before Communit Courts Under Article 230 (4) EC: Illusions and Disillusions after the *Jégo-Quéré* (T-177/01) and *Unión de Pequeños Agricultores* (C-50/00) judgments', ELF 5/2002, p.257-264, hereinafter, KRONENBERGER & DEJMEK

Member States, is also a major advantage for individual applicants and for the uniformity of Community law[140]. Further, the public is informed of the existence of the action by means of a notice published in the Official Journal and third parties may, if they are able to establish a sufficient interest, intervene in accordance with Article 37 of the Statute of the Court. In reference proceedings interested individuals cannot submit observations under Article 20 of the Statute unless they have intervened in the action before the national court. That may be difficult, for although information about reference proceedings is published in the Official Journal, individuals may not be aware of actions in the national courts at a sufficiently early stage to intervene[141].

Most importantly, Advocate General contended, that it was

> 'manifestly desirable for reasons of legal certainty that challenges to the validity of Community acts be brought as soon as possible after their adoption'[142].

This made the two-month limit supplied by Article 230 (4) preferable to Article 234 validity proceedings, which "may in principle be questioned before the national courts at any point of time"[143]. The strict criteria for standing for individual applicants under the existing case-law on Article 230 EC make it necessary for such applicants to bring issues of validity before the Court via Article 234 EC, and may thus have the effect of reducing legal certainty.[144]

For this reason Advocate General Jacobs prescribed as follows the test for individual concern:

> 'a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests'.

Unlike the CFI in *Jégo-Quéré,* Advocate General would not oblige litigants to prove definite and immediate effects. Even the potential for substantial adverse effects would be sufficient to satisfy "individual concern" under the test prescribed by him. Clearly, Advocate General intended to open the possibility to bring an action under Article 230 (4) to an even larger number of situations then the CFI has done in *Jégo-Quéré.* The usual mechanism for

[140] Opinion of AG Jacobs in UPA, *supra* note 117 at para.46
[141] *ibidem* at para.47
[142] *ibidem* at para. 48
[143] *ibidem* at para. 48
[144] *ibidem* at para. 48

challenging the legality of EC measures of general application would thus shift from national courts and validity review, to the Article 230 (4) nullity procedure[145].

The excellent and exhaustive opinion of Advocate General Jacobs in *UPA* gives several reasons for which the criterion of "individual concern" should be reconsidered. It is worth underlining what are the most important motives:

The first one relates to the necessity to put an end to the complexity and lack of coherence of the case law developed after *Plaumann*. In the past years, ECJ and CFI have developed what may be called exceptions to the rigidity of the *Plaumann* formula in several situations (*see supra* at p.12 et seq.). However, this is far from being consistent, what can be seen for example in cases involving anti-dumping Community regulations[146].

The second reason is that the Court of Justice has not in the past refrained from interpreting broadly other provisions of Article 230. This was particularly the case in respect of the standing of the European Parliament in action for annulment of acts adopted by the other institutions (*Les Verts*[147]). The reasons given by the Court to justify it might also have been thought to justify a relaxed approach to standing of natural and legal persons. This would also help consolidate the rule of law[148]. The Court has also recognized that regulations and directives, although they are legislative measures, could also be challenged by private persons. This is an additional sign of a progressive approach to the interpretation of Article 230. Hence, it is not impossible to adopt a wider interpretation of the criterion of 'individual concern' laid down in Article 230.

The judgment of the European Court of Justice in *Unión de Pequeños Agricultores* – is the time ripe for political action?

[145] WARD, p.432
[146] See more: KRONENBERGER & DEJMEK
[147] *Les Verts, supra* note 46
[148] ANTHONY ARNULL, 'The Action for Annulment: A case of Double Standards?' *in* D.O'KEEFFE & A. BAVASSO (eds), *Judicial review in the European Union*, Kluwer 2000, p.185, hereinafter *The Action for Annulment…*

The judgment in *Jégo-Quéré* was indirectly overruled by a judgment of ECJ in *UPA* of 25 July 2002. In this case a trade association of small Spanish agricultural businesses, Unión de Pequeños Agricultores, brought an appeal against the order of 23 November 1999 of the Court of First Instance dismissing its application for partial annulment of a regulation on the common organisation of the market in oils and fats, including the olive oil markets. The Court of First Instance held that application to be manifestly inadmissible, on the ground that the members of the association were not individually concerned by the provisions of the regulation at issue. The Court of Justice has made it clear that the issue to be decided in this appeal is whether a person, who is not individually concerned by the provisions of a regulation, has standing to bring an action for annulment on the sole ground that this is required by the principle of effective judicial protection, given the alleged absence of any legal remedy before the national courts [149]. In case of UPA there was no national implementing measure required which would allow the applicants to initiate the proceeding before the national court, in order to make use of the preliminary ruling procedure under article 234. It was not even possible to infringe the national law by the applicants, which could result in bringing an action against them to the national court and consequently, to address ECJ by the national court with a preliminary question. On this basis the applicants argued that the denial of standing under Article 230 (4), coupled with the lack of alternative remedies, is contrary to the principle of effective judicial protection.

The delivery of this judgment was expected to set aside the legal uncertainty raised by the cohabitation of the traditional case law of the Court of Justice on one hand, and the new definition of "individual concern" initiated by the Court of First Instance in *Jégo-Quéré*[150]. It seemed that ECJ had three options: not to change the interpretation of Article 230 (4), change it according to the Opinion of AG Jacobs and CFI's ruling in or *Jégo-Quéré* or allow for an exception to the current interpretation, i.e. grant the standing to those individuals, who do not fulfil the requirements for *locus standi* under the current case law and yet, according to the principle of effective judicial protection, need to be given the standing, because otherwise they would be deprived of the access to justice [151]. However, ECJ adopted a different approach. Although the judgment involves some hesitations in legal reasoning and may not answer all the questions raised by *Jégo-Quéré,* the full court decided to remain loyal to the

[149] Court of Justice, Press and Information Division , Press Release No 66/02 http://www.curia.eu.int/en/actu/communiques/index.htm
[150] KRONENBERGER & DEJMEK

Plaumann formula[152]. The Court made it clear that whatever criticisms can be made to the existing Community system of legal remedies, the Court cannot disregard the wording of Article 230 (4). This is the sole competence of Member States to change this provision. For the time being, if the condition of "individual concern" is not fulfilled

> 'a natural or legal person does not, *under any circumstances*, have standing to bring an action for annulment of a regulation'[153].

