

Access to Justice in the European Court of Justice in Luxembourg

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*The law, in its majestic equality, forbids the rich,
as well as the poor, to sleep under the bridges,
to beg in the streets, and to steal bread*

– Anatole France

A. Introduction

The European Community is a Community based on the rule of law.¹ Thus the principle of institutional balance (*équilibre institutionnel*) is one of its basic principles.² Recognition of the fundamental right of access to justice is considered one of the essential features of modern procedure.³ This article investigates the extent to which these principles are being honoured in the EU and whether the available procedures truly guarantee their applicability to individuals in the way to which we have become accustomed in our national procedures.

In the EU a private party may be affected either by a measure of the Member State (MS) or by a measure of a Community institution, which has direct consequences on it. Under the national laws of all MSs, remedies exist according to which the acts of the administration can be challenged if the individual's

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¹ Judgment of 23 April 1986 in Case 294/83, *Parti Ecologiste 'Les Verts' v. European Parliament ('Les Verts')* [1986] ECR 1339 at para. 23

² B. Witte, 'Interpreting the EC Treaty Like a Constitution: The Role of the European Court of Justice in Comparative Perspective, in Judicial Control' in *Comparative Essays on Judicial Review* (Antwerpen Maklu Uitgevers 1995) 133–152 at 144.

³ G. Betlem, 'Enforcement of EC Environmental Law in the light of the 5th Action Programme', paper prepared for *Aktuelle Probleme der Umweltverfassung (in) der Europäischen Union* (Symposium-Jubiläumveranstaltung, Saturday 26 October 1996, Universität Bremen) at p. 1.

subjective rights are violated. Indeed, the existence of an effective remedy against the Acts of the Community institutions, which directly affect private parties, is *a conditio sine qua non* under Articles 6 and 13 of the European Convention on Human Rights.⁴

The protection of the Community citizen against unlawful acts is available in the forms of direct actions for annulment under Article 230 EC (ex. Art. 173)⁵ or in a challenge before a national court to any attempt to enforce the measure at the national level.⁶ The necessity of a system of control over the acts of the Community institutions is indisputable and direct actions are one means to implement such a review. Article 230 EC (ex. Art. 173) provides an exhaustive list of the annulment procedures available against the acts of the Community:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB [European Central Bank], other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the European Parliament, by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, 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. [emphasis added]

As can be seen, this article limits the extent of the review to acts adopted jointly by the European Parliament and the Council, acts of the Council, acts of the Commission, acts of the European Central Bank (ECB), and acts of the European

⁴ See in particular D. Gornien *Short Guide to the European Convention on Human Rights* (Strasbourg Council of Europe Press 1997) at 37: 'Access to a judicial forum must be substantive not just formal'.

⁵ This paper is written based on the EC Treaty incorporating the amendments introduced by the Amsterdam Treaty. Before the Maastricht Treaty the remedy of direct actions was encompassed in Art. 173(2) EEC. After the Maastricht amendments the relevant provision became Art. 173(4) ECT, and with the incorporation of the Amsterdam Treaty the provision changed into Art. 230 EC. Throughout this Thesis reference is made to Art. 173(2) or 173(4) corresponding to the time of the relevant case in order to avoid confusion. The same approach has been used by the European Court of Justice.

⁶ J.D. Cooke, 'Conflict of Principle and Pragmatism Locus Standi under Article 173 (4) ECT' in (1996) 3535 *Vorträge, Reden und Berichte aus dem Europa-Institut – Sektion Rechtswissenschaft* 5–35 at 8.

Parliament.⁷ The potential applicants can be classified as a) privileged⁸ b) semi-privileged⁹ and c) non-privileged applicants.¹⁰ This paper focuses in particular on analyzing actions brought by non-privileged applicants as to whether the conditions under which they will be accorded standing are adequate. It advocates the opinion that a Community citizen may be perceived as a *surveillant de l'administration*, in that only through its actions is the Court¹¹ given the opportunity to review the acts of legislation. As with any judiciary panel, the Court cannot act *ex officio* and therefore the cross-control mechanism of the separated powers in the Community is implemented to an extent in particular through these actions. At times however the Court has unnecessarily bypassed such opportunities. Under the present conditions applied by the Court, from time to time there arise cases where the situation of a private party is affected by a measure of the Community, but no adequate remedies exist under the MS law concerned and the remedy under Article 230 EC (ex. Art. 173) is denied on the basis of the conditions as regards granting standing.

The effectiveness of direct actions involves three types of problems from the point of view of a private party. First, it is important to point out that private parties are in essence only granted standing when the challenged acts are decisions that by nature relate to the special situation of this applicant. Secondly, it is based on the wording of the article that a non-privileged applicant cannot challenge a directive.¹² Thirdly,

⁷ T.C. Hartley, *The Foundations of European Community Law* (Oxford Oxford University Press 1998, 4th ed.) at p. 345.

⁸ Art. 230(2) Member States, Council and the Commission; the privileged applicants are always accorded standing. Judgment of 23 February 1988 in Case 131/86, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities*, [1988] ECR 905, at para. 6.

⁹ Art. 230(3) The European Parliament; in matters concerning the safeguarding of the prerogatives of the Parliament. Originally the Court rejected the EP's application that it should be considered a privileged applicant, and the EP was also denied standing on the basis that it was not a 'legal person'. The Maastricht Treaty (TEU) amended Art. 230 EC (ex. Art. 173) to include the EP as a semi-privileged applicant. The same applies to ECB.

¹⁰ Art. 230 (4) Private and public individuals (natural or legal persons) that are directly and individually concerned by the challenged measure. Applicants of this type are limited as to the types of acts they may challenge and are required to produce evidence of them being singled out from all others by a particularity in their situation. Such requirements are not present for other applicants of Art 230 EC (ex. 173). However both semi-privileged and non-privileged applicants are required to meet some conditions in order to be accorded standing.

¹¹ When referring to the 'Court' the author is referring to the European Court of Justice (ECJ) in general, not separating the ECJ from the Court of First Instance (CFI) as such in order to avoid confusion. Council Decision 93/350, OJ 1993 L 144/21 transferred private actions to the CFI. Where necessary the distinction is brought out.

¹² Order of the CFI in the Judgment of 20 October 1994 in Case T-99/94, *Asociación Española de Empresas de la Carne v. Council of the European Union* [1994] ECR II-871 at para. 17. There seems to be a possibility of a different approach, as the Court has in fact considered the possibility of a directive being a decision by nature. See in this respect Judgment of 29 June 1993 in Case C-298/89 *Government of Gibraltar v. Council of the European Communities* [1993] ECR I-3605.

there are extremely rigid time limits for bringing such a claim.¹³ However the main problem is in the requirement of being *individually concerned* by the measure in question. Two tests are relevant as to the standing of private applicants. The first is the test of legal nature and the second, the test of direct and individual concern. The test of legal nature deals with the principle that truly generic norms should under the general theory of law *ipso facto* not be challengeable by private applicants. However throughout the development of Community law, one can see that in certain cases the 'truly generic' measures tend to affect only a few subjects to the extent of affecting only one undertaking on the Common Market. Whether the principle excluding 'generic norms' should still be applied despite these facts and whether the application of the principle may give certain unfair means into the hands of the legislature is a question that has to be analyzed.

On the basis of the wording of Article 230 EC (ex. Art. 173), one can conclude that review proceedings can only be brought under three types of situations. These are cases:

- a) where the applicant is the addressee of the decision;
- b) where the addressee *de jure* is another person,¹⁴ but the applicant finds the decision is *de facto* of direct and individual concern to him or her;
- c) where the act is in the form of a generic norm (i.e., a regulation) but the applicant finds that the actual nature of the measure is an individual decision as regards the applicant.¹⁵

It is common practice to grant *locus standi* to the direct addressees of the measure in question. The situation is however much more complicated in the latter two cases, as the requirements of direct and individual concern has proven to be 'quite a difficult burden to bear' for non-privileged applicants. That, combined with the extremely stringent limitation-period of two months,¹⁶ has resulted in a situation where private parties that are not always the best educated in the labyrinths of European judiciary are expected to fully understand which acts are of direct and

¹³ Art. 230 EC (ex. Art. 173) imposes a statute of limitations of two months. The time limits for bringing proceedings are considered a matter of public policy under Art. 113 of the CFI Rules of Procedure, the Court must ascertain of its own motion whether the time limit for bringing proceedings has been observed, even if the parties have made no submissions on the point. See the Judgment of Case T-514/93, *Cobrecaf SA, Pêche & Froid SA and Klipper investissements SARL v. Commission of the European Communities* [1995] ECR II-621; Judgment of 18 September 1997 Joined Cases T-121/96 and T-151/96, *Mutual Aid Administration Services NV (MAAS) v. Commission of the European Communities* [1997] ECR II-1355, at para. 39.

¹⁴ Or, e.g., a privileged applicant in the sense of Art. 230 EC (ex. Art. 173).

¹⁵ Judgment of 13 May 1971 in Joined Cases 41/70 to 44/70, *NV International Fruit Company and others v. Commission of the European Communities (International Fruit)* [1971] ECR 411.

¹⁶ For more detailed explanation on the limitation period under Art. 230 EC (ex. Art. 173) see P. Oliver, 'Limitations of Actions Before the European Court' in (1978) ELR 3-13 at 6.

individual concern to them and to produce a well-reasoned claim within the limitation period, or else they will be refused a hearing of their case. It seems that to a certain extent these people are in fact denied the protection, which is so generously given to every citizen under the general principles of civil law.¹⁷ In cases b) and c), the system currently exercised by the Court of Justice is to a great extent overshadowed by self-limitation and the access to court by private applicants has been greatly restricted resulting in a situation where the remedies available to these parties are not always sufficient in protecting their legitimate interests under Community Law.

The practice of the Court in granting *locus standi*¹⁸ to individuals seems to differ to a great extent depending on the substance of the case. For example, it seems that the Court has adopted an approach where administrative measures, which serve for the basic goals of the Community (such as agricultural policy) are far better protected than the ones of more individualistic importance such as competition and state aid. Therefore the conditions for granting *locus standi* in the special cases of state aids, competition law, and anti-dumping (AD) are to be discussed separately. The case-law makes it quite clear that the situation with respect to standing is considerably easier in these cases where the legislation foresees certain consultation, initiation or other participatory rights, and the parties have made use of such rights.¹⁹ In such cases, it is common practice to grant standing to these parties even in cases where they were not the immediate addressees of the measure in question.

Curiously, the Court itself has expressed its dissatisfaction with the requirements on standing.²⁰ Indeed, it seems that the Court has adopted an approach where it

¹⁷ The Community follows the rule of law, which has been set as a standard for States wishing to join the EU under the Copenhagen Criteria. Therefore we seem to be in a situation where the acceding States are required to follow the relevant principles, but the practice of the Court may itself be in conflict with the principle of adequate legal protection of individuals.

¹⁸ A position from which one may validly make a legal claim or seek to enforce a right or duty. B.A. Garner, *A Dictionary of Modern Legal Usage* (Oxford 1987) at 515.

¹⁹ D. Ehlers, 'Die Klagebefugnis nach deutschem, europäischem Gemeinschafts- und U.S. - amerikanischem recht' in (1993) 84:2 *Zeitschrift für Verwaltungslehre, Verwaltungsrecht und Verwaltungspolitik (Verwaltungs-Archiv)* 139 at 153; Judgment of 4 October 1983 in Case 191/82, *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v. Commission of the European Communities* [1983] ECR 2913.

²⁰ See ECJ, 'Court Report of the Court of Justice on certain aspects of the application of the Treaty on European Union', May 1995, 21 May 2002, <http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html>. The Court of Justice has itself stated in para. 20 of the Report: 'It may be asked, however, whether the right to bring an action for annulment under Article 173 of the EC Treaty (and the corresponding provisions of the other Treaties), which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions.' Reproduced in full in No. 15/95 of Proceedings of the Court of Justice and CFI – at 12. See also M. Hedemann-Robinson, 'Article 173 EC, General Community Measures and Locus Standi for Private Persons: Still a Cause for Individual Concern?' in (1996) 2:1 *European Public Law* 127 at 153.

recognizes that in certain cases the remedies currently *de facto* available to private parties in challenging community measures are insufficient, but refuses to accept the burden of providing a solution to the problem; rather it waits for a solution from the legislature in the form of redrafting the system of legal remedies in European Union law. The Court has adopted this approach on the grounds of various policy reasons to be discussed later. Nevertheless, according to the same Court in *Foto-Frost*,²¹ it has exclusive competence in the review of the legality of secondary Community law.²² Therefore, these policy arguments may be seriously disputed in certain cases.

In the following sections, evidence is produced that there may be situations where the only rational remedy is direct action, as ultimately the Court has the exclusive power to grant what one has been seeking, namely, the annulment of a Community act, and that the only rational remedy may be denied due to the strict limitations on standing of non-privileged applicants. In cases where the Community act is directly applicable to the situations of private applicants, the MS courts are a *forum non conveniens* as the validity of the Community acts is outside their jurisdiction. Therefore, the practice of the Court has led to a situation where the Court is the only institution authorized to review the legality of the acts of the Community, but refuses to accept this burden on the basis of various policy reasons discussed in the sections below. A discussion of when such cases have occurred is the lead in the 'Problem Cases' section of this paper. Certainly one can say that the approach of the Court has at times been unduly restrictive and the outcome of its rulings has at times come very close to denial of justice to those less fortunate.

B. Direct Concern

In EU law, the requirement of direct concern deals mainly with the issue of whether the enforcement of the Community measure is dependent on any further action being taken by the MS. According to the Court 'A decision, which comes into force immediately, is of direct concern to an interested party, within the meaning of the second paragraph of Article 173 of the EEC Treaty' (now after amendment Art. 230 EC).²³ Essentially a measure is of direct concern to an applicant when it leaves no discretion to the national authorities of the Member States responsible for

²¹ Judgment of 22 October 1997 in Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost (Foto-Frost)*, [1987] ECR 4199 at para. 17.

²² M. Claes, 'Judicial Review in the European Communities: the Division of Labor Between the Court of Justice and National Courts, in Judicial Control' in *Comparative Essays on Judicial Review* (Antwerpen Maklu 1995) pp. 109–131 at p. 113.

²³ Judgment of 25 June 1964 in Cases 106/63 and 107/63, *Alfred Toepfer and Getreide-Import Gesellschaft v. Commission of the EEC (Toepfer)*, [1965] ECR 405.

implementing it.²⁴ Therefore, an individual is directly concerned if the measure per se brings material effects to the rights of that individual.²⁵ This must be understood so that a measure is considered to be of direct concern to an individual whenever it is independently capable of directly affecting the legal position of the individual and leaves no discretion to the addressees of that measure in implementing it.²⁶ As the Court has repeatedly stated ‘... its implementation must be purely automatic and result from Community rules alone without the need for the application of other intermediate measures’.²⁷ In cases where the measure is dependent on, for example, further implementing acts, or in other words leaves wide discretion to the MS on whether to ‘use it or not’, the Court has refused to grant standing to the parties.²⁸ Furthermore, in cases of acts or decisions drawn up in a procedure involving several stages, and particularly at the end of an internal procedure, it is only those measures which definitively determine the position of the institution upon the conclusion of that procedure that are open to challenge. Intermediate measures whose purpose is to prepare for the final decision are not open to challenge.²⁹ As regards situations in which the addressee of the decision is a private party, AG Grand in his opinion on the *Alcan* case explained the test of being directly concerned by stating that there must be a ‘... direct relationship of cause and effect between the measure and its possible effects on the person in question’.³⁰

It may safely be asserted that the reasoning of direct concern lies in the basic idea

²⁴ Judgment of 14 September 1995 in Joined Cases T-480/93 and T-483/93, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice Brokers AVV, Alesie Curaçao NV and Guyana Investments AVV v. Commission of the European Communities*, [1995] ECR II-2305 at para. 63; Judgment of 17 January 2002 in Case T-47/00, *Rica Foods v. Commission* [2002] ECR II-0000 at para. 37.

²⁵ See Ehlers, in *Verwaltungs-Archiv*, *supra* note at 151.

²⁶ Joined Cases 41/70 to 44/70, *International Fruit v. Commission*, [1971] ECR 411, paras. 25–28.

²⁷ Judgment of 5 May 1998 in Case C-386/96 P, *Société Louis Dreyfus & Cie v. Commission of the European Communities (Dreyfus v. Commission)*, [1998] ECR I-2309 at para. 43; Judgment of 13 December 2000 in Case T-69/99, *Danish Satellite TV (DSTV) A/S (Eurotica Rendez-vous Television) v. Commission of the European Communities (DSTV)*, [2000] ECR II-4039, para. 24; Judgment of 12 July 2001 in Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99, *Comafrika SpA and Dole Fresh Fruit Europa Ltd & Co. v. Commission of the European Communities* [2001] ECR I-1975 para. 96.

²⁸ Judgment of 15 September 1998 in Case T-54/96, *Oleifici Italiani SpA & Fratelli Rubino Industrie Olearie SpA. v. Commission of the European Communities*, [1998] ECR II-3377; See also Judgment of 29 March 1979 in Case 113/77, *NTN Toyo Bearing Company Ltd. and Others v. Council of the European Communities*, [1979] ECR 1185.

²⁹ See, for example, Judgment of 14 March 1990 in Joined Cases C-133/87 and C-150/87, *Nashua Corporation and Others v. Commission and Council of the European Communities*, [1990] ECR I-719 at para. 9; Judgment of 18 December 1992 in Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, *Cimenteries CBR SA, Blue Circle Industries plc, Syndicat Nationale des Fabricants de Ciments et de Chaux and Fédération de l’Industrie Cimentière asbl v. Commission of the European Communities*, [1992] ECR II-2667, para. 28.

³⁰ Judgment of 16 June 1970 in Case 69/69, *Alcan Aluminium Raeren and Others v. Commission of the European Communities*, [1970] ECR 385, at 397; See also Judgment of 22

in administrative law, that an individual cannot challenge an act that does not violate his or her subjective rights.³¹ This is inferred *a sensu contrario* by the Court's case-law, where the applicant was still considered directly concerned based on the reasoning that the MS had declared its clear intention to implement the measure as soon as it was adopted by the Community legislature, even though the MS theoretically had discretion to implement. The act itself was capable of having an effect on the individual's subjective rights, and was therefore considered to have direct effect.

This was the basis of the ruling in the *Bock* case.³² Bock was an importer of Chinese mushrooms into Germany. It applied to the German authorities for an import permit, and the latter asked the Commission for authorization to refuse the application. Simultaneously they informed Bock that his request would be rejected as soon as the Commission provided the necessary authorization.³³ The declaration left no doubt that the MS intended to act in conformity with the measure, and that thereby the measure had *de facto* a material effect on the individual's subjective rights.³⁴ The Commission then authorized the German government to deny permission to import Chinese mushrooms and Bock brought proceedings against the decision pursuant to Article 230 EC (ex. Art. 173). The Court held that Bock was directly concerned as the actions of the German government left no reason to believe that any discretion would be exercised after the relevant authorization from the Commission was received.³⁵

Similar reasoning is found in the *ASPEC* case, where the court declared that an

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May 1978 in Case 92/78, *Simmenthal SpA v. Commission of the European Communities*, [1979] ECR 777, Judgment of Case T-298/94, *Roquette Frères SA v. Council of the European Union*, [1996] ECR II-1531.

³¹ Moreover, it is very important to consider the nature of the act, if the measure is a preparatory act it cannot be regarded as being a decision against which an action will lie, as it does not have an effect on the individuals subjective rights; Judgment of 11 November 1981 in Case 60/81, *International Business Machines Corporation v. Commission of the European Communities*, [1981] ECR 2639; Judgment of 10 July 1990 in Case T-64/89, *Automec Srl v. Commission of the European Communities*, [1990] ECR II-367.

³² Judgment of 23 November 1971 in Case 62/70, *Werner A. Bock v. Commission of the European Communities (Bock)*, [1971] ECR 897, paras. 6–8; by contrast, see Judgment of 13 December 2000 in Case T-69/99, *DSTV v. Commission*, [2000] ECR II-4039.

³³ In Case 62/70, *Bock*, [1971] ECR 897 paras. 6–8.

³⁴ *Ibid*; Judgment of 17 January 1985 in Case 11/82, *A.E. Piraiki-Petraiki v. Commission of the European Communities*, [1985] ECR 207, paras. 8–10, and Judgment of 31 March 1998 in Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission of the European Communities (France and others v. Commission)*, [1998] ECR I-1375, para. 51; see also Judgment of 5 May 1998 in Case C-404/96 P, *Glencore Grain v. Commission of the European Communities*, [1998] ECR I-2435, para. 42.

³⁵ The Court also found that *Bock* was individually concerned, as it was differentiated from all other applicants by the fact that it had applied for the license before the measure was enacted.

undertaking must be considered to be directly affected by a decision of the Commission relating to State aid where there is no doubt that the national authorities intend to implement their plan to grant aid.³⁶ In *Gestevisión Telecinco*, the Court found that it was common ground that the various grants at issue were already granted by the Spanish authorities and the granting would have continued.³⁷ Based on the foregoing reasoning, the applicants were considered to be directly concerned.³⁸

In *Getreide Import*,³⁹ a decision addressed to the MS already stipulated the exact rates of levy to be charged on the importation of cereals. As the act was so precise that it was practically directly applicable, this can be considered as a *prima facie* case, of where even though the MS takes implementing measures on the act, such implementation is purely technical and no real discretion exists. The Court was of the same opinion and found the applicants directly concerned.

