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Judicial Review: Advice for the Deaf?

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Abstract

This article examines the state of judicial protection in the European Community system largely against the background of the debate of recent years, and discusses critically the ostrich-like reaction of the Court to the chorus of criticism relating to its interpretation of the concept of “individual concern” in the fourth paragraph of Article 230 of the Treaty establishing the European Community (“EC Treaty”). It also examines the attempt in the Treaty establishing a Constitution for Europe to establish a different approach to admissibility in respect of some types of Community acts.

JUDICIAL REVIEW: ADVICE FOR THE DEAF?

Laurence W. Gormley*

INTRODUCTION

The health of the law relating to judicial review is a good indicator of the status of the rule of law in any State or even in any international organization. Open, transparent, and genuine access to judicial review, and the ability and willingness of judicial institutions to examine the acts of the administration lie at the heart of good democratic structures of government and indeed form an essential, if sometimes overlooked, aspect of good governance.¹ For common law attorneys in particular, judicial review has always been an important aspect of European Community and European Union law, even though many lawyers in continental Europe display remarkably little interest in the subject. For British Advocates General² at the Court of Justice of the European Communities (“the Court”), not surprisingly, judicial review has always been of major interest. Jean-Pierre Warner’s Opinion in the *Japanese Ball Bearings* cases³ forced a revision of the rights of the defence in anti-dumping procedures; the remarkable two-volume *Liber Amicorum*⁴ for Gordon Slynn dealt with judicial review (in European and international law). This was particularly appropriate in view of Eleanor Sharpston’s observation in her discussion of the *Supplementary Levy on Milk*

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1. The Commission of the European Communities (“Community”) defines “Governance” as meaning rules, processes and behavior that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence. See *Commission White Paper on European Governance*, at 8 n.1, COM (2001) 428 final (July 25, 2001), available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2002/com2002_0023en01.pdf (last visited Apr. 8, 2006).

2. So far, there have been four Advocates General: Jean-Pierre Warner; Gordon Slynn; Francis Jacobs; and his successor, Eleanor Sharpston.

3. See *NTN Toyo Bearing Co. Ltd. v. Council*, Case 113/77, [1979] E.C.R. 1185, 1259, 1261-65, [1979] 2 C.M.L.R. 257, 266.

4. See 1 *LIBER AMICORUM LORD SLYNN OF HADLEY: JUDICIAL REVIEW IN EUROPEAN UNION LAW* (Davide O’Keefe ed., 2000) [hereinafter 1 *LIBER AMICORUM SLYNN*]; see also 2 *LIBER AMICORUM LORD SLYNN OF HADLEY: JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE* (Mads Andenas ed., 2000).

(“SLOM”)⁵ litigation that:

As well as facing the political embarrassment, and the considerable administrative inconvenience and difficulty generated by all the SLOM litigation, the Community institutions therefore also found themselves footing some of the bill for the damage flowing from the original SLOM measures. And all because Advocate General Slynn and the Court couldn't stomach a little basic injustice. . .⁶

Moreover, Pieter VerLoren van Themaat's overview of some Opinions of Gordon Slynn⁷ rightly highlighted his important contributions to judicial protection in *AM & S Europe Ltd. v Commission*⁸ and *International Business Machines Corp. v Commission*⁹. Francis Jacobs too will be remembered for his outstanding contribution to diverse fields of Community law and human rights,¹⁰ but perhaps most of all for his distinguished and challenging contributions in the field of judicial protection.¹¹ With that in mind, this contribution examines the state of judicial protection in the Community system largely against the background of the debate of recent years, and discusses critically the ostrich-like reaction of the Court to the chorus of criticism relating to its interpretation of the concept of “individual concern” in the fourth paragraph of Article 230 of the Treaty establishing the European Community (“EC Treaty”).¹² It also examines the attempt in the

5. See Council Regulation No. 856/84, O.J. L 90/10 (1984); see also Council Regulation No. 857/84, O.J. L 90/13 (1984); Commission Regulation No. 1371/84, O.J. L 132/11 (1984), amended by OJ L139/12 (1988).

6. Eleanor Sharpston, *Milk Lakes, Sloms and Legitimate Expectations—A Paradigm in Judicial Review*, in 1 *LIBER AMICORUM SLYNN*, supra note 4, 557, 567. See, e.g., Mulder v. Minister van Landbouw en Visserij, Case 120/86, [1988] E.C.R. 2321; Spagl v. Hauptzollamt Rosenheim, Case C-189/99, [1990] E.C.R. I-4539, [1991-1193 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 95, 818, at 52, 124-25.

7. See Pieter VerLoren van Themaat, *Some Opinions of Sir Gordon Slynn as Advocate General*, in 1 *LIBER AMICORUM SLYNN*, supra note 4, 3, 4-5.

8. See Opinion of Advocate General Warner, *Australian Mining & Smelting Europe Ltd. v. Commission*, Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264.

9. See Opinion of Advocate General Slynn, *Int'l Business Machines Corp. v. Commission*, Case 60/81, [1981] E.C.R. 2639, [1981] 3 C.M.L.R. 635.

10. See e.g., FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2d ed. 1996); *EUROPEAN LAW IN THE ENGLISH COURTS* (Mads Andenas & Francis Jacobs eds., 1998).

11. See, e.g., Opinion of Advocate General Jacobs, *Union de Pequeños Agricultores v. Council*, Case C-50/00, [2002] E.C.R. I-6677, [2002] 1 C.M.L.R. 1, 1 [hereinafter Opinion of Advocate General Jacobs, *UPA*].

12. See Consolidated Version of the Treaty Establishing the European Community, art. 230, O.J. C 325/33 (2002), at 126 [hereinafter EC Treaty].

Treaty establishing a Constitution for Europe¹³ to establish a different approach to admissibility in respect of some types of Community acts.

I. ADMISSIBILITY FOR INDIVIDUALS—GENERAL POINTS

Clarence J. Mann has noted that judicial control in the Communities is fashioned to meet the requirements of political organization and economic regulation in new forms of international organization.¹⁴ He saw the scope of review as reflecting a balance between two competing considerations: the absence of well-developed political controls in the Community called for the broad exercise of judicial review in order to prevent the abuse of power by highly independent Community organs, but this unprecedented attempt at economic integration demanded flexible management of Community powers.¹⁵ Thus, the decisions of Community organs necessarily had to be based on the evaluation of economic facts, trends, and situations, for which no firm standards existed; only to a limited extent could they be accessible to legal analysis and the normative judgments of the

13. See Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. C 310/1 (2004) (not yet ratified) [hereinafter Constitution].

14. See CLARENCE J. MANN, *THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION* 51 (1972). Mann saw the balance as being drawn on seven separate grounds of judicial review—the four mentioned in Articles 33 and 38 of the Treaty Establishing the European Coal and Steel Community (“ECSC Treaty”); Article 230 of the Consolidated Version of the Treaty establishing the European Community (“EC Treaty”); and Article 146 of the Treaty establishing the European Atomic Energy Community (“Euratom Treaty”), the review of acts using unlimited jurisdiction under Article 66(5) and 95 of the ECSC Treaty (approval of mergers and acquisitions; and small Treaty revisions, respectively), the procedure of Article 37 of the ECSC Treaty (Commission reaction or inaction which “is of a nature to provoke fundamental and persistent disturbances” in the economies of the Member States); and, finally, instances in which unlimited jurisdiction is conferred in respect of penalties imposed by the Community institutions under Articles 88 and 36 of the ECSC Treaty, Article 229 of the EC Treaty and Article 144 of the Euratom Treaty—this is particularly evident in, e.g., the fields of anti-trust and anti-dumping. See *id.* at 51-61 and accompanying text. The ECSC Treaty expired on July 23, 2002. As to unlimited jurisdiction, see generally, K.P.E. LASOK & TIMOTHY MILLETT, *JUDICIAL CONTROL IN THE EU*, 71, ¶ 136-39 (2004) and HENRY G. SCHERMERS & DENIS F. WAELEBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN UNION*, 518-19, § 1044 (6th ed. 2001). For a more general overview on judicial protection, see KOEN LENAERTS & DIRK ARTS, *PROCEDURAL LAW OF THE EUROPEAN UNION* (Robert Bray ed., 1999); ANGELA WARD, *EFFECTIVE JUDICIAL PROTECTION AND INDIVIDUAL RIGHTS IN THE EUROPEAN UNION* (2000); and ALBERTINA ALBORS-LLORENS, *PRIVATE PARTIES IN EUROPEAN COMMUNITY LAW: CHALLENGING COMMUNITY MEASURES* (1996).

15. See Mann, *supra* note 14, at 51.

Court.¹⁶ He further noted that it was neither desirable nor intended to raise the Court above the Community executive and quasi-legislative organs “zum höchsten Willensorgan in wirtschaftliche Fragen.”¹⁷ Against this background, it is unsurprising that the Court has consistently upheld a considerable margin of discretion for the Council and Commission in economic policy assessments,¹⁸ an approach, which is particularly visible in the agricultural policy sphere.¹⁹ Nevertheless, that discretion is not unfettered, and the Court has been willing to examine whether the Community institutions have remained within the bounds of their discretion.²⁰ The central controversy in the Court’s approach to judicial review concerns its policy on the admissibility of actions, rather than its practice as to the substantive grounds for review.

While addressees of Community decisions have no problem in bringing actions to the Court, the situation relating to the protection of persons other than the addressees of decisions has been unsatisfactory from the early days of Community law. The problem does not so much lie in the language of the fourth paragraph of Article 230 of the EC Treaty, as in the Court’s interpretation of it. That provision states:

Any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.²¹

16. *See id.*

17. *See id.* (citing various contemporary documents preparing the way for the ECSC Treaty).

18. *See, e.g.*, *Balkan-Import Export GmbH v. Hauptzollamt Berlin-Packhof*, Case 55/75, [1976] E.C.R. 19, 30, ¶8 [hereinafter *Balkan-Import*]; *SA Roquette Frères v. Council*, Case 138/79, [1980] E.C.R. 3333, 3358-59, ¶ 25; *Belgium v. Commission*, Case C-56/93, [1996] E.C.R. I-723, 772, ¶ 11 [hereinafter *Roquette Frères*]; *Compagnie Nationale Air France v. Commission*, Case T-358/94, [1996] E.C.R. II-2109, 2135, [1997] 1 C.M.L.R. 492, 497 [hereinafter *Compagnie Nationale*].

19. *See* RENÉ BARENTS, *THE AGRICULTURAL LAW OF THE EC: AN INQUIRY INTO THE ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY IN THE FIELD OF AGRICULTURE* (1994).

20. *See, e.g.*, *Bock v. Commission*, Case 62/70, [1971] E.C.R. 897, 909-910, ¶¶ 12-15, [1972] 1 C.M.L.R. 160, 172; *Firma A. Racke v. Hauptzollamt Mainz*, Case 98/78, [1979] E.C.R. 69, 81, ¶ 5; *John Deere Ltd. v. Commission*, Case C-7/95P, [1998] E.C.R. I-3111, 3150-51, ¶¶ 31-37, [1998] 5 C.M.L.R. 311, 346-47; *Italy v. Commission*, Case C-100/99, [2001] E.C.R. I-5217, 5252, 5258, 5260, ¶¶ 36, 62, 68-70.