The statement of the Court seems clear, but the following consideration might have indicated that there is a hypothetical possibility to departure form the *Plaumann* test, if it were demonstrated, in a particular case, that no effective legal remedy existed under Community law:

> 'The European Community is, *however*, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights'[154].

The Court recalled that the possibility to grant individuals access to Community Courts when there is no other effective judicial remedy was already indicated in *Greenpeace*[155]. In this case the Court refused standing to an association for the protection of the environment against a Community directive because of lack of individual concern, but it considered nevertheless the applicant's argument concerning the lack of judicial remedy.

It should not be concluded, however, that the Court admits that when no effective judicial remedy is available to an individual, an exception to the rigid interpretation of the concept of individual concern could be considered. In an order delivered on 8 August 2002[156] the President of the CFI referred solely to the ECJ's judgment in *UPA* in order to reject an action as inadmissible. The particular emphasis put on paragraph 37 of the *UPA* judgment indicates that *Plaumann* bears no derogation. *Jégo-Quéré* is then clearly overruled and even totally ignored, first by ECJ in *UPA* and then by the President of the CFI[157]. This is so even before the European Court of Justice has decided on the appeal brought by the Commission against

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[151] PÓŁTORAK, p.194
[152] KRONENBERGER & DEJMEK
[153] *UPA*, *supra* note 127, at para.37 (emphasis added)
[154] *UPA*, *supra* note 127, at para.38 (emphasis added)
[155] *Les Verts, supra* note 36
[156] Case T-155/02 , *VVG International and others v. Commission* [2002] ECR II-3239
[157] KRONENBERGER & DEJMEK

this judgment on 17 July 2002[158]. On this occasion it should be noted that in this case Advocate General Jacobs was also the author of the opinion, issued on 10 July 2003[159]. He stated that in the light of the ruling of ECJ in *UPA* the Commission must succeed in its plea, that the CFI had erred in law when it departed from the traditional interpretation of individual concern and, subsequently, it was in breach of Article 230[160]. AG Jacobs underlined that it follows clearly from *UPA* that the traditional interpretation of individual concern must be applied regardless of its consequences for the right to an effective judicial remedy and even though he finds this outcome unsatisfactory, this is the unavoidable consequence of the current Court's interpretation of Article 230 (4)[161]. He finished by stating that as the law now stands, the Commission's appeal must succeed[162]

In *UPA* the Court recalled that the Treaty had established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts[163]. Individuals not eligible for action for annulment should refer to national courts which may make use of the preliminary ruling procedure. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection[164]. At one point ECJ agreed with the Opinion of AG Jacobs in *UPA*[165]:

> '[I]t is not acceptable to adopt an interpretation of the system of remedies, such as that favoured by the appellant, to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures[166]'.

It is interesting to examine the way of reasoning of the Court. It avoids asking a question about the effectiveness of alternative ways of redress, considering their proper object. It prefers the generalizing approach, whereby the effectiveness is ensured starting from a moment when an individual has access to the judge. The principle of effectiveness is realised

[158] Case C-263/02 P *Commission v. Jégo-Quéré*
[159] Opinion of Advocate General Jacobs in case Case C-263/02 P *Commission v. Jégo-Quéré,* text available on the website of the European Court of Justice http://www.curia.eu.int
[160] *ibidem* at para.42
[161] *ibidem* at para.46-47
[162] *ibidem* at para.48
[163] *UPA, supra* note 127, at para.40
[164] *ibidem* at para.41
[165] Opinion of AG Jacobs in *UPA*, *supra* note 117 at para.50-53

exclusively through a preliminary ruling procedure. The Court reaches an exactly opposite result then CFI in *Jégo-Quéré* in considering this procedure as a substitute for an action for annulment. CFI evoked the concept of the Community based on the rule of law, where access to justice is an essential element which must by guaranteed by the complete system of remedies provided for by the Treaty. It should be then considered to what extent an individual disposes of the right to an effective judicial remedy before Community and national courts. If it were to be shown that the protection offered by the national court is not effective enough, the conditions applicable to the admissibility of action for annulment should be moderated to guarantee the completeness of the jurisdictional system[167].

The ECJ uses contrary premise in its reasoning: it assumes the completeness of the system of remedies in order to achieve the division of jurisdictional competences. This allows the Court to assign to the Member States the exclusive responsibility for guaranteeing the right to effective judicial protection to individuals. The Court departures from the notion of jurisdictional system described in paragraph 23 of a judgment in *Les Verts*[168] . The argument of the Community based on the rule of law is invoked solely to affirm that all the acts of the institutions are subject to control with regard to legality. Moreover, the Court can state that if an individual does not have access to the Community jurisdiction, he should be able to find the effective protection of his rights before the national court[169]. The ruling in *Les Verts* was the first unequivocal affirmation by the Community jurisprudence of the completeness of the system of legal remedies. Thus the Court attaches to it a particular significance and postulates the completeness of the means of redress, stating that the system of legal remedies provided for by the Treaty suffice to guarantee the effectiveness of the protection of individuals under the Community law. It does not, however, verify this effectiveness, but assumes that the jurisdictional system is complete. UPA raised not only the question of the right to access to judge, but also of the adequacy of the recourse. In their opinion the Community court was the only suitable one to decide the case, because of the particular situation of the applicants[170].

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[166] *UPA*, *supra* note 127 at para.43

[167] FREDERIQUE BERROD & FLAVIEN MARIATTE , 'Le pourvoi dans l'affaire Unión de Pequeños Agricultores c/Conseil : le retour de la procession d'Echternach', *Europe (Editions du Juris-Classeur)* Octobre 2002, hereinafter, Berrod & Mariatte, p.7-13

[168] *Les Verts*, *supra note* 36

[169] BERROD & MARIATTE

[170] *UPA*, *supra* note 127, at para.26

This argument was also raised and developed by the Advocate General. The Court, however, did not decide to examine this issue[171]. Further, ECJ states that

> '[A]ccording to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually (…), such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts'[172].