However, one should not be led to believe that proving there are no further implementing measures is easy, and that in the light of the above cases an individual must merely indicate certain expressions of the State which seem to indicate its willingness to apply the measure in a certain manner even before its adoption as such. In *Eridania*,⁴⁰ the applicants challenged decisions that resulted in grants of aid from the European Guidance and Guarantee Fund (EAGGF) to three Italian sugar refineries, and addressed to the Italian government and the recipients of the aid. The Italian government had already made proposals to which companies the aid should be granted and had therewith given a clear indication of its prerogatives. Already based on this factor, one would consider the case as one where the further implementing measures were not bound with any real discretion of the State. Since the government had already identified which companies it preferred, the likelihood of it changing its view was almost nil. However the Court found to the contrary. The competitor was not considered directly concerned because the Italian government was supposedly still entitled to exercise discretion.⁴¹

³⁶ Judgment of 27 April 1995 in Case T-435/93, *Association of Sorbitol Producers within the EC (ASPEC), Cerestar Holding BV, Roquette Frères SA and Merck oHG v. Commission of the European Communities (ASPEC)*, [1995] ECR II-1281, para. 60.

³⁷ Judgment of 15 September 1998 in Case T-95/96, *Gestevisión Telecinco SA v. Commission of the European Communities*, [1998] ECR II-3407.

³⁸ One can argue that whenever the subjective effect of the Community measure is only achieved through the act of the MS authorities, then the proper course of action lies in challenging these national measures under the domestic legal system of the MS. In other words, it is desirable for the party to have exhausted its remedies under national law, before it burdens the Court.

³⁹ Judgment of 1 April 1965 in Case 38/64, *Getreide-Import Gesellschaft v. Commission of the EEC*, [1965] ECR 203.

⁴⁰ Judgment of 10 December 1969 in Joined Cases 10/68 and 18/68, *Società 'Eridania' Zuccherifici Nazionali and others v. Commission of the European Communities supported by Co. Pro. B. – Cooperativa Produttori Bieticoli and others*, [1969] ECR 459.

⁴¹ AG Roemer in his opinion of the case applied a reasoning similar to the one later used in *Bock* in considering that by proposing the competing undertakings as the recipients of the aid, the Italian government had in fact limited its discretion in the application of the measure.

To draw a conclusion, the case-law on the subject matter is quite uniform and in a majority of cases the Court reiterates the same conditions. For example, the Court recently stated in the *Glencore Grain*⁴² case:

... for a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.⁴³

However on the basis of *Eridania*, one can see that certain inconsistencies exist and the private parties concerned will not be able to ascertain beforehand whether their position will be seen by the court as one where the Community act is of direct concern to them. The test of individual concern, nevertheless, has proven to be a much greater obstacle for private applicants to overcome. Therefore, the Court in certain cases has not considered the matters in the order of the text of Article 230 EC (ex. Art. 173). Rather, it turned first to considering whether the applicants were individually concerned and only then looked for whether they were also directly concerned. Interestingly, where the application was held admissible the Court had switched and considered the issue of direct concern first.⁴⁴

⁴² Judgment of 5 May 1998 in Case C-404/96 P, *Glencore Grain Ltd, formerly Richco Commodities Ltd v. Commission of the European Communities*, [1998] ECR I-2435 at para. 41.

⁴³ See also: Case C-386/96 P, *Dreyfus v. Commission*, [1998] ECR I-2309; Joined Cases 41/70 to 44/70, *International Fruit v. Commission*, [1971] ECR 411 at paras 23 to 29; Case 92/78, *Simmenthal*, [1979] ECR 777, at paras 25 and 26; Case 113/77, *NTN* [1979] ECR 1185 at paras 11 and 12; Judgment of 29 March 1979 in Case 118/77, *Import Standard Office (ISO) v. Council of the European Communities* [1979] ECR 1277 at para. 26; Judgment of 20 October 1977 in Case 119/77, *Nippon Seiko KK and others v. Council and Commission of the European Communities*, [1979] ECR 1303 at para. 14; Judgment of 29 March 1979 Case 120/77, *Koyo Seiko Co. Ltd. And others v. Council and Commission of the European Communities*, [1979] ECR 1337 para. 25; Judgment of 29 March 1979 Case 121/77, *Nachi Fujikoshi Corporation and others v. Council of the European Communities* [1979] ECR 1363 at para. 11; Judgment of 11 July 1985 in Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84, *Vittorio Salerno and others v. Commission of the European Communities and Council of the European Communities* [1985] ECR 2523 at para. 31; Judgment of 17 March 1987 in Case 333/85, *Mannesmann-Röhrenwerke AG and Paderwerk Gebr. Benteler GmbH & Co. v. Council of the European Communities*, [1987] ECR 1381 at para. 14; Judgment of 14 January 1988 in Case 55/86, *Asociación provincial de Armadores de buques de pesca de Gran Sol de Pontevedra (Arposol) v. Council of the European Communities* [1988] ECR 13 at paras 11–13; Judgment of 26 April 1988 in Case 207/86, *Asociación Profesional de Empresarios de Pesca Comunitarios (Apesco) v. Commission of the European Communities* [1988] ECR 2151 at para. 12; and Judgment of 26 June 1990 in Case C-152/88, *Sofrimport SARL v. Commission of the European Communities (Sofrimport)*, [1990] ECR I-2477 at para. 9.

⁴⁴ A. Albors-Llorens, *Private Parties in European Community Law; Challenging Community Measures* (Oxford Clarendon Press 1996) at p. 64; Cases 106/63 and 107/63, *Toepfer*, [1965] ECR 405; Case 11/82, *Piraiki-Petraiki* [1985] ECR 207.

C. Individual Concern

The approach of the EU in giving *locus standi* to private parties has been compared by many authors with the German one. In the German *Schutznorm*⁴⁵ theory, the challenged norm has to be *a priori* an institute with the purpose of the protection of an individual. The extent of individualization required is a key factor. However, the Community system differs from that of the German one as the general requirements for standing are insufficient in cases where there are other parties that are actually or potentially affected by the measure.⁴⁶ On the one hand, as will be discussed below, the standing will often be denied even in cases where there are only a limited number of subjects whose identity was known at the date the measure was passed.⁴⁷ On the other hand, the rules seem to be far more relaxed in cases where the applicants are given special rights under the procedures involved, as is the case with anti-dumping, competition and State aids, which will also be discussed below.⁴⁸ At the moment, however, the main test in determining whether a measure is of individual concern to a non-privileged applicant is whether the subjects of the challenged measure form a closed or an open category.

I. Challenging a Decision

As explained above, if a party is the addressee of the decision in question, that party is accorded standing almost automatically. Therefore, these cases are not of importance as regards the discussion at hand since in these cases Article 230 EC (ex. Art. 173) can be considered as providing adequate protection under EU law. Far more important are the cases where the decision is addressed to a third party. The leading case for the purposes of this paper (not only in challenging decisions addressed to a third party but also as regards the general test applied in all Article 230 EC (ex. 173) cases in challenges initiated by non-addressees of the act) is *Plaumann*⁴⁹ since in this case the Court for the first time elaborated on the actual meaning of the requirement of direct and individual concern. The case was concerned with the importation of mandarins

⁴⁵ ‘*Schutznormtheorie*’ – based in particular on paragraph 34 of the German *Grundgesetz* (Basic Law). An individual who has suffered damage can obtain reparation only if he specifically belongs to the group which the superior rule of law infringed was designed to protect.

⁴⁶ T. Danwitz, ‘Die Garantie effektiven Rechtsschutzes im Recht der Europäischen Gemeinschaft’ in (1993) 17 NJW 1108–1115 at 1110.

⁴⁷ Judgment of 6 October 1982 in Case 307/81, *Alusuisse Italia SpA v. Council and Commission of the European Communities (Alusuisse)*, [1982] ECR 3463.

⁴⁸ Judgment of 21 February 1984 in Joined Cases 239/82 and 275/82, *Allied Corporation and others v. Commission of the European Communities*, [1984] ECR 1005; Judgment of 14 July 1988 in Case 187/85, *EEC Seed Crushers’ and Oil Processors’ Federation (Fediol) v. Commission of the European Communities (FEDIOL)*, [1988] ECR 4155.

⁴⁹ Judgment of 15 July 1963 in Case 25/62, *Plaumann & Co. v. Commission of the European Economic Community (Plaumann)*, [1963] ECR 95.

and clementines into the community. The Commission refused to authorize the Federal Republic of Germany to suspend partially customs duties applicable to mandarins and clementines imported from third countries. Plaumann, as a fruit importer, attacked the Decision, and in assessing the circumstances the Court adopted the test that has become the key for determining *locus standi* of non-privileged applicants under Article 230 EC (ex. Art. 173):

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity, which may at any time be practiced by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.⁵⁰ [emphasis added]

This is the landmark case that has complicated the situation of non-privileged applicants, as the criteria set above has in many cases become an incontestable barrier to private actions. Based on the criteria, a private applicant can attack a decision addressed to a third party only if it can actually show that in the challenged act the applicant can just as well replace the third party.⁵¹ Not only is this wording strict as to the standard applied, as one measure can have different and yet substantial effects on different subjects, but also it seems to rule out the possibility of several entities being individually concerned by the measure. In fact this was how the Court implemented the wording for a long period, and to an extent still does. As Craig has explained: ‘... [T]he reasoning of the Court renders it literally impossible for an applicant ever to succeed, except in a very limited category of retrospective cases.’⁵² The test in fact places a great emphasis on ‘differentiated from all other persons’ and throughout this dissertation one can see that the Court has used this wording to dismiss many applications by private parties, which it could easily have entertained.⁵³

⁵⁰ Case 25/62, *Plaumann* [1963] ECR 95 at para. 107.

⁵¹ Judgment of 19 May 1993 in Case C-198/91, *William Cook plc v. Commission of the European Communities (Cook)*, [1993] ECR I-2487; Judgment of 15 June 1993 in Case C-225/91, *Matra SA v. Commission of the European Communities* [1993] ECR I-3203; Judgment of 19 May 1994 Case T-2/93, *Société Anonyme à Participation Ouvrière Compagnie Nationale Air France v. Commission of the European Communities (Air France)*, [1994] ECR II-323; and Judgment of 19 May 1994 in Case T-465/93, *Consorzio gruppo di azione locale ‘Murgia Messapica’ v. Commission of the European Communities (‘Murgia Messapica’)*, [1994] ECR II-361.

⁵² P.P. Craig, ‘Legality, Standing and Substantive Review in Community Law’ in (1994) 14:4 OJLS 507–537 at 509.

⁵³ See most recently Judgment of 5 November 1997 in Case T-149/95, *Etablissements J. Richard Ducros v. Commission of the European Communities (Ducros)*, [1997] ECR II-2031 para. 33.

Based on the reasoning above, the Court later set out the basis for what later became the *closed category test*.⁵⁴ According to this test, the measure can only be of individual concern if the group addressed is such that the number of its members is limited to its current size.⁵⁵ In essence, the Court's position is that the measures contestable by private actions are those that do not regulate abstract situations, but rather affect existing legal positions so that the effect of the measure can no longer be broadened.⁵⁶

In *Glucoseries Réunies*,⁵⁷ the applicant challenged a Commission decision authorizing the French government to levy countervailing duties on importation of glucose from the MSs. The applicant produced evidence that it was the leading glucose manufacturer in the Community and the only importer of the product from Belgium that was '... both willing and able to export glucose'. Therefore, even though the measure was applicable across the Community and not only to exports from Belgium, the evidence showed that the applicant represented a substantial part of the Common market and was to an extent differentiated by these particular characteristics. The Court however applied the test of individual concern more strictly and declared that the measure was applicable to all MSs,⁵⁸ to *all imports* and could not therefore be of individual concern to the applicant.⁵⁹ Interestingly, the Court also mentioned that the *effet utile* of the measure required the ban of imports from all MSs in order to protect the domestic industry in France.⁶⁰ By using this reasoning, the Court seems to indicate that if the applicant can prove that the intent pursued by the measure is to exclude the imports of this applicant, they could be considered individually concerned.

One of the most controversial cases was *Deutsche Lebensmittelwerke v. Commission*,⁶¹ where the Commission addressed a decision to Germany related to the promotion of the sales of butter on the West Berlin market as a part of the

⁵⁴ See Section C.II.2. of this paper: 'The "Closed Category" Cases'.

⁵⁵ Not to be confused with the idea that the group can be identified at the time. The test is mainly focused on the fact that prevents the group from growing in size, and if it can be identified as a potentially expanding one, *locus standi* will most likely not be granted. See for example Judgment of 2 July 1964 in Case 1/64, *Glucoseries réunies v. Commission of the European Economic Community*, [1964] ECR 413 where the sole importer was refused standing on the grounds that anybody might become engaged in the business, disregarding the argument that it is highly unlikely that such an entity could surface. See also Section F of this paper.

⁵⁶ See Danwitz, *supra* note 46 at 1109 '... die keine abstrakte Regelung treffen, sondern an bereits bestehende Rechtspositionen anknüpfen, so daß der Kreis der Betroffenen nach Erlaß der Maßnahme nicht mehr erweitert werden kann.'

⁵⁷ Case 1/64, *Glucoceries Réunies*, [1964] ECR 413.

⁵⁸ Italy did not export any glucose to France and the fact was noticed by the Court as excluding it from the target group of the measure.

⁵⁹ Case 1/64, *Glucoceries Réunies* [1964] ECR 413 at para. 417.

⁶⁰ The *effet utile* analysis in determining whether the applicants could be individually concerned is an interesting approach, as it in fact analyzes whether the act was objectively justified.

⁶¹ Judgment of 21 May 1987 Case 97/85, *Union Deutsche Lebensmittelwerke GmbH and others v. Commission of the European Communities (Deutsche Lebensmittelwerke)*, [1987] ECR 2265.

campaign to expand the markets for milk and milk products, and in order to observe the response of consumers to a reduction in prices for butter.⁶² The federal office for the organization of agricultural markets⁶³ was to make available free of charge 900 tons of butter from public stocks to certain commercial undertakings which it was to select and which were to pledge themselves by contract to package the butter covered by the operation and to sell it through retailers.

The applicants were responsible for the majority of the sales of margarine in the area and naturally considered themselves concerned as the Community literally decided to start dumping an alternative product on the market for a period of two months. In business terms, it is understandable that whenever a product that is highly interchangeable with another product is dumped on the market with a substantially lower price, the sales of the alternative product (margarine) will decrease rapidly and financial loss is inevitable due to lower sales. The applicants brought actions at the local administrative Court asking for interim relief, which was granted. However, the appellate Court found that the applications fell under the jurisdiction of the civil Courts as the implementing measures were all governed by private law, and quashed the orders.⁶⁴ Thereafter, the applicants brought an action for annulment under Article 173 (2) EEC (now, after amendment, Art. 230 EC). Based on the *Plaumann* ruling, the Court ignored the fact that the applicants would suffer economic hardship as an inevitable consequence of the measure and upheld the Commission's argument that the measures were not of individual concern to the applicants as 'other undertakings supply, or may decide to supply, margarine on the West Berlin market'.⁶⁵

There is some doubt as to the reasonableness of this argumentation since it is unlikely any undertaking will enter the market when the Community is in fact dumping an alternative product with prices a private competitor is unable to beat. Therefore, on the basis of how reasonable it is for a new undertaking to enter the business, it would be correct to consider the group closed and the applicants

⁶² OJ 1977 L 131/6; Nine hundred tons of butter from public stocks were to be packaged in packets of 250 grams, each stamped with the words 'free EEC butter'. Those packets were subsequently to be marketed in a package also containing one packet of open-market butter of the same weight, and the price of the packets thus sold together was not to exceed the price chargeable for 250 grams of open-market butter during the marketing period.

⁶³ The competent intervention agency for milk and milk products – Bundesanstalt Für Landwirtschaftliche Marktordnung.

⁶⁴ The Court referred several questions for a preliminary ruling: Judgment of 21 May 1987 in Cases 133–136/85, *Walter Rau Lebensmittelwerke and others v. Bundesanstalt für landwirtschaftliche Marktordnung*, [1987] ECR 2289.

⁶⁵ Whenever there is a theoretical possibility of another private entity entering the business, *locus standi* has been denied. See in that respect Case 25/62, *Plaumann* [1963] ECR 95; Judgment of 14 July 1983 in Case 231/82, *Spijker Kwasten BV v. Commission of the European Communities (Spijker)*, [1983] ECR 2559; Case C-198/91, *Cook* [1993] ECR I–2487; Case C-225/91, *Matra* [1993] ECR I–3203; Case T-2/93, *Air France* [1994] ECR II–323; and Case T-465/93, '*Murgia Messapica*' [1994] ECR II–361.

individually concerned. As to the issue of direct concern, the applicants argued that since the Decision was very specific and unconditional, the discretion exercised by the MS in its implementation was insignificant. The Court did not uphold their argument. It explained that the applicant is free to challenge any national measure implementing the Decision and the national Court can then make a reference for a preliminary ruling. The Court also declared that the issue of the national Court being under no obligation to make such a referral ‘... is an inherent feature of the system of means of redress established by the Treaty ...’⁶⁶ and is thus not sufficient grounds to liberalize the access of private actions to the Court.

Again, the Court instructed the applicants to act on a derivative measure, and to go through the lengthy procedure of obtaining a preliminary ruling, instead of allowing the treatment of the problem at its source. One has to consider whether it is in harmony with the principles pursued by the *acquis* and the idea of a speedy and efficient remedy being available to private applicants. The treatment of the result, instead of the cause, seems quite unreasonable considering that in the end the measure *per se* caused the applicants to suffer economic loss and ultimately only the Court has the authority to declare a Community act invalid.⁶⁷ Based on this, it does not seem sensible to direct the cases to the MS level as the Court of a MS is a *forum non conveniens* for the proceedings on the matter.⁶⁸ Is the Court really instructing the applicants to choose an action for damages instead of an action for annulment? Ultimately, the case-law appears to suggest that it is acceptable to cause harm as long as one has a remedy in damages. It cannot however be left unmentioned that the Court has defined the conditions for Community liability so narrowly that awarding damages is highly unlikely.⁶⁹

⁶⁶ Case 97/85, *Deutsche Lebensmittelwerke* [1987] ECR 2265, para. 12.

⁶⁷ Case 314/85, *Foto-Frost* [1987] ECR 4199, para. 17; since the establishment of the CFI the authority is extended to include the CFI and the ECJ.

⁶⁸ See in that direction the opinion of AG Jacobs in the Judgment of 16 May 1991 in Case C-358/89, *Extramet Industrie SA v. Council of the European Communities (Extramet Industrie)*, [1991] ECR I-2501 (admissibility); [1992] ECR I-3813 at paras. 69–74 (substance).

⁶⁹ ‘It is settled case-law that the Community can incur non-contractual liability only if a set of conditions relating to the illegality of the conduct alleged against the institutions, the occurrence of actual damage and the existence of a causal link between the conduct complained of and the harm alleged are fulfilled. As regards liability arising from legislative measures, the Community conduct complained of must also constitute a breach of a superior rule of law for the protection of individuals. If the institution has adopted the measure in the exercise of a wide power of assessment, as is the case in relation to the common agricultural policy, that breach must also be sufficiently serious, that is to say manifest and grave.’ See, for example, Judgment of 13 December 1995 in Joined Cases T-481/93 and T-484/93, *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee v. Commission of the European Communities*, [1995] ECR II-2941 at para. 81; Judgment of 9 December 1997 in Joined Cases T-195/94 and T-202/94, *Friedhelm Quiller and Johann Heusmann v. Council of the European Union and Commission of the European Communities (Quiller and Heusmann)*, [1997] ECR II-2247 at paras 48–49;

A case with exceptional circumstances, where the applicants were accorded *locus standi* despite a lack of any individualization in their position was *Les Verts*.⁷⁰ The case has been referred to as the one in which the Court openly admitted that its case-law was unable to provide for a fair solution and that an exception had to be made in order to protect the rule of law. In *Les Verts* the European Parliament passed a decision by which funds were granted to parties participating in the upcoming elections. The funds were however granted only to those parties, which already had seats in the parliament *ex avante*, and the newcomers were left without any financial support and thereby clearly suffered discrimination. The *Les Verts* party brought an action for annulment and the Court found that the applicant is to be accorded *locus standi* because ruling otherwise would ‘... give rise to inequality in the protection afforded by the court to the various groupings competing in the same elections’.⁷¹ This is a unique case, as the applicants were in no way in a differentiated position from any other political party which wanted to participate in the elections and had not been in the parliament before, far from being a member of a closed group. Despite the fact that the question of *locus standi* is to be resolved on procedural grounds before giving any consideration of the merits of the case, the Court took the liberty and made an exception based on the substance and decided to hear the case despite of a lack of standing under the normal rules. The question that remains is whether inequality created in *Les Verts* was indeed so much greater than in the other cases, where the Court chose to ignore the mistreatment of individuals.

II. Cases where the Act is in the Form of a Regulation

Where an applicant seeks to challenge a Regulation introduces even greater problems than challenging decisions since, in addition to the conditions discussed above, the applicant has the burden of showing that the challenged regulation is in fact a decision by its particular characteristics related to the applicant’s special circumstances. This requirement stems from the wording of Article 249 EC (ex. Art. 189), according to which ‘[a] regulation shall have general application’. The logic behind the requirement is that allowing individuals to challenge truly generic norms

cont.

Judgment of 17 February 1998 Case T-105/96, *Pharos SA v. Commission of the European Communities (Pharos)*, [1998] ECR II-285 at paras 47–62; see also in this respect B. Engler, ‘Die Schadensersatzklage gegen die EG – Geringe Erfolgchancen für den Einzelnen’ in (1979) EuGRZ 377–382; H. Rasmussen, ‘Why is Article 173 Interpreted Against Private Plaintiffs?’ in (1980) 5 ELRev 112–127; ‘no private party has yet been awarded damages’ – the claim has become invalid as to its absolute nature due to the fact that 1,000 farmers got compensation in the *Mulder* cases; Judgment of 27 January 2000 in Joined Cases C-104/89 and C-37/90, *J.M. Mulder, W.H. Brinkhoff, J.M.M. Muskens, T. Twijnstra and Otto Heinemann v. Council of the European Union and Commission of the European Communities (Mulder and others)*, [1992] ECR I-3061.

⁷⁰ Case 294/83, ‘*Les Verts*’ [1986] ECR 1339.

