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*Locus Standi* of Private  
Applicants under Article 230 (4)  
EC:  
Undue Restriction or over-  
Criticism?

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# Summary

Under Community legal system, private parties are vested with only a restricted capacity to bring an action for annulment of allegedly unlawful Community rules<sup>1</sup>. The conditions for ordinary parties to have *locus standi* were provided in Article 230 (4) EC [ex 173 (2)] and have been interpreted by the Court of Justice in its case law. It is widely agreed that such conditions are strict and not easy to be fulfilled. One may suggest that the interpretation given by the ECJ to the requirements of Article 230(4) EC is highly restrictive and that provisions of the Treaty regarding the right of the interested parties to bring an action must not be interpreted restrictively. However, the question whether it is appropriate to widen *locus standi* of individuals when they challenge the validity of Community acts before the Community Court has been the subject of extensive debate among practitioners and in the legal literature. The two landmark cases – *Jégo-Quéré*, delivered by the CFI on 3 May 2002 and *UPA* delivered by the ECJ on 25 July 2002 – provide vivid examples of this controversy.

The theme of this thesis is the question whether *locus standi* of private applicants under article 230 (4) EC is unduly restricted or is the large amount of criticisms unwarranted. I will begin by analyzing some aspects on which the conditions of private applicants' standing are explicitly based. In this part, I will attempt to answer two questions why the private parties bring an action for annulment and on what grounds their application should be admitted. Then the thesis goes on with the description of individual concern condition as a necessary filter in order to admit the challenges, in case private parties seek proceedings to annul a general application act or an act addressed to another person. Finally, I will dilate upon the arguments made by AG F. Jacobs in *UPA case*, the findings of CFI in *Jégo-Quéré case* and the departure of ECJ in *UPA case* from the earlier opinions or decisions on the point. The question in these cases was whether it was appropriate to widen *locus standi* of individuals when they challenged the validity of Community acts before the Community Court. The new rules on *locus standi* of private parties provided in the Constitutional Treaty are also

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<sup>1</sup> Angela Ward, *Judicial review and the right of the private parties in EC law*, Oxford University Press, New York 2000

specifically mentioned in this part. However, due to the unclear future of the European Constitution, such rules are just presented briefly.

I apparently find no reason for contesting the current conditions on *locus standi* because they are based on the balance between the adverse effect and adequate remedy, efficacy of the action for annulment as one of the instruments of many available remedies in the Community complete system of remedies, overall effectiveness of Community system, the need to protect Institutions from judicial review challenged by private applicants, and the capacity of Community Courts for coping with a deluge cases. A strong suggestion could not be based on one specific aspect. In order to answer the question whether or not *locus standi* should be opened, a broad assessment is needed to be carried out. Drawing *locus standi* of private parties should be based mainly on the adverse legal effect of the contested act that applicant suffered. However there are several other elements that must be taken into account, such as effectiveness of community system, the need to protect Institutions from judicial review challenged by private applicant, the capacity of Community Courts for coping with deluge cases, etc. The value of the former and the latter must be equally considered and the balance between them needs to be struck up.

# Acknowledgment

I owe my heartfelt thanks to Prof. Xavier Groussot for his scholastic guidance and for providing me supervision in the completion of my thesis. Though he had a very busy schedule, he was always receptive to provide me guidance on the topic of my research. My research thesis perhaps could have never been possible if he had not streamlined me in the accomplishment of this Herculean task.

I would also like to recognize my limitations in the writing of this thesis. I admit that my research work might be having some lacunas and gross deficiencies, but I leave this job to the coming-up researchers to fill it up and make up those inadequacies.

I would like to thank 'SIDA' for providing me funds and making it possible for me to complete my Graduation in general and my research project in particular. I am quite aware of the fact that it could have never been possible, had not this Authority spurred me on by giving me financial assistance.

I am also grateful to the library staff of the Juridicum for their cooperation and help in spotting the relevant material from the library.

Finally, I cannot help adding here that the research I have made into will go a long way in proving useful in my academic assignments especially in my country.

# 1 Introduction

Generally speaking, legal systems may adopt three different approaches to the right of individuals to challenge an act. The first and most restrictive alternative is to accord *locus standi* solely when the concerned act infringes the individual's legal rights. At the other end of the spectrum is the so-called *actio popularis*, the most liberal approach, which allows *locus standi* for every citizen, irrespective of a particular interest. The third and middle way is to allow an individual to challenge the validity of an act when he can demonstrate that the act will adversely affect him in some way or another'<sup>2</sup>. Under Community legal system, private parties were vested with only a restricted capacity to bring an action for annulment of allegedly unlawful Community rules<sup>3</sup>. The conditions for ordinary parties to have *locus standi* were provided in paragraph 4 Article 230 of the European Economic Community Treaty amended by the Treaty of Nice (hereinafter EC) and have been interpreted by the European Court of Justice (hereinafter ECJ) in its case law. It is widely agreed that such conditions are strict and not easy to be fulfilled. In this light, it could say that, *locus standi* of private parties under Community law falls within the first approach mentioned above.

There is a fact that the provisions on *locus standi* of private parties to bring an action for annulment do not change since it was provided within Article 173 (2) in Treaty of Rome. The ECJ's approach in interpreting and applying has also not changed for forty years since it created a classic testing for *locus standi* – 'Plaumann formula'<sup>4</sup>. Since then, the question whether it is appropriate to widen *locus standi* of individuals when they challenge the validity of Community acts before the Community Court has been the subject of extensive debate among practitioners and in the legal literature. Many scholars criticize the silence of the ECJ over relaxation requirement. Such criticism has been supported by an additional momentum since the AG Jacobs gave his opinion in *UPA case*<sup>5</sup> and the echo from the CFI in *Jégo – Quéré case*<sup>6</sup>. By the judgment in *UPA case*<sup>7</sup>, the ECJ answered that the

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<sup>2</sup> Vincent Kronenberger & PaulinaDejmek 'Locus Standi of Individuals before Community Courts under Article 230 (4) EC: Illusions and Disillusions after the Jégo-Quéré (T-177/01) and Unión de Pequeños Agricultores (C-50/00) judgments', ELF (2002).

<sup>3</sup> See supra note 1

<sup>4</sup> Case 5/62 *Plaumann v. Commission* [1963] ECR-95

<sup>5</sup> Opinion of AG F. Jacobs, Case C-50/2000 P (*UPA v. Council*) [2002] ECR I-6681

<sup>6</sup> T-177/01 *Jégo-Quéré & Cie v. Commission* [2002] ECR II-2365

'Plaumann test' will not be changed by the Court itself. As a result, the criticism has been continued. Following this long debate, I wonder that if the condition of private parties' standing is really restricted or is there an over-criticism. After my supervisor's—Prof. Xavier Groussot—recommendation, I was convinced forthwith to choose this topic for my thesis: '*Locus Standi* of Private Applicants under Article 230 (4) EC: Undue Restriction or over-Criticism?'

The theme of this thesis is the question whether *locus standi* of private applicants under article 230 (4) EC is unduly restricted or is there an over-criticism. I will begin by analyzing some aspects on which the conditions of private applicants' standing are explicitly based. In this part, I will attempt to answer two questions why the private parties bring an action for annulment and on what ground their application should be admitted. Then the thesis goes on with the description of individual concern condition as a necessary filter in order to admit the challenges, in case private parties seek proceedings to annul a general application act or an act addressed to another person. Finally, I will dilate upon the arguments made by AG F. Jacobs in *UPA case*, the findings of CFI in *Jégo-Quéré case* and the departure of ECJ in *UPA case* from the earlier opinions or decisions on the point. And the question in these cases was whether it was appropriate to widen *locus standi* of individuals when they challenged the validity of Community acts before the Community Court. The new rules on *locus standi* of private parties provided in Constitutional Treaty are also specifically mentioned in this part. However, due to the unclear future of the European Constitution, such rules are just presented in a nut shell.

I find no reason for contesting the current conditions on *locus standi* because they are based on the balance between the adverse effect and adequate remedy, efficacy of the action for annulment as one of the instruments of many available remedies in the Community complete system of remedies, overall effectiveness of Community system, the need to protect Institutions from judicial review challenged by private applicants, and the capacity of Community Courts for coping with a deluge cases.

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<sup>7</sup> Case C-50/2000 P, *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677



## 2 The basis of *locus standi* of private applicants

### 2.1 Private applicants

Action for annulment provided under Article 230 EC can be brought by Member States, European Parliament, the Council, the Commission, the Court of Auditors, the ECB or any natural or legal person. Based on the purpose of action, they are classed in three groups whose capacity to bring the annulment proceedings before the Community court is very different. As Member States, European Parliament, the Council and the Commission are always allowed to bring an action, even where the contested act, in fact, is addressed to some other person or body, they are called privileged applicants. Unlike this, legal or natural person (called non-privileged applicants or private parties) have to fulfill quite tight rules on *locus standi* when they challenge a Community act. The Court of Auditors, the ECB or so called semi-privileged applicants have standing to defend their own prerogatives only.

The concept “legal or natural person” has a broad meaning. It consists of individuals and organizations regardless of their nationality. Even foreign States can be regarded as “legal person” entitled to bring an action under Article 230 (4) of the Treaty. The same is true for local entities such as regions or municipalities<sup>8</sup>. It also embraces legal persons governed by public law<sup>9</sup>. The European Court of First Instance (hereinafter CFI), in *case Sinochem Heilongjiang v Council*<sup>10</sup> said that ‘under the Community judicial system, an applicant is a legal person if, at the latest by the expiry of the period prescribed for proceedings to be instituted, it has acquired legal personality in accordance with the law governing its constitution or if it has been treated as an independent legal entity by the Community

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<sup>8</sup> Henry G. Schermers & Denis F. Waelbroeck *Judicial Protection in the European Union*, Kluwer 2001 p.419, further information see cases 200/82 [1983] ECR 417; C-298/89 [1993] ECR I-3605; C-95/97 [1997] ECR I-1787.

<sup>9</sup> Anthony Arnall, *The European Union and Its Court of Justice*, Oxford EC Law Library, 2006 p 69

<sup>10</sup> Case T-161/94 *Sinochem Heilongjiang v Council of the European Union* [1996] ECR II-00695

institutions<sup>11</sup>. According to Professor Arnall, the legal persons governed by public law, like the position of Sinochem Heilongjiang in the case mentioned above, should not be treated in the same way as the legal persons governed by private law. Private company, for example, for the purposes of Article 230 should in some circumstances be equated with the Member States whose law they are subject to<sup>12</sup>. He claimed, for example, the regional authorities may be responsible for implementing directive in areas which fall within their jurisdiction. They are also obliged to apply directly the provisions of directives which are unconditional and sufficiently precise but which have not been implemented. Those arguments are reasonable; however, there are some difficulties in order to accept this suggestion.

Firstly, the structures of authorities in different Member States are not the same. This will put the Court in an extremely difficult situation when it has to decide whether regional authorities should be treated as a Member State regarding *locus standi*. Since, privileged parties and semi-privileged parties can challenge any kind of Community acts and do not have to fulfill requirements on direct and individual concern; the right of action for annulment may be over used if it is granted for any legal person other than Member States, European Parliament, the Council, the Commission, the Court of Auditors, and the ECB. Regional authorities may use their right of action, suppose if they are granted, for other purposes such as to protect the interests of their own. Furthermore, this may prevent the fast applying Community law in all European territory because the authorities may be getting confused that whether or not they should challenge the act other than implementing it.

Second, there is no problem when regional authorities do not, in any circumstance, have privileged position. If the situation is urgent, the violation is clear and, therefore, it is necessary to challenge the Community act in question. Member States may bring proceedings for annulment if they think it is necessary to do so. Practically, it may conclude that every party other than Member States, European Parliament, the Council, the Commission, the Court of Auditors, and the ECB who wish to bring an action for annulment must be able to fulfill the conditions on *locus standi* provided for private parties under Article 230 (4) EC.

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<sup>11</sup> Id. at para 31

<sup>12</sup> Anthony Arnall, *Private Applicants and the Action for Annulment since Codorniu*, 38 CMLRev (2001).

The field in which the action happens does not create a special legal position of the challenger; mainly, it is depended on such applicant's social function and the purpose of the action for annulment in specific cases. The applicant in case *Les Verts' v. European Parliament*<sup>13</sup> is a pertinent example on this point. In this case, the Court heard the case brought by political party against a decision taken by the European Parliament in respect of the division of money to political groups on the occasion of the 1984 elections, so called public area. After going through the test laid down for private applicants<sup>14</sup>, the Court declared the action admissible.

Legal personality is required to introduce an action before the Court. Normally, the Court considers that the existence of legal personality is established according to national law<sup>15</sup>. According to the Rules of Procedure of the Court of Justice and of the Court of First Instance, any applicant who is a legal person must establish the proof of its legal personality<sup>16</sup>. In case *Travel agency*<sup>17</sup>, the Court held that the meaning of 'legal person' in Article 230 EC is not necessarily the same as in the various legal systems of Member States. The Court also accepts that an applicant must be regarded as having legal personality if it has been treated as such by the Community Institutions<sup>18</sup>.