ECJ agreed that it is possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the Treaty, but it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force[173]. Therefore, according to the principle of sincere cooperation envisaged in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act[174]. By saying that the Court has indirectly admitted that the 'complete system of remedies' has lacunae, which it has never done before[175].

The argument of ECJ that it is not possible to amend Article 230 (4) through its interpretation, even if there are functional arguments in favour of this solution, is not convincing. The interpretation suggested by Advocate General Jacobs is not an interpretation *contra legem* and it only requires the change of the current jurisprudence with regard to Article 230 (4). This provision does not define the notion of an act, which concerns an individual "directly and individually". This definition is given solely by the case law of ECJ. Neither the interpretation proposed by Advocate General, which would encompass all the acts which for certain reasons have or may have adverse effects for individual, nor the definition adopted by Court of First Instance in *Jégo-Quéré,* according to which an act concerns a person individually if it affects his legal position, in a manner which is both definite and immediate,

[171] BERROD & MARIATTE
[172] *UPA*, *supra* note 127 at para.44
[173] *ibidem* at para.45
[174] *ibidem* at para.42
[175] PÓŁTORAK, p.196

by restricting his rights or by imposing obligations on him, are not contrary to the wording of Article 230 (4)[176]. Admittedly, UPA's proposal to give standing to individual in case of lack of alternative legal remedies may be considered as interference into the wording of Article 230 (4), but at the same time it aims at safeguarding the principle of effective judicial protection. ECJ many times used this principle to justify its judgments which went beyond the wording of a Treaty. Hence, even if it is acknowledged that different than the current understanding of Article 230 (4) would modify its content, it is difficult to understand why is ECJ so unwilling to do so. ECJ has itself interpreted EC law extensively or it has created norms which do not have basis in EC legislation. Even in *UPA* ECJ imposed on Member States an obligation not expressed directly in the Community legal order, when it obliged them to ensure that individuals which do not have standing in action for annulment, have access to national ways of redress allowing for referring the case to ECJ. This is not the same as an obligation to provide national procedures for claims arising out of the Community legal order, because not these claims are here at stake, but the way to realize the provision of Article 234 (the possibility to address ECJ by a national court with a request for preliminary ruling). Clearly, there are no grounds for this obligation in Article 234. However, ECJ did not hesitate to enlarge the meaning of Article 234, arguing at the same time that it is not competent to do the same in case of Article 230[177].

The Court's ruling in *UPA* "placed the ball squarely back in the court of the governments of the Member States and both judicial and political arms thereof"[178]. The main practical consequence of *Jégo-Quéré* and the Opinion of Advocate General Jacobs in *UPA* rests with intensification of pressure on national courts and Member State political actors, to address and resolve the problems with judicial architecture. With regard to the latter, the Court has sent a clear signal that any weaknesses of the current system of challenging the Community acts will not be corrected via case law. They can only be addressed by a Treaty revision. This is an important landmark in EU constitutional jurisprudence, because the ECJ established a clear boundary with respect to its constitutional responsibilities[179].

[176] *ibidem*, p.197
[177] *ibidem*
[178] WARD, p.442
[179] *ibidem*

Chapter IV

THE DEBATE OVER A FUTURE CONSTITUTIONAL TREATY AND THE POSSIBLE CHANGES TO THE RULES ON *LOCUS STANDI* OF INDIVIDUALS

It may be argued that the European Court of Justice decided the *UPA* case in a way presented above taking into consideration the works carried at that time by the Convention on the Future of Europe on a constitutional treaty of the European Union. In a momentum such as it is now and in view to the prospective enlargement, the Court took the opportunity to refrain from deciding on an issue so sensitive for it as the standing of private applicants and firmly stated that the change can only be done in a political process. The incorporation of the Charter of Fundamental rights into the new constitutional treaty provides a forceful new reason for introducing a reform to Article 230[180] (*see* p.24).

The Convention did not set up a Working Group on judicial remedies and this question was taken up by Working Group II 'Incorporation of the Charter/ Accession to the ECHR'. It examined the question whether the currents system of judicial remedies for individuals against acts of the institutions needs to be reformed in the light of the fundamental right to effective judicial protection as recognized by case law of the Court of Justice and restated in Article 47 of the Charter of Fundamental Rights. This task had been assigned to the group in its mandate[181] and it was further developed in a document CONV 116/02 'Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR'[182]. Nevertheless some members of the Convention expressed their concern that it was necessary to look seriously at the implications

[180] GRÁINNE DE BÚRCA, 'Fundamental Rights and Citizenship' in: BRUNO DE WITTE (ED), *Ten Reflections on the Constitutional Treaty for Europe,* e-book published in April 2003 by Robert Schumann Centre for Advanced Studies, European University Institute in Florence, p. 26
http://europa.eu.int/futurum/documents/other/oth020403_en.pdf

[181] See point 3 of doc. CONV 72/02 of 31 May 2002: 'the Working Group will have to decide whether to amend the fourth paragraph of Article 230 of the EC Treaty in order to extend the scope of direct appeals by individuals to the Court of Justice, or indeed to introduce a new form of appeal for the protection of fundamental rights, or whether it considers it preferable to maintain the existing system and leave it to case law to refine it',
http://register.consilium.eu.int/pdf/en/02/cv00/00072en2.pdf

[182] CONV 116/02, 18 June 2002, http://register.consilium.eu.int/pdf/en/02/cv00/00116en2.pdf

that certain proposals made within the Convention might have for the operation of the Court of Justice. It was also considered important that the Court of Justice and the Court of First Instance be given an opportunity to express their views on matters concerning them, which were being discussed within the Convention. The Praesidium therefore thought it advisable to set up a "discussion circle" on the operation of the Court of Justice. This circle should in particular look at matters on which the Convention had not yet adopted fixed positions and could explore amongst others whether the wording of the fourth paragraph of Article 230 EC concerning direct appeals by individuals against general acts of the Institutions should be amended and whether these acts should also encompass acts of agencies or bodies set up by the Union[183].

Members of the Convention were asked to consider whether article 230 (4) should be amended to extend the conditions of admissibility for direct actions by individuals, and if so, how? Would it be better to allow case law to define the conditions of admissibility, taking into account the right to effective judicial protection? Finally, would it be appropriate to establish a new direct form of legal action to protect the fundamental rights of individuals, along the lines of certain national constitutional procedures?