21. EC Treaty, *supra* note 12, art. 230, O.J. C 325/33 (2002), at 126.

Although the criteria of “direct concern” and “individual concern” are separate criteria, the concept of “direct concern” has proved uncontroversial in practice.²² The concept of “individual concern” has, however, proved difficult and controversial since the beginning.

In its now notorious judgment in *Plaumann v Commission*,²³ the Court interpreted the words “individual concern” thus:

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.²⁴

Given that the applicant was affected by the disputed decision as an importer of clementines, the Court concluded that there was no feature which distinguished him in relation to the contested decision as in the case of the addressee, pointing out that the applicant was merely engaged in a commercial activity which could be practised by any person at any time.²⁵ Looking at the judgment in *Plaumann* against the light of Advocate General Roemer’s Opinion in that case, the basis for this approach becomes slightly clearer. He observed a fundamental difference between judicial review under the Treaty establishing the European Coal and Steel Community (“ECSC Treaty”) and judicial review under what is now the EC Treaty.²⁶ In the former case he

22. If an act is sufficiently clear and leaves no discretion to its addressee—or the addressee has indicated how it will act if permitted to do so—the European Court of Justice (“Court”) quickly finds that an applicant is directly concerned. *See, e.g.*, SA Piraiki-Patraiki v. Commission, Case 11/82, [1985] E.C.R. 207, 241-42, ¶¶ 4-10, [1985] 2 C.M.L.R. 4, 23-24; Société Louis Dreyfus & C^{ie} v. Commission, Case C-386/96P, [1998] E.C.R. I-2309, 2370-71, ¶¶ 43-47, [1999] 1 C.M.L.R. 481, 534-35.

23. *See Plaumann v. Commission*, Case 25/62, [1963] E.C.R. 95, [1964] C.M.L.R. 29.

24. *Id.* at 107, [1964] C.M.L.R. at 47.

25. *See id.*

26. *See* Opinion of Advocate General Roemer, *Plaumann v. Commission*, Case 25/62, [1963] E.C.R. 95, 115 [1964] C.M.L.R. 29, 36. Gerhard Bebr explained the purpose of annulment actions brought by private parties as serving not only to ensure a legal exercise of Community powers but also to protect interests of private parties against the illegal use of those powers. Like Advocate General Roemer, Bebr observed that the drafters of the EC Treaty sought to limit, if not exclude, annulment actions brought by private parties against normative acts of the Community institutions; moreover, they sought to exclude any possible *actio popularis*. *See* GERHARD BEBR, DEVELOPMENT OF JUDI-

saw the *legal nature* of a contested measure as paramount in fixing the limit of the right of action, so an individual decision affecting the applicant was sufficient.²⁷ In the EC Treaty (and in the Treaty establishing the European Atomic Energy Community (“Euratom Treaty”)),²⁸ on the other hand, he noted that account was already taken of the legal nature of the measures in the definition of the right of action by contrasting regulations and decisions; he therefore adopted the Commission’s standpoint that there must have been an intention to limit further by the criterion of “individual concern” the right of action by reference to legal effects.²⁹ He found that the Commission’s decision rejecting the request by the German government for authorization to suspend in part the general external tariff for fresh clementines was of a similar nature to an authorisation for suspension of customs duties involving an amendment of national customs laws.³⁰ He noted that all those wishing to import clementines in the course of 1962 were concerned and that it could well be that at the end of that year the number of those concerned was relatively small and easily ascertainable.³¹ However he found that this point could not be decisive: for Mr Roemer the important thing was that the concern did not arise from the individuality of particular persons but from membership of the abstractly defined group of all those who wished to import clementines during the period in question; their class was not ascertainable at the time of issue of the decision because, by its

CIAL CONTROL OF THE EUROPEAN COMMUNITIES 21 (1981). However, note that the view that the Member States consciously wanted to make what is now Article 230 of the EC Treaty more restrictive than Article 33 of the ECSC Treaty is not universally shared. See SCHERMERS & WAELBROECK, *supra* note 14, 428, § 868. For more on public interest litigation (*actio popularis*) in European Community law, see H.-W. MICKLITZ & N. REICH, PUBLIC INTEREST LITIGATION BEFORE EUROPEAN COURTS (1996); Laurence W. Gormley, *Public Interest Litigation*, in 1 LIBER AMICORUM SLYNN, *supra*, note 4, at 191; and Laurence W. Gormley, *Judicial Review in the EC and EU Law—Some Architectural Malfunctions and Design Improvements?* 4 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 167 (2001). For those who do not read German, Laurence Gormley’s article also includes a brief summary of Norbert Reich’s proposal about a European Fundamental Right Action, which appears in *Zeitschrift für Rechtspolitik* 375 (2000). See further O. de Schutter, *L’Accès de Groupements à la Justice Communautaire*, 7 JOURN. DES TRIB. DROIT EUR. 153 (1999).

27. See Opinion of Advocate General Roemer, *Plaumann*, [1963] E.C.R. at 115; [1964] C.M.L.R. at 36.

28. See *id.* at 116, [1964] C.M.L.R. at 36.

29. See *id.* at 116, [1964] C.M.L.R. at 36-37.

30. See *id.* at 116, [1964] C.M.L.R. at 37.

31. See *id.*

nature, it was constantly changing, though in practice only to a limited degree.³²

The point about the class of people being ascertainable at the time of issue of a decision would later be fundamental to the celebrated judgment in *Toepfer*.³³ In that case the only persons concerned by the measures which the Commission adopted were importers who had applied for an import licence on October 1, 1963.³⁴ The number and identity of these importers had already become fixed and ascertainable before the contested decision was adopted on October 4, 1963.³⁵ Accordingly, the Commission was in a position to know that its decision affected the interests and position of those importers alone.³⁶ The fundamental difference between *Plaumann* and *Toepfer* was that the class of persons affected was closed at the date of the Commission's decision addressed to the German government.³⁷ Economic operators, however, have often understandably felt that in reality the number of importers for a particular product is eminently known and predictable, and thus it is unsurprising that traders are often bemused by the *Plaumann* definition of "individual concern".³⁸ In these circumstances, with no redress open at the Community level, traders are left to the mercy of their national legal systems; the only hope is to attack national measures taken in pursuit of the Community measure and to attack the Community measure indirectly by persuading a national judge that it may be invalid and that the judge should make a reference to the Court of Justice for a preliminary ruling under Article 234 of

32. *See id.*

33. *See* Alfred Toepfer et al. v. Commission, Joined Cases 106 & 107/63, [1965] E.C.R. 405, 411-12, [1966] C.M.L.R. 111, 141-42.

34. *See id.* at 411, [1966] C.M.L.R. at 142.

35. *See id.*

36. *See id.*

37. *See* Bock v. Commission, Case 62/70, [1971] E.C.R. 897, 908, ¶ 10, [1972] C.M.L.R. 160, 171.

38. If a Community act has specifically taken into account the situation of the applicants, they will be individually concerned and by that act; however, if the applicants were merely known or identifiable at the time when the act was adopted, that will not be sufficient to confer individual concern—an applicant must also show that his or her specific situation was taken into consideration by the Community organ concerned. *See, e.g.,* Spijker Kwasten BV v. Commission, Case 231/82, [1983] E.C.R. 2559, 2566, ¶ 8, [1984] 2 C.M.L.R. 284, 292; Albetal SAT Ltda et al. v. Council, Case C-264/91, [1993] E.C.R. I-3265, 3279-80, ¶ 16; *Roquette Frères*, Case T-298/94, [1996] E.C.R. II-1531 1544-45, ¶ 42; Area Cova SA et al. v. Council & Commission, Case T-12/96, [1999] E.C.R. II-2301, 2315, ¶ 32.

the EC Treaty.³⁹

While the Court has stuck to the *Plaumann* approach through thick and thin, it has become apparent that in certain types of cases the soup is consumed less hot than it is served. Thus the Court has even permitted individual applicants to challenge truly normative Community acts if they can satisfy the criterion of direct and individual concern.⁴⁰ In various fields⁴¹ where there is a specific legal framework within which an applicant has actively participated in the procedure leading up to the adoption of a Community act⁴² or has been prevented from par-

39. See EC Treaty, *supra* note 12, art. 234, O.J. C 325/33 (2002), at 127-28. This supposes that there is a national measure resulting from the Community measure; as is discussed below, which may not always be the case, and, if so, the trader has no recourse at all. If a litigant would have had standing to bring an appeal, i.e., was the addressee or fell within the known scope of being directly and individually concerned, but failed to do so, the Court will not entertain an Article 234 of the EC Treaty reference as a back door way of seeking judicial review of the act concerned. See *TWD Textilwerke Deggendorf GmbH v. Germany*, Case C-188/92, [1994] E.C.R. I-833, 852-53, ¶¶ 13-17; [1995] C.M.L.R. 145, 159.

40. See, e.g., *Codorniu S.A. v. Council*, Case C-309/89, [1994] E.C.R. I-1853, 1885-86, ¶¶ 17-20, [1995] 2 C.M.L.R. 561, 587 (finding applicant to be directly and individually concerned); *Antillean Rice Mills NV et al. v. Commission*, Case C-390/95 P, [1999] E.C.R. I-769 at 810-11, ¶ 28; *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council*, Case T-135/96, [1998] E.C.R. II-2335 2362-63, ¶¶ 63-64, [1998] 3 C.M.L.R. 385, 406 (noting threshold of individual concern not crossed).

41. Competition, State aids, and anti-dumping procedures are the most obvious fields.

42. For complainants in competition and merger cases see, e.g., *Metro SB-Großmärkte & Co. KG v. Commission*, Case 26/76, [1977] E.C.R. 1875, 1901, ¶ 13 and *France et al. v. Commission*, Joined Cases C-68/94 & C-30/95, [1998] E.C.R. I-1375, 1471-1472, ¶¶ 55-58. For those whose competitive situation is likely to be substantially affected by an individual State aid decision see, e.g., *Compagnie Française*, Case 169/84, [1986] E.C.R. 391, 415, ¶ 24; *Van der Kooy*, Joined Cases 67, 68 & 70/85, [1988] E.C.R. 219, 268-69, ¶¶ 18-25; *William Cook PLC v. Commission*, Case C-198/91, [1993] E.C.R. I-2487, 2528, ¶ 29; *Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) v. Commission*, Case C-313/90, [1993] E.C.R. I-1125, 1185, ¶¶ 29-30; *Associazione Italiana Tecnico Economica del Cemento et al. v. Commission*, Joined Cases T-447-449/93, [1995] E.C.R. II-1971, 1994-96, ¶ 58; and *Association des Amidonneries de Céréales de la CEE (AAC) et al. v. Commission*, Case T-442/93, [1995] E.C.R. II-1329. For anti-dumping cases see, e.g., *EEC Seed Crushers' and Oil Processors' Federation (Fediol) v. Commission*, Case 191/82, [1983] E.C.R. 2913, 2934-36, ¶ 26-29; *Timex Corporation v. Council & Commission*, Case 264/82, [1985] E.C.R. 849 at 865-66, ¶¶ 14-16; *Allied Corporation et al. v. Commission*, Joined Cases 239 & 275/82, [1984] E.C.R. 1005, 1030-31, ¶¶ 11-16; *Allied Corporation et al. v. Council*, Case 53/83, [1985] E.C.R. 1621 at 1655-56, ¶¶ 2-5; and *Nashua Corporation v. Commission & Council*, Joined Cases C-133/87 & C-150/87, [1990] E.C.R. I-719 at 772-773, ¶¶ 14-21.

participating,⁴³ the Court has been relatively willing to find applicants admissible, although mere participation will not be sufficient.⁴⁴ Moreover, in some very specific circumstances, the Court has been willing to find applicants admissible rather than see manifest injustice occur. Thus, where the measure would have serious economic effects for the applicant,⁴⁵ or where specific rights have been infringed,⁴⁶ standing has more readily been found. The fact remains however that standing has from time to time been conferred in circumstances where a strict application of the *Plaumann* interpretation of individual concern could not have justified it.⁴⁷ The distinct impression is that that the Court's willingness to be supple resembles the length of the proverbial Lord Chancellor's foot.