## 2.2 Purpose of annulment action: private interest

Contrary to Member States, or to the European Parliament, the Commission and the Council, private parties are not entitled to act in the interest of the law or of the Community in general<sup>19</sup>. Nor are they entitled, for instance, to act in the general interest<sup>20</sup>. As Lenaerts and Corthaut said, access to the courts and the restriction thereon is an important element in determining the checks and the balances inherent in any constitutional system<sup>21</sup>. However

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<sup>13</sup> 294/83 *Les Verts' v European Parliament* [1986] ECR 1339

<sup>14</sup> Id. at paras 33-35

<sup>15</sup> Case 50/84 [1984] ECR 3997 p.7

<sup>16</sup> See supra note 8 at p420

<sup>17</sup> Case 135/81 [1982] ECR 3808, p11

<sup>18</sup> See supra note 16; Case T-161/94 [1996] ECR II-695, p31-34; T-170/94 [1997] ECR II-1383 p.26

<sup>19</sup> Case 85/82 [1983] ECR 2123

<sup>20</sup> See supra n.8 at p.460

<sup>21</sup> Takis Tridimas (editor), *The European Union Law for the Twenty-First Century*, Hart, 2004, pp.18-20

such purpose is not the reason for the ordinary parties to initiate the proceedings. Private parties bring the action before the Court with the sole purpose of getting the annulment of the Act as they think such act causes adverse effect to them illegally. In other words, private parties use the right of action for annulment as an instrument to protect their own interest by directly attacking on the act, aiming at its total elimination<sup>22</sup>.

Interest in the cases, which the applicants have if the contest acts are annulled, is not a 'new' interest. The challengers have no benefit other than restoring interest for what they have suffered or preventing harm which may have effect on their legal rights by the legal effects of the challenging acts. Consequently, in order to demonstrate a personal interest in the case, the applicants have to show the adverse effect caused by the acts. The effect in this case has a broad meaning. It is not only the interest which is deprived by the contested act, but also a right to get benefit of the parties. For example in *Les Vets* case, the loss of the applicant was the right of equal treatment. Without this loss, the parties would get more money. In competition case law, a restriction on free trade of undertaking can be seen as adverse effect. Applicants may challenge the Commission's decision which lays down such limitation even when no fine is imposed. As in *Oil Crisis*<sup>23</sup> the court held 'the absence of pecuniary sanctions in a decision applying Articles 85 and 86 [now Article 81 and 82 EC] of the Treaty does not preclude the addressee from having an interest in obtaining a review by the Court of Justice of the legality of that decision and thus commencing an action for annulment under Article 173 [now Article 230] of the Treaty. However, this does not mean that every person who has a substantial adverse effect by the Community act on their interests<sup>24</sup> may challenge the act directly. In current jurisprudential phenomenon, such effect must be caused directly and differentiated with the applicant (or applicants) from all other persons.

In general, the applicants' interests, which were affected, are in economic nature though it may be anything else whatever the nature<sup>25</sup>. It may be in

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<sup>22</sup> See supra n.8 at p.404

<sup>23</sup> Case 77/77 [1978] ECR 1513 para13

<sup>24</sup> This is the suggested by AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, para 60

<sup>25</sup> Case T-585/93 *Greenpeace International and others v Commission* [1994] ECR II- II-02205 para 50

future, but not hypothetical<sup>26</sup>. As the interest, which an applicant claims, concerns a future legal situation, he must demonstrate that the prejudice to that situation is already certain<sup>27</sup>. Consequently, he needs a legal instrument to prevent adverse effect. In *Fausta Deshormes*<sup>28</sup>, where the party contested an act which effected his future pension right, the Court found although it was true that before retirement, an uncertain future event, pension rights are contingent rights which are in process of creation from day to day, it is nonetheless clear that an administrative act which decides that a particular period of employment cannot be taken into account for the calculation of years of pensionable service immediately and directly affects the legal situation of the person concerned even if that act is to be implemented only subsequently<sup>29</sup>. If applicants rely only upon future and uncertain situations to justify their interest in applying for annulment of the contested act, such action must be rejected as inadmissible.

## **2.3 Personal interest – basic ground to give *locus standi***

If action for annulment is considered as a method for private parties to protect their interest out of illegal effect of Community act, it is only conferred upon natural or legal person to whom the act affected. Of course, it is easy for the addressees to show their adverse effect caused by the contested act. It is also not a matter whether the applicants are the addressee or not. The key point is that how the act affects them. If the applicant is the addressee of the act which is favourable to him, he may not challenge it even if some of the reasoning of this act may harm his interests<sup>30</sup>.

The Court has applied this rule strictly when it decided whether or not an applicant, especially who is not the addressee of the act or who challenged an act of general application, has the right of bringing an action for annulment. The Court will reject to admit all actions which are not acted on applicant's own behalf. In other words, acting on behalf of another party is not acceptable<sup>31</sup>. If the case is brought by a subsidiary company, in order to

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<sup>26</sup> See supra n.8 at p.462

<sup>27</sup> Case T-138/89 [1992] *Nederlandse Bankiersvereniging and Nederlandse Vereniging van Banken v Commission of the European Communities* ECR II-02181, para33

<sup>28</sup> Case 17/78 [1979] ECR 189

<sup>29</sup> Id. at para 10

<sup>30</sup> See supra n.8 at p.463

<sup>31</sup> Id. at p.421

be admitted, it must show its legal interest in bringing proceedings separate from that of an undertaking which it partly controls and which is concerned by the Community measure<sup>32</sup>.

In practice, it is quite complicated in cases when action is brought by associations of undertakings. Generally the Court will admit the action in three cases<sup>33</sup>. The first situation is the case where association is affected in its own interests<sup>34</sup>. The Court has, no doubt, in this case an association which challenges in order to defend its interests in relation to that measure. Secondly, associations are entitled to act on behalf of their members if it can be shown that their members themselves have lawfully participated in such procedure and that the association has the right, according to the Articles of Association, to bring an action on behalf of its members<sup>35</sup>. The link between the applicant and interests in this case is not clear, even does not exist; however, the action is admitted because without the action as the association – a collective application<sup>36</sup>, members will do it by themselves. This will lead to a situation that many different individual applicants might challenge the same contested measure. Thirdly, when associations representing for a category of persons challenge a measure affecting the general interests of that category, their actions will be admissible only if they are entitled to participate in the procedure before the Commission leading to the contested measure and had taken an active part in this procedure<sup>37</sup>. The two elements, associations' legal right of procedure, and nature and proof which show that the associations had participated in the procedure when the contested regulation was adopted, constitute position of associations. Without those, the Court will reject their action. Though personal interests do not appear when the Court considers and accepts the challenger's position before the Court; however, this does not mean that natural or legal person may be granted *locus standi* when he has no personal interests in the case. The interest element is involved in the basis of applicants' rights of procedure in early stage. In other words, right to bring annulment action in this case is based on the right of procedure.

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<sup>32</sup> Case T-597/97 *Euromin SA v Council of the European Union* ECR II-2419 para 50

<sup>33</sup> See supra n. 8 at p.422

<sup>34</sup> Joined Cases T-484/91 and T-484/93 ECR II-2941 para 64

<sup>35</sup> Joined cases T-447,448,449/93 [1994] ECR II-1971, para 54

<sup>36</sup> See supra n.33

<sup>37</sup> *Id.* at p.422

The position of associations which are formed for the protection of the collective interests such as environmental or health interests of a category of persons is under the same condition. However, the nature of such interest makes it extremely difficult for the applicant association to establish direct and individual concern of either its own interest or that of its members. In *Greenpeace case*<sup>38</sup>, three associations (Greenpeace, TEA and CIC) and 16 individuals sought the annulment of a commission decision granting financial assistance for the construction of the two electric power stations in the Canary Islands. The applicant associations were refused *locus standi* because they had not been able to establish any interest of their own distinct from that of their member whose position was not different from the position of the individual applicants in the case. Nor could they demonstrate that their members, who they represented for, had the right to challenge. Furthermore, CFI also refused the role played by the association in a procedure which led to the adoption of the decision since the correspondence which took place between Greenpeace and the Commission and its subsequent meeting with members of the Commission's staff were for purposes of information only, since the Commission was under no duty either to consult or to hear the applicants in the context of the implementation of the challenged decision<sup>39</sup>.

## **2.4 Form and Substance of acts which are open to challenge by private parties**

### **2.4.1 Form of act - (irrelevant element for determining *locus standi*)**

Article 230 (4) EC provides: 'Any legal or natural person ... may institute proceedings against a decision addressed to that person or against a decision, which though in form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'. According to the wording of this provision, there are only two forms of Community acts which are open for challenge. They are act in form of a decision and act in form of a regulation. However, as an instrument for private parties' use to protect their own interests, the proceedings provided for in Article 230 of the Treaty can be instituted against all kinds of acts adversely affecting a

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<sup>38</sup> See supra n.25

<sup>39</sup> Id. at para 63

person's interests. In other words acts that may be challenged are acts which are capable of affecting a given legal position<sup>40</sup>. The ground to decide which acts are open for challenge is if they are capable of producing legal effects and, as a consequence, of adversely affecting private parties' interests. Thus the form of act should be excluded. In other words, an applicant should not be deprived of his right of review just because of the form of the act. The Court stated 'in order to ascertain whether measures are acts within the meaning of article 173 [now article 230], it is necessary to look to their substance as the form in which they are cast is, in principle, immaterial in this respect. Measures producing binding legal effects of such a kind so as to affect the applicant's interests by clearly altering his legal position constitute acts or decisions open to challenge by an application for a declaration that they are void<sup>41</sup>.

There are many examples that the Court admits the action in which the contested act is not in form of a decision nor in form of a regulation. In *Noordwijks Cement Accoord*<sup>42</sup> ECJ admitted the action though the challenged act was a Commission's letter addressed to the applicant which withdrew the immunity from the fines which they had, hitherto, enjoyed. Though the Commission claimed that the letter was not a reviewable act at all, the Court based on the legal effect of the act and stated 'when a Community institution unequivocally adopts a measure the legal effects of which are binding on those to whom it is addressed and affect their interests, this measure by its very nature constitutes a decision'. The case then was admitted as other requirements for admissibility were met. Furthermore, in *Air France v. Commission*<sup>43</sup>, the applicant was allowed to challenge an oral statement made by a Commission spokesman at a press conference because CFI considered that the contested statement produced legal effects in a number of respects<sup>44</sup>. Another example is *UEAPME*<sup>45</sup> case where the Court assessed the admissibility of an action brought by UEAPME seeking

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<sup>40</sup> Case T-138/89 *Nederlandse Bankiersvereniging and Nederlandse Vereniging van Banken v Commission of the European Communities* [1992] ECR II-2181 para31, Case 60/81 *IBM v Commission* [1981] ECR 2639

<sup>41</sup> Case 60/81 *IBM v Commission* [1981] ECR 2639; further information, see Case T-64/89 *Automec v Commission* [1990] ECR II-367; Case T-135/96, *UEAPME v. Council*, [1998] ECR II-2335; Case T-172/98, [200], *Salamnder v. Parliament and Council*, ECR II-2478

<sup>42</sup> Joined cases 8 to 11-66 *Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v Commission of the European Economic Community* [1967] ECR 75

<sup>43</sup> Case T-3/93 [1994] ECR II-121

<sup>44</sup> *Id.* at paras 43 - 45

<sup>45</sup> Case T-135/96, *UEAPME v. Council*, [1998] ECR II-2335



annulment of a directive adopted by the Council. In its judgment, CFI held that ‘Although Article 173, fourth paragraph, [now Article 230 (4)] of the Treaty makes no express provision regarding the admissibility of actions brought by legal persons for annulment of a directive, it is clear from the case-law of the Court of Justice that the mere fact that the contested measure is a directive is not sufficient to render such an action inadmissible’<sup>46</sup>

## 2.4.2 Substance of the challenged act

As mentioned above, the form of contested act is not an element which can protect it from challenge by private parties. The Court recognized that the purpose of allowing such challenge was to prevent the Community institutions from immunizing matters from attack by the form of their classification<sup>47</sup>. For that purpose, determining category of act opened to challenge under Article 230 (4) EC should be based on its capacity of producing legal effects to non-privileged applicants’ legal position. In case *BP Chemicals Ltd v Commission*<sup>48</sup>, CFI added ‘It must be borne in mind that, pursuant to the fourth paragraph of Article 173 [now Article 230] of the Treaty, a natural or legal person may contest only measures which produce binding legal effects capable of affecting that person’s interests by bringing about a significant change in its legal situation. Consequently, where a measure against which an action for annulment has been brought comprises essentially distinct parts, only those parts of that measure which produce binding legal effects capable of bringing about a significant change in the applicant’s legal situation can be challenged’<sup>49</sup>. In other words, the contested act or part of it which is challenged must have legal effect otherwise the application is dismissed as unfounded<sup>50</sup>.