Generally three possible solutions on the Treaty level were proposed[184]. One was to introduce a special remedy based on alleged violations of fundamental rights, similar to the ones existing in some Member States. The second was to enshrine the obligations of Member States to provide for effective rights of action before their courts. Finally, the third proposal was to amend Article 230 (4), in order to alleviate the rigidity currently resulting from the condition of 'individual concern'. All these proposals were discussed during the meetings of the Working Group and the result of the discussion was presented to the Convention in a Final Report of the Working Group II[185].

[183] CERCLE I CONV 636/03, 25 March 2003 'Framework of proceedings', Annex to the Final report of the discussion circle on the Court of Justice
[184] WG II, Working Document 21, 'The question of effective judicial remedies and access of individuals to the European Court of Justice' http://european-convention.eu.int/docs/wd2/3299.pdf

Special remedy based on alleged violations of fundamental rights

Constitutional complaint (*Verfassungsbeschwerde*, *recurso de amparo*, *skarga konstytucyjna*) is directly linked with the protection of the rights of individuals. Judicial review procedures, initiated by public organs, do not provide individuals with a direct access to the court. Some legal systems make up for this by introducing a separate and special procedure through which an individual, who exhausted all remedies possible in all instances (the complaint has a subsidiary character), can apply directly to the constitutional court. The only basis for a complaint can be an infringement of the constitutional rights and freedoms of a particular applicant. The constitutional complaint in this sense was first introduced in Austria in 1867[186].

It has been proposed for some time already to introduce a Community action for the protection of fundamental rights. It would consist of the introduction of a new special action enabling individuals to challenge Community acts, including those of general application (i.e. of legislative or 'regulatory' character) directly before the Court of Justice. The causes of action would however be limited to alleged violations of the applicant's fundamental rights. Models of such an action are to be found in the law of certain Member States, e.g. Germany or Spain, and also in Poland. They will be presented below with special regard to the rules on standing of individuals.

In Germany Article 93 I No. 4a of *Grundgesetz* provides that every citizen is entitled to make a constitutional complaint to the Bundesverfassungsgericht regarding alleged violations of their basic rights or certain rights provided for in *Grundgesetz*, by the action of public authorities. This procedure has proved to be a valuable tool for the protection and assessment of the scope of basic rights and it is taken seriously by citizens. At the same time it can be regarded as having a "filtering effect" in favour of the ECHR as the number of complaints to the Court in Strasbourg decrease while the number if complaints filed before the Bundesverfassungsgericht rises[187]. The procedure is subject to a number of preconditions before it can be set in motion, in order to avoid its abuse. The complaint is first examined as

[185] Document CONV 354/02, Final Report of Working Group II, 22 October 2002 http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf

[186] LESZEK GARLICKI, *Polskie prawo konstytucyjne. Zarys wykładu,* 4th ed, Warsaw 2000, p.381, hereinafter GARLICKI

[187] NIGEL FOSTER & SATISH SULE, *German Legal System and Laws,* 3rd ed, Oxford University Press, 2002, p.242

to its admissibility (*Zulässigkeit*). The act attacked must be of the public authority (Act of State, *Akt der öffentlichen Gewalt*), which includes all acts taken by the executive, judiciary, and legislature (administrative acts, court decisions and legislative acts)[188]. The applicant has *locus standi* (*Beschwerdebefugnis*) when his basic right has been infringed directly and immediately by the Act of State, and he must be prejudiced personally by it at the moment of filing the complaint; the possibility of an infringement in the future does not entitle a person to file a *Verfassungsbeschwerde*. The requirement of a direct infringement means that where a statute is the basis of a restriction of the rights of the applicant, the admissibility depends on whether a restriction takes effect by the law itself, or by an implementing administrative act. Statutes rarely affect individuals, but often applicants allege damage as a result of judicial or administrative action based on an allegedly unconstitutional law. The law is therefore reviewed indirectly. In case of infringements caused by administrative acts, the applicant must have been addressed personally[189].

In Spain the constitutional complaint is called an 'individual appeal for protection' (*recurso de amparo*) and its aim is to protect the citizens against violations by any public power of the fundamental rights and public liberties protected at Part I, Chapter II, Articles 15 to 29 of the Spanish Constitution. These rights include *inter alia* access to justice. According to the Constitution "any citizen may make a claim to the liberties and rights recognized in Article 13 and the first Section of the Second Chapter (…) through the recourse before the Constitutional Court" (Article 53 (2)) and the Constitutional Court is competent to hear "appeals against violation of the rights and liberties referred to in Article 53 (2), in the cases and forms to be established by law" (Article 161(1) (b)). The procedure of *amparo* is further regulated by Title III, Articles 41 to 58 LOTC (Organic Law on the Constitutional Tribunal).

The recourse of *amparo* protects all the citizens vis-à-vis the violations of the rights and freedoms referred to in LOTC, resulting from provisions, legal documents or a single substantive behavior of the public authorities of the State, the autonomous Communities and other public bodies of territorial, corporative or institutional nature, as well as their officials or agents. The procedure of *amparo* is reserved solely to those claims which aim at restoring or to preserving the rights and freedoms for which this case was brought. The infringement of

[188] *ibidem*
[189] *ibidem*

right or freedom of the applicant must result directly and immediately from an act or omission of a public authority.

Article 79 (1) of Polish Constitution provides for a constitutional complaint (*skarga konstytucyjna*) available for everybody, whose constitutional freedoms or rights have been violated. This remedy is not restricted to Polish citizens as "everybody" means every natural person, and also a legal entity, to the extent to which it can be subject of constitutional rights and freedoms[190]. Chapter II of the Constitution contains the catalogue of rights and freedoms, which can be a basis for a complaint, and it must be specified, which right or freedom has been allegedly violated. Generally the Constitutional Tribunal does not accept claims alleging an infringement of general constitutional clauses (i.e. of a state founded on democracy and rule of law), but it may occasionally admit such an action. The complaint may only be filed against a normative act which was a ground for a judgment, against which the applicant appeals. It cannot be brought against an omission of a legislator. The applicant must have a legal interest in bringing an action, which means that there must have been a prejudice on his side.