⁷¹ Case 294/83, ‘*Les Verts*’ [1986] ECR 1339 at para. 36.

is considered to be in conflict with general principles of legislation, since a generic norm should, at least in theory, not have an effect on a private party that is substantially different from the effect it has on all other subjects. Therefore, in order for an applicant to be able to challenge the regulation, the applicant must be affected by the regulation in a very specific manner. In these cases, the Court has used different approaches in different cases, sometimes placing emphasis on the test of legal nature and sometimes disregarding the test and relying in its ruling solely on the question of direct and individual concern.⁷² According to settled case-law the test for distinguishing between a regulation and a decision is whether the measure is of general application or not.⁷³ In general, a measure is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in general and abstract terms.⁷⁴

*UNICME*⁷⁵ may be considered an example of a case where court took as a basis only the test of direct and individual concern. It was stated in this case that where direct and individual concern can be established, it is unnecessary to consider the substance of the measure. This statement could be interpreted as the end of the test of legal nature. However as seen below, subsequent case-law has not been so uniform.⁷⁶ The approach of the court seems to have been inconsistent and has often kept access to it very limited, sometimes using the test of legal nature, and sometimes the tests of direct and individual concern to arrive at a ruling.

⁷² The *closed category test* in particular.

⁷³ Judgment of 26 March 1999 in Case T-114/96, *Confiserie du Tech SA and Biscuiterie-Confiserie LOR SA v. Commission of the European Communities*, [1999] ECR II-913 at para. 26.

⁷⁴ Judgment of 15 June 2001 in Case T-339/00 R, *Bactria Industriehygiene-Service GmbH & Co. KG v. Commission of the European Communities (Bactria)*, [2001] ECR I-0000 at para. 75; Judgment of 11 July 1968 in Case 6/68, *Zuckerfabrik Watenstedt GmbH v. Council of the European Communities (Zuckerfabrik Watenstedt GmbH)*, [1968] ECR 409; Judgment of 24 April 1996 in Case C-87/95 P, *Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e Procuratori v. Council of the European Union (CNPAAP)*, [1996] ECR I-2003 para. 33; Judgment of 10 July 1996 in Case T-482/93, *Martin Weber, Maria Weber and Martin Weber GdbR v. Commission of the European Communities (Weber)*, [1996] ECR II-609 para. 55; and Judgment of 8 July 1999 in Case T-158/95, *Eridania Zuccherifici Nazionali SpA, ISI – Industria Saccarifera Italiana Agroindustriale SpA, Sadam Zuccherifici, Sadam Castiglionesse SpA, Sadam Abruzzo SpA, Zuccherificio del Molise SpA, SFIR – Società Fondiaria Industriale Romagnola SpA and Ponteco Zuccheri SpA v. Council of the European Union (Eridania and others)*, [1999] ECR II-2219 at para. 54.

⁷⁵ Judgment of 16 March 1978 in Case 123/77, *Unione nazionale importatori e commercianti motoveicoli esteri and others v. Council of the European Communities (UNICME)*, [1978] ECR 845 at para. 7.

⁷⁶ See Judgment of 15 June 1993 in Case C-213/91, *Abertal SAT Ltda and Others v. Commission of the European Communities (Abertal)*, [1993] ECR I-3265; Case C-152/88, *Sofrimport*, [1990] ECR I-2477.

1. Decision by Nature, the Conflict Between Substance and Form

According to the Court, when contesting a regulation the applicant bears the burden of showing that the act *constitutes in substance a decision*, which is of both direct and individual concern to it.⁷⁷ The test for establishing whether the act is a regulation or a decision is whether or not the measure in question is of general application.⁷⁸

(A) TEST OF LEGAL NATURE

In *Calpak*⁷⁹ the Court stated:

... *the measure applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner.* The nature of the measure in question 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.⁸⁰ [emphasis added]

This wording has been repeated in *Moksel*⁸¹ as well as other cases.⁸² Even after stating that substance prevails over form, the Court has then discussed whether the text of the measure is by its wording generic in nature. As practice has shown, the Community legislature has been able to draft norms that *de facto* affect a group of entities, which can be ascertained at the time of the passing of the measure, that will not be subject to review by private actions simply on the basis of the wording. Craig best expresses the weakness of what he calls the abstract terminology test: 'The problem with the abstract terminology test is that rather than looking behind form to substance, it comes perilously close to looking behind form to form.'⁸³

The practical application of the test becomes even more questionable when

⁷⁷ Judgment of 27 October 1983 in Case 276/82, *Roomboterfabriek 'De beste boter' BV v. Produktschap voor Zuivel* [1983] ECR 3331; Judgment of 21 November 1989 in Case C-244/88, *Usines coopératives de déshydratation du Vexin and others v. Commission of the European Communities*, [1989] ECR 3811.

⁷⁸ See for example Judgment of 11 December 1996 in Case T-70/94, *Comafrika SpA and Dole Fresh Fruit Europa Ltd & Co. v. Commission of the European Communities*, [1996] ECR II-1741; Opinion of AG Van Gerven in the Judgment of 6 November 1990 in Case 354/87, *Weddel & Co BV v. Commission of the European Communities*, [1990] ECR I-3847 at paras. 12 and 23; Joined cases 41/70 to 44/70, *International Fruit* [1971] ECR 411 at para. 21.

⁷⁹ Judgment of 17 June 1980 in Cases 789/79 and 790/79, *Calpak SpA et Società Emiliana Lavorazione Frutta SpA v. Commission of the European Communities (Calpak)*, [1980] ECR 1949.

⁸⁰ Cases 789/79 and 790/79, *Calpak*, [1980] ECR 1949, para. 9.

⁸¹ Judgment of 25 March 1982 in Case 45/81, *Aleksander Moksel Import-Export GmbH & Co Handels KG v. Commission of the European Communities (Moksel)*, [1982] ECR 1129.

⁸² See Case 307/81, *Alusuisse*, [1982] ECR 3463 at para. 9; Judgment of 14 February 1989 in Case 206/87, *Lefebvre Frères et Soeurs SA v. Commission of the European Communities (Lefebvre)*, [1989] ECR 275 at para. 13.

⁸³ See Craig, *supra* note at 515.

considering that the community often passes regulations, which are only applicable for a short period of time (e.g., 3 months) and by their temporary nature only applicable to a limited group of subjects. Based on the fact that the wording of a measure is abstract in nature, those subjects will not be accorded standing in a direct action even if in fact the group affected is limited. Furthermore, by setting down the above rule the Court somewhat contradicts its statement in paragraph 7 of the judgment, namely, that the rationale for allowing any challenge to provisions which were in the form of regulations was to prevent the Community institutions from immunizing measures from attack merely by the form in which they were expressed.⁸⁴ In paragraph 7, the Court theoretically ‘opened the door’ for reasoning that the choice of form chosen for the measure challenged, despite being generic in form, is in fact a means for the Community legislature to protect it from proceedings from annulment while in fact seeking to adopt a decision.⁸⁵ By making the rule of no use to them on the basis of the test of legal nature, the Court at the same time ‘closed the door’ for *Calpak*.

In most cases the court differentiates between true regulations and decisions of importance to individuals by assessing the nature of the contested decision and in particular the legal effects which it is intended to produce or actually produces.⁸⁶ If the act is applicable to an abstract group of subjects, it is to be considered a regulation by nature. If however the measure identifies certain individuals, for example, it may be susceptible to judicial review by private actions under Article 230 EC (ex. Art. 173). According to settled case-law, any measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his or her legal position, is an act or decision which may be the subject of an action under Article 230 of the Treaty for a declaration that it is void.⁸⁷

The nature of a measure can at times become an unchallengeable barrier to a direct action, and at other times it is completely ignored by the Court and the ruling is passed on the basis of the test of direct and individual concern. For example in cases such as *CAM*,⁸⁸ the Court declared the action admissible without considering at all the nature of the measure or its direct effect, thereby considerably changing the

⁸⁴ Cases 789/79 and 790/79, *Calpak*, [1980] ECR 1949 at para. 7; see Judgment of 9 April 1997 in Case T-47/95, *Terres Rouges, Cobana Import SARL and SIPEF NV v. Commission of the European Communities*, [1997] ECR II-481 at para. 39.

⁸⁵ Here again we meet the principle that substance should prevail over form. See also Case 307/81, *Aluisse*, [1982] ECR 3463 at para. 7.

⁸⁶ See Judgment of 24 February 1987 in Case 26/86, *Deutz und Geldermann, Sektellerei Breisach (Baden) GmbH v. Council of the European Communities (Deutz)*, [1987] ECR 941 at para. 7; the Order of 23 November 1995 in Case C-10/95 P, *Asociación Española de Empresas de la Carne v. Council of the European Union (Asocarne)*, [1995] ECR I-4149 at para. 28; and Case C-87/95 P, *CNPAAP v. Council* [1996] ECR I-2003, para. 33.

⁸⁷ See, for example, the Order of 16 July 1998 in Case T-274/97, *Ca’Pasta Srl v. Commission of the European Communities*, [1998] ECR II-2927 at para. 24.

⁸⁸ Judgment of 18 November 1975 in Case 100/74, *Société CAM SA v. Commission of the European Communities (CAM SA)*, [1975] ECR 1393.

procedure used. The mainstream opinion on the matter is best expressed by AG Jacobs in *Extramet*⁸⁹ where he stated:

... the court should in my view make clear what is already implicit in the prevailing trend of its Case-law, namely that the requirement of a Decision does not exist independently of the requirement of individual concern.

Such a statement would in fact make the lives of applicants easier, in providing for at least some guidelines for what approach to expect from the Court. Currently no such clarity exists, and the applicant must be well prepared for both approaches.

Most recently, in *Jégo-Quéré*,⁹⁰ the Court of First Instance (CFI) chose to bypass the test of legal nature. In paragraph 24 of the judgment, the Court held that the challenged provisions⁹¹ were of general application and in the following paragraph the Court simply stated that despite the general effect of the regulation an applicant can still be considered as directly and individually concerned by the regulation. Interestingly, the Court states that this approach is based on settled case-law, referring to exceptional cases such as *Codorniu*.⁹²

The reasonableness of having the third criteria of the nature of the measure has been a cause for strong criticism, in that a measure may often have a different effect on a particular individual even though its generic in nature. Based on *Jégo-Quéré* it seems that the CFI has declared that based on 'settled case-law' it is now sufficient to demonstrate individual and direct concern, and the applicants are no longer under a burden to demonstrate that the regulation is in fact a decision by nature. Having regard to the severity of the conditions of direct and individual concern, it is certainly time that the test of legal nature is discarded and *locus standi* is granted or denied on the basis of the test of direct and individual concern.⁹³ It is to be seen whether the approach taken by the CFI will become the approach applied also in subsequent cases.

2. The 'Closed Category' Cases

The practice of the Court indicates that the 'key' to establishing individual concern

⁸⁹ Case C-358/89, *Extramet*, [1991] ECR I-2501 para. 53.

⁹⁰ Judgment of 3 May 2002 in Case T-177/01, *Jégo-Quéré & Cie SA v. Commission of the European Communities (Jégo-Quéré)*, [2002] ECR II-0000.

⁹¹ Commission Regulation 1162/2001/EC, OJ 2001 L 159/4.

⁹² The CFI refers to Case C-358/89, *Extramet*, [1991] ECR I-2501 at paras 13 and 14, the judgment of 18 May 1994 in Case C-309/89, *Codorniu SA v. Council of the European Union (Codorniu)*, [1994] ECR I-1853 at para. 19 and judgment of 22 November 2001 in C-451/98, *Antillean Rice Mills NV v. Council of the European Union*, [2001] ECR I-8949 at para. 46; Judgment of 14 August 1998 in Case T-43/98, *Emesa Sugar (Free Zone) NV v. Council of the European Union*, [2001] ECR II-0000 para. 47.

⁹³ F. Emmert, 'Die Gefahr des "denial of justice" durch Selbstbeschränkung des Gerichtshofs' in *Der Europäische Gerichtshof in Luxemburg als Garant der Rechtsgemeinschaft*, (Proefschrift Universiteit Maastricht 1998) pp. 175-237 at p. 202.

has been the closed category test. In cases where the measure affects entities that form a group distinguished from all others in that it can no longer be extended to include any further members, the Court has considered the group of entities to be individually concerned, and has granted *locus standi*.⁹⁴ The landmark decision for such interpretation is *Toepfer*,⁹⁵ where the Federal Republic of Germany had implemented certain protective measures on the importation of maize, millet and sorghum. The applicants had applied for import licences before the Commission adopted a decision allowing Germany to retain in force the above-mentioned measures. The Court found that: '[t]he number and identity of importers had become fixed and ascertainable before 4 October, when the contested decision was made.' Based on this reasoning, the Court dismissed the objection of inadmissibility and held that the applicants were by the same fact distinguished individually from all other persons, just as in the case of the person addressed.

The Court used the same reasoning in *International Fruit*,⁹⁶ which dealt with the importation of apples from third countries into the Community. The procedure foresaw that the importers applied for import licences with their own local authorities, which at the end of each week communicated the quantities applied for to the Commission.⁹⁷ The Commission then adopted a Regulation on the issue of the licences, based *inter alia* on these submissions. The Court held that the Regulation was *de facto* a bundle of decisions⁹⁸ and that at the time the Regulation was adopted, the number of applications, which could be affected, was fixed as no new applications could be added.⁹⁹ On these grounds, the applicant was considered to be individually concerned.¹⁰⁰

In the *CAM*¹⁰¹ case the Commission passed a regulation,¹⁰² which denied *CAM* (among other exporters that applied for an export licence before 7 October 1974) an increase in refunds on the exports of cereals and rice. In this case, the Court found that the number of cereal exporters affected by the measure was fixed,¹⁰³ and

⁹⁴ Judgment of 21 February 1984 in Joined Cases 239/82 and 275/82, *Allied Corporation and others v. Commission of the European Communities (Allied Corporation)*, [1984] ECR 1005.

⁹⁵ Cases 106/63 and 107/63, *Toepfer*, [1965] ECR 405.

⁹⁶ Joined Cases 41/70 to 44/70, *International Fruit*, [1971] ECR 411.

⁹⁷ Art. 2(1) of Regulation 459/70, OJ 1970 L 57/20.

⁹⁸ Joined Cases 41/70 to 44/70, *International Fruit*, [1971] ECR 411 at para. 21.

⁹⁹ Joined cases 41/70 to 44/70, *International Fruit*, [1971] ECR 411 at paras 17–18; the same reasoning was applied in Case 62/70, *Bock* [1971] ECR 897 at para. 10.

¹⁰⁰ Joined Cases 41/70 to 44/70, *International Fruit*, [1971] ECR 411 at para. 22. The applicant was also found to be directly concerned due to the fact that, under Art. 1(2) Regulation no 459/70, national authorities did not enjoy any discretion in the matter of the issue of licences and the conditions on which applications should be granted: the Regulation provided that 'Member States shall in accordance with the conditions laid down in Art. 2, issue the licence to any interested party applying for it'; in that respect *see* Joined Cases 41/70 to 44/70, *International Fruit v. Commission*, [1971] ECR 411 at paras. 25–26.

¹⁰¹ Case 100/74, *CAM SA* [1975] ECR 1393.

¹⁰² Commission Regulation 2546/74, OJ 1974 L 271/77.

therefore the applicants were individually concerned. This seems to somewhat contradict the ruling in *Compagnie Française Commerciale et Financière*,¹⁰⁴ where the Court expressly stated that:

the fact that a transitional provision is applicable only to certain situations arising before a date fixed by it and, therefore, often established before it comes into force, does not prevent that provision from being an integral part of the former and new provisions which it is designed to reconcile and, consequently, from partaking of their general nature.¹⁰⁵

Even AG Warner suggested that on the basis of preceding case-law, the applicants were not individually concerned. However the Court ignored the form of the measure and held the applicants to be individually concerned. The same was stated in *Exportation des sucres*,¹⁰⁶ where the applicants were in possession of a specific licence that in the view of the Court, differentiated them from all other producers in that they were members of a closed group at the time the measure was adopted. As noted in the above cases, the Court based its ruling solely on the fact that the applicants formed a closed group and were thereby in a special situation as far as the measure was concerned. The fact that the measure was generic in nature did not prevent the Court from according standing to the parties concerned.

However even when the applicant is a member of the closed group, there have been cases where the applicants were nevertheless denied standing. In cases such as *Unifruit Hellas* and *Weber*, the fact that a trader formed part of a closed group of traders to which no others could be added at the time when the regulation was adopted was considered insufficient for the trader in question to be considered individually concerned.¹⁰⁷ In *Unifruit* the applicant was engaged in the import and export of fruit and vegetables. In early 1993, it purchased approximately 2 million kilograms of apples from Chile and shipped them to Greece. The applicant applied to the Greek intervention agency for import certificates on 18 March 1993, and on 7 April 1993 a countervailing charge was applied to the apples imported by the

¹⁰³ Case 100/74, *CAM SA* [1975] ECR 1393 at paras 13–18, by the fact that the application deadline had passed and no further entities could enter the group, and that the amount of transactions affected was also known.

¹⁰⁴ Judgment of 16 April 1970 in Case 64/69, *La compagnie française commerciale et financière SA, v. Commission of the European Communities (La Compagnie Française)*, [1970] ECR 221.

¹⁰⁵ Case 64/69, *La Compagnie Française* [1970] ECR 221 at para. 12.

¹⁰⁶ Judgment of 33 March 1977 in Case 88/76, *Société pour l'exportation des sucres SA v. Commission of the European Communities*, [1977] ECR 409; see also Judgment of 1 February 1984 in Case 1/84, *Ilford SpA v. Commission of the European Communities* [1984] ECR 423.

¹⁰⁷ Judgment of 15 December 1994 in Case T-489/93, *Unifruit Hellas EPE v. Commission of the European Communities* [1994] ECR II–1201, para. 25 (upheld by ECJ in its Order of 5 February 1997 in Case C-51/95 P, *Unifruit Hellas EPE v. Commission of the European Communities*, [1997] ECR I–0727), and Case T-482/93, *Weber* [1996] ECR II–609 at paras 63–65.

applicant.¹⁰⁸ The applicant was apparently in a position sufficiently different from all other applicants such that it could be considered individually concerned by the measure since the apples were already in transit to the Community and were purchased under the surveillance measures introduced by Regulation No 384/93. The Court however then referred to its preceding case-law stating that the possibility of identifying the subjects was not sufficient to consider the regulation a decision¹⁰⁹ and further that it must affect the subjects' legal position through factual circumstances which differentiate them from all other persons and distinguish them individually in the same way as a person to whom it is addressed.¹¹⁰ Surprisingly, the Court did not consider the fact that the applicant belonged to a closed class was sufficient to differentiate it from all other members in the trade. It seems that the applicant's rights under the principle of legal certainty may have been infringed, as the measure was applied to his situation only after it had purchased the goods. At least in theory, the applicant was entitled to rely on the norms as they were at the time of the act of purchasing the apples, as the purchase was done on the presumption that it would be able to sell them in the Community market under the conditions set. The Court however decided otherwise.¹¹¹ In *Jégo-Quéré* the Court made it clear that the fact that the applicant was one of the major undertakings affected by the challenged regulation in a geographic area would not sufficiently individualize the applicant in order to make it individually concerned.¹¹²

In general the Court has by now somewhat clarified its understanding of persons

¹⁰⁸ Introduced by Commission Regulation No 846/93 of 7 April 1993, OJ 1993 L 88/30, as amended by Commission Regulations Nos. 915/93, OJ 1993 L 94/26; 1396/93, OJ 1993 L 137/9; and 1467/93, OJ 1993 L 144/11.

¹⁰⁹ See Case 64/69, *La Compagnie Française* [1970] ECR 221, para. 11; Judgment of 5 May 1977 in Case 101/76, *Koninklijke Scholten Honig NV v. Council and Commission of the European Communities (Koninklijke Scholten Honig)* [1977] ECR 797 at para. 23; Case 123/77, *UNICME* [1978] ECR 845 at para. 16; Judgment of 30 September 1982 in Case 242/81, *Société Roquette Frères v. Council of the European Communities* [1982] ECR 3213 at para. 7; Case 26/86, *Deutz* [1987] ECR 941 at para. 8; Judgment of 24 November 1992 in Joined Cases C-15/91 and C-108/91, *Josef Buckl & Söhne OHG and others v. Commission of the European Communities (Buckl)*, [1992] ECR I-6061 at para. 25; Case C-213/91, *Abertal*, [1993] ECR I-3265 at para. 17; Case C-309/89, *Codorniu* [1994] ECR I-1853, para. 18; and the Order of 28 October 1993 in Case T-476/93, *Fédération régionale des syndicats d'exploitants agricoles and Fédération nationale des syndicats d'exploitants agricoles v. Council of the European Communities (FRSEA and FNSEA)*, [1993] ECR II-1187 at para. 19.

¹¹⁰ Case 25/62, *Plaumann* [1963] ECR 95 at p. 107, Case C-309/89, *Codorniu* [1994] ECR I-1853 at para. 20; Order of 21 June 1993 in Case C-257/93, *Léon Van Parijs NV and others v. Council of the European Communities et Communautés européennes* [1993] ECR I-3335 at para. 9; and Case T-476/93, *FRSEA and FNSEA* [1993] ECR II-1187 at para. 20.

¹¹¹ See Case C-152/88, *Sofrimport* [1990] ECR I-2477, where the importer of apples from Chile was granted standing in a similar situation due to a specific mention of goods in transit in the relevant regulation Art. 3(3) (Council Regulation 2707/72, OJ 1972 L 291/3). In *Unifruit* an applicant in the very same situation was denied *locus standi* because the legislator had chosen not to include such a provision.