However, the category of act which can produce legal effects and, as a consequence, of adversely affecting private parties’ interests is too wide

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<sup>46</sup> Case T-135/96, *UEAPME v. Council*, [1998] ECR II-2335 para 63; Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605; Case C-10/95 P *Asocarne v. Council* [1995] ECR I-4149; C-408/95, *Eurotunnel SA and Others v SeaFrance* [1997] ECR I-6315

<sup>47</sup> Paul Craig, ‘EU Administrative Law’, Oxford University Express, 2006, p.332 see case 162/78 [1979] ECR 3476 para 16; Joined case 789& 790/79 [1980] ECR 1949 para 7.

<sup>48</sup> Case T-184/97 [2000] ECR II-3145

<sup>49</sup> Case T-184/97 [2000] ECR II-3145, para 34; further, see Case T-117/95 *Corman v Commission* [1997] ECR II-95 and Case T-178/94 *ATM v Commission* [1997] ECR II-2529, para 53

<sup>50</sup> Case 60/81 *IBM v. Commission* [1981] ECR 2639; Case 87/96 *Generali and Unocredito v. Commission* [1999] ECR 203; Joined Case T-125/97 and T-127/97 *The Coca-Cola Company and Another v. Commission*, [2000] 5 CMLR 467

because all kinds of binding acts, both legislative and executive, belong to this category. The Court will be swamped with cases if every natural or legal person who is adversely affected by Community acts is entitled the right to act for annulment according to Article 230 (4) EC. Unavoidably, it has to deal with the question of admissibility instead of dealing with substantial questions of the case. Moreover, the seriousness of adversely affected can not be used as an only filter because it is not certain and too complicated to evaluate in every case. Consequently, *locus standi* of private parties need to be limited somehow. As a result, the requirement that contested act must be in substance of a decision in case when contested act is in form of a regulation, directive, etc. other than decision (formal sense) or even a decision addressed to another person, was laid down for this purpose.

Particularly, the Court only admits an action which challenges a Community act in case where the applicant can demonstrate that such act is in substance of a decision. In Article 249 EC, it is provided that a decision is binding only upon those to whom it is addressed. In relation to the Article 230 (4) EC, it means that the authors of the Treaty are unwilling to allow private parties to challenge general application acts. Strictly speaking, ordinary persons may bring proceedings against only one kind of acts: a decision<sup>51</sup>. Based on this ground<sup>52</sup> ECJ stated that ‘decisions are characterized by the limited number of persons to whom they are addressed. In order to determine whether or not a measure constitutes a decision, one must enquire whether that measure concerns specific persons’<sup>53</sup>. In this process, the object of the act is not taken into account because according to CFI, it is immaterial as a criterion for its classification as a regulation or a decision<sup>54</sup>.

However, it is provided that acts which can be challenged by non-privileged applicant must be in essence a decision; therefore, general application acts are excluded. This provision is not only unnecessary but also goes far away the purpose of this ‘instrument’ provided for them under Article 230 (4) EC.

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<sup>51</sup> T.C Hartley, *The Foundations of European Community Law*, Oxford University Press, Oxford, 2003 p.356

<sup>52</sup> Joined cases 16/62 and 17/62 [1963] ECR 471, paras 478-479 wherein the Court held that the word ‘decision’ in Art.230 EC has the same meaning as the definition in Article 249 EC

<sup>53</sup> See supra n.4

<sup>54</sup> Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533 para 187

Firstly, it must be kept in mind that the article 230 (4) lays down several other strict conditions which must be fulfilled to have *locus standi*. One of them is individual concern requirement<sup>55</sup>. As Hartley has concluded, in order to determine in doubtful cases whether one is concerned with a decision (individual act) or a regulation (normative act), it is necessary to ascertain whether the measure in question is of individual concern to specific individual<sup>56</sup>. Such ascertainment must be assessed in the light of its character and of the legal effects which it is intended to produce or actually produces<sup>57</sup>. Thus, the latter comprises the former requirement once it is fulfilled. However, whenever the requirement still exists, the Court may apply the abstract terminology test, and almost invariably found that the measure was in substance a regulation. Consequently, the application was then declared inadmissible on *locus standi* grounds<sup>58</sup>. Secondly, a general application act, in some circumstances, may cause adverse effects to ordinary parties which need to be protected. In cases where other requirements such as direct and individual concern were met, it would be lack of judicial protection if the parties were refused to give standing to initiate due to the contested act.

In fact, the Court allows ordinary persons to challenge part of legislative act if such provisions can produce binding legal effects capable of significantly changing the applicant's legal situation. The ECJ held that 'if a measure entitled by its author a regulation contains provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons, it must be admitted that in any case those provisions do not have the character of a regulation and may therefore be impugned by those persons under the terms of the second paragraph of article 173 [now Article 230 (4) EC]'<sup>59</sup>. Further, in case *Extramet Industrie SA v. Council*<sup>60</sup> and case *Codorniu SA v. Commission*<sup>61</sup> private parties were permitted to seek annulment of the regulation which was in legislative nature but was of direct and individual concern to the applicants. According to the Court, a

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<sup>55</sup> 'Individual concern requirement' is only laid down in case the contested act is a general application act or an act addressed to another person other than the parties in the main proceeding. This requirement is difficult to be fulfilled and almost all the criticism is on it.

<sup>56</sup> See supra n.51 at p.360

<sup>57</sup> Case T-135/96, *UEAPME v. Council of the European Union*, [1998] ECR II-02335 para 64

<sup>58</sup> See supra n.51 at p.362

<sup>59</sup> Joined cases 16/62 and 17/62 [1962] ECR 471 para 479

<sup>60</sup> C-358/89 *Extramet Industrie SA v. Council*, [1991] ECR I-2501

<sup>61</sup> C-309/89 *Codorniu SA v. Commission*, [1994] ECR I-1853

legislative measure such as a regulation may, without losing its character as such, be challenged by private applicant who could establish direct and individual concern. The ECJ, in these cases, took a liberal approach to interpret the requirement of Article 230 (4) EC that the contested measure may be a true regulation. However the Court did not follow ‘hybrid theory’ to justify its approach because ‘a single provision cannot at one and the same time has the character of a measure of general application and of an individual measure’<sup>62</sup>. Thus, it is clear that the basic reason which is used to determine whether an act may be opened for challenge by ordinary parties is its impact on the applicant.

## 2.5 Direct concern

Above, we have looked at the private interests issue as the reason and the purpose of non-privileged applicants bringing an action for annulment of Community act. We also have tried to identify Community acts which may become the subject of such action. The task was mainly based on the binding legal effect of Community measures which may affect the interests of an applicant by bringing about a distinct change in his legal position. In this part, we will find the link between the two elements by answering the question: ‘Is such effect caused directly by the contested measure?’

Direct concern condition as laid down under Article 230 (4) EC requires a direct link between legal effect produced by the act and adverse effects suffered by private parties. This is quite clear in case when an applicant challenges a decision addressed to him because if there is any adverse effect, that he suffers, flows directly from that act and from it alone. Contrary to this, doubt does appear when the applicant seeks to annul an act addressed to other parties or an act of general application, because in those cases, generally, the effect of the contested act on the applicant depends on the discretion of another person, such as national authorities, who are entrusted with the task of implementing that act. If such institutions are granted a discretionary power, the effect caused by the implementing act does not establish direct concern to applicants according to Article 230 (4) EC even they suffered adverse effects.

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<sup>62</sup> Case C-45/81, *Alexander Moksel Import-Export GmbH & Co. Handels-KG v. Commission*, [1982], ECR 1129, para 19

Regarding a direct causal link between the contested act and the situation of the applicant, direct concern condition under paragraph 4 of Article 230 EC confirms that *locus standi* is given only to persons whose position is directly affected and it also confirms that only mere acts whose legal effect directly affects applicant's legal situation may be subjected to judicial review by this proceedings. It is sufficient to bear in mind that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order<sup>63</sup>. Both pleas are important, though the first plea relates to the admissible question while the second one is closer to the substantial question of the proceedings.

Thus, in order to fulfill direct concern requirement, first of all, an applicant must be able to show that his legal position or interests of another person who he represents for<sup>64</sup> was affected in adverse manner. This task is necessary because an applicant can not contest that he is directly concerned by an act by demonstrating a direct link between that measure and its alleged effect on the right of other persons. Then, he must demonstrate that the contested act was the direct cause of such effect. The first task provides ground for the second one which is more complicated. It is recognized as a direct cause of an adverse effect on applicants' interest if at the time the contested act was adopted, the effect the act would produce on it was substantially certain. If the task implementing the act is needed, effect must be purely automatic and resulting from the contested measure along with the application of other intermediate rules.

In case the effect on the applicants' legal position relates to the application of intermediate rules, discretionary power of national authorities, who are entrusted with the task of implementing the contested act, must be evaluated carefully. For instance, when the act under challenge is applied by the national authorities to whom it is addressed, it must be ascertained whether application of the act leaves any discretion to those authorities<sup>65</sup>. Even there is some discretion such as national authorities could either make use of or not, individual is still directly affected if it is only theoretically possible for

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<sup>63</sup> Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I 3425, para 29

<sup>64</sup> As discussed above, applicant must bring the case on his own behalf. Association of Undertakings or Parents Company is allowed to challenge in some specific case. In those cases, it has to show the link between decision and the interests of person who he represents for.

<sup>65</sup> Case T-54/96 *Oleifici Italiani and Fratelli Rubino v Commission* [1998] ECR II-3377, para 56

addressees not to give effect to the Community measure, there being no doubt as to their intention to act in conformity with it<sup>66</sup>. Case law *Werner A. Bock v Commission*<sup>67</sup> is an example of this. *Block* is an importer who lodged an application for an import permit for Chinese mushrooms before German national authorities. The authorities were not willing to grant such permit though it was their obligation to do so unless they were authorized by Commission to suspend the issue of permit. In order to refuse granting the permit, German authorities requested an authorization from Commission. After that Commission authorized them to exclude from Community treatment to prepare and preserve Chinese mushrooms. *Block* brought proceedings for annulment of the decision. Commission claimed that, in any event an authorization granted to the federal republic was not of direct concern to the applicant since the German Government remained free to make use of it. However the likelihood that The Government will not make use of the authorization is theoretical one because ‘German authorities had nevertheless already informed the applicant that they would reject its application as soon as the commission had granted them the requisite authorization. They had requested that authorization with particular reference to the applications already before them at that time. It follows therefore that the matter was of direct concern to the applicant’<sup>68</sup>.

In the *Nestlé/Perrier* case<sup>69</sup>, applicant was the body representing workers who were responsible for upholding the collective interests of the employees they represented, sought the annulment of a Commission decision giving approval to a concentration. Being the employees’ representative organizations, their right was only in relation to the functions and privileges given to them, under the applicable legislation, in an undertaking with a particular structure. In its judgment, CFI stated, ‘only a decision which may have an effect on the status of the employees’ representative organizations or on the exercise of the prerogatives and duties given to them by the legislation in force can affect such organizations’ own interests. That cannot be the case with a decision authorizing a

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<sup>66</sup> Case 11/82 *Piraiiki-Patraiki and Others v Commission* [1985] ECR 207, paras 8 to 11, and *Dreyfus v Commission*, para 44

<sup>67</sup> Case 62/70, *Werner A. Bock v Commission*, [1971], ECR 879

<sup>68</sup> *Id.* at paras 7-8

<sup>69</sup> Case T-96/92, *Comité Central d'Entreprise de la Société Générale des Grandes Sources and others v Commission*, [1995], ECR II-1213, see case 11/82 [1985] ECR 207 para 9

concentration’<sup>70</sup>. The effect on the applicant’s members, such as the abolition of jobs and the loss of collective benefits which may establish applicant’s direct concern, according to the CFI, are not inevitable following a concentration. ‘Such effects are thus produced only if measures which are independent of the concentration itself are first adopted, by the undertakings in question acting alone or by the social partners, as the case may be, in conditions strictly defined by the applicable rules’<sup>71</sup>. The applicant in this case can not establish direct concern because neither it is able to demonstrate the direct causal link between adverse effect on its own position and the Commission decision giving approval to a concentration nor the direct relation between job losses and changes in the social benefits given to its members and the contested measure.

*Regione Siciliana case*<sup>72</sup> is recent example on direct concern question. The Regione Siciliana, an Italian regional entity who was the final beneficiary of the aid granted to the Italian Republic instituted an action before the CFI for annulment of Commission decision relating to the cancellation of the contribution of the European Regional Development Fund (ERDF) towards an infrastructure investment in Italy and the recovery of the advance paid by the Commission as part of that contribution. According to the *Regione Siciliana*, the contested decision was of direct concern to it in that the decision directly affected its legal situation. As a matter of fact, the addressee of the contested decision, namely, the Italian Republic, enjoyed no discretion in its implementation, which consisted merely of claiming the recovery of the sums previously paid by the ERDF. No further legislative activity was necessary for that purpose<sup>73</sup>. The Commission raised the objection of inadmissibility. It contested that the decision was not of direct concern to the applicant.