A. From Murmur to Earthquake

Dissatisfaction with the *Plaumann* approach to individual concern among Advocates General can be traced back a long way,⁴⁸ and in academic circles has a long and distinguished heri-

43. See, e.g., *William Cook PLC v. Commission*, Case C-198/91, [1993] E.C.R. I-2487, 2528, ¶¶ 23-26, [1993] 3 C.M.L.R. 206, 237-38; *Société Anonyme à Participation Ouvrière Compagnie Nationale Air France v. Commission*, Case T-3/93, [1994] E.C.R. II-121, 161-63, ¶¶ 79-82; *Métropole Télévision SA et al. v. Commission*, Joined Cases T-528/93, T-542/93, T-543/93 & T-546/93, [1996] E.C.R. II-649, 674-75, ¶¶ 60-63.

44. See, e.g., *Verening van Exporteurs in Levende Varkens et al. v. Commission*, Joined Cases T-481/93 & 484/93, [1995] E.C.R. II-2941, 2964-65 ¶¶ 59-60, 62-63, 65; *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen et al. v. Commission*, Case T-86/96, [1999] E.C.R. II-179, 201, ¶¶ 61-65.

45. See, e.g., *Partie Écologiste 'Les Verts' v. European Parliament*, Case 294/83, [1986] E.C.R. 1339, 1368-69, ¶¶ 35-38, [1987] 2 C.M.L.R. 343, 374 (reasoning on grounds of inequality in judicial protection for the various groupings competing for election to the European Parliament); *Extramet Industrie SA v. Council*, Case C-358/89, [1991] E.C.R. I-2501, 2532, ¶¶ 16-17, [1993] 2 C.M.L.R. 619, 672 (noting serious effect on competitive situation of applicant); *Codorníu SA v. Council*, Case C-309/89, [1994] E.C.R. I-1853, 1886, ¶¶ 21-23 (noting trademark owner unable to continue to use a long-standing trademark).

46. See, e.g., *Antillean Rice Mills NV et al. v. Commission*, Joined Cases T-480/93 & T-483/93, [1995] E.C.R. II-2305, 2331-35, ¶¶ 64-79; *Antillean Rice Mills NV et al. v. Commission*, Case C-390/95P, [1999] E.C.R. I-769, 810-11, ¶¶ 25-29 (confirming reasoning of court below).

47. Perhaps the most celebrated instance is *Extramet Industrie v. Council*, [1991] E.C.R. I-2501, [1993] 2 C.M.L.R. 619, which is discussed below.

48. See, e.g., Opinion of Advocate General Slynn, *Bethell v. Commission*, Case 246/81, [1982] E.C.R. 2277, ¶ 2299 ("[A]lthough I see much force in the argument that natural and legal persons should have a wider right of challenge before the Court in regard to the activities of the Commission, I am, for the reasons given, of the opinion that the present application has to be declared inadmissible."). The learned Advocate

tage,⁴⁹ but it is really since the 1990's that the storm clouds started to gather for the assault on the *Plaumann* approach. As noted above, there have been some celebrated occasions on which the injustice and the strict application of *Plaumann* has been so manifest that the Court has had to have recourse to pulling an equitable rabbit out of the proverbial hat to escape from the digital straitjacket that its interpretation of the criterion of individual concern in *Plaumann* has become. These early escapes from the straitjacket in *Extramet*⁵⁰ and *Cordorniu*⁵¹ involved, as Advocate General Lenz observed in the latter case,⁵² the largest producer of the type of product involved; its economic activity was largely dependent on business transactions adversely affected by the contested regulation, and its activity was severely affected by that regulation.⁵³ The judgment in *Cordorniu* has rightly been described as "terse, in places even in-

General concluded that the commission's letter was not a decision which could be the subject of review. *See id.*; *see also* Opinion of Advocate General Jacobs, *Extramet*, Case C-358/89, [1991] E.C.R. I-2501 at 2523; Opinion of Advocate General Colomer, *Associazione Agricoltori della Provincia di Rovigo et al. v. Commission et al.*, Case C-142/95P, [1996] E.C.R. I-6669, 6679, ¶ 42. Extra-judicially, members of the Court and of the Court of First Instance ("CFI") have made no secret of their dissatisfaction with *Plaumann*. *See* the impressive list cited by Advocate General Jacobs in his *UPA* Opinion. *See* Opinion of Advocate General Jacobs, *UPA*, Case C-50/00, [2002] E.C.R. I-6677, 6682, ¶¶ 2 & 2 n.5, [2002] 1 C.M.L.R. 1.

49. *See, e.g.*, Anthony Arnall, *Private Applicants and the Action for Annulment Since Cordorniu*, 28 *COMMON MKT. L. REV.* 7 (2001); Lawrence W. Gormley, *Judicial Review in the EC and EU Law—Some Architectural Malfunctions and Design Improvements?* 4 *THE CAMBRIDGE Y.B. OF EUR. LEGAL STUD.* 167 (2001); Anthony Arnall, *Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty*, 32 *COMMON MKT. L. REV.* 7, (1995); Georges Vandersanden, *Pour un Élargissement du Droit des Particuliers D'Agir en Annulation Contre des Actes Autres que les Décisions qui leur sont Adressées*, 31 *CAH. DR. EUR.* 535 (1995); Denis Waelbroeck & A.-M. Verheyden, *Les Conditions de Recevabilité des Recours en Annulation des Particuliers Contre les Actes Normatifs Communautaires: A La Lumière du Droit Compare et de la Convention des Droits de L'Homme*, 31 *CAH. DR. EUR.* 399 (1995); Hjalte Rasmussen, *Why is Art. 173 Interpreted Against Private Plaintiffs?*, 5 *EUR. L. REV.* 112 (1980); Anthony Arnall, *Challenging EC Anti-Dumping Regulations: The Problem of Admissibility*, 13 *EUR. COMPETITION L. REV.* 73 (1992); Carol Harlow, *Toward a Theory of Access for the European Court of Justice*, 12 *Y.B. OF EUR. L.* 213 (1992); Ami Barav, *Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC*, 11 *COMMON MKT. L. REV.* 191 (1974).

50. *See* *Extramet Industrie SA v. Council*, Case C-358/89, [1991] E.C.R. I-2501, I-2532, ¶¶ 16-17, [1993] 2 C.M.L.R. 619, 672.

51. *See* *Codorniu SA v. Council*, Case C-309/89, [1994] E.C.R. I-1853, 1886, ¶ 20.

52. *See* Opinion of Advocate General Lenz, *Codorniu SA v. Council*, Case C-309/89, [1994] E.C.R. I-1853 at 1870-71, ¶ 58.

53. *See id.* at I-1870-71, ¶¶ 54, 58.

coherent.”⁵⁴ In *Greenpeace*⁵⁵ and *Danielsson*⁵⁶ the traditional hostile stance to standing for persons other than the addressees of an act was clearly maintained. Thus, where

the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act. The same applies to associations which claim to have *locus standi* on the basis of the fact that persons whom they represent are individually concerned.⁵⁷

Arnall has rightly opined that “it seems wrong in principle that a litigant’s right to invoke the jurisdiction of the court of law should depend on factors which are unrelated to the circumstances of his claim and which may vary with the passage of time.”⁵⁸ This sentiment was destined to find an echo in subsequent judicial pronouncements. He proposed that individual concern should be defined as “an act adversely affecting an applicant’s interests”.⁵⁹ This reformulation of the meaning of the term “individual concern” could indeed have been adopted by the Court without a revision of the EC Treaty or even without stretching its wording, although it would be more transparent to substitute his proposed definition for the present criterion in a Treaty amendment.

On March 21, 2000, in his rightly celebrated opinion in *Unión de Pequeños Agricultores v Council*⁶⁰ (“UPA”), Advocate General Jacobs delivered an earthquake which shook the Plateau de

54. See Anthony Arnall, *Challenging Community Acts—An Introduction*, in MICKLITZ & REICH, *supra* note 26, at 39, 46.

55. See *Stichting Greenpeace Council (Greenpeace International) et al. v. Commission*, Case T-585/93, [1995] E.C.R.T. II-2205, 2230-32, ¶¶ 59-65; see also *Stichting Greenpeace Council (Greenpeace International) et al. v. Commission*, Case C-321/95P, [1998] E.C.R. I-1651, 1715-16, ¶¶ 27-35.

56. See *Danielsson et al. v. Commission*, Case T-219/95R, [1995] E.C.R. II-3051, 3071-74, ¶¶ 66-77 (deciding under the Euratom Treaty).

57. *Stichting Greenpeace Council (Greenpeace International) et al. v. Commission*, Case C-321/95P, [1998] E.C.R. I-1651, 1715, ¶¶ 28-29.

58. Anthony Arnall, *Challenging Community Acts—An Introduction*, in MICKLITZ & REICH, *supra* note 26, at 51.

59. *Id.* at 53-54.

60. See Opinion of Advocate General Jacobs, *UPA*, Case C-50/00P, [2002] E.C.R. I-6677, 3 C.M.L.R. 1, 1.

Kirchberg⁶¹ to its foundations. He dismissed the adequacy of leaving the challenge of normative acts largely to the national courts.⁶² In sum, his argument that proceedings before national courts may not provide effective judicial protection of individual applicants is, unlike ancient Gaul, divided into four parts. Firstly, national courts may not themselves declare Community law measures invalid; their limited competence in such matters is in stark contrast to their important role in relation to the application, enforcement and interpretation of Community law.⁶³ Secondly, there is no *right* of access to the Court for a remedy under Article 234 of the EC Treaty;⁶⁴ national courts have discretion whether to refer cases, and, even in those cases where there is an obligation to refer, they may err in their assessment of the necessity of a reference or in the questions posed.⁶⁵ Thirdly, where Community measures do not require implementing acts, or where national authorities do not base their own acts on a Community framework, there may be no possibility at all of challenging Community measures; and to say that a person must ostensibly breach directly applicable Community law and face civil or even criminal proceedings in order to try to get a reference does not encourage respect for the rule of law.⁶⁶ His fourth, and final, consideration relates to procedural disadvantages: substantial extra delays and costs. Moreover, the willingness of national courts to order the interim suspension of Community measures pending a ruling from the Court may vary from Member State to Member State, which could prejudice the uniform application of Community law or even totally subvert it.⁶⁷

61. Plateau de Kirchberg is on the outskirts of Luxembourg City and is where the Court's buildings are located.

62. See Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at I-6693, ¶ 40, [2002] 3 C.M.L.R. at 18.

63. See *id.* at I-6693, ¶ 41, 3 C.M.L.R. at 18.

64. See EC Treaty, *supra* note 12, art. 234, O.J. C 325/33 (2002), at 127-28; see also Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at I-6693, ¶ 42, [2002] 3 C.M.L.R. at 18-19.