Taking into consideration the features of a constitutional complaint, as it exists in the European legal tradition, the following wording of an eventual Community *Verfassungsbeschwerde* was proposed[191]:

> Fundamental Rights Complaint
>
> Any natural or legal person may contest a legal act of the Union due to a violation of any of the rights granted to it by the Charter of Fundamental Rights of the Union if no other judicial recourse is available for seeking review of the violation of the fundamental right in question. Specific requirements for the acceptance of a Fundamental Rights Complaint may be provided for.

The advocates of that model argued that it would leave intact the "normal" system of direct actions as established by Article 230 (4) focusing on individual acts of administrative character, and to add a special remedy of a truly constitutional character[192]. Critics however doubt whether it would be possible to draw a clear distinction between grounds of action relating to the protection of fundamental rights and other grounds of action for challenging

[190] GARLICKI
[191] CERCLE I Working Document 03, Contribution of Prof. Dr. Jürgen Meyer, 'Fundamental Complaint'. (proposal taken from "Freiburger Draft of the European Constitution" by Prof. Dr. Jürgen Schwarze)
[192] WG II, working Document 21, *supra* note at 184

the Community acts[193]. It is hard to identify fundamental rights cases without examining their substance. Such a reform would encourage the applicants to dress up cases as involving fundamental rights in order to take advantage of the more generous standing rules which would then apply[194]. Moreover, it would be difficult to determine the court with jurisdiction to take cognisance of a Community *Verfassungsbeschwerde*. With any jurisdiction other than the Court of Justice, there would be a possibility of a conflict of jurisdiction. If, on the other hand, the Court of Justice were to have jurisdiction, the introduction of a new remedy would complicate and lengthen the procedure before it[195].

The Court of Justice itself considers that there is no need to create such a remedy in order to improve the protection of fundamental rights in the European Union. According to the President of the European Court of Justice, Gil Carlos Rodrigues Iglesias, it seems that it is preferable to protect fundamental rights in the framework of existing remedies. If those remedies were found to be inadequate, it would then be appropriate to improve them in relation to the protection of all individual rights, not merely fundamental rights[196].

Similarly Advocate General Jacobs found the introduction of a special new remedy both unnecessary and inappropriate because issues of fundamental rights already arise in connection with the application of the ordinary remedies, often in combination with other issues (e.g. equal treatment, proportionality, etc) and can and should continue to be dealt with in principle within the habitual framework[197]. This does not mean, however, that the existing system of remedies is always adequate, what has been shown by Advocate General in an exhaustive manner in his Opinion in *UPA*.

As a majority of members of the Working Group II had reservations about the idea of establishing the special procedure for the protection of fundamental rights, the Group did not recommend it to the Convention in the Final Report[198].

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[193] WG II Working Document 19, Hearing of Judge Mr. Vassilios Skouris, 17 September 2002
[194] ARNULL, *The European Union ...,* p.49
[195] WG II Working Document 19, *supra* note at 193
[196] Document CONV 572/03, Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the "discussion circle" on the Court of Justice on 17 February 2003
[197] WG II Working Document 20, F.G. Jacobs, 'Necessary changes to the system of judicial remedies', note to the WG II presented by group member, Mr. Ben Fayot

Enshrining the obligations of Member States to provide for effective judicial remedies before national courts

This proposal was put forward by the European Ombudsman, Jacob Söderman[199]. It would not enlarge the rights of direct action of individuals before the Community courts as it merely codifies the existing case law of the European Court of Justice, but if it were to be expressed in the constitutional treaty, it would underline the Member States' responsibility in this area (respecting the principle of procedural autonomy) and facilitate such reforms to the national procedural systems as may prove necessary[200]. The advocates of this solution hoped that both the liberal interpretation by the Court of Article 230 (4) (if it were to stay not amended) and evolutions in the national procedural systems might over time help eliminate existing lacunae in judicial protection against the Community acts. Moreover, this solution respects the best the principle of subsidiarity. However, it might not necessarily permit to provide effective judicial protection in each individual case where a lacuna becomes manifest.

This solution, which is in accordance with the position adopted and recently reaffirmed by the Court of Justice[201], was supported by a large number of members of the Working Group. In their opinion the present overall system of remedies, and the "division of work" between Community and national courts it entails, should not be profoundly altered by a possible reform of Article 230 (4). For this reason some members of a Group strongly supported the idea to add to the Treaty a provision on the obligation of Member Sates with respect to ensuring effective judicial protection[202].

Such provision has been indeed inserted into Article I-28 of the draft Constitution, devoted to the Court of Justice, which now provides expressly that the Member States shall provide rights of appeal sufficient to ensure effective legal protection in the fields covered by Union law.

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[198] Document CONV 354/02, Final Report of Working Group II
[199] Document CONV 221/02,Contribution by Mr Jacob Söderman, European Ombudsman: "Proposals for Treaty changes", http://register.consilium.eu.int/pdf/en/02/cv00/00221en2.pdf
[200] WG II, working Document 21, *supra* note at 184
[201] *UPA*, *supra* note at 127

Possible amendment of the wording of Article 230 (4) EC

In its Final Report Working Group II did not propose an amendment to Article 230 (4) because there was no consensus among the Group members whether it is necessary to change this provision. Some members supported other ways to improve the judicial protection of individuals (discussed above) and therefore Group had recommended to the Convention further examination of this issue. Having regard to this, the Convention Secretariat presented a Working Paper with proposals of possible amendments to Article 230 (4) to the Discussion Circle I on the Court of Justice[203]. Members of the Circle were asked to consider whether or not amending Article 230 (4) is essential to guaranteeing individuals' rights to effective judicial protection of their rights under the Community legal order. The President of the Court of Justice stated in this connection that "the Court considers that the current system, which is based on the principle of subsidiarity in that the national courts in particular are responsible for protecting the rights of individuals, satisfies the requirements essential for the effective judicial protection of those rights, including fundamental rights"[204].