¹¹² Case T-177/01, *Jégo-Quéré*, [2002] ECR II-0000 paras 28 and 29.

that can be accorded standing on the basis that they belong to a closed group of subjects. It can now safely be said that the mere fact of belonging to a closed group is not sufficient. According to the Court, in order for a member of a closed group to be accorded standing the adopting institution must have been under an 'obligation to take account of the particular situation of those traders when adopting the measure'.¹¹³ This in itself creates an additional limitation to those already present that private applicants must overcome even before the substance of their case is heard. Whether the additional limitation is indeed necessary remains questionable.

D. The *Codorníu* Fenomena

In *Extramet*¹¹⁴ the Court was at last faced with a situation where it had to declare that some 'true regulations' might in fact be of direct and individual concern to private applicants. The ruling in *Codorníu SA v. Council*¹¹⁵ seemed to push the limits even further, and the case is by many authors considered a landmark decision to finally opening the doors to private parties. The ruling in *Codorníu* is certainly of significance, but its effect as regards 'opening the doors' should not be overemphasized. The specific circumstances of the case had a significant impact on the ruling.

The applicant had secured a trademark (TM) in 1924 containing the term '*Crément*' in Spain.¹¹⁶ The Council passed a regulation which limited the use of the above-mentioned term to a certain type of sparkling wines from Luxemburg or France. The applicant challenged this regulation on the basis that the regulation limited its right to the use of the TM. The respondent argued that there was no way *Codorníu* could be accorded *locus standi* as the measure challenged was clearly a 'true regulation' within the meaning of the *Calpak* judgment.¹¹⁷ In response the Court made the following statement:

Although it is true that according to the criteria in the second paragraph of Article 173 of the Treaty [now, after amendment, Art. 230 EC] the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, *that does not prevent it from being of individual concern to some of them.* [emphasis and amendment reference added]

¹¹³ Case T-339/00 R, *Bactria*, [2001] ECR II-0000 at para. 83; Order of 12 October 2000 in Case C-300/00 P(R), *Federación de Cofradías de Pescadores de Guipúzcoa and others v. Council of the European Union and Commission of the European Communities* [2000] ECR I-8797 at para. 46.

¹¹⁴ Case C-358/89, *Extramet*, [1991] ECR I-2501.

¹¹⁵ Case C-309/89, *Codorníu*, [1994] ECR I-1853.

¹¹⁶ Case C-309/89, *Codorníu*, [1994] ECR I-1853 at para. 21.

¹¹⁷ Cases 789/79 and 790/79, *Calpak*, [1980] ECR 1949 at para. 9.

As stated above, the ruling in *Codorníu* is important as it went directly against the earlier rulings, where if the measure was found to be truly abstract in nature the case was ‘kicked out’ with no further discussion.¹¹⁸ However *Codorníu* was very exceptional in circumstances due to the applicant holding the TM for such a lengthy period of time. In effect the measure could even be interpreted as being addressed to *Codorníu* in that this measure significantly changed its legal situation by prohibiting the use of its TM and that it was the only subject to which the measure had such an effect. Thus one can understand why the Court decided that *locus standi* had to be granted. The significance of the statement of the Court lies in the fact that non-privileged applicants could challenge a true regulation without having to show that the regulation was by nature in fact a bundle of decisions. The Court recognized that there are special cases, where the applicant can challenge a generic measure. However, as the case shows, one would have to be in a position very distinguished from all the other subjects of the regulation in order to be able to meet the conditions of the Plaumann formula.¹¹⁹

In its case-law, the Court has used the different approaches interchangeably depending on the factual situation of the case. In some cases, it has shown that an applicant can even be considered individually concerned if the regulation causes excessive harm to it. The fundamental case in that direction is *Extramet*,¹²⁰ where the Court found that since Extramet was the only importer of the good in question and at the same time the primary user and would have had excessive difficulties in obtaining the good from an alternative source¹²¹ it was individually concerned by the Anti-dumping duty (ADD) regulation.

Despite all indications, the Court has not abandoned the strict limits set out in *Plaumann*. For example in *Buralux*¹²² the court turned to its ruling in *Calpak*¹²³ dismissing the case on the basis that the group was not a closed one. However in *Jégo-Quéré* the CFI described *Codorníu* as being a part of the settled case-law.¹²⁴

It seems that the Court’s current practice is to apply the *Plaumann* type of reasoning, unless the applicant argues that it is in a special situation that would make

¹¹⁸ Cases 789/79 and 790/79, *Calpak*, [1980] ECR 1949.

¹¹⁹ See, for example, the order of 9 August 1995 in Case T-585/93, *Stichting Greenpeace Council (Greenpeace International) and others v. Commission of the European Communities (Greenpeace International)*, [1995] ECR II-2205 at para. 48, confirmed on appeal by judgment of 2 April 1998 in Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission of the European Communities*, [1998] ECR I-1651; Judgment of 15 February 1996 in Case C-209/94 P, *Buralux SA, Satrod SA and Ourry SA v. Council of the European Union (Buralux)*, [1996] ECR I-0615 at para. 25; Judgment of 17 June 1998 in Case T-135/96, *Union Européenne de l’artisanat et des petites et moyennes entreprises (UEAPME) v. Council of the European Union (UEAPME)*, [1998] ECR II-2335 at para. 69.

¹²⁰ Case C-358/89, *Extramet*, [1991] ECR I-2501.

¹²¹ In para. 13: A competitor and the only community producer of the raw material Pechiney refused to supply calcium metal to Extramet.

¹²² Case C-209/94 P, *Buralux*, [1996] ECR I-0615.

¹²³ Cases 789/79 and 790/79, *Calpak*, [1980] ECR 1949.

¹²⁴ Case T-177/01, *Jégo-Quéré*, [2002] ECR II-0000 at para. 25.

the more lenient case-law applicable to its case. Nevertheless, the burden lies with the applicant, and the Court will not walk the extra mile to loosen the ties in a case there are no differentiating circumstances.

E. Cases Where the Court has Taken a More Liberal Approach

As noted above, the case-law of the Court has not been completely uniform as regards the questions of according standing to non-privileged applicants. On occasion, the rules have been very strict, but there are situations when the approach of the Court has been quite different. The common factor in all these cases is that once one has participatory rights under the norms, and one has made use of those rights, one will be granted standing.¹²⁵ Therefore the decision of whether or not to accord standing in the cases below depends on whether the applicant participated in the administrative procedure, either as the complainant or as a third party submitting comments pursuant to a notice on the opening of a procedure;¹²⁶ and whether the conduct of that procedure was largely determined by its observations or whether its position on the market was significantly affected by the aid in question.¹²⁷

I. Competition Cases

Competition cases are regulated by Treaty Articles 81 (ex. Art. 85) and 82 (ex. Art. 86), the former dealing with concentrations and the latter with abuse of dominant positions. As stated above, in principle the giving of *locus standi* to a competitor is far

¹²⁵ For example, the preamble of Regulation 17 states that '... [u]ndertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their comments beforehand, and it must be ensured that wide publicity is given to decisions taken'. Therefore on the basis of this provision one can already raise the issue of being individually concerned by the resulting measure.

¹²⁶ E.g. pursuant to Art. 93(2) of the Treaty.

¹²⁷ Judgment of 20 March 1985 in Case 264/82, *Timex Corporation v. Council and Commission of the European Communities*, [1985] ECR 849; Judgment of 28 January 1986 in Case 169/84, *Compagnie française de l'azote (Cofaz) SA and others v. Commission of the European Communities (Cofaz)*, [1986] ECR 391 at para. 25, and, in that case, the Opinion of Advocate General VerLoren Van Themaat, p. 405; Case T-435/93, *ASPEC* [1995] ECR II-1281 at para. 64; and judgment of 27 April 1995 in Case T-442/93, *Association des Amidonneries de Céréales de la CEE, Levantina Agricola Industrial SA, Società Piemontese Amidi e Derivati SpA, Pfeifer & Langen, Ogilvie Aquitaine SA, Cargill BV and Latenstein Zetmeel BV v. Commission of the European Communities (AAC and others)*, [1995] ECR II-1329 at para. 49.

more likely to occur if the procedures foresee some sort of participatory rights.¹²⁸ Therefore, as regards the standing of applicants, the key legislation is EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, as it lays down these participatory rights of interested parties.¹²⁹ If the applicants have made use of these rights, then practice indicates that any measures taken thereafter are considered to be of direct and individual concern to them.¹³⁰ Therefore if one has participated in the Commission investigation under the Merger Control Regulation,¹³¹ then the Commission's finding of whether the merger is or is not compatible with the Common market is considered as being of direct and individual concern to it.

One of the most interesting cases in the field of competition law is the *Metro case*.¹³² Metro complained to the Commission that SABA was engaged in anti-competitive trade practices, in that it had refused to supply Metro with its electronic products.¹³³ The Commission decided that there was no violation of Article 81 EC (ex. 85). As competition decisions are addressed to the subjects, and not to the ones that initiate the proceedings, the Court was faced with a dispute on whether or not Metro was individually concerned by the resolution. The Court found that the Commission's proceedings were initiated on the basis of Metro's complaint and that after such initiation, in order to protect the legitimate interests of the participant, it was necessary to grant it judicial review if its request was not complied with. These factors were sufficient for Metro to be considered individually concerned and it was granted *locus standi*.¹³⁴

The application of the above principle has been uniform and the granting of standing in such cases provides adequate access to those undertakings, which were cautious enough to participate when possible. The reasoning of the Court in granting standing is expressed by AG Fennelly in *Kruidvat BVBA v. Commission*¹³⁵ as follows:

¹²⁸ See Ehlers, in *Verwaltungs-Archiv*, *supra* note at 153.

¹²⁹ Series-I I, OJ 1962 L 13/204 (English Special Edition).

¹³⁰ Case 191/82, *FEDIOL*, [1983] ECR 2913.

¹³¹ Council Regulation 4064/89 of 21 December 1989, OJ 1989 L 395/1, also called 'Merger Control Regulation'.

¹³² Judgment of 25 October 1977 in Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities (Metro)*, [1977] ECR 1875.

¹³³ Under Regulation 17, Art. 3 sets the procedural ground for a private party to initiate proceedings: SABA Claimed that Metro did not meet its requirements to Dealers concerning servicing the goods.

1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Art. 85 or Art. 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are: (a) Member States; (b) *natural or legal persons who claim a legitimate interest* [emphasis added].

¹³⁴ The Court also found that as Metro was suffering under the SABA's restrictive trade practices, it was also thereby individually concerned.

¹³⁵ The opinion of AG Fennelly in Judgment of 17 November 1998 in Case C-70/97 P, *Kruidvat BVBA v. Commission of the European Communities* [1998] ECR I-7183 at para. 34.

The Court considered the application admissible for two closely related, but none the less distinct, reasons; namely, that where natural or legal persons were entitled to make a complaint pursuant to Article 3(2) of Regulation No 17, it was both 'in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86' of the Treaty that such persons 'be able, if their request is not complied with either wholly or in part, to institute proceedings to protect their legitimate interests'.¹³⁶ The Community has an interest in receiving the most accurate and precise information in the administrative proceedings leading to any decision by an institution, and that Community interest is in close harmony with the protection of the interests of persons capable of furnishing that information. A person who plays a part in the decision-making process is so distinguished from other market participants as to have an individual concern in the decision.

When comparing the cases on Competition law to the case-law discussed before this section, one can see that the rules have been substantially relaxed. The preceding case-law made it quite clear that the fact that it was possible to identify the subjects whom the measure affected was insufficient, and the extent of the effect of the measure on one's position was considered insignificant, as long as it could be declared a 'true regulation' or as long as the applicant was not differentiated from all others.¹³⁷ Furthermore, the requirement of being a member of a closed group would have excluded Metro simply on the basis of the wording from the Piraiki-Petraiki decision¹³⁸ 'that is clearly a commercial activity which can be carried on at any time by any undertaking whatever'. On the basis of these previous tests, any company could have entered the same business that Metro was dealing in and would have been just as much 'concerned'. Therefore, what the Court decided was that the fact that Metro, unlike any other undertaking, had taken steps which it was authorized to take under Regulation 17 differentiated Metro from all other undertakings. Eventually one can see that in a strange way the Court held on to its ruling in Plaumann and simply modified the case-law in recognizing the special situation of those parties which were granted certain procedural guarantees under the respective norms of the *acquis*.

II. Anti-Dumping Cases

The situation in Dumping Cases is quite similar to the cases discussed above. The main line of cases important under the subject matter of this thesis are related to situations where the applicants' complaint was the basis for initiating proceedings or where the data provided by the applicants was used for the calculation of the anti-dumping duty

¹³⁶ Case 26/76, *Metro* [1977] ECR 1875 at para. 19.

¹³⁷ Case 123/77, *UNICME*, [1978] ECR 845.

¹³⁸ Case 11/82, *Piraiki-Petraiki*, [1985] ECR 207 para. 14.

¹³⁹ Joined Cases 239/82 and 275/82, *Allied Corporation*, [1984] ECR 1005 at para. 15; Art. 6, Council Regulation 384/96 on Protection Against Dumped Imports, OJ 1996 L 56/1, as

and/or the ex-factory price of the goods of the company allegedly dumping them on the Community market.¹³⁹ The situation differs from the cases described above since imposing anti-dumping duties is done in the form of a regulation.¹⁴⁰ Therefore in *Alusuisse*¹⁴¹ and *Allied Corporation*¹⁴² the Court recognized the special situation of AD Regulations and stated that even though they were legislative in nature they could still be challenged by interested parties. Furthermore in the *Allied* case the Court made it quite clear that producers or exporters, who were either identified in the measures or were concerned by the preliminary investigations, should be granted *locus standi*.¹⁴³ Therewith the Court has taken an approach where it recognizes the measures in question as generic norms¹⁴⁴ but bases its findings on the discussion of whether an applicant is or is not individually concerned by them, again recognizing the idea that even truly generic measures may be of direct and individual concern to some members of the general public affected. At the same time it has been made quite clear that in fact it is not possible for the Commission to exclude its measures from private actions, as anyone involved in the procedure or identified by the measure is likely to be able to bring a claim.

In *Timex*¹⁴⁵ the only British watch producer had initiated the proceedings through the British trade association and found that the resulting ADDs imposed on mechanical watches from the Soviet Union were insufficient as they did not cover the importation of watch movements of such watches and did not therefore correspond to the actual rate of dumping involved. In finding that the applicant had *locus standi* the Court stated that the AD Regulations are legislative in nature and scope inasmuch as they apply to traders in general. However as the initial act was based on the applicant's circumstances, it was to be considered a decision, which was of direct and individual concern to the applicant.¹⁴⁶ The Court found that the passing of the regulation was based on *Timex's* complaint. *Timex* had participated in the proceedings and interestingly had also mentioned that it was the main producer affected by the dumping. Once more the Court recognized that it was no longer necessary to prove that the regulation was in fact a decision and thereby reiterated that even true regulations can be of direct and individual concern.¹⁴⁷ To conclude the discussion

cont.

amended by Council Regulation 2331/96 of 2 December 1996, OJ 1996 L 317/1 and by Council Regulation 905/98 of 27 April 1998, OJ 1998 L 128/18.

¹⁴⁰ 'A regulation shall have general application.'

¹⁴¹ Case 307/81, *Alusuisse*, [1982] ECR 3463 at para. 9.

¹⁴² Joined Cases 239/82 and 275/82, *Allied Corporation*, [1984] ECR 1005.

¹⁴³ Joined Cases 239/82 and 275/82, *Allied Corporation*, [1984] ECR 1005 at para. 12.

¹⁴⁴ Not decisions – substance and form argumentation is here not applicable.

¹⁴⁵ Case 264/82, *Timex*, [1985] ECR 849.

¹⁴⁶ Case 264/82, *Timex* [1985] ECR 849 at paras. 12 and 16.

¹⁴⁷ See, for example, Case 25/62, *Plaumann*, [1963] ECR 95 at para. 107, and Case C-309/89, *Codorniu*, [1994] ECR I-1853 at paras. 19–20, and the order in Case C-10/95 P, *Asocarne*, [1995] ECR I-4149 at para. 43.

about the form of the measure in AD cases this paper claims that the Court has finally abandoned its position from *Moksel*¹⁴⁸ that a provision cannot have the character of individual measure and of that of a general application at the same time.

1. *Importer and Exporter*

According *locus standi* to exporters and importers is again questionable as ADD's are imposed by regulations and therefore imposed on all imports into the Community. However here it is more difficult to show that one is individually concerned by the measure since the investigation and the adoption of the measure do not guarantee any involvement in the proceedings for the importers and exporters. Once the measure is passed it affects all traders in general and it is no longer possible for one to express its concern with the subject matter.

As an example, in *Alusuisse*¹⁴⁹ the applicant was an independent importer of a product (orthoxytol) and the Commission imposed an ADD on the product imported from the US and Puerto Rico. Here the question of legal nature became a crucial factor for the applicant. The Commission heavily relied upon the notion that a regulation is of general application and could not be of individual concern to the applicant. The Court referred to Article 189 EEC (now Article 249 EC), upheld the argument and stated that the claim of the applicant that the subjects of the measure were identifiable was irrelevant. The application was dismissed on the basis that AD regulations are directed at all imports and that no importers are identified in the regulations.

By reason of the above emphasis must be placed on the importance that importers and exporters take advantage of their procedural options since all interested parties have the right to present their views on whether dumping exists. The Commission also sends out questionnaires to those importers and exporters that are known to the Commission.¹⁵⁰ It is, therefore, important to observe the developments in one's field of business in order to submit one's observations in time. If possible, one should cooperate with the Commission investigation and submit documentation to the Commission because the regulation by which the ADD is imposed lists the entities that participated in the proceedings and whose data was used in the calculation. An importer, whose name appears on the list, will be given standing.

III. *State Aid*¹⁵¹

The most illustrative case concerning the situation with State aids is certainly *COFAZ*,¹⁵² where the applicants initiated proceedings with the Commission against

¹⁴⁸ Case 45/81, *Moksel*, [1982] ECR 1129 at para. 18.

¹⁴⁹ Case 307/81, *Alusuisse*, [1982] ECR 3463.

¹⁵⁰ See Hartley, *supra* note at 367.

¹⁵¹ State-aids are regulated by Art. 12 of the Treaty of Amsterdam, Art. 36 (ex Art. 42), Art. 73 (ex Art. 77), Art. 86 (ex Art. 90), Art. 87 (ex Art. 92), Art. 88 (ex Art. 93), Art. 89 (ex Art. 94). The procedural regulation is set out in Council Regulation no 659/99 of 22 March 1999 laying down detailed rules for the application of Art. 93 EC [now Art. 88] OJ 1999 L 83/1.

the Netherlands for preferential tariffs to Dutch producers of nitrate fertilizers for the supply of natural gas. The applicants took full advantage of their procedural rights and participated at all stages. The Netherlands then chose to withdraw partly the benefits and the Commission, in a decision addressed to the Dutch authorities, terminated the proceedings. Once more the question arose as to whether those companies had standing to challenge this resolution. In contrast with the discussion above, here the Commission did not come to a decision, but instead terminated the proceedings. This opened a whole new line of arguments in that even if it was common practice for the final decision to be challengeable by participants it was not clear whether the same applied in the case there was no ultimate decision and the proceedings were simply terminated. Quite correctly, the Court decided not to differentiate between the types of resolutions and reiterated that whenever there were special rights accorded to the applicants by the relevant norms of procedure; these applicants would be individually concerned and would have standing to challenge the final measures.¹⁵³

IV. Conclusion on the More Liberal Cases

The ‘preferential grounds’ on which applicants are granted *locus standi* are similar in all three types of cases. The procedural involvement of the applicants in the adoption of the measure under challenge can be considered the key factor or the ground for being individually concerned and ultimately being granted *locus standi*. Therefore, in order to take full advantage of this benefit introduced by the Court, the private parties engaged in activities in these three categories should be well aware of the ‘life’ of the Commission and proceedings in it in order to submit their observations in time and ultimately to be able to present their case in Luxembourg. Another effect this line of case-law has possibly produced is the understanding that one should try to observe the acts of competitors and the MS in order to be able to file a complaint as soon as possible. The effect of such reasoning may in the future well be a substantial increase in the flow of complaints of the Commission and possibly adaptation of new ‘floodgates’ to prevent the Commission from being overloaded with work and in fact being paralyzed by its low administrative capacity and its *modus operandi* in dealing with those new cases.¹⁵⁴ However, it can be concluded that the issues with standing

¹⁵² Case 169/84, *COFAZ*, [1986] ECR 391.

¹⁵³ Case T-149/95, *Ducros*, [1997] ECR II-2031 at para. 32. In accordance with the principle of affecting an individual’s subjective rights, it is common that the applicant is directly concerned by the contested decision inasmuch as that measure declares compatible with the common market aid that has already been granted.

¹⁵⁴ ‘... We now have to carry out a fundamental review of the way the institution works. The challenge facing us is to re-engineer, adapt and improve the organisation to make it more efficient and more effective. To fight fraud at every level. To put it at the service of the European public...’ Romano Prodi, President; the grand total of human resources employed in the Commission is put at 31,013 person/years (all the figures quoted relate to the reference period for the exercise, which, by convention, is May 1998). This figure,

and the chances of not having a remedy are quite limited in comparison with the rest of the cases analyzed in this paper.

F. Problem Cases

The preceding may leave one with the impression that the Court has laid down clear rules for according *locus standi*, has limited the access of those cases that do not meet the test laid down in Article 230 EC (ex. Art. 173) and has in exceptional cases, where it is absolutely necessary, granted standing.¹⁵⁵ In the following discussion, focus will be on the issue of whether the Court has at times unreasonably restricted access in certain cases and has perhaps prevented applicants from access to effective justice where they were affected by the measure.