65. See Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at I-6693, ¶ 42, [2002] 3 C.M.L.R. at 18-19. The Court may, however, reformulate the questions, but a reference cannot be wholly reinvented.

66. See *id.* at I-6694, ¶ 43, [2002] 3 C.M.L.R. at I-6694, ¶ 43. This point bears interesting comparison with the disgraceful circumstances in *R. v. Tymen*, Case 269/80, [1981] E.C.R. 3079.

67. See Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at I-6694, ¶ 44, [2002] 3 C.M.L.R. at 19.

Mr. Jacobs went on to observe that an action for annulment before the Court was a more appropriate vehicle for deciding issues of validity issues than Article 234 of the EC Treaty. A full exchange of pleadings is possible in a direct action, but under Article 234 only one round of pleading takes place before the hearing.⁶⁸ In a direct action, intervention by interested third parties is possible, but this is impossible on a reference unless the third-party had intervened in the litigation before the national courts.⁶⁹ Finally, challenges to Community acts have to be brought to the Court quickly, and the application of strict standing criterion at the Community level means that those who fall outside the criterion are left to take their chances in the national forum.⁷⁰ This has the disadvantage of reducing legal certainty by effectively extending the possibility of challenge without a limited time.⁷¹ Although mixed issues of validity and interpretation might appropriately be left to the national court filtration mechanism of Article 234 of the EC Treaty, the learned Advocate General concluded that where only the validity was at issue, the more appropriate route would be the direct action for annulment.⁷² In any event, an appeal against a ruling of the Court of First Instance ("CFI") on points of law alone is open to the Court of Justice itself.⁷³ However, the learned Advocate General concluded that those who were not individually concerned should not automatically be given standing if they could show that no other effective judicial protection was available to the applicant.⁷⁴ The absence of national remedies is not, he opined, a matter for Community law, nor is it for the centralised Community judiciary to examine the details of national procedural law.⁷⁵ Making standing dependant on national law would also risk divergence and inequality developing in access to the Court

68. *See id.* at I-6695, ¶ 46, [2002] 3 C.M.L.R. at 20.

69. *See id.* at I-6695, ¶ 47, [2002] 3 C.M.L.R. at 2047.

70. *See id.* at I-6695-97, ¶¶ 47-53, [2002] 3 C.M.L.R. at 20-22.

71. This would not be a route available to someone with standing to challenge a Community act directly but did not avail himself of that right. *See* TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland, Case C-188/92, [1994] E.C.R. I-833 at 852-53, ¶ 18.

72. *See* Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at I-6699, ¶ 65, 3 C.M.L.R. at 24.

73. *See id.* at I-6709, ¶ 92, 3 C.M.L.R. at 33.

74. *See id.* at I-6696, ¶ 50, 3 C.M.L.R. at 21.

75. *See id.* at I-6696, ¶ 52, 3 C.M.L.R. at 21.

of Justice for litigants from different Member States.⁷⁶ In view of all these considerations, Advocate General Jacobs proposed that the notion of individual concern should be reinterpreted: accordingly, he proposed that, “an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests.”⁷⁷

As will be apparent, this test is stricter than that advocated by Arnall, because of the addition of the word “substantial.” This test was to leave considerable room for the court to take a view on the individual merits of each case as to admissibility, but it would be a higher threshold for cowboy claimants, while being more liberal than the traditional approach of the Court. Mr. Jacobs noted a number of arguments in favour of his text.⁷⁸ Firstly, in view of the rejection of the option of granting automatic standing in the absence of other effective judicial protection, this was the only way of avoiding a denial of justice.⁷⁹ Secondly, it would ensure that individual applicants who were directly and adversely affected by Community acts would never be without a remedy, while having the additional advantage of allowing validity issues relating to normative acts to be addressed in the best forum (one which could also grant effective interim relief).⁸⁰ Thirdly, it would provide clarity to a body of law that many commentators viewed as at best conceptually uncertain.⁸¹ Fourthly, it would encourage validity issues to be resolved in direct actions rather than through the precarious route of national courts and Article 234 of the EC Treaty.⁸² As a penultimate point, Mr. Jacobs felt that this interpretation would transfer the emphasis of judicial review from admissibility issues to issues of substance.⁸³ Finally, he identified a number of anomalies in the case law on judicial review arising from the different approaches to the notion of “individual concern” and to the other parts of Article 230 of the EC Treaty,⁸⁴ and from the fact that there were

76. *See id.* at I-6695-97, ¶ 53, 3 C.M.L.R. at 22.

77. *Id.* at I-6715, ¶ 102(4), 3 C.M.L.R. at 37.

78. *See id.*

79. *See id.* at I-6699, ¶ 62, 3 C.M.L.R. at 23.

80. *See id.* at I-6699, ¶ 63, 3 C.M.L.R. at 23.

81. *See id.* at I-6699, ¶ 64, 3 C.M.L.R. at 23-24.

82. *See id.* at I-6699, ¶ 65, 3 C.M.L.R. at 24.

83. *See id.* at I-6700, ¶ 66, 3 C.M.L.R. at 24.

84. As an example of judicial creativity in this area, see *European Parliament v. Council*, Case C-70/88, [1990] E.C.R. I-2041—Chernobyl, standing for the Parliament to pro-

no standing restrictions on applicants seeking damages for loss caused by Community measures.⁸⁵ He then proceeded to make short shrift of the objections to widening standing.⁸⁶ He noted that his suggestion did not depart from the wording of the EC Treaty; that comparison with the ECSC Treaty was of limited relevance today in increasing active Community legal order in which there was a correspondingly greater need for effective judicial protection against unlawful action; that the Community legal order had outgrown mere intergovernmental co-operation,⁸⁷ and the Court was far more than an international tribunal; that the deluge argument of the centralised Community judiciary being flooded out by a mass of litigation was overstated, and, finally, that procedural and jurisdictional reforms, some of which had already been introduced and others which were envisaged in the Treaty of Nice,⁸⁸ could increase the efficiency of the case handling by the Court of Justice.⁸⁹

This Opinion, delivered to the Court hearing the case in plenary session with a view to reconsidering its case law on individual concern, was followed by an aftershock from an at-first-sight surprising source. A few weeks later, on May 3, 2002, a notably strong First Chamber of the CFI, sitting in extended composition, delivered its judgment upon the admissibility issue in *Jégo-Quéré et Cie v. Commission*.⁹⁰ Without in any way seeking to

test its prerogatives, later codified and extended to privileged applicant, i.e., no requirement to show an interest) in amendments to the EC Treaty. *See, e.g.*, Council v. European Parliament, Case C-34/86, [1986] E.C.R. 2155, 2212; European Parliament v. Council, Case C-295/90, [1992] E.C.R. I-4193, 4236-37; European Parliament v. Council, Case C-271/94, [1996] E.C.R. I-1689, 1719 (applying Article 231 of the EC Treaty (ex Article 174)).

85. *See* Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at I-6701-02, ¶ 72, 3 C.M.L.R. at 26; *see also* EC Treaty, *supra* note 12, arts. 235, 288, O.J. C 325/33 (2002), at 128, 147.

86. *See* Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at I-6702-05, ¶¶ 75-81, 3 C.M.L.R. at 27-29.

87. *See* EC Treaty, *supra* note 12, art. 252, O.J. C 325/33 (2002), at 134-35.

88. For an overview of the judicial architecture of the European Union after Nice, *see* Lawrence W. Gormley, *The Judicial Architecture of the European Union after Nice*, in *ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION* 133 (A.M. Arnulf & D. Wincott eds., 2001).

89. *See* Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at I-6705, ¶ 81, 3 C.M.L.R. at 29.

90. *See Jégo-Quéré*, Case T-177/01, [2002] E.C.R. II-2365, [2002] 2 C.M.L.R. 44, 1137. The judges were Bo Vesterdorf (President), Koen Lenaerts, Josef Azizi, Nicholas James Forwood, and Hubert Legal.

revise the wording of Article 230 of the EC Treaty itself, the CFI proceeded to decimate the standard interpretation of individual concern in *Plaumann*.⁹¹ It is particularly important in this case to note that it concerned a situation in which no act had been adopted at national level in pursuance of the Community regulation involved, against which proceedings could be brought.⁹² The CFI noted that although the regulation was of general application, the applicant was directly concerned as it was bound by the regulation, which required the adoption of no further measures either at Community or national level.⁹³ However, under the existing case-law it was impossible to find that the applicant was individually concerned: the applicant could not be individually differentiated, even though it was in practice the only operator fishing for whiting in the waters south of Ireland with vessels over thirty meters in length; and while the applicant had had meetings with the Commission, there were no procedural rights conferred upon it under a specific scheme of Community legislation, and it had not produced evidence of the peculiar circumstances such as those in *Extramet* or *Cordornú*.⁹⁴ The Commission had argued that the applicant was not left without a remedy, because it could seek damages under the second paragraph of Article 235 of EC Treaty in conjunction with Article 288 of the EC Treaty.⁹⁵ However these submissions found no favour with the CFI. Firstly, access to the courts was one of the essential elements of a Community based on the rule of law and was enshrined in the Community legal order.⁹⁶ Secondly, the right to an effective remedy before a court of competent jurisdiction was based on the constitutional traditions common to the laws of the Member States and also based on Articles 6 and 13 of the European Convention on Human Rights.⁹⁷ Finally, the right to an

91. *See id.* at II-2382, ¶ 47, 2 C.M.L.R. 44 at 1150.

92. *See id.* at II-2380, ¶ 39, 2 C.M.L.R. 44 at 1148.

93. *See id.* at II-2377, ¶ 26, 2 C.M.L.R. 44 at 1146.

94. *See id.* at II-2380, ¶ 37, 2 C.M.L.R. 44 at 1148.

95. *See id.* at II-2380, ¶ 40, 2 C.M.L.R. 44 at 1148.

96. *See id.* at II-2380, ¶ 41, 2 C.M.L.R. 44 at 1148. Because of the complete system of remedies to permit review of the legality of acts of the Community Institutions, see *Partie écologiste 'Les Verts' v. European Parliament*, Case 294/83, [1986] E.C.R. 1339, [1987] 2 C.M.L.R. 343, in which the Court of Justice also noted that "[n]either [the Community's] [M]ember-States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." *Id.* at 1365, [1987] 2 C.M.L.R. at 371.