In his Opinion in *UPA* Advocate General Jacobs did not consider it essential to amend the Treaty and suggested that the Court interpret Article 230 (4) in such a way as to recognize that an individual is "individually concerned by a Community measure where the measure is or is likely to be substantially prejudicial to his interests". The Court of Justice, however, did not accept this interpretation and underlined that "it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the rights to effective judicial protection". This suggests that the changing of the conditions for admissibility of actions of individuals by the Court would not appear to be an option at this stage. As it has been mentioned, the President of the Court of First Instance has also made it clear that it is not possible to change the interpretation of Article 230 (4). He admitted that opinion among Members of CFI is divided as to whether the judicial protection afforded to individuals under Article 230 is adequate, but in any case the decision as to whether the conditions of

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[202] Final Report of Working Group II, *supra* note at 185
[203] CERCLE I Working Document I, 26 February 2003, 'Access to the Court of Justice for individuals – possible amendments to Article 230, paragraph 4, of the EC Treaty'
http://european-convention.eu.int/docs/wdcir1/8563.pdf
[204] Document CONV 572/03, *supra* note at 196

admissibility of actions for annulment laid down in the fourth paragraph of Article 230 EC should be made more flexible is, first and foremost, a matter of policy, which is the responsibility of the constituent authority to settle[205]. It may be then concluded that both Community Courts have now acknowledged the appropriateness or even the need for Treaty amendment at this point.

The circle has discussed different options with regard to the wording of Article 230 (4) proposed by the Working Group II. A majority of members were in favour of amending the fourth paragraph of Article 230 to read as follows:

> Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, and against [an act of general application][a regulatory act] which is of direct concern to him without entailing implementing measures.

The draft Constitution for Europe presented to the President of the European Council in Rome on 18 July 2003[206] contains the amended version of Article 230 (4) which becomes Article III-270 and reads as follows:

> Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against *a regulatory act*[207] which is of direct concern to him or her and does not entail implementing measures.

The addition of words "without entailing implementing measures" would serve to solve the problem of "self-executing" legal acts which under current rules cannot be contested before the CFI and where an individual must first breach the law before he can have access to the Court, whether the act concerned is a legislative or a non-legislative one (the mere deleting the words "although in the form of a regulation or a decision addressed to another person" would only change the wording and not the scope of Article 230 (4)). Private person would then be able to contest before the CFI a non-legislative act containing a prohibition, but requiring no implementing measure, if he can demonstrate that the act is of direct concern to him.

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[205] CERCLE I CONV 575/03, 10 March 2003, Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the "discussion circle" on the Court of Justice on 24 February 2003

[206] Final draft Constitutional Treaty of 18 July 2003, http://europa.eu.int/futurum/constitution/index_en.htm

If a phrase "act addressed to that person" replaces the phrase "decision addressed to that person", it will reflect the case-law of the Court which in a case *IBM*[208] held that in principle, it is not a form but a substance of a measure which is important to ascertain whether the measures in question are acts within the meaning of Article 230 EC.

The Convention has chosen words "regulatory act" to reflect the new hierarchy of legal acts of the Union to be established by the Constitution. The question of the amendment of Article 230 (4) is closely linked with this reform, introducing the distinction between the legislative and non-legislative acts. Currently the clear distinction between normative (general) acts and individual acts, which in the laws of Member States are considered administrative acts, does not exist in the European Union, due partly to the confusion of legislative and executive powers in the Council and the Commission. Regulations are normally identified as "Community laws" but some of them are in fact real laws, while the others clearly resemble administrative acts. On the other hand decisions, which are by definition individual administrative acts, can sometimes have a very general scope of application, especially in case of decisions addressed to the Member States[209]. The result of this confusion is that the same remedies are being used to assess the 'constitutionality' of legislative measures and the legality of administrative acts, whereas in the Member States there are separate remedies to control the conformity of laws with the constitution and to protect the individuals against any illegal action of public authorities[210]. Consequently, the *locus standi* conditions imposed on private parties who wish to challenge both types of acts are very different in national legal systems, and under the EC Treaty they merge into one.

The Convention proposed[211] to reduce the number of legal instruments in the European Union to six, out of which four (Law, Framework Law, Decision and Regulation) would be binding and two (Recommendation and Opinion) would be non-binding. Laws (ex-Regulations) and Framework Laws (ex-Directives) would have a legislative character, while Decisions and Regulations would be non-legislative acts (in case of a Regulation, a non-legislative act of general application). In addition, there would be delegated regulations (enacted by Commission to supplement or amend certain non-essential elements of the European law or

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[207] emphasis added
[208] Case 60/81, IBM v. Commission [1981] ECR-2639, par.9
[209] ALBORS-LLORENS, p.5
[210] *ibidem*
[211] Document CONV 424/02, 29 November 2002, Final Report of Working Group IX on Simplification,

framework law) and implementing acts (enacted by Member States or in certain cases by Commission or Council of Ministers).These instruments would be listed in Articles I-32 to I-36 of the Constitutional Treaty.

Some participants of the debate argued that individuals should not be able to challenge a legislative act before the Court of Justice, even though such a possibility existed in some legal orders[212]. The President of the Court of Justice emphasized that if a hierarchy of secondary legislation were to be introduced, "it would seem wise to adopt a restrictive approach with regard to actions against legislative acts and allow for a more open approach towards regulatory acts"[213]. Similarly, the President of the Court of First Instance expressed the desire to draw a distinction between legislative and regulatory acts by allowing the individuals to challenge the latter category of acts. With regard to the possibility of challenging legislative acts, the current conditions should be maintained "so as not to take a step backwards"[214]. Thus, in case of legislative acts, the requirement of "individual and direct concern" would still apply (as it is interpreted after *Codorniu*) and the approach with regard to administrative acts would be more open – the applicant would only have to demonstrate that he is directly concerned.

In the course of discussions the vocabulary used in article I-32 and following had been changed and the Secretariat of the Intergovernmental Conference, which is now discussing the draft Constitution, noted that the term "regulatory act" is not present anymore in the Constitution. Therefore it has proposed to change the wording of draft Article III-270 to ensure coherence between it and Articles I-32 to 36:

> Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a r*egulation or decision having no addressees*[215] which is of direct concern to him or her and does not entail implementing measures[216].