In the judgment on 18 October 2005, the CFI held that the applicant’s legal situation was directly affected by the contested decision. First, according to the CFI the measure at issue deprived the applicant of the balance of the assistance because the unpaid balance of the assistance would not be paid to the Italian Republic by the Commission, for the assistance had been cancelled. The Italian authorities would not, therefore, be able to pay it on to

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<sup>70</sup> Id. at para 38

<sup>71</sup> Id. at paras 40-41

<sup>72</sup> Case C-15/06 P, *Regione Siciliana v. Commission* [2007]

<sup>73</sup> Case T-60/03 *Regione Siciliana v. Commission* [2005] REC II-4139, para 39

the applicant<sup>74</sup>. Second, the decision might vis-à-vis the national authorities, imposed on the applicant the duty to repay the sums paid by way of advances. According to the CFI the reason was that the contested decision meant that it was no longer impossible for the national authorities under both Community and domestic law to demand repayment from the applicant of the sums<sup>75</sup>. In addition, the CFI based on the provisions of the third indent of Article 211 EC in conjunction with the fourth paragraph of Article 249 EC, stated that the effects on the applicant was followed from the contested decision along and the national authorities enjoyed no discretion in their duty to implement the decision<sup>76</sup>.

The application in the above cited case was admitted; however, the substance of the action (requirements of applicant) was dismissed as unfounded. Consequently, applicant appealed the CFI's Judgment before ECJ. Commission also made the cross-appeal relating to the admissibility of the action brought by the Regione Siciliana before the Court of First Instance. Since according to the Commission, the challenger *in casu* was not directly concerned by the contested act. In the judgment on 22 March 2007, the ECJ set aside the judgment of the CFI. It stated that nothing in the documents in the case giving rise to that judgment supported the conclusion that the *Regione Siciliana* was directly concerned within the meaning of the fourth paragraph of Article 230 EC in its capacity as the authority responsible for the implementation of the project<sup>77</sup>. The ECJ pointed out that the fact of being the authority responsible for the execution of the project, mentioned in the annexure to the decision to grant, did not imply that the applicant was itself entitled to the financial assistance<sup>78</sup>. The Regione Siciliana's ability to receive ERDF assistance was dependent on the autonomous decisions of the Italian Republic. The ECJ did not go on to assert the question that whether or not the Italian Government was left discretion while implementing the contested decision because such answer was needed only when the decision affected adversely on the applicant's position.

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<sup>74</sup> Id. at para 53

<sup>75</sup> Id. at para 54

<sup>76</sup> Case T-60/03 *Regione Siciliana v. Commission* [2005] REC II-4139, paras 53, 54, 57-62

<sup>77</sup> See supra n.72 at para 32

<sup>78</sup> Id. at para 36; Case C 417/04 P *Regione Siciliana v Commission* [2006] ECR I 3881, para 30



It is clear that applicant was failed to show the private interest which he was affected by the decision when direct concern requirement was examined. As discussed above, a private interest is the basic of standing. It is the reason why *locus standi* should be granted to specific parties in specific circumstances. The position of the applicant in this case is the authority responsible for the execution of the project. He must be able to demonstrate his own interest which was affected by the contested decision. At the time the contested decision was adopted, there was no clear evidence demonstrating that the balance of the assistance remaining to be paid by the Commission belonged to the applicant. In addition, there was no certain loss which was suffered by the applicant due to the duty to repay the sums imposed to the Italian Government. The effect of the contested decision which might be passed on to the appellant was not only potential but also hypothetical. If the Italian Republic decided to pass on to the appellant such duty, it is opposed solely by intermediate rules of National authorities. Consequently, the Regione Siciliana could not be considered to be directly concerned by the contested decision.

In conclusion, in order to be granted standing to direct attack on a Community act, first of all private parties by one way or another, must be able to demonstrate two following necessary requirements. Firstly, his personal legal interest was infringed or being under a clear risk. Secondly, the act which he challenges is the direct cause of the infringement or the risk. Those requirements are important but unexhausted. In some specific cases, the applicant does not have to show anything since such requirements are certain. In some other cases, however, additional conditions may be added.

# 3 The second filter - Individual concern

## 3.1 The need of limitation

In principle, it is enough to grant for an ordinary party *locus standi* to challenge an act if he can demonstrate that his legal interest is suffered directly by such acts. However in all legal systems, standing of ordinary parties has been limited somehow. The fact is that some natural or legal persons are not granted the standing though they can show that they have been adversely affected while some others in some different circumstances are given. The point at which the line is drawn is determined by balancing, on the one hand, the fundamental principle that a legal system should be governed by the rule of law, and, on the other hand, the perceived need to limit access to courts to some extent to maintain a proper constitutional relationship between the judiciary, politicians and the citizens and to avoid frivolous cases<sup>79</sup>. The *locus standi* of private parties challenging the validity of Community acts under paragraph 4 Article 230 EC is being the same situation. Right of direct action for annulment can not be granted for ordinary parties whenever the contested Community acts directly affect quite adversely his interests because of several reasons.

### **First, avoid the potentially disruptive efficiency and functioning of the EU**

As it has been stated above (2.2), action for annulment of Community acts is a strong legal instrument given to private parties who will directly attack on the act which, according to them, directly affect their legal position in order to protect their own interests. In those proceedings, the degree of scrutiny is more intense because of the full exchange of pleading and the institution which adopted the contested norm will be a party from the start of the proceedings. However, this way of challenging may hamper the institutions in their task of implementing Community policies. Particularly, direct actions may disturb functioning of the institution all the time because European institutions have to explain the reasoning of their task in case by

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<sup>79</sup> Anthony Arnall, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty', 32 CMLRev. 7, (1995).

case whenever the acts are challenged.

**Second, balance the need to give sufficient protection to the individual interests by direct action with that of ensuring the public policy.**

It is not the case when the contested act is a particular act which is addressed to the applicant because the 'policy' is being interrupted to affect only to particular persons or a 'closed category'. However, the situation of the legislative act such as a regulation is different. It may not only affect adversely the applicant's legal position but it also has an effect on other persons who are not party to the proceedings in opposite way. In such proceedings, all the reasons and pleas used by the applicants with a sole purpose is to protect their own private interests regardless others' interests. Of course, once the case was admitted, the Court could not base on balance between public and private interest in deciding whether the substantial questions should be accepted or rejected. In order to avoid facing this difficulty, some extra condition for admissibility would be added. The function of such added condition is to make sure that the action need to be admitted because the contested act violates the rule of law by treating the applicant in the way that differs from all other people (individual concern); therefore, it is needed to review. In other words, it is needed to filter out all unnecessary claims and ensure that only the claims of genuine merit are allowed.

The restriction of the right to direct attack or even refusing the case as inadmissible does not lead to a lack of judicial protection. Instead of direct action for annulment with sole purpose of getting the act annulled, the applicants are shifted to use another way of challenging Community acts which corresponds to both applicants' interests and public policy. The two substitute instruments are the plea of illegality and the request for a preliminary ruling on the validity of a Community act. The former is designed to prevent the applicant of an illegal act from being used as legal for further action while the latter can be brought by national Court or tribunal when they have to apply a Community act whose validity is doubted.

Furthermore, it must be kept in mind that private applicant is not the only party who may initiate action for annulment of Community acts. As provided in paragraph 2 article 230 EC, together with the Parliament,

Council and Commission, Member States belong to the privileged group who may bring the proceedings direct against every Community act without any requirement of *locus standi*. Thus as a representative for all its citizen, Member State may challenge a Community act which affects their citizens adversely but who can not do so because of *locus standi* restriction. The privileged position of the parties mentioned above may be considered as a compensation for the lack of a sufficient democratic control at the moment an act is adopted in the Community. The duty of ensuring that the fundamental values of Community legal order are not violated by unconstitutional legislation can not be entrusted directly to natural and legal person. Different from the role of national parliament, it should not expect anything other than protecting the private parties' own interests when granting the right to challenge directly the Community act for private applicants.

### **Third, prevent workload problem**

There is undoubted situation that the more easily *locus standi* is granted, the more serious case-load problem the Court has to deal with. In this relationship, in some aspects, *locus standi* is considered as a gate preventing plaintiffs come to the latter. However, standing restriction is not served for this purpose since judicial protection could not depend on the ECJ's perceived burden<sup>80</sup>. If the legality interests of individuals are being under infringement, they must be granted the judicial protection remedy (Art 6, 13 ECHR). However, before an examination of the court, nothing can make sure that whether or not such interest was illegally affected.

It is unmanageable and unnecessary for opening judicial procedure whenever the plaintiffs wish to do so. Whatever the position of the Community Court is, it could not be overloaded by unnecessary claims where individuals abuse their right of judicial protection. A full of case-load situation may prevent the Community court to be able to concentrate on its main functions. Furthermore, workload may also affect the genuine merit challengers, since the exiting time limits will be longer. Therefore workload may affect the principle of effective judicial protection somehow.

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<sup>80</sup> The researcher does not agree with the statement that 'As a matter of principle it is an admission of weakness to let the extension of judicial protection depend on the ECJ's perceived burden' (see Takis Tridimas (editor), *The European Union Law for the Twenty-First Century*, Hart, 2004, p.310)

### **3.2 The situations in which *locus standi* need to be limited**

According to paragraph 4 Article 230 EC, there are three situations in which a private party may bring annulment proceedings: to (1) challenge a decision addressed to him; (2) bring an action for annulment of a decision in form of a regulation and (3) challenge an act addressed to another person. In the first case, there is no additional restriction on standing is necessary. This is due to two main reasons. Firstly, there is no potential challenger who may abuse the right of direct action. Secondly, the best and the most corresponding way for the ordinary parties to protect their legal interests or to prevent adverse effect caused by the act directly addressed to him is action for annulment.

In contrary, the challengers in the second and the third case are in different position. In the second situation, challenged norm is a regulation which shall have a general application<sup>81</sup>. It may address to any person at anytime. It is adopted for carrying out a policy rather than managing a specific situation. In such process, the author sometimes must skip some small and specific interests in order to pursue common and important ones. As a result, a normative act may affect many people in many different manners. Regarding the third situation, it is uncountable how many third parties may be affected by a decision addressed to another person. Moreover, the question how they are affected is also quite difficult to answer in this situation. Because of the characteristics mentioned above, the numbers of potential challengers in these cases are unpredictable. The ‘sufficient’ interest requirement would neither be able to make sure that the challengers constitute an action for honest purpose nor prevent insincere action. Applicants may try to protect the interests to which other persons are responsible to protect. They may bring an action for annulment because they hope to delay applying that act. They may try to use the way of direct action while there are other suitable ways that they avoid to use.

Despite this fact, private parties could not be deprived of the right of action for annulment when there is a legislative act or a decision addressed to another person which causes an adverse effect to their legal position. The

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<sup>81</sup> Article 249 (3) EC

question is how an abuse of direct action under Article 230 (4) can be retrained while the right of the genuine merit challengers is still sufficiently guaranteed. In those cases individual concern requirement seems the best filter.

### 3.3 Establishing Individual concern

#### 3.3.1 'Closed category' theory

The purpose of individual requirement restricts direct action for annulment brought by private parties other than the addressees. It allowed natural or legal persons who are affected individually by the contested to constitute an action for annulment. In *case Plaumann & Co v. Commission*<sup>82</sup> the ECJ constituted a classic test for individual concern. The Court stated in its judgment:

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<sup>83</sup>.

The action for annulment of *Plaumann & Co.* was declared inadmissible because according to the Court, the applicant was 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 practised 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<sup>84</sup>. Supposing that if the challenged measure applied only to persons who held an import license during some period before the time it comes into force, the affected persons may be granted *locus standi* since there is no anymore person who could have the same position as what they were. In other words, in such circumstance they will be differentiated from all other persons. It is suggested that 'closed category' theory is a suitable testing theory for determining person who was affected individually. Accordingly, a closed category is a class of persons the membership of which is fixed when the

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<sup>82</sup> See supra n.4

<sup>83</sup> Ibid

<sup>84</sup> Ibid

measure comes into force<sup>85</sup>. When some specific parties were classed into a closed category, they must be differentiated from all other persons who belong to open category. Similar to substance of a decision that may affect one or several persons, it is not a matter how many members are in the category. The important question is whether they were defined or not. Obviously, there is no reason preventing more than one person to have *locus standi* to challenge the same Community act if all such applicants belong to a closed category. It is distinguished from an open category, which is a class of membership of which is not fixed when the measure comes into force.

In *Alfred Toepfer and Getreide-import Gesellschaft v. Commission*<sup>86</sup>, a group of German grain dealers applied to the Germany authority for import licenses on October 1<sup>st</sup> 1963. Due to a change on import levy rate in few days, the authority decided to reject the applications until the levy rate had been increased. On October 1<sup>st</sup>, 1963, the Commission raised the rate as from October 2<sup>nd</sup>, 1963. On 3 October 1963, it took a decision addressed to Germany confirming the ban with regard to applications made on 1 to 4 October, inclusive. The dealers brought proceedings to annul that decision. It is clear that, the dealers who applied for import licences on 1 October 1963 belonged to a closed category which was fixed at the time the decision of Commission came into force. Their position was different from the position of any other trader who would apply when the ban expired. Other traders belonged to an 'open category' because every trader might apply for such import licences and they would be under the same condition (new levy rate). The decision was thus of individual concern since it differentiated the applicants from all other persons and distinguished them individually. The ECJ then concluded that the applicants were individual concern<sup>87</sup>.