97. *See Jégo-Quéré I* at II-2380, ¶ 41, 2 C.M.L.R. 44 at 1148. European Convention

effective remedy for everyone whose rights and freedoms guaranteed by the law of the European Union had been violated was reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on December 7, 2000.⁹⁸ Given that the Charter does not itself have legal force, this last argument is essentially political in nature. However, soft law can at the very least be a very effective aid to interpretation; it can be relied upon to bolster a conclusion, and can be taken into account by the Court.⁹⁹

The CFI proceeded to examine whether in this case the applicant would be deprived of its right to an effective remedy if the application were to be held inadmissible.¹⁰⁰ It noted that no action before a national court was possible, and adopted Advocate General Jacobs's argument about it not being possible to require individuals to break the law in order to gain access to justice.¹⁰¹ Moreover, falling back on an action of the damages would not result in the removal from the Community legal order of a measure that was held to be illegal.¹⁰² In any event, the admissibility and substantive requirements relating to actions for damages differed from those for action for annulment, and judicial review carried out in the former actions was limited to censuring sufficiently serious infringements of rules of law intended to confer rights on individuals, whereas in the latter case judicial review was more comprehensive.¹⁰³ This led to the inevitable conclusion, that neither the possibility of using Article 234 of the EC Treaty, nor of an action in damages could be regarded as guaranteeing persons the right to an effective remedy enabling them to contest the legality of measures of general application which directly affected their legal situation.¹⁰⁴ Without in any way wishing to do anything other than respect the procedures

for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222, in its present form contained in Protocol No. 11 thereto (ETS No. 155) (entered into force November 1, 1998).

98. See *Jégo-Quéré I* at II-2381, ¶ 42, 2 C.M.L.R. 44 at 1148; see also Charter of Fundamental Rights of the European Union, art. 47, O.J. C 364/1 (2000).

99. See, e.g., *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 22/84, [1986] E.C.R. 1651; *United Kingdom v. Commission*, Case C-106/96, [1998] E.C.R. I-2728.

100. See *Jégo-Quéré I*, [2002] E.C.R. at 2381, ¶ 43, [2002] 2 C.M.L.R. at 1148-49.

101. See *id.* at 2381, ¶ 45, [2002] 2 C.M.L.R. at 1149.

102. See *id.* at 2382, ¶ 46, [2002] 2 C.M.L.R. at 1149-50.

103. See *id.*

104. See *id.* at 2382, ¶ 47, [2002] 2 C.M.L.R. at 1150.

established by the EC Treaty,¹⁰⁵ the CFI agreed with Advocate General Jacobs that there was no compelling reason to read into the notion of “individual concern” in the fourth paragraph of Article 230 of the EC Treaty a requirement that an applicant seeking to challenge the general measure had to be differentiated from all others affected by it in the same way the addressee.¹⁰⁶ Accordingly, the CFI felt that reconsideration of the previous strict interpretation of that notion of individual concern was appropriate,¹⁰⁷ and it adopted the following view:

A natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question effects his legal position, in a manner which is both definite and immediate, by restricting his right or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.¹⁰⁸

The conclusion was that the applicant, who was clearly affected by the scope and provisions of the regulation, was individually concerned, and, as direct concern had also been established, its action was admissible.¹⁰⁹

It is perhaps somewhat inevitable that the Court of Justice felt that its toes had been trodden on, given that it was still deliberating on *UPA*. A number of reasons support the conclusion that the CFI was correct to act when it did, however. First of all, although it was (at that time) attached to the Court of Justice, it has its own jurisdiction, subject to appeal on a point of law to the Court of Justice.¹¹⁰ It does not have to wait for the Court of Jus-

105. The CFI clearly had an eye to the Court of Justice looking over its shoulder by specifically stating that it was not redrafting the EC Treaty, although the Court of Justice does that itself on occasion—e.g., Article 231 of the EC Treaty confers power on the Court to decide which effects of an annulled regulation shall be considered definitive, but the Court has interpreted that provision by analogy to give itself the same power in respect of directives. *See, e.g.*, *European Parliament v. Council*, Case C-295/90, [1992] E.C.R. I-4193, 4236-37.

106. *See Jégo-Quéré I*, [2002] E.C.R. at 2383, ¶ 49, [2002] 2 C.M.L.R. at 1150.

107. *See id.* at 2383, ¶ 50, [2002] 2 C.M.L.R. at 1150.

108. *Id.* at 2383, ¶ 51, [2002] 2 C.M.L.R. at 1150.

109. *See id.* at 2384, ¶¶ 52-54, [2002] 2 C.M.L.R. at 1150-51.

110. *See* Protocol on the Statute of the Court of Justice, art. 19, *annexed to the TEU, the EC Treaty, and the Euratom Treaty*, O.J. C-325/167 (2002), at 180. If a case is remitted to the CFI by the Court of Justice for re-determination in accordance with a

tice to act: it can form its own view¹¹¹ in its original jurisdiction because the CFI is perfectly entitled to depart from an earlier line taken by the Court of Justice if the circumstances so demand.¹¹² Secondly, judicial development often takes place in a dialogue. A lower court—or a dissenting judge—may often in the long-term have its or his or her view adopted by higher courts. English lawyers only have to think of Lord Denning's views on the citation of Hansard in court and by judges eventually triumphing in the Judicial Committee of the House of Lords to illustrate that point.¹¹³ Thirdly, if the CFI had blindly followed the *Plaumann* approach, this would very clearly have left the applicant helpless. Given that the Court of Justice had already decided to hear *UPA* in plenary session with a view to re-considering its case law on individual concern, a speedy decision by the CFI would offer the possibility that its views could be taken into account by the Court of Justice in its deliberations as part of the existing corpus of law. But while some sensitive souls in the Court of Justice may have felt that the CFI was acting like an upstart, such feelings resemble those of a patient with a terminal case of wounded pride. It would, with the utmost possible respect, be manifestly wholly inappropriate if the CFI were unable to contribute the judicial, academic, and even policy dialogue about judicial protection simply for fear of treading on somewhat judicial toes of varying length. Even the Court of Justice itself is not infallible, nor does it always arrive at results clearly supported by the premises on which they are based. Even

point of law decided on appeal by the Court of Justice, the CFI is then bound by that decision on the point of law involved. *See id.* art. 61, at 181.

111. *See id.* art. 54, at 179.

112. *See id.* art. 54, at 179. *See, e.g.,* Altmann et al. v. Commission, Joined Cases T-177/94 & 377/94, [1996] E.C.R. II-2041 (departing from *Ainsworth et al. v. Commission & Council*, Joined Cases C-271/83, 15, 36, 113, 158, 203/84 & 13/85, [1987] E.C.R. I-167, because of changes in nature of JET project). The CFI thus followed the analysis advocated by Advocates General Mischo and VerLoren van Themaat in that earlier case.

113. *See* *Pepper (Inspector of Taxes) v. Hart*, [1993] A.C. 593 (H.L.), (overruling on this point *Davis v. Johnson*, [1979] A.C. 264 (H.L.)). As to Lord Denning's approach, *see* *Davis v. Johnson*, [1978] 1 All E.R. 841 at 850-52—although as to the substantive result the House of Lords affirmed the Court of Appeal. But Lord Denning demonstrated that there was a perfect way around the views of the House of Lords by quoting Hansard in *Davis*, and quoting someone else citing Hansard. *See* *R. v. Local Commissioner for Administration for the North and East Area of England, ex parte Bradford Metropolitan City Council*, [1979] E.C.R. 2 (elaborating on the meaning of maladministration).

a long-standing line of authority which is widely perceived to be perverse or no longer appropriate must be open to challenge in judicial as well as academic or even political fora.

But it seems that there is no limit to the deafness of the Court of Justice to criticism of its standpoint on admissibility issues. Very shortly after the aftershock of the CFI's judgment in *Jégo-Quéré*, the Court of Justice delivered its reaction in its judgment in *UPA*.¹¹⁴ The Court noted that the particular findings of the CFI in *UPA* that the regulation involved was of general application, that the appellants' specific interests were not affected, and that the appellant did not satisfy the *Plaumann* criterion, were not being challenged.¹¹⁵ The sole point at issue was therefore whether the appellant, as representative of its members, could nevertheless have standing on the sole ground that, in the absence of any legal remedy before the national courts, the right to effective judicial protection required it.¹¹⁶ The Court then summarised its existing case law and reaffirmed the entitlement, as a matter of Community law, of individuals to effective judicial protection of rights they derive from the Community legal order.¹¹⁷ It also reaffirmed its often-stated view that the EC Treaty had established a complete system of legal remedies and procedures for judicial review of Community acts, through direct and indirect means.¹¹⁸ The Court went on to state that it was for the Member States to establish a system of legal remedies and procedures which ensured respect for the right to effective judicial protection.¹¹⁹ In that context, on the basis of what is now Article 10 of the EC Treaty, national courts were

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.¹²⁰

114. *See UPA*, Case C-50/00P, [2002] E.C.R. I-6677, [2002] 3 C.M.L.R. 1.

115. *See id.* at 6732, ¶ 32, [2002] 3 C.M.L.R. at 45.

116. *See id.* at 6732, ¶ 33, [2002] 3 C.M.L.R. at 45-46.

117. *See id.* at 6733-34, ¶¶ 34-41, [2002] 3 C.M.L.R. at 46-47.

118. *See id.* at 6734, ¶ 40, [2002] 3 C.M.L.R. at 47.

119. *See id.* at 6734, ¶ 41, [2002] 3 C.M.L.R. at 47.

120. *Id.* at 6735, ¶ 42, [2002] 3 C.M.L.R. at 47. In this case, the Court of Justice took a similar view to that of the CFI in *UPA*, Case T-173/98, [1999] E.C.R. II-3357 at

Like Advocate General Jacobs, it rejected the argument that the non-availability of action at national level should allow direct action against the Community measure concerned: this would require the centralised Community judiciary to examine interpret national procedural law in each case, something which was beyond their jurisdiction.¹²¹ The Court noted that there had been exceptional circumstances in which a litigant had demonstrated that it was directly and individually concerned by a regulation, but stated that such instances could not have the effect of setting aside the condition of direct and individual concern which was laid down in the EC Treaty itself.¹²² Any changes would have to be made by way of revision of the EC Treaty using the procedure of Article 48 of the EU Treaty.¹²³

This clearly bounced the ball in the direction of the Member States. On the one hand it is up to them to decide whether to revise the Treaty; on the other hand national courts are required by Community law to be as accommodating as possible to litigants seeking to challenge Community acts. While the points made by the Court may be fair enough in themselves, the Court wholly sidesteps the criticisms of Advocate General Jacobs and the CFI; it misses the point completely. Advocate General Jacobs himself rejected the idea that the availability or otherwise of remedies at national level should be a determining criterion for admissibility at the Community level.¹²⁴ What both the Advocate General and even more clearly the CFI sought to do was to expand the *interpretation* of the existing wording of the fourth paragraph of Article 230 of the EC Treaty in the manner in which would avoid injustice yet be sufficiently certain to ensure that cowboy litigants could not jeopardise the proper functioning of

3378-3379, ¶¶ 62-63 and *SalamanderAG et al. v. European Parliament & Council*, Joined Cases T-172/98, T-175/98 & T-177/98, [2000] E.C.R. II-2487 at 2516, ¶ 74, [2000] 2 C.M.L.R. 1099, 1118. The words "as far as possible" are new, however, and they clearly echo the limitation of the obligation on national courts to interpret national law "as far as possible" in conformity with Community directives. *See, e.g.,* *Wagner Miret v. Fondo di Garantía Social*, Case C-334/92, [1993] E.C.R. I-6911 at 6932, ¶ 23, [1995] 2 C.M.L.R. 49, 64.

121. *See* *UPA*, [2002] E.C.R. at 6735, ¶ 43, [2002] 3 C.M.L.R. at 47; *see also* Opinion of Advocate General Jacobs, *UPA*, Case C-50/00P, [2002] E.C.R. I-6677, 6696-97, ¶¶ 50-53, [2002] 3 C.M.L.R. 1, 21-22.