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http://register.consilium.eu.int/pdf/en/02/cv00/00424en2.pdf
[212] CERCLE I Working Document I, *supra* note at 203
[213] Document CONV 572/03, *supra* note at 196
[214] Document CONV 575/03, *supra* note at 205
[215] emphasis added
[216] Document CIG 4/1/03, 6 October 2003, Editorial and legal comments on the draft Treaty establishing a Constitution for Europe – Basic document, http://ue.eu.int/igcpdf/en/03/cg00/cg00004-re01.en03.pdf

According to IGC Secretariat regulations or decisions having no addressees are the 'obligatory non-legislative acts having general application' mentioned in Article I-32 and Secretariat finds it appropriate to insert this reference. It is doubtful, however, that it provides for a better solution, because Article I-32 does not mention acts having no addressees either, and an act always has an addressee, be it an institution, a Member State or an individual.

What would be the consequences of the adoption of the amendment of Article 230 (4) for the private applicants? They would be able to challenge:

- Acts addressed to them (e.g. Commission's decisions in the field of competition law)

Whether this new wording would relax the conditions of admissibility with regard to individual acts, would depend on the interpretation of the notion of 'individual concern'. If it were to be interpreted according to *Plaumann*, then there would be no change with regard to the current situation.

- Acts not addressed to them, but which concern them directly and individually.

Here the difference with the current situation is that this definition encompasses the "legislative" acts which under some circumstances may be of individual and direct concern for the applicant. This possibility is recognized by the Court since *Codorniu* but now it would be explicitly written in the Treaty. Thus, in case of general acts concerning the applicant individually, there would be an extension of the standing with regard to the wording of article 230 (4) but not with regard to case law (*Codorniu*).

- Acts of general application (regulations or decisions having no addressees) which do not require implementing measures.

In this case there would be a real progress, the gap in the legal system would be removed and the problem of "self-executing regulations" existing today would be resolved. This would mean the victory of Advocate general Jacobs and the judges of the Court of First Instance ruling in *Jégo-Quéré.* Nevertheless, the requirement of "direct concern" would still apply and would require interpretation.

As regards the application of Article 230 to the agencies and bodies of the Union, it has been noted that in general the acts setting up the agencies contain provisions for means of redress before the Court of Justice as regards legal acts adopted by these agencies[217]. However, the practice for verification of the legality of acts is disparate and for this reason the Commission

recommended to the Parliament and the Council to standardize the arrangements by making Article 230 (4) applicable to proceedings contesting acts of all the agencies. The principle of an effective judicial guarantee requires that no contested act of an institution, a body or an agency can escape judicial scrutiny of its legality. It is also impossible to state categorically, when an agency is set up, that it will not perform such acts, even if the act establishing it does not give it power to adopt decisions in the formal sense. Therefore it was recommended to the Convention to amend Article 230 so as to cover, in addition to legal acts adopted by the institutions, those of the Union's bodies and agencies. Such a provision has been inserted into first paragraph of Article III-270. The proceedings instituted against a body or an agency would be admissible only if they have adopted acts intended to produce legal effects vis-à-vis third parties.

[217] CERCLE I Working Document 09, 10 March 2003, note from Secretariat 'Right of appeal against agencies created by secondary legislation', http://european-convention.eu.int/docs/wdcir1/8684.pdf

Conclusions

As Anthony Arnull stated, initially the European Community was conceived by elites for the implementation by elites. There was little concern for accountability or involving the individuals. The main role was assigned to the Commission and the Council, which was not required to meet in public or to reveal how its members had voted. Acts adopted by the institutions were only to a limited extent subject to judicial review at the suit of private parties, who were apparently to have no right to challenge regulations or directives, however adverse their effects and doubtful the legality[218].

Against this background the Court of Justice delivered its famous judgment in *Van Gend en Loos*[219], which in a clearly subversive manner proclaimed that nationals of the Member States are also subjects of the new legal order established by the EEC Treaty. As a consequence the national courts have to ensure the rights conferred by the Treaty on individuals. This direct effect of Treaty provisions was further extended to regulations and directives. In the later case law it is notable that the Court took a broad view of the effect of many substantive provisions of the Treaty (e.g. in the field of four freedoms). Therefore it could have been expected that the Court would take an equally progressive approach to the interpretation of article 230 (4). *Van Gend en Loos* suggested that the Court may interpret the Treaty in order to develop a system of judicial review which would take individuals into account. However, the court adopted an inconsistent approach which prevented the Article's full capacity for ensuring respect for the rule of law from being realized[220].

The wording of Article 230 (4) imposes limits on the standing of individuals as it requires the applicant to be directly and individually concerned by the contested measure. This requirement, especially in case of individual concern, is very difficult to meet. However, it is the Court of Justice who interprets this provision in a severe manner. It has been shown above how the restrictive interpretation of the rules for standing of individuals developed over time.

[218] ARNULL, The Action For Annulment…, p.177
[219] *Van Gend en Loos*, *supra* note 3

It has also been discussed why the Court does not want to change its interpretation. Among many arguments one is especially often invoked and serves to justify Court's unwillingness to relax the conditions for standing. This is the reluctance to add to the Court's already heavy workload. The Court fears that it will not be able to manage the increased number of cases which might be brought if the conditions applicable to private parties were relaxed. However, the problems posed by the Court's workload are notoriously difficult to resolve and equally notoriously unattractive to politicians. It is obvious that the essentially managerial difficulties caused by the Court's workload cannot be used indefinitely as an excuse to tackle other issues which are "vital to the health and legitimacy of the Union"[221]. Moreover, the CFI often dismisses as inadmissible proceedings brought under Article 230 (4) but at the same time it devotes many pages to analyzing the applicant's standing. This does not seem to make sense from the point of view of the proceedings' economy.

The Community is no longer the same as it was in 1960's and 1970's and the argument of keeping with the expectations of the authors of the EEC Treaty or the needs of the infant legal order of the Community is no longer convincing. The European Union after Maastricht Treaty is a different entity than the small Community from the past. The peoples of Member States are no longer ready to leave the governance of Europe in the hands of secretive elites; transparency and accountability have become the order of the day. Therefore it is inconsistent with this change of mood for the Community to upheld outdated and paternalistic view of the rights of individuals to bring annulment proceedings.