Another example is case *International Fruit Company and others v. Commission*<sup>88</sup>, decided in 1971. The applicants belonged to a closed category which was a class of membership which was fixed when the challenged Regulation no 983/70 was adopted. In this case, the closed category was established clearly since the contested measure was adopted with a view on the one hand to the state of the market and on the other to the quantities of dessert apples for which applications for import licences had

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<sup>85</sup> See supra n. 51 at p. 361

<sup>86</sup> Joined cases 106 and 107/63 [1965] ECR 405 (second case)

<sup>87</sup> Id. at paras 411, 412

<sup>88</sup> Joined cases 41 to 44/70 [1971] ECR 411

been made in the week ending on 22 May 1970. It followed that when the said regulation was adopted, the number of applications which could be affected by it was fixed. No new application could be added. The challengers were held individual concern<sup>89</sup>.

### **3.3.2 Plea of enquiring individual concern: Private interest**

What characteristic applicant may rely on to establish a closed category to which he belongs or to demonstrate that the contested measure affected him alone is a difficult question. It is clear in *Plaumann* that applicant, of course, could not demonstrate that he was affected individually by only the fact that his business was affected adversely by the contested measure. It is also insufficient to be considered as individual concern even when applicant's interests have been affected more seriously than other parties. Similarly, the fact that there are only one or several persons who are affected at the time the contested measure was adopted does not mean that the act is of individual concern to them since other people may enter into such category at anytime and, therefore, they will be affected in the same manner.

In joined cases 789&790/79 *Calpak SpA et Società Emiliana Lavorazione Frutta SpA v Commission*<sup>90</sup>, the applicants claimed that they belonged to a closed and definable group and were either known to or at least identifiable by the Commission at the time when it adopted the disputed measure. The applicants demonstrated by showing mere facts that when crops were plentiful during the 1976/77 marketing year they would help to absorb the surplus by buying up large quantities of fruit; when basic supplies were less plentiful, however, as in the case of the 1978/79 marketing year, such undertakings purchased much less, and as a result the quantity they processed into preserves was small. The commission was well aware of those facts. However, the action was dismissed. According to the ECJ, 'in fact the measure applied to objectively determined situations and produced legal effects with regard to categories of persons described in a generalized and abstract manner. The nature of the measure as a regulation was not

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<sup>89</sup> Id. at paras 16-18

<sup>90</sup> Joined cases 789 and 790/79 *Calpak SpA et Società Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 01949



called in question by the mere fact that it was possible to determine the number or even the identity of the producers to be granted the aid which is limited thereby. Moreover, the fact that the choice of reference period was particularly important for the applicants, whose production was subject to considerable variation from one marketing year to another as a result of their own programmer of production was not sufficient to entitle them to an individual remedy<sup>91</sup>.

However the situation is different in case *Codorniu SA v Council*<sup>92</sup>, decided in 1994. In this case Codorniu SA brought a proceedings annulment against a Council regulation which reserved the term ‘cremant’ to certain quality sparkling wines manufactured in France and Luxembourg. The Court held the applicant was individually concerned by the challenged regulation because it had resisted the graphic trademark ‘*Gran Cremat de Codorniu*’ in Spain in 1924 and had traditionally used it before and after registration. By reserving the right to use the term ‘crémant’ to French and Luxembourg producers, the contested provision prevented Codorniu from using its graphic trade mark<sup>93</sup>. The applicant was affected individually by a general application act because it had established the existence of a situation which from the point of view of the contested provision differentiated it from all other traders<sup>94</sup>. The judgment was remarkable both for the Court’s apparent willingness to allow the applicant to challenge a true regulation and also for its unusually liberal approach to the question of individual concern<sup>95</sup>. However, in this particular circumstance the requirement of ‘closed category’ theory, a substantial characteristic of a decision, was met. The category was closed at the time when the impugned provision was adopted since no person could have the same position like those of applicant. Though it is true that the applicant operated a trade which could be engaged in by any other person, such fact did not prevent him from being individual concern which may be established by taking account of the various circumstances. *In casu*, the applicant was affected individually because he was deprived the graphic trade mark by the contested regulation.

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<sup>91</sup> Id. at paras 9-11

<sup>92</sup> See supra n.61

<sup>93</sup> Id. at para 21

<sup>94</sup> Id. at para 22

<sup>95</sup> See supra n.9 at p.72

Furthermore, in *Les Verts*<sup>96</sup> case, Parti Ecologiste ‘Les Verts’ challenged the decisions of The Bureau of the European Parliament granting financial support to the political parties since the rule was laid down that the parties which were not represented in the Parliament received less financial support than those represented in the Parliament. It led to an inequality in the protection of different parties who competed in the same election. Equally, the parties might have received more than the amount what was stated in the contested decision. The Court held the applicant association, which was in existence at the time when the 1982 decision was adopted and which was able to present candidates at the 1984 elections, was individually concerned by the contested measures<sup>97</sup>.

By settled case law, it is suggested that the core element used for enquiring individual concern is private interests of applicant which have been affected or be under risk produced by the contested measure. In order to enquire individual concern, applicant’s private interest and the adverse effect caused by the measure are evaluated in comprising to those in other situation. In *Calpak case*, mentioned above, the Court held applicant was not affected individually by the contested measure because the applicant could not convince that his legal interests were under the risk which was different from all other parties’ interested. The applicant could not demonstrate that he belonged to a closed category and no body could have the same position regarding the effect from the act when it came into force.

As it is discussed above (2.3), though private interest which has been affected is normally in economic nature, it may be anything else whatever its nature is<sup>98</sup>. It may be future, but not hypothetical<sup>99</sup>. However, the more abstract it is, the more difficult for applicant to show they are individually affected. In *Les Verts* case, the private interest of the challenger was the right to receive financial support which was not less than those of other parties who had been represented in the Parliament. Moreover, the number of persons who may challenge the decision was fixed since due to the nature of the political groupings in the election. Therefore there was no need to exercise the ‘closed category’ test theory.

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<sup>96</sup> 294/83 *Partie Ecologiste ‘Les Verts’ v. Parliament* [1986] ECR-1339

<sup>97</sup> Id. at para 37

<sup>98</sup> See supra n.25 at para 50

<sup>99</sup> See supra n.8 at p.462

The position of applicant in *Greenpeace* is different. Their interests affected by the contested decision are not economic, as has been the case in almost all the judgments delivered in relation to Article 230 of the Treaty, but of a quite different kind, relating to environmental and health protection. The applicants, both individuals and associations were refused *locus standi*. The reason of the rejection was that the applicants could not demonstrate that they were affected individually by the contested, other than the nature of the interest which they claimed. In the judgment on 9<sup>th</sup> August 1995 the CFI held that ‘whilst the line of authority comprised judgments given mostly in cases concerning, in principle, economic interests, it was nonetheless true that the essential criterion applied in those judgments ... remains applicable whatever the nature, economic or otherwise, of those of the applicants’ interests which are affected. The applicants thus cannot be affected by the contested decision other than in the same manner as any other local resident, fisherman, farmer or tourist who is, or might be in the future, in the same situation since such harm may affect, generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually<sup>100</sup>’.

### 3.3.3 Quasi-judicial acts

In some cases, private parties bring proceedings to annul acts of a quasi-judicial nature. They are the final determinations depended largely on question of fact rather than discretionary decisions. The Community institution which adopts such act is bound by clear rules. A semi-judicial procedure is followed<sup>101</sup> as to which private parties may participate in either with an active role such as complainant in competition case or being concerned by the preliminary investigations in dumping and state aids cases<sup>102</sup>. In those cases, the Community Courts have adopted a liberal attitude regarding *locus standi* of private parties when they bring proceedings for annulment. Normally, complainants and other persons who have taken part in the preliminary proceedings will be granted *locus standi*.

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<sup>100</sup> See supra n.25 at paras 50-5

<sup>101</sup> See supra n.51 at p.363

<sup>102</sup> For example see cases 307/1981 *Alusuisse v. Commission* [1982] ECR 3463; Case 239/82 *Allied Cororation v. Commission* [1984] ECR 1005; case 113/77 *NTN Toyo Bearing v. Council* [1979] ECR 1185; case 264/82 *Timex v. Council* [1985] ECR 849; case *COFAZ v. Commission* [1986] ECR 391

For example, in *Metro v. Commission*<sup>103</sup> case, Metro was the complainant who had complained to Commission that SABA was acting in violation of competition rules laid down in Article 81 EC. Commission, after investigating procedure, adopted a decision exonerating SABA. Metro then brought proceedings to annul that decision. The ECJ held that the applicant must be considered to be directly and individually concerned by the contested decision since the contested was adopted as a result of Metro's complaint. In Paragraph 13 of the judgment, the ECJ stated that it was in the interests of a satisfactory administration of justice and of the proper application of Articles 81 and 82 EC that natural or legal persons who are entitled to institute proceedings in order to protect their legitimate interests<sup>104</sup> can bring proceedings before the Court.

The 'function' of individual concern requirement is guaranteed though the Court has taken a liberal attitude regarding this condition in cases when private applicants challenge a quasi-judicial acts which is either applying to another person or in legislative nature. As a filter it only allows specific persons who had instituted or participated in or been concerned to the semi-judicial procedure. A closed category was defined; therefore, the number of challengers is well controlled.

**Conclusion:** In order to avoid the potentially disruptive effect on functioning of the Community institution by direct challenge and to prevent workload problem while sufficient protection to the individual interests is still ensured, it is provided that private party who challenges a decision addressed to another person or a decision in form of legislative act has to fulfill an additional requirement: individual concern. Applicant must be able to demonstrate that their legal position was individually affected by the contested act according to the test laid down in *Plaumann case*. In other words, he has to show that, by the way he was affected, he belongs to a closed category fixed when the measure comes into force. In almost all cases, the plea for individual concern claim is based on economic private

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<sup>103</sup> Case 26/76 *Metro v. Commission* [1977] ECR 1875

<sup>104</sup> Id. at para 13. Following this judgment, CFI took a more liberal approach; accordingly, in case T-3/93 it accepted that an individual who has the right to complain but was prevented to exercise it was admissible in his action (Joined cases T-528/93, T-542/93, T-543/93 and T-546/93). The CFI held if the applicant had the right to participate in the procedure but he had not done so, he is not prevented to do so. He still is regarded as individually concerned by the final act in case he could demonstrate that his competitive situation was substantially affected.

interest since it is easy to show the difference between effects suffered by applicant and the effect which anytime may be suffered by any member of 'open category'. However the economic nature of the effect is not compulsory since any circumstance that may distinguish an applicant individually has been taken into account.

## 4 Expanding private parties' standing: suggestions and responses

### 4.1 The new approaches on *locus standi*

In 2002, two new testing technologies for individual concern were offered. The first one was offered by AG Jacobs in the *UPA case* and the other was offered by CFI in *Jégo-Quééré case*. Both suggestions place the right of effective judicial protection as a yardstick for assessing individual concern. According to the authors, effectiveness of judicial protection should be given priority over the value which is protected by traditional test for individual concern in *Plaumann*. Therefore, according to them, the ECJ's traditional approach on *locus standi* of private parties, especially the interpretation of individual concern requirement must be changed.

#### 4.1.1 AG Jacobs' suggestion in *UPA case*

In *UPA case*<sup>105</sup>, Unión de Pequeños Agricultores (UPA), an association of farmers, brought an action for annulment of Council's regulation which amended the regulation to establish the system of guaranteed prices and production aids within the olive oil market. The application was dismissed by the CFI because the members of the association were not individually concerned by the contested regulation according to *Plaumann* test under Article 230 (4) EC. Consequently, UPA appealed against the decision of the CFI and claimed that it derived effective judicial protection since there was no national measure implementing the regulation as a result excluding the possibility of challenging the measure before national court via Article 234 EC. UPA did not appeal the reason of inadmissibility. Instead, it offered the plea of 'right of effective judicial protection' as a new reason for that.