122. *See* *UPA*, [2002] E.C.R. at 6735, ¶ 44, [2002] 3 C.M.L.R. at 47-48.

123. *See id.* at 6735-36, ¶ 45, [2002] 3 C.M.L.R. at 48.

124. *See* Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at 6693-94, ¶ 40-44, [2002] 3 C.M.L.R. at 18-20.

the Community system.¹²⁵

It is all very well for the Court of Justice to say that if there are changes to be made, it is up to the Member State to make them, but this statement ignores the fact that it is unnecessary to adapt the Treaty itself to permit more general standing, it would be sufficient for the Court of Justice to revisit its interpretation of the present wording of the Treaty. The interpretation advocated by the CFI is more worked out in detail than that proposed by Advocate General Jacobs but undoubtedly shows the enormous influence of his Opinion.¹²⁶ It has undeniable merits. It is sufficiently demanding with the use of the phrase "it in a manner which is both definite and immediate" and sufficiently targeted "by restricting his rights or imposing obligations on him."¹²⁷ As noted above, it does not throw open the door to cowboy applicants, but it does clearly complete—at Community level—the system of remedies which Community law seeks to afford litigants. It has the undeniable advantage of removing litigants from the often arbitrary and sometimes only scantily informed venue of national law as a threshold that must be crossed for a remedy in relation to the Community act concerned.

Already politically at Nice,¹²⁸ the need for credibility in the eyes of citizens of the Union and other parties as to the transparent nature of Community legislative action and judicial protection has been acknowledged. It is no longer appropriate or acceptable that normative Community acts (outside special systems such as competition, State aids, and anti-dumping) have for so long been subject to scrutiny at the instance of a private party who is clearly affected by those acts only if that party can either convince a national judge to make a reference, or satisfy the centralized Community judiciary that there has been a sufficiently serious infringement of a superior rule of law intended to confer rights on individuals.¹²⁹ As Advocate General Jacobs amply

125. See *id.* at 6712-13, ¶ 101-103, [2002] 3 C.M.L.R. at 36-38; see also *Jégo-Quéré I*, Case T-177/01, [2002] E.C.R. II-2365, 2383, ¶ 50, [2002] 2 C.M.L.R. 44, 1137, 1150.

126. *Contra Jégo-Quéré I*, [2002] E.C.R. at 2382-83, ¶ 47-51, [2002] 2 C.M.L.R. at 1150; Opinion of Advocate General Jacobs, *UPA*, [2002] E.C.R. at 6713-18, ¶ 102-103, [2002] 3 C.M.L.R. at 36-38.

127. *Jégo-Quéré I*, [2002] E.C.R. at 2383, ¶ 51, [2002] 2 C.M.L.R. at 1150.

128. See Charter of Fundamental Rights of the European Union, art. 47, O.J. C 364/01 (2000).

129. See 1-1 COMPETITION LAW OF THE EUROPEAN COMMUNITY § 1.05, at (2)(c)(i) (2nd ed. 2001 & Supp. 2005); see also BUSINESS GUIDE TO EU INITIATIVES 2004, EU COM-

demonstrated in his Opinion in *UPA*, the time is more than ripe for an evolution in the interpretation of the notion of individual concern.¹³⁰

While it may be argued that changing the restrictive approach would centralise appeals, removing them from being close to the citizen, whereas the Court of Justice's approach of leaving normative challenges to be routed via the national courts is more citizen friendly, that view ignores four key points. Firstly, the existing approach leaves people without a remedy where there is no national act to attack that is rooted in the Community act. Secondly, it makes more sense for issues of validity to be decided as far as possible in the context of proceedings that permit speedy and effective remedies, including interim measures, and it is well known that the Court of Justice feels that the centralised Community judiciary is the best forum for deciding such matters. Thirdly, the approach of the CFI in fact promotes more use of a one-stop shop instead of a possibly multilayered national approach preceding a reference. Finally, it avoids litigants being at the mercy on occasions of the whimsical approaches of national judiciaries that may refuse to make references in cases in which the need to refer is glaringly apparent.

The Commission lodged an appeal in *Jégo-Quéré*¹³¹ a few days before the judgment of the Court of Justice in *UPA*.¹³² Ad-

MITTEE OF THE AMERICAN CHAMBER OF COMMERCE IN BELGIUM 2004, (2004); *Court of First Instance: Ruling in Favor of Individual's Right to Challenge EU Laws*, EUR. INFO. SERVICE, May 9, 2002, available at <http://eisnet.eis.be/Content/Default.asp.html>; *Community Law: Court Rules Individual Cannot Challenge Law of General Application*, EUR. INFO. SERVICE, Apr. 7, 2004, available at <http://eisnet.eis.be/Content/Default.asp.html>.

130. See Opinion of Advocate General Jacobs, *UPA*, Case C-50/00P, [2002] E.C.R. I-6677, 6705, ¶ 82, [2002] 3 C.M.L.R. 1, 29-30. Advocate General Jacobs felt that the Court of Justice's case law was hardly entirely consistent and settled, as there had been some movement over the years; the Court of Justice's case law on standing was increasingly out of line with the administrative laws of the Member States. The establishment of the CFI and the progressive transfer to it of all actions brought on by individuals made it increasingly appropriate to enlarge the standing of individuals to challenge general measures—and this could be achieved without stretching the wording of Article 230 of the EC Treaty. Finally, the case-law of the Court of Justice on the principle that the national courts must offer effective judicial protection of rights granted under Community law made it increasingly difficult to justify narrow restrictions on standing before Community courts.

131. See *Commission v. Jégo-Quéré et Cie SA*, Case C-262/02P, [2004] E.C.R. I-3425, [2004] 2 C.M.L.R. 12 [hereinafter *Jégo-Quéré II*].

132. The Commission lodged an appeal in *Jégo-Quéré I* on July 17, 2002, a few days before the judgment of the Court of Justice in *UPA* on July 25, 2002.

vocate General Jacobs was once again called upon for his opinion. He accepted that in view of the judgment in *UPA* the Commission had to succeed in its appeal on the admissibility issue.¹³³ However, he took the opportunity to make some general comments in the following terms:

As I explained in my Opinion in *Unión de Pequeños Agricultores*, I find highly problematic the strict test of standing currently applicable under the fourth paragraph of Art[icle] 230. In my view, that test gives rise to a real risk that individuals will be denied any satisfactory means of challenging before a court of competent jurisdiction the validity of a generally applicable and self-implementing Community measure. It may prove impossible for such individuals to gain access to a national court (which in any event has no competence to rule on validity) otherwise than by infringing the law in the expectation that criminal (or other enforcement) proceedings will then be brought against them when the national court may be persuaded to refer to the Court of Justice the issue of the validity of the measure. Besides the various practical disadvantages which may attend the making of a reference in the context of criminal proceedings, such a procedural avenue exposes the individuals in question to an intolerable burden of risk.

Nor do Art[icle] 235 and the second paragraph of Art[icle] 288 appear to me to supply an adequate alternative remedy. As the Court of First Instance stated in the present case, an action for damages does not allow the Community judicature to perform a comprehensive judicial review of all of the factors which may affect the legality of a Community measure. For such an action to proceed, it is necessary for the applicant to show a sufficiently serious infringement of rules of law intended to confer rights on individuals. The Commission is not, in my view, correct to state that in order to determine whether such an infringement has been shown, it will always be necessary for a Community Court to undertake an exhaustive investigation of the legality of the measure at issue.

However, it clearly follows from the Court's judgment in *Unión de Pequeños Agricultores* that the traditional interpretation of individual concern, because it is understood to flow from the Treaty itself, must be applied regardless of its consequences for the right to an effective judicial remedy.

133. See Opinion of Advocate General Jacobs, *Jégo-Quéré II*, Case C-262/02P, [2004] E.C.R. I-3425, __, ¶¶ 30, 41, 57, [2004] 2 C.M.L.R. 12, 275, 277, 279.

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 Art[icle] 230 is considered by the Court to impose. As the Court made clear in *Unión de Pequeños Agricultores*, necessary reforms to the Community system of judicial review are therefore dependent upon action by the Member States to amend that provision of the Treaty. In my opinion, there are powerful arguments in favour of introducing a more liberal standing requirement in respect of individuals seeking to challenge generally applicable Community measures in order to ensure that full judicial protection is in all circumstances guaranteed.¹³⁴

The battle for judicial revision had clearly been lost, although the learned Advocate General was rightly not in recanting mode, clearly finding the reasoning of the Court several slices short of a picnic.

Unsurprisingly, in its judgment on appeal in Case C-263/02P, *Commission v Jégo-Quéré et Cie SA*¹³⁵ the Court of Justice simply recited its existing approach, repeating its reasoning in *UPA*.¹³⁶ It was unwilling to cope at Community level with the situation in which there were no national measures for an applicant to challenge:

[A]n action for annulment before the Community Court should not on any view be available, even where it is apparent that the national procedural rules to not allow the individual to contest the validity of the Community measure at issue unless he has first contravened it.

In the present case, it should be pointed out that the fact that [the regulation concerned] applies directly, without intervention by the national authorities, does not mean that a party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself

134. *Id.* at __, ¶¶ 43-46, [2004] 2 C.M.L.R. at 277-78 (internal citation omitted).

135. See *Jégo-Quéré II*, Case C-262/03P, [2004] E.C.R. I-3425, [2004] 2 C.M.L.R. 12, 266. The date of pronouncement of the judgment was April 1, 2004, unfortunately before midday.

136. See *id.*, [2004] E.C.R. at __, ¶¶ 29-33, 36, [2004] 2 C.M.L.R. at 286-87; see also *UPA*, [2002] E.C.R. at 6733-35, ¶¶ 37, 39-44, [2002] 2 C.M.L.R. at 287-88.

be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by [the regulation] may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly.

Although the condition that a natural or legal person can bring an action challenging a regulation only if he is concerned both directly and individually must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty.

That applies to the interpretation of the condition in question set out at para. [51] of the contested judgment, to the effect that a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.

Such an interpretation has the effect of removing all meaning from the requirement of individual concern set out in the fourth paragraph of Art[icle] 230 EC.¹³⁷

While the Court of Justice is clearly not in a listening mood, it in fact does little more than reiterate its belief that the Community legal order has established a complete system of remedies, and bounces the issue to the Member States.¹³⁸ As has been noted above, particularly in the case of regulations which do not lead to national measures which themselves can be challenged, there is a gaping hole in the system of judicial protection, which the Court clearly feels it is not for it to fill. It is possible that the Court had in mind something akin to a declaration in the English system of public law as a means whereby a ruling could be sought indirectly from the Court of Justice as a step in

137. *Jégo-Quéré II*, [2004] E.C.R. at __, ¶¶ 34-38, [2004] 2 C.M.L.R. at 287-88.