I. Cases Where the Subjects of the Measure Were Identifiable

Since the creation of the Court there have been several cases where the challenged regulation affected very small categories of people; the categories were so small in fact that one could have easily ascertained their identities even before the regulation was passed. The problem with the tests currently applied by the Court appears most clearly in the fact that the nature of the regulation as a 'true regulation' becomes questionable. This is so because one must consider whether the competent authority, that is, the Commission, is not in fact trying to pass a decision regulating the circumstances of these particular subjects through a generic measure in order to prevent actions for annulment and judicial review of that measure.¹⁵⁶ It certainly raises questions as to whether there are only a handful of undertakings engaged in a

however, includes 393 statutory posts in the private offices of the Members of the *cont.*

Commission and 1,834 statutory posts in the Joint Research Centre, which were not covered by DECODE; in addition, the 2,525 persons working in the Commission delegations in non-member countries were only partly covered by the exercise. The DECODE *analysis* is based therefore on the 26,261 persons who were counted during the exercise and for whom all the data are available. This total is divided into 22,496 employees working *in* the Commission buildings (intramurally) and approximately 3,765 working outside them (extramurally). Cited from: European Commission, The report of the screening exercise – 7 July 1999, 'Designing Tomorrow's Commission; A review of the Commission's Organization and Operation' at 3; Comparing this number to the current number of EU Citizens, which is around 350 million, and considering the accession of new MS in 2005, one can see that the Commission will be likely to run into serious management problems, due to its lack of manpower.

¹⁵⁵ Case C-309/89, *Codorniu*, [1994] ECR I-1853, Case T-158/95, *Eridania and others* [1999] ECR II-2219.

¹⁵⁶ Cases 789/79 and 790/79, *Calpak*, [1980] ECR 1949 and the order in Case T-476/93, *FRSEA and FNSEA*, [1993] ECR II-1187.

particular activity and the Commission, instead of passing a decision addressed to those undertakings, decides to pass 'a measure of general application'.¹⁵⁷

Through its case-law, the Court has made it quite clear that the possibility of identifying the subjects which the measure affected at any given time does not suffice for granting *locus standi* unless the group was of a closed nature.¹⁵⁸ The Court has dismissed several cases where it can be said that the Commission knew, or could easily have known the exact number or even identities of the subjects of the measure at the time of its issuance. It is these cases where one can see the problems associated with current tests applied by the Court.¹⁵⁹ The problem is best seen as stated by the Court in the *Zuckerfabrik Watenstedt*¹⁶⁰ case:

A measure does not lose its character as a Regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which it applies at any given time as long as there is no doubt that the measure is applicable as the result of an objective situation of the law or of fact which it specifies and which is in harmony with its ultimate objective.¹⁶¹

Based on this reasoning, the Court dismissed the application creating *de facto* a possibility for the Community legislature to adopt measures to regulate the circumstances of certain subjects and make an effort to exempt its acts from annulment proceedings simply by superficially giving it abstract form. The above-quoted statement is closely linked to the idea of the closed-category test and in combination they form an effective tool for excluding annulment proceedings from private applicants in several cases.

In *Compagnie Française Commerciale et Financière*¹⁶² a provision in a Regulation specifically concerned exporters that had entered into contracts and registered those contracts before a certain time. The Commission could have easily identified these exporters and the group was closed since it was not possible to extend that group after the regulation was passed. Contrary to AG Roemer's suggestions, the Court found that the Regulation was truly generic in nature and that the group was not individually concerned.

In *Koninklijke Scholten Honig v. Council and Commission*,¹⁶³ the regulation applied to a very limited number of icoglucose producers.¹⁶⁴ The production of

¹⁵⁷ See for example Case 101/76, *Koninklijke Scholten Honig*, [1977] ECR 797 and Case 6/68, *Zuckerfabrik Watenstedt GmbH*, [1968] ECR 409.

¹⁵⁸ Case 123/77, *UNICME* [1978] ECR 845.

¹⁵⁹ See, for example, Case 123/77, *UNICME*, [1978] ECR 845 and Case 26/86, *Deutz*, [1987] ECR 941.

¹⁶⁰ Case 6/68, *Zuckerfabrik Watenstedt GmbH*, [1968] ECR 409.

¹⁶¹ Case 6/68, *Zuckerfabrik Watenstedt GmbH*, [1968] ECR 409 at para. 415(2).

¹⁶² Case 64/69, *La Compagnie Française*, [1970] ECR 221.

¹⁶³ Case 101/76, *Koninklijke Scholten Honig*, [1977] ECR 797.

¹⁶⁴ Many authors refer to the case by nickname 'the Isoglucose case'.

icoglucose involved specific technology, much of which was patented, and getting involved in the business required significant financial contribution. Simply on economic reasoning the group of producers was thus a closed one not likely to increase in the near future. The Court however ruled that it was an open one because the applicants were concerned due to their objective characteristics as icoglucose producers, which was an activity that could be carried out by any other entity.

In *Binderer*¹⁶⁵ the applicants challenged an amending regulation, which prohibited the use of the terms '*spätgelesen*' and '*ausgelesen*' in translating into German descriptions indicating the superior quality of wines.¹⁶⁶ The applicants were in fact specialized in the importation of wines from Hungary and Yugoslavia, which by their specificity were designated by terms such as those prohibited. Because the use of words '*spätlese*' and '*auslese*' was originally prohibited, the applicant applied to the Commission proposing that in order to keep the translation as faithful as possible, the terms '*spätgelesen*' and '*ausgelesen*' be used. The Commission accepted the proposal, but in May 1983 the Commission amended the original regulation¹⁶⁷ and included the proposed terms into the list of prohibited terms. The Court held that the applicant was not to be accorded *locus standi* despite the fact that there were only *two other undertakings* involved in the importation of such wines into Germany and despite the fact that the applicant's proposal to the Commission and its acceptance by the Commission was very likely the ground for the amendment of the original legislation. Since the applicant's participation in the procedure was not foreseen in the normal procedure of adoption of such measures, the applicant's contributions were not considered to sufficiently differentiate it from all others. However, if one takes into account that the measure would most probably never have been adopted unless the applicant had used the phrases and/or applied to the commission with the letter, it would certainly seem reasonable to rule that any other measure taken after such acts of the applicant, should be of direct and individual concern to it. Considering the limited applicability of the regulation and the fact that there were only three subjects to the challenged regulation, this can be taken as a perfect example of circumstances under which the only subjects of the measure were denied the judicial review of the measure because the legislature had chosen to pass it in an abstract form theoretically applicable to any further party that would enter the trade at some point in the future.¹⁶⁸

It seems unreasonable for the Court to place the test of individual concern on the abstract possibility of someone entering the trade at some time in the future. If such

¹⁶⁵ Judgment of 29 January 1985 in Case 147/83, *Münchener Import-Weinkellerei Herold Binderer GmbH v. Commission of the European Union*, [1985] ECR 257.

¹⁶⁶ *Spätgelesen* means harvested late, and *ausgelesen* means selected.

¹⁶⁷ Commission Regulation EEC No 997/81 of 26 March 1981, OJ 1981 L 106/1, included words '*spätlese*' and '*auslese*'; Commission Regulation No 1224/83 of 6 May 1983, OJ 1983 L 134/1, amending the original Regulation added '*spätgelesen*' and '*ausgelesen*' into the wording of Art. 1(3)(g).

¹⁶⁸ Case 11/82, *Piraiki-Petraiki*, [1985] ECR 207 at para. 14.

reasoning must be preserved for certain policy reasons, then there must be a rule of reason assessment of the economic likelihood of such occurrence in the near future.¹⁶⁹ The mere fact that it is theoretically possible for someone to enter the market cannot serve as evidence of the fact that the current applicant is not the only *de facto* addressee of the measure at that point. From an impartial point of view it seems only natural that the importer is singled out and is individually concerned by the by the measure if that measure affects the only importer at that point. Furthermore, the number of entities engaged in a certain business activity is limited by the simple laws of economics, where the marked redistribution is highly dependent on the current structure of supply and demand and the economies of scale make it very unlikely that anyone will interfere in the existing business environment.

Despite of the above-mentioned arguments against the test adopted in *Plaumann*, the Court firmly upheld the adopted reasoning and refused standing to the sole Belgian importer of a product to France in *Glucoceries Reunies*¹⁷⁰ as well as a very limited group of exporters of cotton-yarn to France in *Piraiki-Petraiki*.¹⁷¹ Even though the respective measure in reality affected only seven companies, the Court upheld its reasoning stating that:

... [T]he applicants are affected by the decision at issue only in their capacity as exporters to France of cotton yarn of Greek origin. As for the exportation of those products to France, that is clearly a commercial activity, which can be carried on at any time by any undertaking whatever.

Here, the Court ignored the fact that the measure was designed with the sole purpose of excluding the imports from Greek producers into France, and that these imports were in fact performed mainly by these seven importers. The approach adopted seems to contradict the reasoning behind Article 230 EC (ex. Art. 173) which has always been to prevent the Community institutions from making their measures 'bullet proof' by passing them in a generic form, or by addressing them to another person.¹⁷²

In *Abertal SAT LTDA*¹⁷³ the applicants, Spanish producers of nuts and locust beans, brought an action against a Council Regulation, which limited the maximum amount of aid to this sector. Prior to the adoption of the measure, the applicants had presented their approved improvement plans and the Council Regulation was passed because the quota applied for by the applicants exceeded the Community budget estimates. By this fact, the applicants considered themselves to be in a sufficiently

¹⁶⁹ Similar to competition cases.

¹⁷⁰ Case 1/64, *Glucoceries Réunies*, [1964] ECR 413.

¹⁷¹ Case 11/82, *Piraiki-Petraiki*, [1985] ECR 207, para. 14.

¹⁷² A few of the applicants had entered into supply contracts, and the Court found them to be individually concerned, as the decision in fact prevented them for fulfilling these contracts as to the extent they exceeded the quota limits, and was therefore of individual concern to them; see also Case 26/86, *Deutz* [1987] ECR 941.

¹⁷³ Case C-213/91, *Abertal* [1993] ECR I-3265.

distinct position from all other private entities. The Court however disagreed and, after restating that the mere fact that they were identifiable was not sufficient, went on to analyze the nature of the measure. The Court found that the measure ‘... far from affecting the applicants by reason of certain characteristics which are particular to them ... is *addressed in general and abstract terms ... and applies to objectively determined situations*’¹⁷⁴ [emphasis added]. In so stating the Court ignored the fact that the applications of the Council *de facto* adopted the regulation based on the data provided by the applicant producers and dismissed the case on the basis that the measure was objective and abstract in its wording. Furthermore, the Court ignored the fact that the regulation provided for special treatment to those who had presented their application prior to its adoption and stated that these differences were objectively justified in the light of existing actual circumstances.¹⁷⁵

The case provides only one example of where the existence of the applicants had pushed the Community legislature to adopt a measure having regard for the special circumstances of the applicants and yet the measure was declared immune from annulment proceedings brought by the same applicants.¹⁷⁶ On the basis of the cases referred to in the discussion above *ex mea sententia*, many of these cases could have easily been entertained by the Court in order to truly evaluate the legitimacy of the acts in question and in order to guarantee the persons affected a fair hearing and the right to be heard. The denial of access to these applicants on the basis that the measure is a true regulation while ignoring the factual circumstances is unreasonable.

1. Rule of Reason Argumentation

This article proposes that if the Court is unwilling to completely reconsider its approach to the meaning of individual concern then at the least the test should be to an extent restructured in cases where the subjects of the act are identifiable. The question of admissibility should include a rule of reason argumentation. In that respect, ruling on the admissibility should to an extent include an analysis of whether or not the subjects were readily identifiable at the time of the passing of the measure and thereafter an analysis of whether the number of the members of the group is likely to change to a substantial extent within a certain time period. Here the applicants and the respondents could bring expert testimony and/or analysis and on the basis of the information provided the Court would rule on whether the applicants are individually concerned. It is clear that this procedure will place a further burden on the Court and the workload will to an extent increase. However an allegation of denial of justice is a far more serious problem than the possible additional burden could ever be. It is understandable that the present system of judiciary on the Community level places a heavy burden on the Court, which due to

¹⁷⁴ Case C-213/91, *Abertal* [1993] ECR I-3265 para. 19.

¹⁷⁵ Case C-213/91, *Abertal* [1993] ECR I-3265 paras. 23–24.

¹⁷⁶ See also Joined Cases C-15/91 and C-108/91, *Buckl* [1992] ECR I-6061.

an increase in the amount of case-law results in prolonging the time from filing a suit to a final ruling. Therefore it is also the task of the legislature to find solutions and to reform the structure.

II. Applicants Seriously Affected

*Thierry Arnaud*¹⁷⁷ illustrates one of the greatest problems with rules on standing, namely, the granting of standing to individuals who are affected by the measure as subjects of the measure but are not members of a closed group and are at times not even identifiable as in the cases discussed above. The case was concerned with the well-known issue of using driftnets when fishing for tuna.¹⁷⁸ The Council adopted a regulation banning the use of driftnets longer than 2.5 km in certain regions. The regulation provided for an extension for those fishermen who had used longer driftnets within the last two years immediately preceding the adoption of the measure. The applicants were French tuna fishermen who claimed that since they were subject to this extension and the group is a closed one, as it could no longer be expanded from the date of the enactment of the regulation, they were individually concerned by the measure. The Court however found that since the purpose of the differentiation in the measure was to lay down a transitional period for the benefit of albacore fishermen, the provision applies to objectively determined situations in an abstract manner.

Because the Court dismissed the application, the question arises as regards which alternative remedies the applicants should seek to protect their economic interests that were clearly affected by the measure. The purchase of new nets places a heavy financial burden on the fishermen, which in fact was the reason for the transitional period. The legal situation of the fishermen was significantly affected by the measure. Moreover, looking at the preceding case-law one could indeed argue that the group was not only identifiable, but also a closed one and the applicants should have been accorded standing in order to protect their rights under Community law. These fishermen could have perhaps provided fundamental insight into the issue and in the light of these arguments the act could have been amended. However, giving the current approach of eliminating cases on procedural grounds, their arguments will not be heard.

Even though the reasoning behind the ruling is again in accordance with the earlier cases, there still remains doubt as to whether it was reasonable for the Court to avoid review of cases, on the basis of lack of individual concern of the applicants. The effect of such an approach is that the measures remain in force. Therefore, without having an opportunity to analyze the legality of such measures, the Court in fact has refused a chance to exercise its duty as the monitoring institution over the

¹⁷⁷ Judgment of 24 May 1993 in Case C-131/92, *Thierry Arnaud and Others v. Council of the European Communities*, [1993] ECR I-2573.

¹⁷⁸ For similar discussion under GATT see the *Tuna Dolphin GATT Case (TUNA Case)*, case number 72.

legislature under the basic principle of separation of powers. Even if one considers that the measures may be in perfect harmony with the *aquis*, one must still be aware of the trend, since the same approach will be applied in cases where the measure clearly violates the same body of laws. After all, the Court will only analyze the merits of the case after establishing whether an individual is directly and individually concerned, as was set out in the *Plaumann* case.

III. Environmental Cases – Is There an Effective Remedy Available?

The Fifth Environmental Action Programme stipulates that members of the public ‘... have a direct interest in the quality of their living environment ...’ and that ‘individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped’.¹⁷⁹ The action plan is directed at the MS authorities in order to ensure that EU environmental law is properly applied and implemented in the MSs. However the system has again been drafted to work only in one direction. What will happen if the situation is reversed and the Community is the one responsible for environmental actions that have an effect on private parties? It seems sensible that the Community be bound by the same rules as the MSs. However as is seen in the following discussion, the case-law has taken a direction opposite to the one drafted in the action programme. The main line of cases deals with Commission decisions that certain funds should be granted for projects inside the MSs. As such, Commission decisions are normally not implemented into the national law of the MSs, an effective action through the preliminary rulings procedure is not available, and in fact the only remedy that remains is a direct action.¹⁸⁰

Only a few years ago, the ECJ upheld a decision by the CFI. The case involved private individuals and NGO’s (associations of farmers and fishers) who asserted that a decision taken by the Commission to allocate funding to Italy for financing part of the Po Delta programme was contrary to Community environmental law and policy. The ruling was that they were not individually concerned by the measure.¹⁸¹ The CFI found that the measure had legal effects to categories viewed generally and in the abstract. The applicants were concerned mainly by virtue of them being agriculturalists and the Court found that this activity could be carried out by anyone at any time in the future.

¹⁷⁹ European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, COM (92) 23 final, Vol. II, pp.76–77; OJ 1993 C 138/5; see Betlem, *supra* note at p. 3.

¹⁸⁰ Betlem, *ibid.* at p. 6.

¹⁸¹ Judgment of 21 February 1995 in Case T-117/94, *Associazione Agricoltori della Provincia di Rovigo, Associazione Polesana Coltivatori Diretti di Rovigo, Consorzio Cooperative Pescatori del Polesine, Cirillo Brena, Mauro Girello and Greguoldo Daniele v. Commission of the European Communities (Associazione)*, [1995] ECR II–455.

When the situation is considered objectively, one can see that the implementation of the Po Delta programme¹⁸² in the area could have significant adverse effects on the situation of farmers in the same area. The establishment of the rules for the conservation of nature introduces new limitations and new standards relating to the protection of the environment, the nature of the activities permissible to be exercised in the area and so on. The value of their estate is likely to change due to the above-mentioned limitations and even their livelihoods are to a certain extent affected. Therefore before declaring a measure valid, one should not disregard the principle of *audi alteram partem* and consider whether these applicants could provide significant reasons for annulling the measure in question. Moreover, the present limitations on *locus standi* may leave these persons without any effective remedies at all. As AG Ruiz-Jarabo stated in his opinion regarding this case,

‘... environmental matters, which involve such a multiplicity of crucial, and sometimes opposing, social interests, capacity to bring proceedings should be more widely recognized, so that both associations such as the appellants and others representing wider interests can have free access to judicial protection.’¹⁸³

The Court’s rationale ignores these particular grounds and it bluntly bases its ruling on the generally established criteria for individual concern. Disallowing the actions of representative organizations is the final drop in the bucket, since from then on there is no body that will present the views of these affected subjects. Furthermore, according to AG Ruiz-Jarabo in a footnote to its opinion, the Court has always ignored the opinions of AG’s concerning the establishment of wider access to private actions. The statement of judge Moitinho de Almeida referred to in the footnote supports the AG’s claim:

In his work entitled ‘Le recours en annulation des particuliers (article 173, deuxième alinea du trait CE): nouvelles réflexions sur l’expression “la concernent ... individuellement”’, Festschrift fuer Ulrich Everling, 1995, p. 852, Judge Moitinho de Almeida stated: ‘la Cour n’a jamais suivi les suggestions de ses avocats généraux visant une interprétation plus large de l’exigence d’un intérêt individuel’ (‘the Court of Justice has never followed the suggestions of its Advocates General that a wider interpretation be given to the requirement of individual concern’).¹⁸⁴

As AG’s are well aware of this approach, they seem to have recognized that the Court will apply the strict limitations despite their opinions on the matter and in order to be seriously considered by the Court at all, they have begun basing their

¹⁸² ‘Conservation programme for the geographical area of the Po delta’.

¹⁸³ Case T-117/94, *Associazione*, [1995] ECR II-455 at para. 41 (Opinion).

¹⁸⁴ Case T-117/94, *Associazione*, [1995] ECR II-455 at para. 40 (Opinion, secondary reference).

opinions on the same trend of case-law. Therefore for a long period the AG's have refrained from extensive discussions on whether a more lenient approach is needed and before giving their 'main trend' opinion simply make a declaratory statement that they believe the limits are too stringent.¹⁸⁵ After making that statement¹⁸⁶ AG Ruiz-Jarabo recognized that '... [his] personal preference does not accord with the way in which the fourth paragraph of Article 173 ECT (now, after amendment, Article 230 EC) has consistently been implemented',¹⁸⁷ dismissed the idea of the special situation in environmental cases and found that the present approach of the Court was well expressed in *Buralux*,¹⁸⁸ which again reiterated that subjects being identifiable in no way implies that the measure is of individual concern within the meaning of Article 230 EC (ex. Art. 173). As stated above, the Court agreed with AG Ruiz-Jarabo in that respect and found that applicants did not have standing to challenge the measure.

The fact that even AG's have refrained from relaxing the conditions for according *locus standi* to non-privileged applicants is an indicator of how serious the danger of the denial of an effective remedy to applicants really is. The reasoning of the Court in combination with the opinion of the AG resulted in a situation where the agriculturalists in the area were practically forced into accepting the measure on an 'as is' basis, without any real remedy to protect their interests. Is it now possible for the Community legislature to regulate on the lives of private applicants without having to consider their opinions on what the effects of the measure will be? Or is the legislature so 'well informed' on the situation in the particular field that it can afford to ignore the opinion of these individuals? These questions should be remembered while proceeding with the discussion based on the following case.

The *Stichting Greenpeace Council*¹⁸⁹ ruling exemplifies the problems involved with the fact that the Court does not satisfactorily analyze the true consequences of measures and denies access to annulment proceedings based on formalities and insufficient individual concern. This paper claims that if sufficiently serious, the mere existence of harm suffered or to be suffered *a posteriori* should be considered sufficient to grant *locus standi*. The Court however disagrees and finds that suffering harm is not a ground for individual concern, as long as such harm affects generally and in the abstract a large number of persons. On this basis one can say that it is acceptable for the Community legislature to cause harm and/or damage to private applicants as long as there are more than a few subjects, or that harm is caused in the abstract manner. The remedy available would in this case be an action for damages. Is the Court in fact advocating an approach where the Community is willing to pay

¹⁸⁵ The *Olive Oil* case will be discussed below; in the case, AG Jacobs has once again raised the issue of whether the standards should be reviewed.

¹⁸⁶ Case T-117/94, *Associazione*, [1995] ECR II-455 at paras 40 to 42 (Opinion).

¹⁸⁷ Case T-117/94, *Associazione*, [1995] ECR II-455 at para. 42 (Opinion).

¹⁸⁸ Case C-209/94 P, *Buralux*, [1996] ECR I-0615 at paras 24 to 25.

¹⁸⁹ Case T-585/93, *Greenpeace International*, [1995] ECR II-2205.

damages, but avoids annulment of the measures unjustly causing these damages? This reasoning is in no way acceptable as the approach is directed towards rectification of harm rather than preventive tactics such as annulment of the measure.