In his opinion, delivered on 21 March 2002, AG Jacobs made an extensive analysis relating to *locus standi*. He placed the fundamental right of effective judicial protection at the centre and examined whether there was any proper way for appellant to protect its right. Accordingly, all ability was

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<sup>105</sup> See supra n.7

tested against this background right. He started by focusing on the question whether preliminary ruling procedure under Article 234 EC could offer an effective alternative to direct action under Article 230 (4) EC for protecting the right of effective judicial protection. He found that indirect action was not appropriate since in this procedure the applicant had no right to decide whether a reference was made, which measures were referred for review or what grounds of invalidity were raised and thus no right of access to the Court of Justice; on the other hand, the national court could not itself grant the desired remedy to declare the Community measure invalid. He pointed out that there may be a denial of justice in cases where it was difficult or impossible for an applicant to challenge a general measure indirectly (e.g. where there are no challengeable implementing measures or where the applicant would have to break the law in order to be able to challenge ensuing sanctions). Moreover, legal certainty principle required allowing a general measure to be reviewed as soon as possible and not only after implementing measures have been adopted<sup>106</sup>. In addition, there were a number of procedural disadvantages for applicants under preliminary reference procedure in comparison to direct challenges under Article 230 EC before the CFI.

Moreover, AG Jacobs also examined and refused the appellant's suggestion that the Court of justice had to create an exception in situations that a preliminary reference was not available, as *in casu* there was no challengeable implementing measure. According to him, this option must be rejected because of three reasons. First, it has no basis in the wording of the Treaty. Second, it would inevitably oblige the Community Courts to interpret and apply rules of national law, a task for which they are neither well prepared nor even competent. And third, it would lead to inequality between operators from different Member States and to a further loss of legal certainty<sup>107</sup>. Finally, he discussed the option that proposed the creation of an obligation for national court to ensure the availability of preliminarily references when there was a restriction to a direct challenge. This solution was also rejected since it would 'leave unresolved most of the problems of the current situation such as the absence of remedy as a matter of right, unnecessary delays and costs for the applicant or the award of interim

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<sup>106</sup> Opinion of AG para 102 (1)

<sup>107</sup> Id. at para 102 (2)

measures’<sup>108</sup>. Furthermore, it would be difficult to monitor and enforce, and would require ‘a far-reaching interference with national procedural autonomy’<sup>109</sup>.

Thus, AG Jacobs rejected all three options which were linked with Article 234 EC and as a consequence, he made a conclusion that the only way to secure the right of effective judicial protection is relaxation of the condition of *locus standi* so that the applicant would be able to directly challenge Community norms before the Court of First Instance. Particularly, he proposed a new test for individual concern based on substantial adverse effect as follows:

‘A person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests’<sup>110</sup>

#### 4.1.2 CFI’s suggestions in Jégo-Quééré case

In *Jégo-Quééré v. Commission*<sup>111</sup> case, a fishing company sought the annulment of a regulation imposing minimum mesh size on certain fishing vessels in order to conserve fish stocks. The regulation was directly applicable and no national implementing measure was required. The CFI held that the applicant could not be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC, on the basis of the criteria hitherto established by Community case-law<sup>112</sup>. However the Court did not immediately dismiss the action as it usually did before. In the light of AG Jacobs’ opinion in *UPA case*, the CFI *in casu* turned to consider whether the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy<sup>113</sup>. Thus, once again the fundamental right of effective judicial protection was considered as a basic to grant standing.

The same situation of the applicant in *UPA case*, *Jégo-Quééré et Cie SA* could not challenge the regulation before the national court since there were no national acts of implementation. Moreover, CFI was right in founding

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<sup>108</sup> Id. at para 102 (3)

<sup>109</sup> Ibid

<sup>110</sup> Id. at para 60

<sup>111</sup> See supra n.6

<sup>112</sup> Id. at para 38

<sup>113</sup> Id. at para 43



that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it laid down and then asserting their illegality in subsequent judicial proceedings brought against him did not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice<sup>114</sup>.

Regarding the option proposed by the Commission that the applicant can bring an action for non-contractual liability pursuant to Article 235 EC and the second paragraph of Article 288 EC<sup>115</sup>, it is not denied access to the courts. The Court of First Instance also dismissed this argument because of following reasons. First, such an action cannot result in the removal from the Community legal order of a measure which is, nevertheless, necessarily held to be illegal<sup>116</sup>. Second, the action is subject to particular condition of admissibility and substance that does not enable the Community Court to exercise full judicial review of the challenged norms<sup>117</sup>. Therefore, in some circumstances, it fails to ensure rules of law intended to confer rights on individuals. Up to this stage, the CFI made an inevitable conclusion that ‘the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and the second paragraph of Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation’<sup>118</sup>. The CFI agreed with AG Jacobs on the point that there was no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee<sup>119</sup>. In order to ensure effective judicial protection for individuals, the CFI suggested a new test for individual concern requirement:

‘a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if

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<sup>114</sup> Id. at para 45

<sup>115</sup> Id. at para 40

<sup>116</sup> Id. at para 46

<sup>117</sup> Ibid

<sup>118</sup> Id. at para 47

<sup>119</sup> Id. at para 49 (cited AG Jacobs’ opinion p. 45)

the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him'<sup>120</sup>

## 4.2 The response of the ECJ

In judgment of UPA case given on 25<sup>th</sup> July 2002, the ECJ rejected the suggestion put forward by AG Jacobs and the CFI. Contrary to the new approach, the ECJ responded the criticisms though supporting the traditional interpretation of individual concern in its case law by starting the judgment with the Plaumann test. According to the ECJ, individual concern must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances; however, such an interpretation could not have the effect of setting aside the condition in question<sup>121</sup>. Thus the Plaumann formula was the priority and the right to effective judicial protection was the subsidiary consideration. The Court was careful to clarify that the right to the effective judicial protection was a fundamental right forming an integral part of the Community legal order that is founded on the Rule of Law, thus implying that the event of the conflict of the possibility of departure from Plaumann was hypothetically possible<sup>122</sup>. The ECJ made a clear statement that the Treaty had established a complete system of legal remedies and procedures for private parties to challenge the legality of the Community acts. Under that system, where natural or legal persons cannot fulfill the conditions for admissibility laid down in Article 230 (4) EC, they are able either indirectly to plead the invalidity of such acts before the Community Courts under Article 241 of the Treaty or to do so before the national courts though preliminary ruling under Article 234 EC<sup>123</sup>.

In order to respond to the CFI's criticism that the current system of legal remedies fails to ensure rules of law intended to confer rights on individuals<sup>124</sup>, the ECJ stated that the rule of law is not managed only at the system of remedies at the Community level<sup>125</sup>. It delegates the

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<sup>120</sup> See supra n.6 at para 51

<sup>121</sup> See supra n.7 at para 44

<sup>122</sup> Constantinos C. Kombos, *'The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution?'*, EIoP 2005 (017)

<sup>123</sup> See supra n.7 at para 40

<sup>124</sup> See supra n.6 at paras 46-7

<sup>125</sup> In case C-491/01 *British American Tobacco Ltd* [2002] ECR I-11453, the ECJ had already addressed this issue, at para 40 of that judgment wherein it held: 'The European Community is a community based on the rule of law in which the institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general

responsibility to the national level as effectiveness is presumed to be present at the Community level. That enables the delegation to national courts of the obligation to guarantee access to that complete system at Community level by interpreting national rules in a manner facilitating access to the Court. After access to the Court is ensured, it follows that because of Article 234 EC being part of complete system of remedies, the right of effective judicial protection is ensured<sup>126</sup>.

The ECJ held on its classic criteria test as set out by it in *Plaumann case* while it did not propose directly any proper solution when there is no national implementing measure in place. Court agreed with AG that the creation of an exception was highly sophisticated since such solution would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures<sup>127</sup>. However, this does not mean that the ECJ indirectly admitted that the system of remedies has lacunae. It must be kept in mind that the Court of Justice acknowledged in *Les Vest case*<sup>128</sup> and now at paragraph 40 of the judgment that ‘the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts’ The ECJ, in the same paragraph held:

‘Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 [new Article 230] of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 [new Article 241] of the Treaty or to do so before the national courts ...’<sup>129</sup>

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principles of law which include the fundamental rights ... In accordance with the principle of sincere cooperation laid down in Article 5 [now Article 10] of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of right of action in the way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a community act of general application, adopted pursuant to national law. In that respect, it is sufficient if the national court is called up on to hear a genuine dispute in which the question of the validity of such act is raised indirectly.’

<sup>126</sup> See supra n.122

<sup>127</sup> See supra n.7 at para 43

<sup>128</sup> See supra n.13 at para 23

<sup>129</sup> See supra n.7 at para 40

Clearly, the ECJ had responded perfectly the issue raised by CFI in *Jégo-Quéré*.

In theory, there are two options for the ECJ other than reliance on the Plaumann test and response to all the criticism. First, the ECJ may follow the CFI's reasoning or the opinion of AG Jacobs and their respective tests. Second, it may create an exception to the case law in situations when there is no national implementing measure in place; therefore, preliminary ruling reference is not available. Academic researchers may think that the court refused those options since it avoided admitting failure to protect the right of effective judicial protection or the jurisprudence was in breach of such right<sup>130</sup>. The plea seems reasonable since there may be a change as a whole or a part of the system of case law. However, the main reason is why the system of legal remedies needs reform if there is no gap<sup>131</sup>? And why the Court has to follow the instigation then facing with many potential problems, especially political one? Thus, there is no reason to regret that the Court of Justice has refused to re-interpret Article radically<sup>132</sup>.

In very later part of the judgment, the Court of Justice acknowledged that the possibility to open the condition of *locus standi* in case of a challenged act is act of general application, the only way is legislative reform because 'individual concern' interpretation of the court in its case law is followed from the provision of the Treaty. At paragraph 45 of the judgment, it stated:

'it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, *if necessary*, in accordance with Article 48 EU, to reform the system currently in force'<sup>133</sup>.

The conceptual problem of the argument is that requests for reform referred to the test for the textual requirement of individual concern and not to 'individual concern' *per se*. In that light, there was no issue of judicial amendment of the Treaty, but rather a change of the test in Plaumann. Nevertheless, the ECJ was not intending to change the law for reasons

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<sup>130</sup> See supra note 122

<sup>131</sup> Groussot, '*Effective Judicial protection: Does the System really need Reform?*', LIEI 221, (2003)

<sup>132</sup> John Temple Lang, '*Action for declaration that Community Regulations are invalid: The duties of National Court under Article 10 EC*' 28 ELRev. 102, (2003).

<sup>133</sup> See supra n.7 at para 45 (emphasis added)

already explained and which had nothing to do with textual constraints<sup>134</sup>. Therefore, the ECJ was cleverly avoiding the undue criticism.

### 4.3 Assessment of the new test formulas

These suggestions are initiated in the situation when the contested act is a “self-executing regulation”. In such case, no national implementing act is required; therefore the possibility for individuals challenging the Community act sometimes is extremely difficult. Both AG Jacobs in *UPA* and CFI in *Jégo-Quéré* paid a great attention on the right to effective judicial protection which was considered as a yardstick for assessing the ‘complete system of legal remedies’<sup>135</sup>. They found that, in such system, the only way to ensure the right to effective judicial protection is to allow the applicants directly challenge the Community act. However, in those present cases, the applicants could not fulfill the conditions for admissibility laid down in the fourth paragraph of Article 230 of the Treaty and interpreted in the case law. Consequently, those conditions were suggested to be reconsidered. Of course, ‘individual concern’ condition, an important restriction, was attacked firstly. AG Jacobs summed up that the ECJ had a discretionary right when it established the test for individual concern; thus, he asked for a judicial amendment which is not prohibited by the wording of Article 230 (4) EC<sup>136</sup> other than required by a legislative reform.

The AG Jacobs’ suggestion which was followed by the CFI in case *Jégo-Quéré*<sup>137</sup> is considered as a ‘revolutionary blueprint’<sup>138</sup>. However, there are some mistakes that may have been involved. As to the basis of reconsidering, the suggestions were based on the right of effective judicial protection which is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>139</sup>. It was created by the Court of Justice and held on in its case law<sup>140</sup>. The question that may

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<sup>134</sup> See supra n.122

<sup>135</sup> See supra n.7 at para 40

<sup>136</sup> See supra note 5 at paras 73-5

<sup>137</sup> See supra n.6

<sup>138</sup> See supra n.122

<sup>139</sup> See supra n.7 at para 39

<sup>140</sup> Case C-424/99, *Commission v. Austria* [2001] ECR I-9285, para 45; Case 222/84 *Johnston* [1986] ECR 1651, para 18; Also see *Les Vest case*

rise is whether it is strong enough to voice the traditional interpretation on individual concern which is also established by the Court for over forty years. Of course, the ECJ must have paid attention on how to ensure such fundamental right when it was created.

Concerning the question whether the new tests correspond to the wording of Article 230 (4) EC, it seems to me that the answer is not. Both individual test technology suggested by AG Jacobs and by CFI are based on the vagueness element such as ‘a potential substantial adverse effect on interests’<sup>141</sup> or ‘definite and immediate restriction on rights or obligations’<sup>142</sup>. As a result, they could not limit the number of potential challengers. It is not wrong if more than one applicant is allowed to challenge the same act; however, it must be wrong if every person is ensured such right. To cite, once again, Article 230 (4) EC, ‘any legal or natural person ... may institute proceedings against *a decision* addressed to that person or against *a decision*, which though in form of a regulation or *a decision* addressed to another person, is of direct and individual concern to the former’<sup>143</sup>. The two new tests could not satisfy the requirement laid down in the article that the challenged act must be in substance of a decision since an act is regarded as a decision only in particular circumstances where the number of its addressees is definitely identifiable. It may be contested that a measure of general application such as a regulation can be challenged in some cases<sup>144</sup>. However that fact does not go beyond the wording of the provisions in Article 230 (4) EC because in those certain circumstances, the applicants fulfilled the requirement of individual concern according to Plaumann test and is thus in the nature of a decision in their regard<sup>145</sup>.