138. *See id.* at __, ¶ 31, [2004] 2 C.M.L.R. at 286.

national proceedings, but this is not at all clear. Leaving the initiative for indirect challenge to the legal systems of the Member States is not likely to encourage the development of uniform judicial protection within the Community. Given that the Court has over the years laid much emphasis upon the need for regulations in particular to be applied immediately in the same manner throughout the Community, it should be obvious that if rights and obligations are to be applied in the same way so, too, should remedies be available in the same way. In the third pillar¹³⁹ of European Union activity (Police and Judicial Cooperation in Criminal Matters,¹⁴⁰ still more commonly thought of by its old title of Justice and Home Affairs) there is at the moment considerable variable geometry in the willingness of the Member State to permit their national courts to make references under Article 35 of the Treaty on European Union ("EU Treaty"),¹⁴¹ a situation which clearly leaves Union citizens in a number of Member States without any obvious means of challenging Union acts. That this is untenable was acknowledged in the Constitution with the abolition of such a cafeteria approach to jurisdiction.¹⁴² Moreover, the Court's response to the point about private parties being forced in effect to break the law in order to force a civil or criminal (or indeed administrative) law action to mount a challenge to certain Community regulations¹⁴³ is wholly unsuccessfully parried with the specious argument that Member States could invent what in some cases would have to be a wholly new type of procedure in order to cope with the problem. While the present writer is the last to seek to diminish the dynamic and far-reaching scope of the duty of cooperation incumbent on Member States under Article 10 of the EC Treaty,¹⁴⁴ this ap-

139. For description of the "third pillar" of Community law, see GEORGE A. BERMAN, ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* (1993) 17, 63-65.

140. See Consolidated Version of the Treaty on European Union, arts. 29-42, O.J. C 325/5 (2002), at 21-28, 37 I.L.M. 67.

141. This gives the Member States the choice of whether to accept the jurisdiction of the Court of Justice to give preliminary rulings.

142. See Constitution, *supra* note 13, art. III-369, O.J. C 310/1 (2004), at 161. The present provisions of Article 35 of the EU Treaty have not been included in the Constitution.

143. See *Jégo-Quéré II*, Case C-262/03P, [2004] E.C.R. I-3425, __, ¶¶ 30-31, [2004] 2 C.M.L.R. 12, 286.

144. See, e.g., J. Temple Lang, *The Core of the Constitutional Law of the Community—Article 5 EC*, in *CURRENT AND FUTURE PERSPECTIVES ON EC COMPETITION LAW*, EUROPEAN MONOGRAPHS 14, 41 (L.W. Gormley ed., 1997); L.W. Gormley, *Proportionality: Review of*

proach is a bit rich to say the least. It is because of the Community system that people are left without a possible remedy, not because of the national legal systems as such. It is the Community regulation concerned which effectively indicates whether additional authorised steps need to be taken by the Member States.¹⁴⁵ The reasoning of the Court in *UPA* is, with as much respect as the reasoning undoubtedly deserves, wholly unconvincing, and that in *Jégo-Quéré*, while logically consistent with that in *UPA*, is just as flawed. The failure of the Court of Justice to take on board the serious criticisms of its case law made by judicial colleagues and academics¹⁴⁶ is a major shortcoming in its fulfilment of its legal obligation to ensure that in the interpretation and application of the EC Treaty the law is observed.¹⁴⁷

Since *Jégo-Quéré* the dust has settled on the Plateau de Kirchberg somewhat, although the Court's deafness has not meant that critics of its approach have given up.¹⁴⁸ Even the Commission has asked the Court, in the context of State aids, to clarify the notion of "individual concern" once and for all.¹⁴⁹ It may

Community Measures, in GENERAL PRINCIPLES OF EUROPEAN COMMUNITY LAW EUROPEAN MONOGRAPHS 25, 113 (Bernitz & J. Nergelius eds., 2000); C.-F. Durand, COMMENTAIRE MÉGRET: LE DROIT DE LA CEE I 25-63 (M. Waelbroeck et al. eds., 2nd. ed., 1992).

145. It is trite law that a regulation cannot be implemented by national legislation (to do so would disguise the Community nature of the directly applicable obligations and rights flowing from a regulation), but a regulation may well itself require that Member States take, for example, appropriate measures to penalize—whether in the criminal, civil or administrative spheres—breaches of the regulation.

146. See generally Jason Coppel & Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 12 LEGAL STUD. 227 (1992); Gunnar W.G. Karnell, *The European Sui Generis Protection of Data Bases: Nordic and U.K. Law Approaching the Court of the European Communities—Some Comparative Reflections*, 49 J. COPYRIGHT SOC'Y USA 983 (2002); Mark Beunderman, *Slovenia Joins Constitution Revival Camp* (Jan. 12, 2006), available at <http://euobserver.com/>; Mark Beunderman, *Fresh EU Presidency Attacks ECJ* (Jan. 3, 2006), available at <http://euobserver.com/>.

147. This is an obligation under Article 220 of the EC Treaty. See EC Treaty, *supra* note 12, art. 220, O.J. C 325/33 (2002), at 122. It is now an obligation imposed on the Court of Justice and on the CFI, each within its jurisdiction.

148. See generally Koen Lenaerts & Tim Corthaut, *Judicial Review as a Contribution to the Development of European Constitutionalism*, 22 Y.B. OF EUR. L. 1 (2003); Christopher Brown & John Morijn, *Case-note: Jégo-Quéré—Judgment of 1 April 2004*, 41 COMMON MKT. L. REV. 1639 (2004); Filip Ragolle, *Access to Justice For Private Applicants in the Community Legal Order: Recent (R)evolutions*, 28 EUR. L. REV. 90 (2003); Cornelia Koch, *Locus Standi of Private Applicants Under the EU Constitution: Preserving Gaps in the Protection of Individuals' Right To an Effective Remedy*, 30 EUR. L. REV. 511 (2005); John A. Usher, *Direct and Individual Concern—an Effective Remedy Or a Conventional Solution?*, 28 EUR. L. REV. 575 (2003).

149. See Opinion of Advocate General Jacobs, *Commission v. Aktionsgemeinschaft*

well be that in time the Court will reconsider: its composition is changing quite rapidly; some new judges are known advocates of reform in their extra-judicial writings (although the processes of judicial decision-making and academic writing are indeed discrete),¹⁵⁰ although it may well take some time for the reform-minded to achieve a majority. The advice to the Court is simple: prick up your ears!¹⁵¹ The other option is for the Member States to pick up the ball thrown in their direction, so that advice could also be addressed to the Member States (which is what the Court has effectively done). A start in this direction has undoubtedly been made in the Constitution.¹⁵²

II. THE APPROACH IN THE CONSTITUTION

By far the most interesting development in the judicial architecture of the Constitution is the rather cryptic formulation of the standing provisions in Article III-365.¹⁵³ The traditional distinction between privileged and semi-privileged litigants is maintained, with the Committee of the Regions being given semi-privileged status (the right to seek annulment of an act in order to protect its prerogatives).¹⁵⁴ The dramatic change comes in Article III-365(4), which makes a distinction between actions brought by a legal or natural person against an act addressed to that person or which is of direct and individual concern to him or her, and actions brought by such a person against a regulatory act which is of direct concern to him or her and

Recht und Eigentum, Case C-78/03P (pending; Opinion Transcript Feb. 24, 2005), ¶ 101. *Aktionsgemeinschaft* is an appeal against the judgment of the CFI in *Aktionsgemeinschaft Recht und Eigentum v. Commission*, Case T-114/00, [2002] E.C.R. II-5121.

150. Koen Lenaerts is one such judge. See generally Koen Lenaerts & Tim Corthaut, *Judicial Review as a Contribution to the Development of European Constitutionalism*, 22 Y.B. OF EUR. L. 1 (2003).

151. See European Convention, Secretariat, *Oral Presentation by M. Gil Carlos Rodriguez Iglesias, President of the Court of Justice of the European Communities, to the "Discussion Circle" on the Court of Justice on 17 February 2003*, CONV 572/03 (1) 3-5 (Mar. 10, 2003); see also European Convention, Secretariat, *Oral Presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the Discussion Circle on the Court of Justice on 24 February 2003*, CONV 575/03 (1) 4-5 (Mar. 10, 2003). The Court of Justice and the CFI made proposals relating to Article 230 of the EC Treaty to the Discussion Circle on the Court of Justice in the Convention, which merely further exposed the divisions in judicial thinking—also among the members of the CFI.

152. See Constitution, *supra* note 13, arts. II-107, II-112 (4)-(5), II-113, O.J. C 310/1 (2004) 52-54.

153. See *id.* art. III-365, O.J. C 310/1 (2004), at 159-60.

154. See *id.*

does not entail implementing measures.¹⁵⁵ The phrase “regulatory act” only occurs in this provision.¹⁵⁶ The views of the Discussion Circle on the Court in the Convention¹⁵⁷ which preceded the Intergovernmental Conference¹⁵⁸ which drew up the final Treaty were divided:

Members of the circle who were in favour of amending the fourth paragraph of Article 230 expressed a preference for the option mentioning “an act of general application”. Some members, however, considered that the term “a regulatory act” would be more appropriate, since it would enable a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts (for which the “of direct and individual concern” condition remains applicable) while providing for a more open approach to actions against regulatory acts.

The Praesidium has adopted the latter approach and proposes that provision be made for actions by natural or legal persons against regulatory acts which are of direct concern to them without entailing implementing measures.¹⁵⁹

In this view, the key distinction is between legislative and non-legislative acts.¹⁶⁰ If an act is adopted as a European law or

155. *See id.* art. III-365 (4), O.J. C 310/1 (2004), at 160.

156. The Constitution distinguishes between European laws, framework laws, regulations, decisions, recommendations, and opinions. *See id.* art. I-33, O.J. C 310/1 (2004), at 26. A European law corresponds with the present regulations, and a framework law with the present directives. European regulations are non-legislative acts of general application for the implementation of legislative acts—European laws and framework laws—and of certain provisions of the Constitution. *See id.* art. I-34, O.J. C 310/1 (2004), at 27. Their legal effects may correspond to those of a present regulation or of a present directive, and may take the form of delegated European regulations adopted by the Commission. *See id.* art. I-36, O.J. C 310/1 (2004), at 28. European decisions correspond to the present decisions and are non-legislative in nature. *See id.* art. I-33, O.J. C 310/1 (2004), at 26.

157. The Convention, chaired by Valéry Giscard d'Estaing, presented its Draft Constitution on July 18, 2003. *See* Elisabeth Zoller, *The Treaty Establishing a Constitution For Europe and the Democratic Legitimacy of the European Union*, 12 *IND. J. GLOBAL LEGAL STUD.* 391, 392 (2005).

158. The Intergovernmental Conference of the Member States, convened under Article 48 of the EU Treaty. *See id.*

159. European Convention, Praesidium, *Articles on the Court of Justice and the High Court*, CONV 734/03, at 20 (May 12, 2003).