The case was concerned with granting financial assistance from the European Regional Development Fund to Spain with the purpose of constructing power plants on the Canary Islands, in particular on Gran Canaria and Tenerife. The applicants were local fishermen, farmers and other local residents who all found that they were individually concerned because the construction of the power plants would significantly change the conditions under which they live, as the constructions would have a negative impact on the nature, the tourist industry, the fishing industry and so on. Based on earlier case-law, one can see that those applicants *per se* do not meet the standards set out in the Treaty and the case-law as they are not in a sufficiently differentiated situation from all other fishermen, farmers and other inhabitants of that area.¹⁹⁰

However, one must consider whether the rules set out provide for an effective remedy for those in need of one. One should consider whether the measure truly has serious consequences on the situation of the applicants and see what their possible alternative remedies are. First, it is generally understood that the construction of power plants will negatively affect the nature on the islands and the level of pollution in the air will rise substantially. It is also clear that a place like the Canary Islands heavily relies on its tourist industry, which is greatly dependent on their ecologic situation. It is also a known fact that often if a government has reason to believe that substantial funds will be available for a project, in this case the construction of power plants, it will 'bend over backwards' to start the project and will not refuse the funds on environmental reasons as long as the harm caused is not extreme. Therefore the granting of the aid *ipso facto* passes the decision to construct the plants.

After one has established that the construction is closely related to the granting of financial aid and that the construction will affect the living conditions of the applicants, one must consider the actual remedies available to the applicants in such a situation. Due to the fact that they are not members of a closed group as required by the Court the action for annulment is not available for them. An action for annulment under the Spanish legal system would not be reasonably effective due to the fact that only the Court has jurisdiction over declaring the Community acts void. Moreover, the lack of uniform access to national courts is widely recognized as problematic. The often-suggested alternative remedy – a preliminary rulings procedure – would be a possibility, but national Courts are not under a duty to refer the case for a preliminary ruling and as was the case here, even though some of the applicants had started parallel actions at the national level, these cases did not

¹⁹⁰ Case 231/82, *Spijker*, [1983] ECR 2559 at para. 9; Case T-117/94, *Associazione* [1995] ECR II-455 at para. 25.

make it to the ECJ.¹⁹¹ Furthermore, one must also bear in mind the fact that the national judiciary may not be able to act completely in disregard to the fact of substantial funds being granted for construction.¹⁹²

As AG Cosmas stated in its opinion on the case¹⁹³

“... [T]he protection provided by the Community legal order remains incomplete and fragmentary.” The remedies under national law are only adequate in cases where the Community legislation is directly applicable, and annulment proceedings against community acts are “... in practice fraught with particularly severe obstacles”’.

The position of the applicants was further complicated by the fact that the Commission had authorized the granting of funds despite the fact that an EIA test had not been carried out by the government.¹⁹⁴ Had the Commission fulfilled its duties under the Treaty, the construction could not have been started without the proper EIA’s being conducted. As stated at the beginning of this article, the Court cannot act *ex officio* and as the Commission is not properly monitoring observance of the *acquis* it would seem only reasonable that an individual should be able to bring a claim in order to enable the judiciary to rule on the legality of such acts. As AG Cosmas stated ‘... observance ... of the relevant Community legislation during the financing of the relevant works in Canary Islands, is not of concern solely to the Commission but *is also of relevance for certain individuals*’¹⁹⁵ [emphasis added]. Even though Mr Cosmas thereafter stated that this does not mean that the requirements set down by the Court for according standing were met, the argument posed is still a significant point in favour of more lenient standards. Where an entity’s right is violated or its interests are concerned, that entity must have access to an effective remedy to protect these interests.

The most alarming aspect about the case is that not only were private individuals denied access, the Court also found that the public interest groups (Greenpeace, etc.) did not have standing. One could certainly understand that if actions by private individuals were admitted simply on the basis of existence of harm the Court could be flooded with cases. However denying access to collective actions by representative groups such as environmentalist organizations produces a situation where the interests of individuals in the protection of the environment are ‘left out in the cold’. Is it now possible for the Community legislature to be the ultimate judge over what is right for the environment without having to fear an action for annulment by entities, which are specialized in the area of environmental research and protection? It seems that the Commission’s duty to comply with EU environmental law has become

¹⁹¹ Case T-117/94, *Associazione*, [1995] ECR II-455 at para. 74 (Opinion).

¹⁹² See in that direction the opinion of AG Jacobs in Case C-358/89, *Extramet*, [1991] ECR I-2501 at paras. 69 to 74.

¹⁹³ See Case C-358/89, *Extramet*, [1991] ECR I-2501 at para. 60 (Opinion).

¹⁹⁴ Environmental protection requirements must be integrated into the definition and implementation of other Community policies. Art. 174 EC (ex. Art. 130R).

¹⁹⁵ Case C-358/89, *Extramet*, [1991] ECR I-2501 at para. 65 (Opinion).

unenforceable in situations as such, since the only parties interested in bringing a claim were denied access and the ones who were entitled to bring one, in other words the recipients of the aid, were not likely to bring proceedings against it.

The seriousness of the problem with standing of private applicants in environmental matters is illustrated by the *Danielsson* case,¹⁹⁶ where the inhabitants of Tahiti were faced with the French government, which wanted to carry out a series of nuclear tests from Fall 1995 to Spring 1996 on the atolls of Mururoa and Fangataufa, which form part of French Polynesia.¹⁹⁷ Even though the case never made it to the main action for annulment, the issues involved in denying interim-relief were very interesting. The applicants applied to the Court for such relief¹⁹⁸ in an action to challenge the Commission's decision that Article 34 of the EAEC Treaty¹⁹⁹ was not applicable in the circumstances. They argued that the Commission incorrectly concluded that the nuclear tests were not particularly dangerous experiments because it had not given sufficient analysis to the environmental and health risks involved. The Court dismissed the application on the basis that the applicants were not *ipso facto* individually concerned.²⁰⁰

One must consider whether such reasoning of the Court, even though in harmony with earlier case-law, takes into full consideration the true seriousness involved in nuclear testing. Is it correct to deny access to the courts to those applicants whose health may be in serious danger on the basis that all other residents were in just as serious danger? It seems that it would be reasonable to follow the reasoning of the applicants in that the danger to their health should be sufficient to consider them individually concerned.²⁰¹ The applicants provided the Court with relevant scientific

¹⁹⁶ Judgment of 22 December 1995 in Case T-219/95 R, *Marie-Thérèse Danielsson, Pierre Largentreau and Edwin Haa v. Commission of the European Communities (Danielsson and others)*, [1995] ECR II-3051.

¹⁹⁷ The capital of which lies on Tahiti.

¹⁹⁸ Art. 243 (ex. Art. 186) EC.

¹⁹⁹ Art. 34 of The Treaty Establishing The European Atomic Energy Community places an obligation on the MS in case particularly dangerous experiments are to take place to ask the Commission for its permission on the matter.

²⁰⁰ Case C-10/95 P, *Asocarne*, [1995] ECR I-4149 at para. 43; Case 25/62, *Plaumann*, [1963] ECR 95; Joined Cases 67/85, 68/85 and 70/85, *Van der Kooy and others v. Commission*, [1988] ECR 219 at para. 14; Joined Cases T-447/93, T-448/93 and T-449/93, *AITEC and Others v. Commission*, [1995] ECR II-1971 at para. 34.

²⁰¹ Case C-358/89, *Extramet*, [1991] ECR I-2501; Case C-309/89, *Codornú*, [1994] ECR I-1853; and Joined Cases T-480/93 and T-483/93, *Antillean Rice Mills and Others v. Commission*, [1995] ECR II-2305. The applicants argue that they are individually concerned because they are particularly seriously affected by the Commission's decision, in which it failed to take properly into account the critical impact which the nuclear tests could have on their health.

²⁰² 'In 1987, according to one study cited, a small amount of radioactive gas was accidentally released as a result of a Soviet nuclear test on the island of Novaya Zembyla, following which air and mild (sic.) were found to be contaminated in areas up to 2,000 km away, further than the distance between Mururoa and either Pitcairn or Tahiti.' Case T-219/95 R, *Danielsson and others*, [1995] ECR II-3051 at para. 36.

publications²⁰² stating that the tests may have short-term effects such as geological damage and the venting of gaseous and volatile fission products into the biosphere, landslides, and so on²⁰³ and long-term effects such as leakage of radioactive material.²⁰⁴ The Court ignored these arguments and dismissed the application for interim measures.

What were the alternative remedies available to these applicants? They were affected as residents and the only realistic chance for possible prevention of the tests could have been the Commission's finding that Article 34 was applicable. Is it reasonable to apply the case-law that has developed under the assumption that there are other remedies available? How likely is it that a French court would grant interim relief to the applicants after there is evidence that on-site research did not reveal to the Commission any evidence for the possibility of serious harm?²⁰⁵ The applicants were faced with a situation where they did not have an effective remedy on the national level, were denied relief on the Community level, the tests were carried out and they had to accept them 'as is'. It seems that on the Community level there is no appropriate remedy for such applicants.²⁰⁶ Upholding this reasoning of the Court results in a situation where an unlawful act of a Community institution cannot be challenged as long as it damages a large group of people.²⁰⁷

²⁰³ See Case T-219/95 R, *Danielsson and others*, [1995] ECR II-3051 at para. 35 or the Order: 'There was in fact a major underwater landslide at Mururoa in 1979, when a nuclear device was exploded after jamming half-way down its shaft. Such landslides are liable to give rise and have in the past given rise to tsunamis, or tidal waves, causing coastal damage in areas as far away as Pitcairn and Tahiti and endangering residences such as that of Ms Danielsson. They could also release radioactive material into the sea, with catastrophic effects on the food chain in an area such as French Polynesia where fish is an important part of the diet.'

²⁰⁴ See Case T-219/95 R, *Danielsson and others*, [1995] ECR II-3051 at para. 37: 'The applicants state that such leakage already occurs at Mururoa at rates found by scientists to be higher than those assumed by the French authorities, and stress that the geology of the island makes it unsuitable to contain such waste safely. Leakage of radioactive material, exacerbated by meteorological events such as hurricanes, can damage the local marine ecology and enter the food chain.'

²⁰⁵ The national courts can provide interim relief; See judgment of 9 November 1995 in Case C-465/93, *Atlanta Fruchthandelsgesellschaft MbH and others v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761 at para. 51 in which the Court held that interim relief can be ordered by a national court only if 'that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice; there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief; the [national] court takes due account of the Community interest; and in its assessment of all those conditions, [the national court] respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.'

²⁰⁶ The case was removed from the register and never made it to the main action for annulment: OJ 1996 C 210/24.

²⁰⁷ G. Betlem, 'Being "Directly and Individually Concerned"', The *Schutznorm* Doctrine and *Francovich* Liability' in (Hans-W. Micklitz & Norbert Reich (eds.)) *Public Interest Litigation before European Courts* (Baden-Baden Nomos Verlag 1996) pp. 319-341 at p. 15.

The case-law in MSs has taken quite a different approach as best illustrated by AG Cosmas in the following excerpt of his opinion in the *Stichting Greenpeace* case.²⁰⁸ Even though the arguments of AG Cosmas in his opinion on the case were more or less consistent with the ruling of the Court, in footnote 121 of his opinion Mr Cosmas produced a long line of national case-law arguing exactly the opposite:

(121) – See, for example: – English law: in *R. v. Secretary of State for Trade and Industry, ex parte Duddridge and Others* [1995] ELR 151 the decision of a public authority not to limit by regulation electromagnetic emissions from electricity cables may be challenged before the courts by parents residing in the area in which new electricity cables are placed, relying solely on the increased danger of leukaemia to which their children are exposed as a specific consequence of high electromagnetic levels. – Belgian law: Conseil d’Etat, Ville de Liège et Heze, 20.9.1991, No 37.676. Proceedings by neighbour to quash decision approving installation of plant using substances harmful to environment held to be admissible. – Netherlands law: Raad Van State, Afdeling Bestuursrechtspraak (Council of State, Administrative Law Section), 18.6.96, AB 1996, 313. Inhabitants of a village may invoke expected reduction in road safety in their village in order to challenge projected works. – German law: Bundesverwaltungsgericht (Fed. Admin. Ct.), 1.12.82, BVerwGE 66, p. 307 (crab-fishermen case): proceedings held to be admissible brought by fishermen against decision approving dumping at sea of liquid toxic waste on ground of reduction in fish population as a result of dumping of waste. – Italian law: T.A.R. Lazio, 20.1.95, No.62, Foro Italiano 1995, II-460. Inhabitants of an area may invoke their right to quality of life (*interesse di vita*) in order to challenge permission to build shopping and trading centre in their area. – Greek law: Simvoulia tis Epikratias (Council of State) 2281/1992: Inhabitant of the centre of a large town held to have *locus standi* to seek the quashing of decisions authorizing clearance of wooded area on edge of town. Held that the town and threatened woods belonged to same geographical basin which constituted an unbroken ekistic whole with very few green spaces in constant diminution. Thus, the unfavourable consequences for the ecological balance and for the quality of life of its inhabitants of the decisions leading to clearance of a wooded area in that basin are experienced not only by those in its immediate vicinity but also by those in more distant and lower-lying areas, and indeed in some cases more intensely by the latter. – French law: Vicinity constitutes the principal criterion of *locus standi* for natural persons in planning cases (Conseil d’Etat, 22.10.86, Reynaud, Lebon, p. 652). In determining vicinity regard is had, in addition to distance from proposed works, to nature and gravity of consequences arising. Thus, an applicant challenging building permit for large shopping centre (Conseil d’Etat, 24.6.91, Soc. Interprovence

²⁰⁸ Case T-585/93, *Greenpeace International*, [1995] ECR II-2205.

Côte d'Azur, Lebon, p. 1110) does not need to be in such close proximity to the works as an applicant challenging construction works having less significant environmental impact (CE 17.6.91, Renault, Lebon, p. 1110). See also R. Chapus, *Droit du Contentieux Administratif*, LGDJ, 6th Ed., 1996, No 438).

In addition, an example may be drawn from Italian environmental associations that are given the right to sue in administrative courts under certain conditions.²⁰⁹ Why has the Community refused to accept similar remedies for applicants under the *acquis*? Is it because the applicants supposedly already have a remedy under national law? This argument cannot be supported since only the Court is authorized to review the legality of acts for which the applicants were seeking the annulment in the cases discussed above.²¹⁰ The applicants were affected in ways similar to the cases referred to by Mr Cosmas, these being the inhabitants of the area or members of the trade concerned. The carrying out of nuclear tests in the vicinity of one's home certainly qualifies as being of certain danger to one's health, as much as the building of power plants on the Canary islands affects the livelihoods of local inhabitants. It would only make sense to allow these people at least a discussion on the merits of their case instead of refusing to do so on procedural grounds. Moreover, one could say that as to the *Danielsson* case the range of people affected was limited to those living in the area at the time of the tests and could therefore be considered a closed one. Or is it to be considered open on the basis that their grandchildren could have health problems resulting from the tests and the range of people affected was bound to increase with time? Perhaps it is time for the Court to take a shift in its case-law and reconsider the tests applied, at least in cases where human health is involved, since according to the ECT human health qualifies as one of the top priorities of the Community.²¹¹

G. Preliminary Rulings as an Alternative to Direct Actions

In principle, there are two different mechanisms for judicial control over the acts of the Community, the direct control remedy under Article 230 EC (ex. Art. 173) and the indirect control remedy under Article 234 EC (ex. Art. 177).²¹² As mentioned above, in some cases the Court has stated *expressis verbis* that there is an alternative

²⁰⁹ Art. 13(1) and 18(5) of Law No. 349 of 1986.

²¹⁰ Case 314/85, *Foto-Frost*, [1987] ECR 4199 at para. 17.

²¹¹ Art. 152, Title XIII (Public Health) (ex. Title X) ECT; the *acquis* even provides for a human health exception under the fundamental freedom of movement. See Council Directive 64/221 on the Co-ordination of Special Measures Concerning the Movement and Residence of Foreign Nationals Which are Justified on Grounds of Public Policy, Public Security or Public Health, OJ 1964 L 56/850.

²¹² G. Bebr, 'Direct and Indirect Judicial Control of Community Acts in Practice: the Relation Between Articles 173 and 177 of the EEC Treaty' in (1984) *Michigan Law Review* 91–111 at 91.

remedy available for the applicants and therefore the issue of inadequate legal protection must be dismissed. As an example in *Deutsche Lebensmittelwerke*²¹³ the Court dismissed the applicant's argument that the action must be held admissible to enable them to enjoy full legal protection.

It must be pointed out that, in support of an action challenging a national measure implementing a Community Decision, the applicant may plead the illegality of that Decision and thereby require the national court to adjudicate on all the allegations formulated in that respect, if necessary after making a reference to the Court of Justice for a ruling on the validity of the Decision in question.²¹⁴

AG Lenz, who considered in his opinion whether there were alternative remedies available to the applicant, also supported the reasoning.²¹⁵ Mr Lenz found that the applicants may bring an action for damages pursuant to Article 178 (now Art. 235 EC) and the second paragraph of Article 215 (now Art. 288 EC) of the EEC Treaty.

In *Extramet* AG Jacobs put forward a persuasive argument proving that the existence of an alternative remedy does not compensate for the remedy denied in a direct action and should not therefore be considered as an argument towards declaring a direct application inadmissible. The remedies provided for under Article 234 EC (ex. Art. 177) do not meet the standards of protection for affected subjects in as thorough manner as the action for annulment would. In essence the preliminary rulings procedure is substantially different for many reasons.

In Article 234 EC (ex. Art. 177) proceedings, the parties are only able to produce evidence and dispute questions raised by the national Court. In an action for annulment the applicant produces a full set of pleadings describing the subject as extensively as possible in order to be able to challenge the measure effectively. Furthermore, the national Court may in fact be to an extent ignorant on the matter and the questions presented to the ECJ may thus not reflect the whole scope of the issue as presented by the parties. Under the preliminary rulings procedure the national Court will not have the benefit of the participation of the Council and the Commission.²¹⁶ Therefore the issues raised will be dependent on what the parties are able to produce and the questions put before the Court are a combination of these arguments and the limited expertise of the national court.

The resolution of such issues on the MS level may result in no reference to the Court at all. In these cases, there may be several rulings throughout the Community in different directions which would '... lack the uniform character, which could be achieved by a Decision of [the ECJ or the CFI] ...'.²¹⁷ If, after a period, the Court did indeed get a chance to rule on the issue, the ultimate annulment of the measure may in fact cause significant legal changes in the MSs. In addition, it would decrease

²¹³ Case 97/85, *Deutsche Lebensmittelwerke*, [1987] ECR 2265.

²¹⁴ Case 97/85, *Deutsche Lebensmittelwerke*, [1987] ECR 2265 at para. 12.

²¹⁵ Case 97/85, *Deutsche Lebensmittelwerke*, [1987] ECR 2265 at para. 47.

²¹⁶ Case C-358/89, *Extramet*, [1991] ECR I-2501 at para. 71 (Opinion).

²¹⁷ Case C-358/89, *Extramet* [1991] ECR I-2501 at para. 71 (Opinion).

the credibility of the Community legislature and the judiciary since instead of permitting direct review of such acts it has allowed the application of a faulty norm for some time. Such an annulment could cause severe damages as all the decisions made based on the challenged norm in the national Courts may become invalid due to the annulment of the norm in question. Also, the authority of the national Courts is likely to suffer, as they will be criticized for erroneous implementation of the measure despite their lack of fault because ultimately the Community failed to produce adequate guidelines for them to act upon.

One can see that the preliminary rulings procedure will be lengthier. In addition, when the annulment of the measure is ultimately achieved, the legal certainty for the entities not involved in the proceedings could suffer much greater harm than it could if the Court were to rule on the matter in a direct action.²¹⁸ The issue of time limits and the extent of encroaching on the right for legal certainty in the two procedures is in fact possibly the strongest argument in favour of the direct actions as against preliminary rulings.²¹⁹ Statistically, it takes around two years to obtain a preliminary ruling from the Court. As is well known, there are also possible delays in the national procedures which, combined with the possibility of appeals and the possibility of having the case sent back to the Court of First Instance, will postpone the annulment of such a measure for an immeasurable period. According to AG Jacobs, this makes it likely that interim measures will be necessary. Even though the granting of such measures by a national Court is permissible,²²⁰ in accordance with the principle of sovereignty of States, such a relief could only be applied within that MS and not extraterritorially, as opposed to a ruling of the Court.²²¹ This, along with the

²¹⁸ Judgment of 27 June 2000 in Joined Cases T-172/98 and T-175/98 to T-177/98, *Salamander AG, Una Film "City Revue" GmbH, Alma Media Group Advertising SA & Co. Partnership, Panel Two and Four Advertising SA, Rythmos Outdoor Advertising SA, Media Center Advertising SA, Zino Davidoff SA and Davidoff & Cie SA v. European Parliament and Council of the European Union (Salamander and others)*, [2000] ECR II-2487 at paras 74–75 the Court stated that based on the 'principle of equality of access to 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.' Thus the Court made it clear that even if there are no adequate national remedies the Court will not bend the rules in order to give the applicants *locus standi*. The Court also made it clear that even if the remedy of seeking a preliminary ruling is less effective, the Court will not change the system of legal remedies and procedures established by the treaty.

²¹⁹ The extent of the impact that an annulment under Art. 234 proceedings may have is evidenced by the fact that Art. 20 of the Statute of The European Court of Justice demands that the Court notify not only the Parties, but also the Member States, the Commission and in case of proceedings against an act of the Council, also the Council, which will then have the opportunity to submit statements or written observations on the matter. This provision is to assure that the Community interests are adequately protected.

²²⁰ Judgment of 21 February 1991 in Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, [1991] ECR I-0415 at para. 21

²²¹ Case C-358/89, *Extramet*, [1991] ECR I-2501, para. 72 (Opinion).

inherent tendency of a MS Court to have trust in the legitimacy of Community acts, places the applicants at a considerable disadvantage compared to the one in a direct action.