The suggestions can not be accepted in the sense that ‘individual concern requirement’ can not manage workload problem and system effectiveness anymore. As it is discussed in section 3, a measure of general application, such as a regulation, may affect many persons and cause adverse effect somehow. In the light of those test, all new Community acts may be challenged directly by private parties. This could not be acceptable.

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<sup>141</sup> See supra n.5 at para 60

<sup>142</sup> See supra n.6 at para 51

<sup>143</sup> Article 230 (4) EC (emphasis added)

<sup>144</sup> Case 358/89 *Extramet Industrie v. Council* [1991] ECR I-2501, para 13; Case 309/89 *Codorniu v. Council* [1994] ECR I-1853, para 19, and Case C-41/99 P *Sadam Zuccherifici and Others v Council* [2001] ECR I-4239, para 27.

<sup>145</sup> See supra n.7 at para 40

Furthermore, under the new suggested test, all such persons may challenge the act if they wish to do so. Contrarily, it is difficult for the Community Court to dismiss the application as inadmissible. Supposing that, if the first level court does so, almost all applicants may appeal to the ECJ since they may not be convinced by the reasons that why the action was dismissed. In his opinion<sup>146</sup>, paragraph 75 to 81, AG Jacobs shows other limitation that may manage case-load problem, though could not be effective in situations mentioned above. In short, individual concern requirement will lose its natural purpose<sup>147</sup> once it is tested by the new technologies.

The assignment now shifts to the question whether private parties will be better protected under the new individual concern test. It is submitted that such test makes it become easier to access to the court. In addition, as AG Jacobs points out the proceedings in national courts do not provide effective judicial protection, because there should be access to a court with power to annul the measure. The national court may not think there was enough doubt to justify referring the question of validity and the Article 234 procedure might be too slow. Question referred might not be the question which the plaintiffs want to have asked<sup>148</sup>. In addition, under Article 230 EC the body that adopted the measure in question will be a party from the start of the proceedings, whereas under Article 234 EC that would not be guaranteed. Moreover, the degree of scrutiny is more intense under Article 230 (4) EC because of the full exchange of pleadings, whereas under Art. 234 EC there is a round of observations and oral arguments before the Court. Those comments are true; however, it must be kept in mind that what is the purpose of private parties when they institute an action. It may be said that there is nothing other than to protect their own interests. In this context, ensuring effective judicial protection means providing physical or legal person a corresponding instrument to protect their legitimate rights. Such right should not be abused for any purpose even political purpose or academic study.

Going back to the cases where the criticism on the lack of judicial protection has occurred, it is easy to recognize that both AG Jacobs and the CFI apathetically or unintentionally skipped over remedy of actions for invalid

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<sup>146</sup> See supra n.5 at paras 75-81

<sup>147</sup> As we have discussed in part 2, individual concern requirement serves for two main purposes: to limit unnecessary challenge and prevent challenging general application act.

<sup>148</sup> See supra n.122

declarations when they assess the current system of legal remedy. In those cases, the applicants challenged a self-executing regulation, but they could not fulfill individual concern requirement and they also could not challenge the measure before the national courts under Article 234 EC. Therefore they concluded that there was a lacuna in the system. Since it had been made within deficient background, the conclusion of the said AG's and that of CFI now must be reconsidered<sup>149</sup>.

## 4.4 An alternative legal remedy: actions for invalid declarations

Article 241 [ex 184] provides that 'Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230 EC, any party may, in the proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission or of the ECB is at issue, place the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of justice the inapplicability of that regulation'. The aim of this Article is to authorize individual applicants to challenge not only the implementing measure but also, circuitously, the regulation upon which they are founded. Beside its scope of application has been interpreted generously by the court as it includes acts of the institutions which, though they are not in form of a regulation, nevertheless produce similar effects and on these grounds may not be challenged under Article 230 by natural or legal person other than Community institutions and Member States<sup>150</sup>. Professor Temp Lang suggests that the action for a declaration, or the equivalent, is an appropriate and widely used procedure, and often the best procedure, for a national court to use. He also suggests that the duty of national courts to find or create a

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<sup>149</sup> Interestingly, AG F. Jacobs is also the AG in case C-263/02 P *Commission v. Jégo-Quéré* when the judgment of the CFI was appealed before the ECJ. Clearly, the opinion in this case was influenced incisively by the UPA judgment. The right to effective judicial protection which was considered as a keystone in earlier opinion is not used in this case at all. Instead, the opinion now referred to the Plaumann requirements and the wording provisions of Article 230 (4) EC. He also made a reference to the difficulty of individuals challenging the self-executing regulation, and a reference to the inadequacy of other alternative remedies was made as well. However, no reference to his proposed test of substantial adverse effects was made. In paragraph 46 of the opinion, he said: '*Such an outcome is to my mind unsatisfactory, but is the unavoidable consequence of the limitations which the current formulation of the fourth paragraph of Article 230 is considered by the Court to impose*'. By this opinion, AG Jacobs admitted that no liberal test on *locus standi* may be accepted, at least at the current time.

<sup>150</sup> Grousot, 'Effective Judicial protection: Does the System really need Reform?', LIEI 221, (2003)



procedure allowing the validity of a Community regulation to be questioned, if the national court thinks that appropriate before the court of justice, is not limited to cases in which there is or will be a national act binding on the private party if the party can show some sufficient interest. According to him, procedure under Article 241 is not limited to cases in which a national measure is challenged<sup>151</sup>. In other words, private parties can use this Article to ask for declarations self-exciting regulations are invalid. Those suggestions are rational and convincing. This argument was illustrated by *Omega Air case*<sup>152</sup>.

Omega used to trade in aircraft, principally Boeing 707s, and carried on related activities such as aircraft engine maintenance. In 1996 Omega announced a programme to replace the engines in a number of Boeing 707s with Pratt & Whitney JT8D-219 engines which had a by-pass ratio of 1.74. By the time the decision was taken to include in the proposals for a directive and a regulation, aero-planes which had been re-engined with engines with a by-pass ratio less than 3, it was too late for Omega to change its plans. It considered that, despite its approaches to the Community institutions, its situation had not been taken into consideration, as the Regulation prevented the operation in the Community of the re-engined Boeing 707s, even though they complied with the noise and gaseous emissions standards of Chapter 3 of the regulation. Omega therefore brought proceedings against the authorities responsible for civil aviation in the United Kingdom and Ireland, with a view to having the Regulation declared inapplicable. The High Court of England and Wales and the High Court (Ireland) considered that some of Omega's claims raised serious issues, and so decided to stay proceedings and refer the following question to the Court for a preliminary ruling<sup>153</sup>. By the Judgment given on 12 March 2002, the ECJ answered all the questions referred.

Whatever the substance of the case was, it is a good example for private access to the Community Court when they could not challenge under Article 230 (4) or Article 234 EC. More specifically, where a private party is not individually concerned by a Community Regulation, he may challenge the

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<sup>151</sup> See supra n.132

<sup>152</sup> Joined cases C-27/00 and C-122/00 *the Queen and Secretary of the State for the environment, Transport and the Regions v. Omega Air Ltd and Irish Aviation Authority* [2002] ECR I-2569

<sup>153</sup> *Id.* at paras 37-40.

measure applying the regulation (national implementing or enforcing act) to him before a national court. Without such act, he may (he does not have to violate the law before) ask a national Court for a declaration that the Regulation is wholly or partly invalid under Article 241 EC. Thus, in principle the applicants in *UPA* and *Jégo-Quéré*, absolutely, may ask Spanish or French court, respectively, for declaration of the contested regulation void before it is applied to them

## 4.5 The rules governing *locus standi* in Constitutional Treaty

Under Constitutional Treaty, the fundamental right to effective remedy is written down and incorporated into the Charter of Fundamental Rights. Article II-107 (1) provides: ‘Everyone whose right and freedom guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal...’. In order to ensure such right, two methods are mentioned. First, the Constitution imposes an obligation on the Member States to protect this right. Article I-29 provides: ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. The incorporation of this duty on Member States into the Constitutional Treaty endorses the approach of the ECJ in *UPA case*<sup>154</sup>. The requirement in the constitutional Treaty is more powerful as compared to the case law of the ECJ; therefore, it is easier to enforce it. This requirement does not limit the area of judicial amendment. Member States may have to amend their legal system to provide individual adequate legal remedy, if it is necessary. However, Member States are often hesitant and slow in their compliance with Union requirements to reform their legal systems. Private parties will be refused access to the national courts until the states put the required legal structures in place. Moreover, it is unlikely that every country will adopt rules which provide access to the national courts for the individual to the same extent. Therefore, there will be an inequality

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<sup>154</sup> C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, The ECJ held in paragraphs 41-2 that: ‘It is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 [now Article 10] of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.’

between applicants bringing actions in different Member States as the laws in some countries will allow access more easily than those in others<sup>155</sup>.

The second and more important new rule on *locus standi* in Constitutional Treaty is enshrined in Article III-365 (4). This provision is the successor of Article 230 (4) EC. It provides:

Any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and *against a regulatory act which is of direct concern to him or her and does not entail implementing measures*.<sup>156</sup>

When assessing this provision, an important thing that must be kept in mind is that the provision was based on the new Community legal instruments which are provided in Article I-33 to Article I-35. Accordingly, it introduces four types of community binding acts. They include European laws, European framework of laws, European regulations, and European decisions. The first two kinds are legislative acts, the rest are non-legislative. Clearly, private parties may bring an action for annulment of three types of acts: act addressed to that person; act which is of direct and individual concern to him or her, and regulatory act which is of direct concern to him or her and does not entail implementing measures. There is nothing new in case applicants challenge an act addressed to them since it is not problematic for them to have standing. However, there are two new things in the other cases. First, the duty to demonstrate that the contested act must be in substance of a decision is not required anymore. As a consequence, the Court can not apply ‘terminology test’ since the purpose of this test was abolished. In short, this provision gives the ECJ more freedom to establish the concept of ‘individual concern’ in its case law. Second, there is a significant change that may be found in the third kind. Particularly, individual concern condition is not required in case the challenged act is a regulatory act which does not entail implementing measures. So, it is important to identify regulatory act in order to state exactly when applicants are remitted such duty. Unfortunately, the word ‘regulatory act’ is not defined anywhere in the Treaty. Therefore, the Court will have room to manoeuvre its interpretation<sup>157</sup>. In the light of the

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<sup>155</sup> Cornelia Koch, ‘*Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ right to an effective remedy*’ 30 ELRev (2005)

<sup>156</sup> Article III-365 (4) Constitutional Treaty. Emphasis added.

<sup>157</sup> See supra n.155

manifestation of the right to an effective remedy in Article II-107 (1) and the approach of the ECJ in *UPA case*, it is predictable that the Court will not interpret this type of act as a wide rank. Since the future of the Constitutional Treaty is uncertain, it should not expect too much from the new rules on *locus standi*. However, it would be fun to see how immoderate criticism will go on.

## 5 Conclusion

From the foregoing submissions, it can be reiterated in the conclusion part of the thesis that action for annulment is one of several methods (action against failure to act, plead of illegality, request for a preliminary ruling on the validity of a Community act, suit for damages caused by an illegal act) in which a Community act can be challenged. This method is granted for individuals as an instrument by which they can protect their personal legal interests. Once, natural or legal persons believe that their legal right is infringed by a Community act they may invoke this instrument by instituting proceedings for annulment. If the action for annulment succeeds, the annulment is retroactive and has general effect. Since private parties are not only allowed to directly attack a decision addressed to them, but they are also allowed to attack an act addressed to another person or even a general application act, but the consequences of this method must be considered carefully. In the first case, if the act addressed to the challenger is annulled, no potential effects may happen to other parties other than the challenger. On the contrary, annulment of the challenged act may have, in the latter case, an adverse effect on other value that the contested act is aimed to create and protect. Taking this fact into account, the conditions to give *locus standi* in those cases must be different from each other. If an applicant challenges an act addressed to him, the application will be admitted if he could show his personal interest which is affected by the contested act. Moreover, there are additional conditions added in cases when the applicant challenges an act which is not addressed to him. The additional conditions are direct and individual concern.

It may be safely concluded that the conditions on *locus standi* of private parties to an action for annulment under Article 230 (4) EC and the interpretation of the Court of Justice are difficult to be fulfilled. Especially, in some cases, a applicant could not fulfill the individual concern requirement. As a result, private parties can not bring an action for annulment though the act in question may adversely affect him in some ways or another. Based on this fact, many researchers and practitioners criticize severely the conditions of *locus standi* of private parties that bring an action for annulment. Most state that the conditions should be relaxed, especially the interpretation on the concept of individual concern of the ECJ

in its case law. The criticism was at its peak when it was linked with the right to effective judicial protection. And finally, critics conclude that current system of remedies fails to ensure the right of effectiveness of judicial protection.