A final development which suggests the need to reconsider the case-law on individual concern is the Court's evolving case-law on the principle of effective protection of rights derived from Community law in national courts. Even though this principle was expressed in 1986, in the case *Johnston*[222], its implications have only gradually been spelt out in the Court's case-law in the subsequent period[223]. It is now clear from the judgments in *Factortame*[224] and *Verholen*[225] that the principle of effective judicial protection may require national courts to review all national legislative measures, to grant interim relief and to grant individuals standing to bring proceedings, even where they would be unable to do so under

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[220] ARNULL, The Action For Annulment…, p.179
[221] *ibidem* p.190
[222] *Johnston*, *supra* note 91
[223] Opinion of AG Jacobs in *UPA*, at para.97
[224] Case C-213/89 *Factortame I* [1990] ECR I-2433, at 19-22

national law. As it has been pointed out above, this may sometimes be described as a case of double standards because the Court imposes obligations on the Member States not provided explicitly in the Treaty, and itself refrains from enlarging its responsibilities, on the grounds that it cannot go beyond its competences. This explanation is at least dubious, taking into consideration all the areas in which the Court interpreted the law against its literal meaning.

Advocate General Jacobs in his Opinion in *UPA* presented in an exhaustive way the arguments in favour of the reinterpretation of Article 230 (4) and he suggested a new test for standing, based on the adverse effect which the contested measure has on an individual. Although followed by the CFI in *Jégo-Quéré*, the Opinion was not accepted by the ECJ and for the time being, the *locus standi* rules with regard to individual concern stay the same.

It follows from above that the only possible change may now happen via the political action. It is the time for Member States to decide what kind of European Union they want to have in future and what position will the individuals have in it. If decision-makers are truly concerned with democracy and the rule of law in the EU, they should not back up and leave the question of challenging the EC acts by private persons aside. The democratic deficit in the EU is a commonly acknowledged fact and Member Sates should not waist opportunities to enforce the credibility and democracy within the EU.

The gap between the judicial review in the Member Sates and EU is growing because modern legal systems adopt a very liberal approach to the admissibility of actions of individuals. In the case of legislative measures, natural or legal persons may only challenge them in very special cases (or at all). If such a remedy exists (*see supra* at p.44 et seq.), the right of action is restricted to cases of infringement of the constitutional laws. It should not be forgotten, however, that in the Member States laws are enacted by parliaments who directly express the voice of the citizens and thus have a key role in the legislative process (which is still not the case of the European Parliament). On the contrary, in case of administrative measures, private parties may challenge them in all Member States and generally they enjoy a wide right of action[226]. In Germany the general admissibility conditions prior to judicial review are, at least for constitutional reasons, no high hurdles in the sense that they hinder effective judicial protection of those being infringed in their rights. The applicant must demonstrate a "legally

[225] Joined Cases C-87/90, C-88/90 and C-89/90, *Verholen*, [1991] ECR I-3757, at 23-24
[226] ALBORS-LLORENS, p.30

protected interest" which must be both direct and susceptible to individualization[227]. One may say that, also from the comparative point of view, the filter of general conditions of admissibility is not very dense[228]. Under French law private parties have a wide right of action to challenge administrative acts, but they still have to indicate the certain interest (*intérêt à agir*) – otherwise the intervention would be an *actio popularis,* which is not recognized by the French law[229]. The *locus standi* requirements can be described as requiring the presence of a *direct* and *individual* interest. The admissibility barrier is relatively easy to overcome for French parties in annulment proceedings. In the United Kingdom the rules about standing in judicial review proceedings are now very generous. Standing has ceased to be a preliminary condition, distinct from the merits of the case. An applicant for judicial review is required to have a "sufficient interest in the matter" and the House of Lords have interpreted this condition liberally[230]. Generally, a direct personal interest will be required, but in some circumstances applicants with a general or public interest will be granted standing where there has been a breach, or failure to carry out statutory or public duties, by the authorities involved[231].

The argument that a distinction between the availability of judicial review of legislation and administrative acts for individuals as it is in national laws should be reflected also in the Community law was rejected by Advocate General Jacobs in his Opinion in *UPA*[232]. He pointed out that the judicial review of legislation is not generally excluded in national laws, even if it is subject to stricter conditions than the review of administrative measures. Furthermore, national laws generally establish a clear distinction between legislation and administrative measures and legislation is systematically adopted by more democratically legitimate procedures than administrative measures. By contrast, the Community treaties do not establish a clear "hierarchy of norms", and while the EC Treaty draws a distinction between basic Community measures and implementing measures, the former are not systematically adopted by more democratically legitimate procedures than the latter[233].

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[227] *ibidem* at p.34
[228] HANS-HEINRICH TRUTE & THOMAS GROSS, German report *in*: Epaminondas Spiliotopoulos (ed) *'Towards a Unified Judicial Protection of Citizens in Europe (?), Vers une protection juridictionnelle commune des citoyens en Europe(?)'*, European Public Law Series, vol. XII, London 2000, p.191
[229] BERNARD PACTEAU, rapport Français, *in*: Epaminondas Spiliotopoulos (ed), p.291
[230] J. BEATSON & J. MORRISON, British report, *in*: Epaminondas Spiliotopoulos (ed), p.787
[231] ALBORS-LLORENS, p.36
[232] Opinion of AG Jacobs in UPA, *supra* note 117 at para.87-90
[233] *ibidem*

The draft Constitution seems to meet these criticisms insofar as it makes this clear terminological distinction and requires that legislative acts in principle be adopted jointly by the Parliament and the Council under a modified codecision procedure[234]. The explicit obligation of Member States to provide rights of appeal sufficient to ensure effective judicial protection and the amendment of Article 230 (4) are also steps in a good direction. Nevertheless some authors express concern that there may be a shift of a current distinction between the general and individual acts to a new 'frontier' between legislative and non-legislative acts and that requirement to show individual concern should be removed also in case of legislative acts which are of direct concern to individual and do not entail implementing measures[235].

It can be concluded that the time is definitely ripe for change of the rules on standing of individuals in an action for annulment of Community measures. There are broad policy arguments in favour and both Community institutions and the main political players in the Member States have acknowledged it. Most probably the Constitutional Treaty will contain the provisions modifying the status quo. However, the significance and practical consequence of that on the principle of effective judicial protection are difficult to assess at this stage and they remain to be seen in future.

[234] John A. Usher, "Direct and Individual Concern – An Effective Remedy or a Conventional Solution?", (2003) 28 ELRev, p.599

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[235] *ibidem*

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