Additionally, in accordance with Article 231 EC (ex. Art. 174), an annulled measure must be regarded as ‘non-existent’ or invalid *ex tunc* and the legal position of the subjects has to be restored to the one it was before the adoption.²²² Even though the Court may limit the effects of annulment only to *inter partes* it is not possible to guarantee that it will not be necessary to declare it void *erga omnes*. Furthermore, one has to bear in mind the fact that even if the private applicant is not admitted to challenge the act whether due to its lack of *locus standi* or due to the expiration of the two month time limit, the national court can still at any time request a ruling on the validity of the measure.²²³ Therefore by limiting the access of direct actions we are in fact creating a high-risk situation where a measure, which is illegal, the application for annulment of which was dismissed a long time ago because the applicant was not *directly and individually concerned*, is suddenly declared invalid. In addition, whenever an act is declared void *ex tunc* a complete mutual restitution is an inevitable result. This has proven to be a source of hundreds of judicial disputes.²²⁴

H. Why is Article 230 Interpreted Against Private Parties

As discussed above, non-privileged applicants under Article 230 have not readily been accorded standing with the exception of the three types of cases where the Court has adopted a more lenient approach. The reasoning behind the restrictive standards has been the object of lengthy academic discussions.²²⁵ It has been explained by the

²²² Judgment of 31 March 1971 in Case 22/70, *Commission of the European Communities v. Council of the European Communities* [1971] ECR 263 at para. 60; Judgment of 20 April 1999 in Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV and DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v. Commission of the European Communities (Wacker-Chemie v. Commission)* [1999] ECR II-931 at para. 162.

²²³ Opinion of AG Grand in judgment of 1 December 1965 in Case 16/65, *Firma G. Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1965] ECR 1081.

²²⁴ Emmert has suggested the replacement of restitution with damages (*‘Schadenersatz statt Naturalrestitution’*) even though a possibility, this would require a reform of the basic principles of annulment in all MSs as complete restitution is by many legal systems considered a natural consequence of a declaration of nullity. The general acceptance of such a change by the representatives of the MSs is not likely. See Emmert, *supra* note at p. 180.

²²⁵ See Rasmussen in ELRev, *supra* note ; A. Arnulf, ‘Private Applicants and the Action for Annulment under Article 173 of the EC Treaty’ in (1995) 32:1 CMLRev. 7–49 at 44–46.

Court's understanding of the *ratio legis* behind the text of the Treaty, its fear of being unable to deal with the excessive number of cases and by its understanding of what the system of remedies and institutional framework by which such remedies are granted should look like. According to Rasmussen, the Court is designing the system of remedies in a way which will allow it to act more like a court of appeals, and that this interest outweighs the citizen's interest in direct access to the Court.²²⁶

I. The Court of Justice as an Appellate Court of the European Union

Rasmussen argues that his claim is evidenced by the Court's application of the same strict standards in Articles 175 (3) (now Art. 232 EC)²²⁷ and 215 (now Art. 288 EC).²²⁸ He also finds that the Court's earlier case-law in actions for damages is evidence of its unwillingness to allow private actions. A further argument in support of his statement is that in a memorandum from 1978 the ECJ sought to persuade the Council of the need to establish the CFI allowing the ECJ to concentrate on matters of law. Rasmussen then proceeds to discuss that the Court has enlarged the jurisdiction of the MS Courts and aided in the rapid development of direct effect.

Craig²²⁹ finds that relying on the restrictive approach in actions for damages in order to support the appellate court thesis is invalid and relies in turn on Harding,²³⁰ who claimed that the Court was not under high caseload pressure in the 1960s. Although it is true that the appellate court thesis is probably not the main reason for the restrictive approach, it cannot be completely ruled out. The counter-argument produced seems to have misinterpreted the essence of the appellate court argument. The argument does not rely on the problem of caseload as such, but rather the issue of being able to concentrate on serious matters of law and development of the case-law. As the Community in accepting the Court's rulings as a source and guidance for interpretation of the *acquis* has chosen a dynamic legal system instead of a static one, it is sensible to have an institution which provides uniform guidance on what the developments are and how they should be observed. In that respect, the issue of high caseload should be seen as a separate argument from the appellate court argument, rather than as evidence to the contrary.

In criticizing Rasmussen's theory, Craig argues that it is undermined by the Court's case-law.

... ECJ clearly wishes to limit the range of applicants who can, in general, challenge decisions or regulations within Article 230 ... The idea, then, that the

²²⁶ Rasmussen, *ibid.* at 122.

²²⁷ Procedures against the Community for failure to act – interim measure. C.H. Beck and F. Emmert, *European Union Law; Documents* (The Hague Kluwer Law International 1999).

²²⁸ Contractual Liability; Non-Contractual Liability; Personal Liability of the Community. C.H. Beck and F. Emmert, *ibid.*

²²⁹ P. Craig and G. De Burca, *EU Law Text, Cases, and Materials* (Oxford 1998, 2nd ed.) at p. 481; see also P.P. Craig, 'Legality, Standing and Substantive Review in Community Law' in (1994) 14:4 OJLS 507–537 at 520–527.

ECJ intended to limit Article 230 very restrictively, 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 norm challenged thereby, is not wholly convincing.

The arguments produced are correct, but do not contradict Rasmussen's claims. Craig suggests that the trend towards encouraging preliminary rulings is a counter argument to the appellate court argument. However, the nature of the preliminary rulings procedure is one of the fundamental keys to the proper functioning of the Community judiciary system.²³¹ There is substantial difference depending on whether the action comes directly to the Court or through a preliminary reference from a national Court. In the former, the Court is faced with the burden of establishing all the relevant issues; in the latter, the MS Court has already (at least in theory) elaborated on the merits of the case and formulated the issues relevant to the case. Furthermore, in the former the Court is still treated as the remedy towards which the applicant will turn *a priori*. In the latter, however, the Court exercises its duties as the Court of Appeals and only as an initial remedy in case the previous levels are incapable of providing a fair solution without the assistance of the Court. Furthermore, Rasmussen is not claiming that the goal of the Court is to rule initially on the same cases through preliminary references. To the contrary, he claims that the effort is towards solving the cases as far as possible on the MS level²³² and only when this is not possible, on the appellate level. Therefore, the fact-finding process and the execution of judgments is done on the national level. The Court is in fact acting as the Court of Appeals. Indeed it seems that the arguments of both scholars are correct in that they both serve as grounds for the approach adopted and do not in fact rule out the validity of the other's.

The appellate Court argument has in fact become outdated to a degree since the establishment of the CFI. The direct actions have been given into the jurisdiction of the CFI and ever since, the ECJ is not faced with the issue of private actions as such and only provides for their review in the case of an appeal. Therefore, at least in theory, the ECJ has to an extent achieved its position as the Court of Appeals, Rasmussen's thesis has been achieved and the argument is not valid anymore as an explanation for the Court's restrictive granting of *locus standi* in actions for annulment. The only support by which the argument could still partially be upheld is

²³⁰ C. Harding, 'The Private Interest in Challenging Community Action' in (1980) 5 ELRev at 354–355.

²³¹ The Community-wide acceptance of rulings of the Court is not an easy goal to achieve. One can see evidence of various international panels, which have failed to give their rulings truly binding effect, due to the fact that they are perceived as a 'foreign body, trying to tell us what to do'. The European judiciary has chosen a clever route in that they will give the national courts guidance on the proper application of the law, but the initial ruling comes from the MS court. The rulings are thus perceived as the rulings of the MS court and in a State, which observes the rule of law, the rulings of the Court are followed and respected.

²³² The argument of extending the jurisdictions of MS courts.

that the CFI is to an extent bound by the earlier case-law of the Court, which developed as a result of the desire to become the Court of Appeals. However, as has been seen, the Court does not always consider it bound by its own case-law and could therefore have taken a substantial shift towards more flexible standards in the matter.²³³ Either way, the desire of the Court to be considered a Court of Appeals cannot serve as a justification for the situation at issue, where the applicants are denied the remedy granted to them under the Treaty.

II. The Strict Wording of Article 230 EC (ex. Art. 173)

In addition, there is a question of whether Art 230 EC (ex. Art. 173) was ever intended to provide remedies in cases of regulations or decisions addressed to third parties. Harding claims that the text of the Treaty already provided for the strict limitations, and that taken in combination with Article 189 EEC (now Art. 249 EC) a remedy in such action was probably never intended.²³⁴ It can be argued that there was never an intention that the text challenge the true regulations and that the requirement of special interest was intended to be very strict, since according to Article 249 EC (ex. Art. 189) a regulation is of general application. Furthermore, it is claimed that a private challenge of generic norms is not acceptable as such. Harding claims that relying on the text of the Treaty 'it would not be a good policy to allow private parties to challenge measures such as regulations and decisions addressed to Member States'.

There is certainly some basis to that argument in the sense that the text of Article 230 EC is more restrictive than that of its predecessor Article 33 ECSC. However, the limits of the provisions have already to an extent been exceeded by allowing challenges against the acts of the EP and actions of the Parliament against the Council. Concerning regulations, the argument that such generic norms should not be challengeable *per se* due to public law traditions, is not quite convincing. For example, in France, private actions against norms of generic nature are considered perfectly acceptable.

In addition, one must consider Article 2 (4) TEU (ex. Art. B), which lists as one of the fundamental objectives of the Community maintaining and developing the Union as an area of freedom, security and justice. Drawing from this statement, one must conclude that whenever there is harm caused to a Community citizen, there must be a remedy available for him or her to demand rectification for this harm. Therefore, even if the text of the Treaty is strict, the drafters of the Treaty were acting under the notion that whenever there is harm there will be a remedy. It would not have been possible to list all the possible means of harming the interests of citizens and in the light of the

²³³ In that respect it could be argued that such steps have already been taken in cases such as Case C-309/89, *Codorniu* [1994] ECR I-1853; however on the basis of this paper and the recent case-law one can see that the shift has not been uniform and that the *Plaumann* formula continues to be the basis for denial of *locus standi* in private actions.

²³⁴ See Harding, *supra* note at 355.

substance and not form theory, this was not even necessary. In fact the text of the Treaty does not exclude actions for annulment of regulations *per se*. *Ex mea sententia* one can read ‘although in a form of a regulation or a decision addressed to another person, is of direct and individual concern to the former’²³⁵ and derive that the requirement of individual concern should be understood as a personal concern stemming from harm that is caused to the individual by the measure; a group with particular characteristics can share that personal concern and there is no reason to require that group to be completely closed. As discussed above, the Court introduced the requirement of the group being a closed one. The text of Article 230 EC (ex. Art. 173) does not *prima facie* provide for such interpretation. Even if the Article was read as interpreted by Harding, the argument that there is no adequate alternative remedy available should prevail, and the Article should be read and interpreted in the light of that factor. The requirements imposed by the Court in and after *Plaumann* are simply a matter of interpretation. Adopting a different view does not mean contradicting the Treaty, but rather reviewing our understanding of it after having seen the results of the earlier interpretations.

Furthermore, it would be possible to overcome the strict standards of the Article by creating new procedures involving private parties in the adoption of the acts.²³⁶ It would in fact be a solution to the problems with standing in environmental cases if the procedures foresaw that, for example, the Commission is obliged to publish in the Official Journal any acts that are soon to be adopted and all private entities that are likely to be (or that may be) affected by the measure have the right to produce their views on the matter, which have to be analyzed and taken into consideration before the actual adoption of the act. If the applicants are truly concerned about the problems that may follow the adoption of such an act they will make an effort to express their views to the Commission and in fact participate in the adoption procedures. Thereby the applicants would be directly and individually concerned similarly to what has already happened in the field of competition law, State aids and anti-dumping. Such a system would in fact exclude the risk of *actio popularis* as the sphere of potential applicants is already limited by the actions taken prior to the annulment proceedings and at the same time provide for judicial review of potentially illegal acts of the Commission. Furthermore, the adopting institution would be *ex avante* aware of the concerns of the general public and perhaps adopt a different approach in the act. At the end it is the *effet utile* of the Community law that must be pursued and providing effective remedies is an essential part of that direction.

III. The Legal Certainty Argument

It has been suggested that allowing private actions against generic norms will encroach on the fundamental rights of other subjects of the norm that have been acting in

²³⁵ Art. 230 EC (ex. Art. 173).

²³⁶ See Betlem, in Micklitz & Reich, *supra* note at 19–20.

compliance with it. *A priori* the protection of the legal certainty argument is undermined in the discussion above under the comparison of the possible remedies of Articles 230 and 234 EC (ex. Arts. 173 and 177), where it was concluded that annulment under the preliminary rulings procedure has the potential of causing harm to legal certainty and therefore direct actions should be preferred for their lower time expense. Such an approach would be in harmony with the principle of proportionality in that it is the duty of the Court to direct the case-law towards the less harmful solutions. Furthermore, protecting the illegal acts adopted will not assist in upholding the credibility of the *acquis*. Even if at times such an effect is achieved, in other cases the effect will be the opposite, if the measure can at a later time be annulled pursuant to a preliminary reference. After all, the national court is by no means prevented from making such a reference at any time, if it doubts the legitimacy of the act in the course of national proceedings. It is common knowledge that if now such an act is annulled, it will be the target of severe criticism by all means imaginable as to the resulting chaos in the legal position of its subjects. The group of subjects affected and the number of entities ‘blowing the horn’ will be far smaller if the measure is annulled soon after the direct action. Furthermore, it is ethically improper to protect faulty norms on the basis of the legal certainty argument. Ultimately, only correct norms deserve the protection currently granted to all norms under the limitations on standing.²³⁷

The limitation period of two months for bringing an action for annulment is widely recognized and used in many legal systems. The limitation serves *a priori* the goal of protecting the legal certainty of the subjects, leaving only a relatively short time-period where their legitimate expectations are placed at risk. Even though ultimately one cannot rule out the risk to one’s legal certainty, it is not clear if that risk is indeed of greater priority to the Community compared to actual harm caused to the private applicants by the illegality of the measure. Considering the above arguments, it seems that the risk of legal certainty should not serve as justification of the restrictive standards applied to private applicants, as doing so may indeed result in far greater harm to possibly a far larger group of subjects.²³⁸

IV. The Flood-Gate Argumentation

The principal argument however, and the one that is the most difficult to defeat, is the so called ‘flood-gate’ argument, in that if such applications were admitted less restrictively the Court would be overburdened with cases and in the end would in fact have disastrous consequences for the efficiency of the institution. The interests of all applicants would thus suffer in that the quality of the judgments pronounced

²³⁷ See Emmert, *supra* note at 181.

²³⁸ Emmert, *ibid.*, suggests the possibility of the Court to limit the application of its judgments in that they take effect only *ex nunc*. This would indeed to a certain extent protect the legal certainty of its subjects. Furthermore it would give the Court a chance to apply a rule of reason argumentation in comparing the possible harm of annulment *ex tunc* to the harm caused by derogation from the principle.

would decline as the quantity increased.²³⁹ The concern of the Court on this issue is expressed in the following excerpt:

Since the two Courts have no control over the number of cases brought before them, they are faced with a structural increase in the number of pending cases. The constant increase in the number of cases dealt with by the Court of Justice and the Court of First Instance (768 cases were disposed of in 1998) is evidence of the efforts made to cope with the situation.

Despite the steps taken to improve the efficiency of working methods and procedural practices, such an increase inevitably entails a lengthening of proceedings. This situation is particularly regrettable in the case of references for preliminary rulings. In order for the rights of individuals to be safeguarded and for cooperation between national courts and the Court of Justice under the preliminary reference procedure to function properly, replies to the questions asked must be given as quickly as possible. The system of preliminary references is a key factor in the proper functioning of the internal market.²⁴⁰

Considering the Court is already working at its limits and the time it takes to get a judgment is increasing, loosening the standards would not produce the expected positive effect, if this were to result in excessively lengthening the duration of the procedure. The positive effect of more flexible standards would be reversed by the encroaching right for a speedy trial. The Court itself admits that not revising the organizational and procedural framework ‘... will inevitably result, for both Courts, in delays on a scale which cannot be reconciled with an acceptable level of judicial protection in the Union’.²⁴¹

In the same document it is stated that more than half of the new cases are preliminary rulings. One can therefore conclude that the excessive number of preliminary references causes the real burden of the Court and it would therefore be more reasonable to deal with some of these cases as direct actions, thereby shifting the burden from the ECJ to the CFI.²⁴² On the other hand, according to the 1998 statistics of the CFI, 105 cases out of 123 brought under the ECT were based on

²³⁹ See Harding, *supra* note at 354–361; the same is expressed by the CFI, ‘Contribution of the Court of First Instance for the Purposes of the 1996 Intergovernmental Conference’ May 1995, 21 May 2002, <<http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/report.html>> .

²⁴⁰ ECJ, EXPLANATORY NOTE: Court of Justice sent the Council a document containing proposals and reflections on ‘The Future of the Judicial System of the European Union’, 10 May 1999, 21 May 2002, <<http://www.curia.eu.int/en/txts/intergov/ave.pdf>> at 5.

²⁴¹ ECJ, EXPLANATORY NOTE: Court of Justice sent the Council a document containing proposals and reflections on ‘The Future of the Judicial System of the European Union’, 10 May 1999, 21 May 2002, <<http://www.curia.eu.int/en/txts/intergov/ave.pdf>> at 8.

²⁴² ECJ, EXPLANATORY NOTE: Court of Justice sent the Council a document containing proposals and reflections on ‘The Future of the Judicial System of the European Union’, 10 May 1999, 1 March 2000, 10 May 1999, 21 May 2002, <<http://www.curia.eu.int/en/txts/intergov/ave.pdf>> at 5 ‘References for preliminary rulings now account for more than half of the new cases brought before the Court of Justice (264 references out of 485 cases)’.

Article 173 ECT (now Art. 230 EC).²⁴³ However as discussed below, the high caseload of the CFI is not as serious and can be overcome by adjusting the working of the institution. In addition, relaxing the conditions for standing in direct actions will certainly reduce the number of cases brought with the goal of assessing the acts under the preliminary rulings procedure.

Furthermore, one could consider establishing further Chambers to the CFI that would aid in the effective management of the increasing case-law.²⁴⁴ Considering the upcoming accession of new MSs, the number of judges in the CFI is likely to increase which would provide for the additional human resources necessary. One should also consider whether it would not be practical to abandon the tacit agreement of having one judge per MS in the ECJ and direct the additional judges to the CFI instead.²⁴⁵ After all, in the light of the risk of denial of justice in direct actions, an increase in the Chambers of the CFI would permit the Court to relax the controversial standards and be able to fully exercise its control over the Community legislature. As the CFI sits in chambers of three and five and a possibility of appeal exists on its rulings, the increase in the membership would not cause operational difficulties as it would in the ECJ.²⁴⁶ The ECJ would still preserve its position as the Appellate Court, and the uniformity of the case-law and the rights of private applicants could be protected in an adequate, reasonable and effective manner. One should also consider the creation of specialized chambers or even new CFI's to deal with certain areas. Higher specialization will in turn increase the efficiency of the institution and reduce the risk of conflicts in the resolutions.

It is claimed that by the addition of new judges and new Chambers, the uniformity of the Court's case-law is jeopardized. A closer analysis of the matter reveals that this is not a *conditio sine qua non*. Even now, the ECJ is effectively reviewing the rulings of the CFI and thereby upholds the uniformity of interpretation of the *acquis* just as any supreme court in a MS would. The ECJ has managed to provide guidance for the CFI at a satisfactory level and there are no cases where the two have made obviously conflicting rulings and the CFI ruling was later enforced. Whenever the

²⁴³ CFI, Statistical information of the Court of First Instance, 1998, 21 May 2002 <<http://curia.eu.int/en/stat/st98tr.pdf>> .

²⁴⁴ The idea is also supported in CFI, 'Contribution of the Court of First Instance for the Purposes of the 1996 Intergovernmental Conference', May 1995, 21 May 2002, <<http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/report.html>> .

²⁴⁵ ECJ, 'Court Report of the Court of Justice on certain aspects of the application of the Treaty on European Union', May 1995, 21 May 2002, <http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html> , para. 16.

²⁴⁶ Increasing the number of judges in the ECJ may cause the plenary session to become ineffective due to its 'changing' from a collegiate court to a 'deliberative assembly' and as the ECJ is the ultimate court of appeal of the EU the increase in the number of Chambers could threaten the uniformity of its case-law. An increase in the number of judges could be achieved by amendment of the Decision of October 1988 establishing the CFI; statistically 218 out of 348 cases were heard in Chambers of 3 judges. CFI, Statistical information of the Court of First Instance, 1998, 21 May 2002 <<http://curia.eu.int/en/stat/st98tr.pdf>> .

CFI has ruled on a matter, there is the remedy of an appeal to the ECJ.²⁴⁷ Even though additional measures for the coordination of the case-law will be necessary, the procedure of appeals to the ECJ should be sufficient to provide for the unity of the rulings.²⁴⁸

The CFI has proposed the appointment of ‘assistant rapporteurs’ as a solution for dealing with the growing caseload.²⁴⁹ Doing so would not require an amendment to the Treaty, but merely an amendment to the Statute of the Court of Justice. These assistant rapporteurs would be ‘experts of proven competence’ and would bear the burden of research and drafting, provide assistance to the Court in the course of proceedings, while leaving the actual decision-making to the judges. The possible disadvantage to this approach is the lack of involvement of the judge in the process of resolving the case and the resulting limited knowledge of its particularities. However, if such persons were introduced, they would certainly provide CFI with an effective tool, which could be compared to the current advantageous situation of the ECJ in having eminent legal experts in the form of advocate generals at their service. Furthermore, even if there are certain limitations to the information forwarded to the judge, it will still permit the Court to hear cases which currently are dismissed due to lack of procedural capacities of the institution.