160. *See* Constitution, *supra* note 13, arts. I-34, I-35, O.J. C 310/1 (2004), at 27. As to the binding nature of the legal acts of the Community, *see id.* art. I-33, O.J. C 310/1 (2004), at 26.

framework law, individuals can only challenge it if they can show direct and individual concern.¹⁶¹ From the point of view of an individual, this is actually a slight improvement, as it is impossible for an individual to challenge a directive (the predecessor of a framework law) in the EC system;¹⁶² an individual is left to the indirect challenge via a reference in the course of a challenge to national implementing measures.¹⁶³

European regulations and decisions are clearly non-legislative acts, but may not always be regulatory acts,¹⁶⁴ so the use of the term “regulatory acts” is distinctly unfortunate. However, the burden of Article III-365(4)¹⁶⁵ would appear to be that non-legislative acts could be challenged if direct concern can be shown, and the act does not entail implementing measures. That latter point is itself not entirely clear. It appears that it was designed to address the lacuna exposed in *Jégo-Quéré*¹⁶⁶ of a person being forced to break the law in order to elicit proceedings in the course of which a challenge could be mounted to a Community regulation which did not require national implementing measures.¹⁶⁷ Accordingly, it would appear that what was intended by the framers of the Constitution was that the regulatory

161. See *id.* art. III-365 (4), O.J. C 310/1 (2004), at 159.

162. See Opinion of Advocate General Geelhoed, *The Queen v. Secretary of State for Health, ex parte British-American Tobacco (Investments) Ltd. Et al.*, Case C-491/01, [2002] E.C.R. I-11453 at 11482, ¶ 49, [2004] 1 C.M.L.R. 14, 460. It may be possible to find direct concern after transposition, although not beforehand. See, e.g., SCHERMERS & WAELBROECK, *supra* note 14, 459, § 918; *SalamanderAG et al. v. European Parliament & Council*, Joined Cases T-172/98, T-175/98 & T-177/98, [2000] E.C.R. II-2487, 2513-2515, ¶¶ 62-68, [2002] 2 C.M.L.R. 1099, 1116-1117; *Asociación Española de Impresas de la Carne (Asocarne) v. Council*, Case C-10/95 P, [1995] E.C.R. I-4149, 4160, ¶ 32. The Court, affirming the CFI’s decision, found it unnecessary to decide whether a private party should treat directives like regulations for the purpose of ruling on the admissibility of an action. See *Asociación Española de Impresas de la Carne (Asocarne) v. Council*, Case T-99/94, [1994] E.C.R. II-871 at 880-81, ¶¶ 18-21.

163. See, e.g., *The Queen v. Secretary of State for Health, ex parte British-American Tobacco (Investments) Ltd. et al.*, Case C-49/01, [2002] E.C.R. I-11453, [2003] 1 C.M.L.R. 14.

164. A European decision may be more individual in character (but can always be attacked by the addressee or by interested parties who can show direct and individual concern), although it may be more general.

165. See Constitution, *supra* note 13, art. III-365 (4), O.J. C 310/1 (2004), at 159.

166. See *Jégo-Quéré I*, Case T-177/01, [2002] E.C.R. II-2365.

167. The CFI was clearly heavily influenced by this consideration, but the Court of Justice was less convinced. See also the Judgment of the European Court of Human Rights in *Posti & Rahko v. Finland*, (No. 27824/95) 37 Eur. Ct. H.R. 6, 158, 174, ¶ 64 (2003).

act does not entail *national* implementing measures. In this scenario, the equality of judicial protection would require that it is the Union act itself which is determinative of whether or not it entails implementing measures.¹⁶⁸ However, implementing acts in the Constitution may be national implementing measures (Article I-37(1))¹⁶⁹ or acts adopted by the Commission or the Council in implementation of parent Union acts (Article I-37(2))¹⁷⁰; the latter being called European implementing regulations or European implementing decisions.¹⁷¹

Standing requirements are thus made to depend on the type of act involved, and the choice of the type of act, if not specified in the Constitution, is left to the Union institutions to decide “on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality referred to in Article I-11.”¹⁷² While Barents¹⁷³ points out that the Court has always set its face against the degree of judicial protection being dependent on the choice of the legislator,¹⁷⁴ this is really aimed at arbitrary misuse of power to seek to escape challenges. The terms of Article I-38(1)¹⁷⁵ would seem to leave the Court free to examine whether there has been any misuse of power. There are, however, likely to be arguments advanced that what is adopted in the form of a legislative act is in fact a regulatory act; a return to the bad old days of the Sixties may be in the cards!

168. Thus, it would not matter for standing if a Member State did in fact implement the regulatory act. A Member State which implements a Union act which needs no implementation may, however, find itself with problems for disguising the Community nature of the obligation involved—just as is the case with regulations at present, unless the regulation itself requires specific Member State action, such as providing for penalties for non-compliance.

169. See Constitution, *supra* note 13, art I 37(1), O.J. C310/1 (2004), at 28.

170. See *id.* art. 37(2), O.J. C310/1 (2004), at 28.

171. See *id.* art. 37 (1)-(2), O.J. C310/1 (2004), at 28.

172. See *id.* art. 38(1), O.J. C310/1 (2004), at 29.

173. RENE BARENTS, *Een Grondwet voor Europa* 525 (2005).

174. For example, according to settled case law, in the context of the organization of Community powers, the choice of the legal basis for a measure must rest on objective factors that are amenable to judicial review. Those factors specifically include the aim and content of the measure. See *Parliament v. Council*, Case C-271/94, [1996] E.C.R. I 1689, I-1701, ¶ 14; see also *Parliament v. Council*, Case C-42/97, [1999] E.C.R. I-869, ¶ 36); *Commission v. Council*, Case C-269/97 [2000] E.C.R. I-2257 at 2290, ¶ 43.

175. See Constitution, *supra* note 13, art. I-38(1), O.J. C 310/0 (2004), at 29.

III. SOME CONCLUSIONS

The present state of judicial review in relation to the fourth paragraph of Article 230 of the EC Treaty is still fundamentally unsatisfactory. Indirect routes using national courts do not offer a reliable route for exercising a fundamental *right* to judicial review,¹⁷⁶ and the room for evaluating circumstances specific to each applicant individually is in fact very limited indeed.¹⁷⁷ In view of the unlikelihood of a wholesale revision of the *Plaumann* interpretation in the immediate future by the Court, the way forward could indeed lie in a Treaty amendment. Elsewhere the present writer has advanced an amendment to the present text of Article 230 of the EC Treaty¹⁷⁸ to take account of public interest litigation,¹⁷⁹ but perhaps the present wording of direct and individual concern could usefully be replaced by incorporating the CFI's definition of individual concern from *Jégo-Quéré*. The amended fourth paragraph of Article 230 of the EC Treaty would then read:

Any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person is of direct [concern to him and affects his legal position, in a manner which is both definite and immediate, by restricting his rights or imposing obligations on him.]¹⁸⁰

It is obvious from this wording that standing would become a much more transparent concept and that the number of potential litigants would increase, but it is submitted that this is a small price to pay for a major improvement in the system of judi-

176. See the very convincing set of reasons given by Schermers and Waelbroeck, *supra* note 14, 453-54, § 910, and the clear analysis of Lenaerts and Corthaut, *supra* note 148, at 12-19.

177. See *Commission v. Camar Srl et al.*, Case C-312/00P, [2002] E.C.R. I-11355, 11428; see also, Lenaerts & Corthaut, *supra* note 148, at 20. Note that the CFI has some margin of appreciation in assessing the facts and deducing the relevant factors in determining whether an applicant is individually concerned, but acknowledges that this is very limited in view of *Commission v. Nederlandse Antillen*, Case C-142/00P, [2003] E.C.R. I-3483.

178. See EC Treaty, *supra* note 12, art. 230, O.J. C 325/33 (2002), at 126.

179. See Laurence W. Gormley, *Public Interest Litigation*, in 1 *LIBER AMICORUM SLYNN*, *supra* note 4, 191 at 197 (adding a new fifth paragraph to Article 230 of the EC Treaty).

180. EC Treaty, *supra* note 12, art. 230, O.J. C 325/33 (2002), at 126.

cial review in Community law. The essentially managerial flood-gates argument is not a sufficiently weighty reason to retain a system of judicial protection that no longer enjoys the confidence of those who are affected by it, particularly in view of the huge developments in the widening of judicial review in many Member States over the last twenty years. It may be objected that this draft would permit challenges to normative Community acts on a much broader scale than now,¹⁸¹ and would in effect permit an *actio popularis*. Lenaerts and Corthaut point out that some Member States do permit challenges to legislation if a sufficient interest can be demonstrated.¹⁸² It is submitted that the Community legal order is now well-enough established to be able to afford to Union citizens and other interested parties modern, open access to justice which is not constrained by artificial interpretations of the concept of "individual concern." There is absolutely no reason to be afraid of the CFI's approach in *Jégo-Quéré*. At a time in which the liberties of the citizen are under steady erosion in the name of security, the need for an adequate system of judicial protection which affords those affected by Community action the right to be heard in Court has never been greater. Indirect judicial protection is not a right but a mere chance.

While the Court of Justice has been unwilling to pick up the ball offered it by the CFI, the efforts of the Constitution to improve on Article 230 of the EC Treaty have not resulted in very much in the way of transparency: the attempt to introduce a clear hierarchy of norms has not translated into clarity for judicial review, so the avenue of a Treaty amendment is perhaps less likely to be followed in the near future, given the unpromising future of the Constitution.¹⁸³ Leaving the ball in the forum of the national legal systems is not an option which will afford an equal level of judicial protection to private parties. The ball returns firmly to the hands of the Court of Justice, which should

181. See generally Angela Ward, *Locus Standi Under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a "Wobbly Polity,"* 22 Y.B. EUR. L. 45 (2003) (proposing opening up *locus standi* in areas in which the Community institutions and the Member States share implementation duties).

182. See Lenaerts & Corthaut, *supra* note 148, at 23.

183. That does not mean, however, that the Constitution is now devoid of interest; it will be the inevitable starting point for any further attempts to revise the EU and EC Treaties. See generally JEAN-CLAUDE PIRIS, *THE CONSTITUTION FOR EUROPE* (2006).

acknowledge that at least in the *Jégo-Quééré* situation it has failed dismally; moreover, it has failed to address adequately or at all the argument that its own interpretation in *Plaumann* is simply misconceived. If there might have been something to be said for it in the early 1960's—and the present writer is not of such opinion—there is nothing to be said for it nowadays. Community law is dynamic, develops with the times and is not stuck in an era in which judicial review in the Member States was highly underdeveloped. It is time that the Community ceased to offer less substantial judicial protection than that which citizens have a right to expect. What is beyond doubt in any event is that the CFI was logically entirely right to say that the number and position of other persons who are likewise affected by the Community measure are of no relevance to determining whether a litigant is individually concerned.¹⁸⁴ It cannot be right that the Community system does *not* offer a complete system of remedies to litigants, and the Court of Justice is simply incorrect to claim that it does. Time to prick up your ears!

VALEDICTORY

Francis Jacobs has been one of the great Advocates General at the Court, and his wise counsel will be sorely missed in Luxembourg, where his measured but often devastating analysis has shown the way forward in so many fields of law. He has tirelessly devoted himself to the development of European law, giving unstintingly of his time and energy to academic and professional bodies and to the elucidation of the judiciary. The seeds of reform in judicial review which he has sown *will* develop and multiply in time; the ground on the Plateau de Kirchberg may not yet be as fertile as might be hoped, but the time will come when more people are ready to listen. Then his ideas on judicial review will be found after all to have fallen in the rich soil, and will be taken up by “people with a noble and generous heart who have heard the word and take it to themselves and yield a harvest through their perseverance.”¹⁸⁵

184. See *Jégo-Quééré*, Case T-177/01, [2002] E.C.R. II-2365, II-2383, ¶ 51, [2002] 2 C.M.L.R. 44, 1150.

185. Luke 8:15 (Jerusalem Bible).