It seems to me that the criticism is not based on a global background and goes beyond the objective of the purpose of private parties when they bring an action. The critics have established a lacuna in their assessment since the plea of illegality provided under Article 241 EC (ex Article 184) has not been taken into account when the criticism was made. As the ECJ pointed out that ‘where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 (now Article 230 EC) of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 (now Article 241) of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, ... to make a reference to the Court of Justice for a preliminary ruling on validity’<sup>158</sup>.

In practice, in some Member States individuals may be prevented access to a court in some manner. However, this does not mean that there is a lacuna in the system of remedies. The fact, itself cannot lead to fundamentally change the conditions on *locus standi* of private parties under Article 230 (4) EC and the functioning of interpretation of the ECJ on this issue. Individuals will always ensure the right to an effective remedy if and only if the national courts always do their job<sup>159</sup>. The ECJ, in *UPA case*, stated: ‘National courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act’<sup>160</sup>. One may argue that, by imposing an obligation on the Member States to give private parties sufficient legal remedy, the ECJ has ingeniously refused its obligation. However, it seems that the Court just threw the ball to the ground where it should be played. Those that

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<sup>158</sup> See supra n.7 at para 40

<sup>159</sup> See supra note 131

<sup>160</sup> See supra n.158

would like to condemn the ECJ's approach should save time and labour to develop the best remedy in the Member States to protect individuals' rights.

In my opinion, action for annulment should not be regarded as the first option for private parties to protect their legal rights affected by a general application act or an act addressed to another person. The main reason is that direct action brought by ordinary persons may disrupt efficiency and functioning of the EU and may prevent the Institutions carry out the EU public policies. In annulment proceedings, the Court has no other option than to annul or not to annul<sup>161</sup>; therefore it is extremely difficult for the Court to find the balance between private and public interest. It is suggested that if there is any remedy which is available for private parties to protect their rights, it must be priority. In this way, the procedure for obtaining through national courts a preliminary ruling on their validity seems the best way. National court which deals with the fact of the case only asks for preliminary rulings where it has doubts on the validity of the Community act or when the matter raised before a court of last instance. Otherwise, it may decide the case. Thus, in preliminary ruling procedure, the question for annulment will be raised only when it is necessary to do so. This necessarily, *in casu*, is considered by the national courts based on the fact of the case other than the wish or desire of the applicants.

The fact is that the increased scope and influence of Community law leads to an increasing need for effective judicial protection. In this regard, the system of remedies needs to be reformed and amplified proportionally. Once the gates for action under Article 230 (4) are opened, the Court must be given adequate resources to deal with an increase in the number of cases. This may require a big amount of time, money, and labour.

It may be summed up that, strict conditions of admissibility of direct actions for annulment by private parties against Community acts could not lead to a lack of judicial protection if there are other remedies for them to do so. The conditions of *locus standi* are functioning well so they should not be changed. Under the current system, attacking Community acts by way of preliminary rulings on their validity is always available if national courts and the Community Courts cooperate. In this regard, the national courts are

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<sup>161</sup> See supra n.8 at p. 408

responsible to provide for judicial proceedings so that the right to effective judicial protection is ensured.



# 6 Bibliography

## Books

ALBERTINA ALBORS-LLORENS, *'Private parties in European Community Law. Challenging Community Measures'*, Clarendon Press, Oxford 1996

Angela Ward, *'Judicial Architecture at the Cross-Roads: Private Parties and Challenge to EC Measures Post – Jégo – Quéré'*, The Cambridge Yearbook of European Legal Studies, vol.4, 2001

Angela Ward, *'Judicial review and the right of the private parties in EC law'*, Oxford University Press, New York 2000

Anthony Arnall, *'The European Union and Its Court of Justice'*, Oxford EC Law Library, 2006

Groussot, *'The Role of National Courts in the European Union: A Future Perspective'*, SIEPS 2005

Henry G. Schermers & Denis F. Waelbroeck *'Judicial Protection in the European Union'*, Kluwer 2001

Intersentia Uitgevers Antwerpen – Groningen, *'Administrative Law of the Union, Its Member States and The United States'*, Edited by Rene Seerden and Frits Stroink, Metro, 2002.

Josephine Steiner, Lorna Woods & Christian Twigg-Flesner, *'EU Law'*, Oxford University Press, 2006

Paul Craig & De Burca *'EU Law, cases and materials'*, 3<sup>rd</sup> ed., Oxford University Press, 2003

Paul Craig, *'EU Administrative Law'*, Oxford University Express, 2006

T.C Hartley, *'The Foundations of European Community Law'*, Oxford University Press, Oxford, 2003

Takis Tridimas (editor), *'The European Union Law for the Twenty-First Century'*, Hart, 2004

The Contributors Severally, *'The Future of the Judicial System of The European Union'*, edited by Alan Dashwood & Angus Johnston, Oxford and Portland, Oregon 2001

## Articles

Albors-Llorens, *'The Standing of Private parties Challenging Community Measures: Has the European Court missed the Boat?'* 62(1) CLJ 72, (2003).

Anthony Arnall, *'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty'*, 32 CMLRev. 7, (1995).

Anthony Arnall, *'Private Applicants and the Action for Annulment since Codorniu'*, 38 CMLRev (2001).

C. Harlow, *'Towards a Theory of Access for the European Court of Justice'*, 12 YEL 213 (1992).

Christopher Harding, *'The Private interest in Challenging Community Action'*, 5 ELRev. 354 (1980).

Constantinos C. Kombos, *'The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution?'*, EIOP 2005-017

Cornelia Koch, *'locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy'* 30 ELRev (2005)

Domink Hanf, *'Facilitating Private Applicants' Access to the European Courts? On the Possible Impact of the CFI's Ruling in Jégo – Quéré'*, 3 GLJ (2002).

Emily Reid, *'Judicial Review and protection of non-commercial Interests in the European Community'*, Web JCLI, (1) 2001

Greaves, *'Locus standi under 173 EEC when seeking Annulment of a Regulation'*, 11, ELRev. 119, (1986).

Groussot, *'Effective Judicial protection: Does the System really need Reform?'*, LIEI 221, (2003)

Harlow, *'Toward a Theory of Access for the European Court of Justice'*, 12 YEL 213, (1992).

Hjalte Rasmussen, *'Why Is Article 173 Interpreted Against Private Plaintiffs?'*, 5 ELRev. (1980).

John A.Usher, *'Direct and individual concern-an effective remedy or a Conventional solution?'*, 28 ELRev. 575, (2003).

John Temple Lang, '*Action for declaration that Community Regulations are invalid: The duties of National Court under Article 10 EC*' 28 ELRev. 102, (2003).

Mancini & Keeling, '*Democracy and the European Court of Justice*' 57 MLR 175, (1994).

Neuwahl, '*Article 173 Paragraph 4 EC: Past, Present and Possible Future*', 21 ELRev. 112, (1996).

Paul Craig, '*Legality, Standing and Substantial Review in Community Law*', 14 Oxford Journal of Legal Studies 507, (1994).

Paul Craig, '*Standing, Rights and the Structure of Legal Argument's* 9 EPL 439, (2003).

Ragolle, '*Access to Justice for Private Applicants in the Community order: recent revolutions*, 28 ELRev. 90, (2003).

Silvia Schikhof, '*Direct and Individual Concern in Environmental Cases: The Barriers to Prospective Litigants*', ELRew, 276, (1998).

Schwarze, '*The legal protection of the Individual against regulation in EU Law-Remarks on the ECJ judgment in the case UPA of July 2002 in view of the European Constitutional Reform*', 10 EPL 285, (2004).

Vincent Kronenberger & Paulina Dejmek '*Locus Standi of Individuals before Community Courts under Article 230 (4) EC: Illusions and Disillusions after the Jégo-Quééré (T-177/01) and Unión de Pequeños Agricultures (C-50/00) judgments*', ELF (2002).

# 7 Table of Cases

- 16/60 *Producteurs de Fruits v. Council*, [1962] ECR-901
- 16/64 *Costa v. ENEL* [1964] ECR 585,
- 5/62 *Plaumann v. Commission* [1963] ECR-95
- 30/64 *Sgarlata v. Commission* [1965] ECR-215
- 106-107/63 *Toepfer v. Commission* [1965] ECR-405
- 69/69 *Alcan v. Commission* [1971] ECR-385
- 41-44/70 *NV International Fruit Company v. Commission* [1971] ECR-411
- 5/71 *Zuckerfabrik Schoepfenstedt v. Council* [1971] ECR-975
- 62/70 *Bock v. Commission* [1971] ECR-897
- 41-44/70 *NV International Fruit Company v. Commission* [1971] ECR-411
- 39/72 *Commission v. Italy* [1973] ECR-101
- 41/74 *Van Duyn v. Home Office* [1974] ECR-13372
- 26/76 *Metro-SB-Großmärkte GmbH & Co KG v. Commission* [1977] ECR-1875
- 101/76 *Koninklijke Scholten Honig v. Council and Commission* [1977] ECR-797
- 125/77 *Koninklijke Scholten-Honig NV and others v. Hoofdproduktschaap voor Akkerbouwprodukten* [1978] ECR-1991
- 730/79 *Phillip Morris Holland BV v. Commission* [1980] ECR-2671
- 789-790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] ECR-1949
- 60/81 *IBM v. Commission* [1981] ECR-2639
- 11/82 *Piraiiki – Patraiki v. Commission* [1985] ECR-207
- 231/82 *Spijker Kwasten v. Commission* [1983] ECR-2559
- 239, 275/82 *Allied Corporation v. Commission* [1984] ECR-1005
- 264/82 *Timex Corporation v. Council and Commission* [1985] ECR-849
- 281/82 *Unifrex v. Council and Commission* [1984] ECR-1969
- 294/83 *Partie Ecologiste ‘Les Verts’ v. Parliament* [1986] ECR-1339
- 169/84 *COFAZ v. Commission* [1984] ECR-391
- 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR-4199
- 294/83 *Les Verts’ v European Parliament* [1986] ECR 1339
- C-298/89 *Gibraltar v. Council* [1993] ECR I-3605
- C-309/89 *Codorniu SA v. Commission*, [1994] ECR I-1853
- C-358/89 *Extramet Industrie SA v. Council*, [1991] ECR I-2501

C-198/91 *William Cook plc v. Commission* [1993] ECR I-2486

T-83/92 *Zunis Holdings S.A. v. Commission* [1993] ECR II-1169

C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029

T-472/93 *Campo Ebro Industrial SA v. Council* [1995] ECR II-421

483/93 *Antillean Rice Mills NV. V. Commission* [1995] ECR II-2305

T-585/93 *Stichting Greenpeace Council (Greenpeace International) v. Commission*, [1995] ECR II-2205

T-489/93 *Unifruit Hellas EPE v. Commission* [1994] ECR II-1201

T-99/94 *Asociacion Espanalo de Empresas de la Carne (ASOCARNE) v. Council* [1994] ECR II-871

T-107/94 *Kik v. Council and Commission* [1995] ECR II-1717

T-117/94 *Associazione Agricoltori della Provincia di Rovigo et al. v. Commission (Po Delta)* [1995] ECR II-455

C-321/95P *Stichting Greenpeace Council (Greenpeace International) v. Commission* [1998] ECR I-1651

T-135/96 *UEAPME v. Council* [1998] ECR II-2335

T-109/97 *Molkerei Großbraunshain and Bene Nahrungsmittel v. Commission* [1998] ECR II-3533

T-172/98, 175-177/98 *Salamander and others v. Parliament and Council* [2000] ECR II 2487

T-173/98 *Unión de Pequeños Agricultores v. Council* [1999] ECR II-3357

C-300/99 *Area Cova and others v. Council* [2001] ECR I-983

C-301/99 *Area Cova and others v. Council and Commission* [2001] ECR I-1005

T-18/99 *Cordis v. Commission* [2001] ECR II-913

T-30/99 *Bocchi Food Trade International v. Commission* [2001] ECR II-943),

T-52/99 *T. Port v. Commission* [2001] ECR II-981

C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-06279

C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677

Joined cases C-27/00 and C-122/00 *the Queen and Secretary of the State for the environment, Transport and the Regions v. Omega Air Ltd and Irish Aviation Authority* [2002] ECR I-2569

Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533 para 187

T-177/01 *Jégo-Quéré & Cie v. Commission* [2002] ECR II-2365

T-155/02 *VVG International and others v. Commission* [2002] ECR II-3239

C-263/02 P *Commission v. Jégo-Quéré* [2004] ECR I-3425

T-60/03 *Regione Siciliana v. Commission* [2005] REC II-4139  
C-417/04 P *Regione Siciliana v Commission* [2006] ECR I 3881  
C-15/06 P *Regione Siciliana v. Commission* [2007]