In the same document, the CFI proposes that certain issues should be dealt with using a single judge.²⁵⁰ The use of a single judge in the national judiciary has proven to be quite problematic, as on issues where complex assessment of facts and legal issues are involved, it is often excessively difficult for one person to be fully able to analyze all aspects of the matter. The possibility of referring the case to the Chamber does not guarantee such referral due to the discretion available to the judge. This however results in a substantial number of appeals and is ultimately not a solution to the problem. However if, as proposed by the CFI and as also finally adopted, only one judge were used after the Chamber finds that the case at hand can effectively be resolved by one and refers the case to the single-judge panel and in combination with the availability of assistant rapporteurs, such an approach could definitely prove to be a substantial relief to the Court in the effective management of the caseload.²⁵¹ By the Decision of 26 April 1999, which came into effect on 1 July 1999, this amendment was made, enabling the Court of First Instance to sit ‘when constituted by a single judge’.²⁵² On Thursday 28 October 1999, the first judgment was delivered by a single

²⁴⁷ See Art. 49 of the Statute of the ECJ and Title IV of the ECJ Rules of Procedure.

²⁴⁸ ECJ, EXPLANATORY NOTE: Court of Justice sent the Council a document containing proposals and reflections on ‘The Future of the Judicial System of the European Union’, 10 May 1999, 21 May 2002, <www.curia.eu.int/en/txts/intergov/ave.pdf> at 19.

²⁴⁹ CFI, ‘Contribution of the Court of First Instance for the Purposes of the 1996 Intergovernmental Conference’, May 1995, 21 May 2002, <<http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/report.html>> at 3.

²⁵⁰ Ibid.

²⁵¹ According to the CFI that approach could be achieved simply by an amendment to the Decision of October 1988.

judge.²⁵³ The judgment in question was delivered only 6 weeks after the hearing date and under one year from the filing of the case. This can already be considered substantial progress towards more effective management with the problem of high caseloads and perhaps a means for opening up the access to actions for annulment. Ironically, the case in question concerned an action for annulment, which the Court rejected. However the general trend of finding measures towards speeding up the proceedings is to be welcomed, as this may in fact relieve the Court of a reason for restricting annulment proceedings. Indeed, such an approach should theoretically improve the quality of the judgments given and should perhaps even be considered in reforming the national judiciaries in MSs in order to provide for more effective procedures. After the establishment of such a system, the Community will be much better equipped for dealing with the extensive caseload, and much more flexible standards can be applied.²⁵⁴

The risks involved in adopting a more liberal approach must also be assessed on the basis of the national experience. For example, in the UK even *actio popularis* is effectively permissible and it is subject to the Court's discretion in 'appropriate cases'.²⁵⁵ The requirement of standing is not discussed as a separate issue and is instead analyzed together with the merits of the case itself. The adoption of a similar test to the UK, the test of sufficient interest, would already serve as a means of excluding those cases, which are clearly unfounded. However, it would allow the relaxation of the current rules in permitting more applications. The Court would be given more discretion on which cases to allow and which to exclude. In the end, the Court does go through substantial deliberations before ruling on the admissibility issues. Would it not in fact be easier to rule on which cases to allow when knowing the merits of the case and the significance of the possible ruling? The purpose of the whole system of remedies available to the individual is ultimately '... that it is repugnant to any constitution based upon the rule of law that any citizen should be subjected to unconstitutional legislation or unlawful decisions ... [T]he question as to whether third parties should have *locus standi* under Article 173 (4) [now Art. 230 EC] should be determined by practical and procedural considerations and not treated as a question of immutable principle'²⁵⁶ [amendment reference added].

²⁵² Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, was amended by Decision of 26 April 1999 which came into effect on 1 July 1999, OJ 1999 L 114/p. 52.

²⁵³ ECJ, Press and Informative Division, Press Release No. 86/99, Judgement of 28 October 1999 in Case T-180/98, *Elizabeth Cotrim v. European Centre for the Development of Vocational Training (Cedefop)*, [1999] ECR IA-207, ECR-1077 (First Judgment Delivered by Single Judge at Court of First Instance, 28 October 1999, 21 May 2002 <<http://curia.eu.int/en/cp/cp99/cp9986en.htm>>).

²⁵⁴ See Ehlers, in *Verwaltungs-Archiv*, *supra* note, at 171: impossibility of *actio popularis*. The opposite is argued by Emmert, *see supra*, note 93 at 180.

²⁵⁵ See Cooke, *supra* note at 13.

²⁵⁶ *Ibid.* at 35.

I. Olive Oil and Jégo-Quére

At the time of writing, the Court was once again facing strong pressure to change its case-law regarding individual concern in considering the *Olive Oil* case.²⁵⁷ AG Jacobs presented the Court his opinion in which he argued that the case-law on individual concern must be changed. In the case the UPA (a representative association of small Spanish agricultural businesses) challenged Regulation No 1638/98 reforming the common organization of the oil market.

The Court of First Instance dismissed the action for annulment based on the argument that the regulation was legislative in nature as it applied in a general and abstract manner to objectively-determined factual and legal situations.²⁵⁸ The CFI found that the applicant was not individually concerned by the regulation and dismissed the application as manifestly unfounded.²⁵⁹

Appealing the ruling from the CFI the UPA emphasized that it has been deprived of effective judicial protection. The applicant claimed that the CFI is under an obligation to consider whether applying the conditions of Article 230 would prevent an individual from enjoying effective judicial protection. UPA has claimed that dismissing a claim as unfounded can only be allowed after it has been ascertained that the individual has a possibility of bringing the case before the Court of Justice via a reference for a preliminary ruling from a national court. As a basis to its claim the applicant argued that in the Spanish courts it was not possible to challenge a measure of general application, which in turn would make a reference for a preliminary ruling impossible and thus by not giving it *locus standi* under an Article 230 procedure, the applicant is deprived of an opportunity to challenge the regulation in any way.

Ex mea sententia the UPA correctly raised the question of the high risk of denial of justice in the case, which could indeed potentially be contrary to the requirements of the ECHR. However the arguments of UPA that the Court is under a duty to consider the presence of national remedies cannot be supported, as the conditions for standing under the Treaty should not depend on national law. However the solution to the risk of denial of justice regarding challenging the Community acts can indeed be solved via relaxing the interpretation given to Article 230 (4) by the Court in *Plaumann*. The solution proposed by AG Jacobs in his opinion accords to a large extent with what has been suggested above and is strongly supported by this author.

In his opinion AG Jacobs finds that Article 230 of the Treaty must be interpreted in a way that complies with the principle of effective judicial protection and argues that the preliminary rulings procedure is indeed not an effective alternative to the

²⁵⁷ Judgment of 23 November 1999 in Case T-173/98, *Unión de Pequeños Agricultores (UPA) v. Council of the European Union (Olive Oil)* [1999] ECR II-3357; Opinion of AG Jacobs in judgment of 25 July 2002 in Case C-50/00 P, *Unión de Pequeños Agricultores v. Council of the European Union*, [2002] ECR 0.

²⁵⁸ CFI paras 35–44.

²⁵⁹ CFI paras 65–66.

annulment proceedings, basing its claims largely on the same arguments advocated in this article such as lack of authority of national courts to rule on the legality of Community acts.²⁶⁰

The significance of the opinion lies in the proposal that AG Jacobs poses in order to solve the controversial situation with the issue of standing in direct actions. AG Jacobs introduces a new approach to interpreting the requirement of individual concern of an individual and connects the interpretation of the term of individual concern to 'substantial adverse effects on his interests'.²⁶¹ It must be admitted that the terminology employed by AG Jacobs would be an effective means for the Court to solve the situation with *locus standi* in private actions that has become so critical in the European Law. By employing this terminology the Court would be able to bypass the risk of having to rule *contra legem*, as there is nothing in the Treaty that requires the term 'individual concern' to be interpreted as strictly as it has been done this far. One can certainly see the fact of being adversely affected by a Community act as being individually concerned.

The approach of AG Jacobs has already found its way into the case-law of the CFI, even though the ECJ has not yet had a chance to demonstrate, whether its views accord with the ones of the AG. In *Jégo-Quéré* the CFI was once again faced with a situation where the applicant claimed that without a remedy under Article 230, it would be denied of a remedy against the challenged regulation.²⁶²

It must be recalled here that in *Olive-Oil* the CFI stated that the applicant cannot rely on the lack of remedies under national law in its request for being granted standing.²⁶³ The Court did indeed refer to the requirement of loyalty to the Community under Article 5 of the Treaty (ex Art. 10), however in the next paragraph the CFI made it clear that the absence of a remedy cannot justify the Court bypassing the system of remedies established under Art 173 (4) and exceeding its competence.²⁶⁴

However in *Jégo-Quéré* the CFI adopted an approach, which, if upheld by the ECJ, may indeed become a partial solution to the problems addressed in this article. Recalling the exceptional judgment *Les Verts*, in paragraph 41 of the judgment the Court emphasized that access to justice is one of the fundamental elements of a community of law. In analyzing whether there is an alternative remedy available to the applicant, the Court found that the remedies under Articles 235 and 288 (damages) do not place the Community judge in a position that would enable him or her to fully exercise the test of legality of the measure.²⁶⁵

²⁶⁰ AG Jacobs paras 37–44.

²⁶¹ AG Jacobs para. 60.

²⁶² Case T-177/01, *Jégo-Quéré* [2002] ECR II-0000.

²⁶³ Case T-173/98, *Olive Oil* [1999] ECR II-3357 at para. 61.

²⁶⁴ Case T-173/98, *Olive Oil* [1999] ECR II-3357 at paras. 62–63, see also order of the Court of Justice in judgment of 24 April 1996 in Case C-87/95 P, *Cassa Nazionale di Previdenza ed Assistenza a favore degli avvocati e dei Procuratori v. Council of the European Union* [1996] ECR I-2003 at para. 38.

²⁶⁵ Case T-177/01, *Jégo-Quéré* [2002] ECR II-0000 at para. 46.

Interestingly, the Court thereafter reaffirmed the position from earlier case-law, stating that the Court does not have the authority to change the system of remedies and procedures established by the Treaty.²⁶⁶ However it then went on to quote AG Jacobs from *Olive Oil* and found that in order to assure effective judicial protection to individuals, in this case, standing had to be granted.²⁶⁷ According to the CFI:

Au vu de ce qui précède, et afin d'assurer une protection juridictionnelle effective des particuliers, une personne physique ou morale doit être considérée comme individuellement concernée par une disposition communautaire de portée générale qui la concerne directement, si la disposition en question affecte, d'une manière certaine et actuelle, sa situation juridique en restreignant ses droits ou en lui imposant des obligations. Le nombre et la situation d'autres personnes également affectées par la disposition ou susceptibles de l'être ne sont pas, à cet égard, des considérations pertinentes.

In the last few paragraphs of the ruling, the CFI radically changed what had been the settled case-law up to this point. The fact that the CFI accepted the approach of AG Jacobs from *Olive Oil*, even before the ECJ had a chance to present its opinion on the matter, demonstrates the severity of the problem faced by the Community under the current practice created by potential denial of justice contrary to paragraphs 6 and 13 of the European Convention of Human Rights and article 47 of the Charter of Fundamental Rights. It remains to be seen whether the solution adopted will be upheld.

On 25th July 2002 the ECJ gave its ruling in the *Olive Oil* case, dismissing the appeal as unfounded. The Court affirmed that Articles 7 and 13 of the ECHR do indeed enshrine the individual's right to effective judicial protection of the rights they derive from the Community legal order, then argued, however, that Article 173, Article 184 (now Article 241 EC) and Article 177 represent the complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions and where the conditions of standing do not permit the individual's full protection 'it is for the Member State to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.'

Once again the Court refused to make a change in its case-law and to accept the arguments of the advocate general. The arguments of Mr Jacobs as to the possibility of a different interpretation of the term 'individual concern' are not analyzed in the ruling, instead the Court simply states that the principle of effective judicial protection cannot serve as grounds for the Court to set aside the conditions expressly laid down in the Treaty

Even though one cannot dispute that the Court cannot act *ultra vires*, there still remains the question of whether the text of Article 230 does indeed constitute such a strict limitation in the term 'individual concern'. A. G. Jacobs certainly argued a strong case to demonstrate that the term itself can be interpreted differently. It is the

²⁶⁶ Case T-177/01, *Jégo-Quéré* [2002] ECR II-0000 at para. 48.

²⁶⁷ Case T-177/01, *Jégo-Quéré* [2002] ECR II-0000 at para. 49-51.

view of this author that the Court was not requested to act *ultra vires*, but rather requested to interpret the requirements of Article 230 in the light of the principle of effective judicial protection and in the light of other fundamental principles of the Treaty. Leaving the question of protection of individuals against the acts of the Community up to the courts of the Member States certainly does not provide for an adequate solution.

J. Conclusions

As explained in this paper, access to annulment proceedings by non-privileged applicants is at present conditioned on strict tests. The potential resolution from *Jégo-Quéré* may indeed take some pressure off the Court, in that at least the extreme cases can result in *locus standi* for the applicant. However the approach of AG Jacobs in completely rethinking the test of individual concern has not yet become official practice. It is impossible to state whether the resolution in *Jégo-Quéré* was a result of a new approach, or simply another exception to the rule as in *Les Verts*. As long as there are no clear-cut answers one must be aware that the bulk of the case-law is still overshadowed by self-limitation.

It remains unclear whether the reasons of the Court in support of its self-limitation are indeed sufficient to compensate the harm caused by denying access to even a few private applicants. However, there are indications that the current approach will have to be substantially modified. In the end, widespread access to justice would only result in equal justice for all. The fear of the Court that allowing ‘everyone’ to question the validity of generic norms would burden it with cases brought by ‘busybodies’ that will complain given the chance, is quite effectively contradicted by the arguments put forward in *Emmert*.²⁶⁸ Namely, it is highly unlikely that a person that is not seriously concerned by a measure will spend his or her time and money on the time-consuming and quite expensive procedure involved in getting that measure annulled. In particular, considering the fact that in case of a failure to prove one’s case, under Article 69 (2) of the Rules of Procedure the unsuccessful party will be ordered to pay the costs, including those of the opposing party. If one, knowing the possible consequences, still decides to pursue the case, it seems very likely that the issue must concern an important general interest or an extremely explicit violation of an objective right. Furthermore the remaining cases where the application is not objectively justified will form such an insignificant portion that will not become a burden and can be eliminated by other means. Also the restricted time limit on presenting the claims, the requirement of direct concern and ultimately the approach that where an individual has passed the possibility of

²⁶⁸ See *Emmert*, *supra* note 93 at 180.

challenging a measure in a direct action the remedy of Article 234 would no longer be open to it²⁶⁹ would serve as a floodgate. This floodgate would be strong enough to protect the court, however flexible enough to avoid allegations of denial of justice on the Community level.

Most of the existing case-law perceives the situation as a denial of a remedy, in that the applicants are directed towards other possible remedies. However the nature of those other remedies and the extent of risk and discretion involved with those other remedies makes it in some cases possible to label the practice as denial of justice rather than a denial of a remedy. Considering the fact that obtaining a preliminary ruling takes on average two years, that in numerous cases the challenged act only affects the situation in a much smaller time frame, that the national court is not under a duty to make a reference for a preliminary ruling,²⁷⁰ (in which case the only way to get one's case to the ECJ is through the exhaustion of national remedies and then appealing to the Court, which takes even longer),²⁷¹ that the Court has defined the conditions of Community liability so narrowly that only a few private parties have been awarded damages,²⁷² that it is extremely expensive for a private applicant to retain legal counsel in such a lengthy matter and that often due to this factor the applicant retains weaker counsel than one would in a shorter period (the direct action) (this can ultimately mean losing the case because of lack of experience in the proceedings, etc. on the part of the counsel), one can see that the alternative remedies suggested are not sufficient and cannot serve as justification for not granting *locus standi* to private applicants. Justice delayed is justice denied, and such an approach is certainly not acceptable as regards the fundamental principles of the Treaty. Furthermore, the factual existence of a remedy in direct actions is itself an argument in support of its effective use. Conforming to the maxim *ubi ius ibi remedium*, a constitutional right of every EU Citizen to have its interests represented is created under Article 230 EC (ex. Art. 173)²⁷³ and the existence of such a remedy should not depend on the absence of alternative means of redress.²⁷⁴

Why has the Community legislature chosen to uphold strict limitations despite the different practices of Member States? The French administrative procedure admits applicants on the basis that an actual interest of the applicant has been harmed and does not require a violation of a right.²⁷⁵ It seems that most of the cases that could

²⁶⁹ Judgment of 9 March 1994 in Case C-188/92, *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland* [1994] ECR I-833.

²⁷⁰ T. Danwitz, in 17 NJW, *supra* note at 1112.

²⁷¹ *Ibid.* at 1113.

²⁷² See Rasmussen, in ELRev, *supra* note at 112–127; Rasmussen claims that no private parties has been awarded damages. This has become untrue since the *Mulder* cases: Joined Cases C-104/89 and C-37/90, *Mulder and others* [1992] ECR I-3061.

²⁷³ Considering the Treaty as the Constitution of the EU.

²⁷⁴ Case C-358/89, *Extramet*, [1991] ECR I-2501 para. 70 (Opinion).

²⁷⁵ H.-U. Erichsen and R. Weiß, 'System des europäischen Rechtsschutzes' in (1990) 10 *Jura* 528–535 at 532.

possibly become a burden to the Court would already be eliminated by the requirement of direct concern. After all, only those measures are of direct concern where the MS is put under an obligation to do something. An applicant will not be considered directly concerned if the MS is only *enabled* to act on the measure.²⁷⁶ It would make sense that, if a Community institution passes a measure that is of direct concern to a non-privileged applicant, it should also be aware that this measure is subject to judicial control under Article 230 EC (ex. Art. 173). The EU not only needs to ensure that its judicial system is transparent and comprehensible, but also that it is accessible to the public.²⁷⁷ The Court however has followed the opposite route. Instead of applying the Treaty on an as-is basis, it defined its position in *Plaumann* giving a most restrictive interpretation of the term 'individual concern'. Not only is it necessary to be in a unique position, the Court also introduced the means of determining who is individually concerned. In *UNICME* it ruled that belonging to a readily identifiable group was not enough. With the strict application of the 'closed-category' test there has been no room left for 'rule-of-reason' argumentation. As discussed above, in many cases it is not likely or is even highly unlikely that the group will grow in the near future. Furthermore, in cases the rule of economics basically rule out the possibility. The case-law has however been uniform and the applicants were not considered individually concerned. Would it have fallen outside the meaning of Article 230 EC (ex. Art. 173) if these applicants had been accorded standing simply on the basis of being identifiable and to a certain extent fixed at that point? Is it really necessary to interpret the requirement of *individual concern* in a way that includes the possibility of further expansion? The wording of the Treaty does not expressly provide for such interpretation. Moreover, other areas of Community law have for a long time applied the rule of reason argumentation in areas where there is no clear-cut answer.

The *raison d'être* of Article 230 EC is to provide for judicial review of the acts of the Community institutions and to preclude the legislative from preventing private actions by simple choice of form of the act. The Court has recognized this principle²⁷⁸ and has even stated that limiting access to it 'could deprive individuals of effective judicial protection and undermine the unity of the case-law'.²⁷⁹ Even though the statement was made with reference to preliminary rulings, its substance is equally applicable to direct actions. The test applied today is exercised only on formal terms of whether the measure regulates objectively determined situations and produces legal effects with respect to categories of person's envisaged in general and abstract

²⁷⁶ Ibid. at 535.

²⁷⁷ ECJ, EXPLANATORY NOTE: Court of Justice sent the Council a document containing proposals and reflections on 'The Future of the Judicial System of the European Union', 10 May 1999, 21 May 2002, <www.curia.eu.int/en/txts/intergov/ave.pdf> at 17.

²⁷⁸ Cases 789/79 and 790/79, *Calpak*, [1980] ECR 1949 at para. 7.

²⁷⁹ ECJ, 'Court Report of the Court of Justice on certain aspects of the application of the Treaty on European Union', May 1995, 21 May 2002, <http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html> at 4, para. 11.

terms²⁸⁰ and in ignorance of the objective factors such as the small number or even identifiability of the subjects affected.²⁸¹

It is time for the Community to learn from its MSs in the field of private actions. The applicant should be accorded standing if it is directly concerned and there is proof of one of their interests being negatively affected, that interest being to an extent different from the Community at large in that there is a possibility of harm to the applicant. One should allow applications on the basis of a legally protected interest or a factual interest and abandon the understanding of individual concern as it has been applied after *Plaumann*. Under EU law today, the applicant not only needs to distinguish him or herself from the Community at large, but also from the group of people generally affected by the contested measure, which is not an easy task.²⁸² The environmental cases discussed above provide for a serious *lacuna* in the procedure as it stands. Ruling that one is not individually concerned by a measure as long as it is harmful to more than a few is absurd. With such an approach, more people are harmed the greater the protection of the measure from review and initial annulment.

At the moment the case-law is clear, the legal protection afforded by the Court of First Instance cannot in any event serve to cure the deficiencies in legal protection at the national level.²⁸³ The fact that there is no other remedy available does not place an obligation on the Court to hear the case. Whatever the reasons for the current situation, they cannot be strong enough to justify denial of justice to those less fortunate. Perhaps *Jégo-Quéré* will become the foundation for the Court to reconsider its case-law on individual concern and take the first steps to write *Plaumann* into the thick books that record the past of the *acquis communautaire*.

²⁸⁰ Case T-158/95, *Eridania and others*, [1999] ECR II-2219 para. 54.

²⁸¹ See Danwitz, *supra* note at 1115.

²⁸² A. Albors-Llorens, *Private Parties in European Community Law; Challenging Community Measures* (Oxford Clarendon Press 1996) at p. 52.

²⁸³ Opinion of Advocate General Gulmann in Joined Cases C-15/91 and C-108/91, *Buckl* [1992] ECR I-6061 at para. 27, CFI in Case T-398/94, *Kahn Scheepvaart BV v. Commission*, [1996] ECR II-477 at para. 50.