

# *Fordham International Law Journal*

---

*Volume 30, Issue 5*

2006

*Article 7*

---

## Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should it be Fixed?

Xavier Lewis\*

\*

Copyright ©2006 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should it be Fixed?

Xavier Lewis

## **Abstract**

This Article will examine the problem of the standing of private litigants by putting the action for annulment in its context. It will describe briefly how the Treaty of Rome set up a complex system in which the acts of the EC Institutions could be reviewed, a task that is shared between the European Courts and the courts of the Member States. It will also describe briefly the different correctives introduced by the Court of Justice and the Court of First Instance to the system as initially envisaged. It will be seen that a good deal of flexibility has been introduced into the position of private litigants.

# STANDING OF PRIVATE PLAINTIFFS TO ANNUL GENERALLY APPLICABLE EUROPEAN COMMUNITY MEASURES: IF THE SYSTEM IS BROKEN, WHERE SHOULD IT BE FIXED?

*Xavier Lewis\**

## *INTRODUCTION*

The establishment of the Court of First Instance over which Judge Vesterdorf has presided since March 4, 1998 has greatly enhanced the judicial protection of litigants in the European Community legal order. Visitors and parties appearing for the first time are almost always impressed by how carefully the Court of First Instance goes about its business and how far removed its approach is from that of continental administrative jurisdictions.

A glance at its closely reasoned judgments shows how systematically the Court of First Instance examines the pleas of the parties: their submissions are dissected and answered in tightly reasoned judgments. The consequence is that the judgments can be long. One judgment even ran to a thousand pages.<sup>1</sup> One might also attend a hearing of the Court and listen to the cross examination of counsel by the members of the bench. The counsel for each party is given about fifteen to twenty minutes to make submissions orally, usually uninterrupted. Then, once the prepared oral submissions are over, the questions from the bench rain down: pleas are tested, facts are questioned, documents on the Court's file are examined. Those sessions are exhaustive and often exhausting, and the hearings in complex cases can sometimes last several days. The hearing in the Microsoft case lasted an entire week.<sup>2</sup> Each case is conducted in

---

\* Barrister, Legal Service, European Commission. Special thanks to Professor Francesca Bignami. Thanks also to Paul Bury, Laurent Forestier, Luigi Malferrari, Imola Strehö, LEMONIA Tsaroucha and Hubert van Vliet. All errors and infelicities are mine alone. All views and opinions are purely personal and should not be attributed to the European Commission.

1. See *Cimenteries CBR v. Commission*, Joined Cases T-25, T-26, T-30-32, T-34-39, T-42-46, T-48, T-50-65, T-68-71, T-87, T-88, T-103, T-104/95, [2000] E.C.R. II-491 (dealing with a cement cartel).

2. See *Microsoft Corp. v. Commission*, Case T-201/04 (case pending). The hearing in this case lasted from April 24 to April 28, 2006.

a way to enhance the judicial protection of the litigants. Thus, the Court of First Instance amply carries out its mission as assigned to it by the Council Decision that set it up.<sup>3</sup> The fourth recital of that Decision states: “[I]n respect of actions requiring close examination of complex facts, the establishment of a second court will improve the judicial protection of individual interests.”<sup>4</sup>

There is one area, however, in which the Court of First Instance tried and did not succeed to bring about a change that many believe would have improved the judicial protection of individuals—the rules on standing of private litigants to seek the annulment under Article 230, section 4 of the Treaty Establishing the European Community (“EC Treaty”) of acts of the Institutions of which they are not the addressees.<sup>5</sup> As will be seen, those rules are regarded as restrictive of standing: only a private litigant who can show that she has some unique characteristic or is in a unique position—is “directly and individually concerned” according to the terminology employed—can sue. All other private litigants must endeavor to seek redress in the courts of the Member States. Those restrictive rules on standing have been much criticized not only by academic writers and practitioners but also by several Advocates General of the European Court of Justice.

In 2002, the Court of First Instance tried to re-interpret the rules on standing of private litigants—seeking to challenge a measure which is not addressed to them and which is of general application—in a more liberal manner. But its judgment was overturned by the Court of Justice.

Consequently, this Article will try to answer the following questions: why the changes proposed by the Court of First Instance were rejected by the Court of Justice; whether they really do constitute a missed opportunity to improve the judicial protection of individuals; and whether those changes are even necessary. Moreover, the problem of access to the courts by private plaintiffs has to be seen in the light of the evolving and increasingly liberal standards of standing. As Anthony Arnall puts it

---

3. See Council Decision No. 88/591/ECSC, O.J. L 319/1 (1988).

4. *Id.* at 1.

5. See Consolidated Version of the Treaty Establishing the European Community, Dec. 29, 2006, O.J. C 321 E/37 (2006) [hereinafter EC Treaty].

pithily: “[W]hat may have been appropriate in the 1960s and 1970s is no longer so at the beginning of the new millennium.”<sup>6</sup> Many jurisdictions in the Member States and elsewhere impose relatively strict requirements on private plaintiffs who seek to have measures of general application reviewed by a court. In Europe, those strict requirements have come under scrutiny by the European Court of Human Rights to see if they comply with Article 6, Section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>7</sup> Indeed, the European Court of Human Rights held in *Posti & Rahko v. Finland* that the inability to challenge before a court of law a measure of general application that affected a “civil right” of the plaintiff constituted a breach of Article 6, Section 1 of that Convention.<sup>8</sup>

Issues of standing of private plaintiffs take on an added dimension in EC law. Not only must the question of *whether* a private plaintiff should have standing be asked but also the questions of *where* and *when* standing should be granted. Although the *where* and the *when* are connected in reality, it is proposed to concentrate on where a private party should bring an action for judicial review. When an action should be brought raises fascinating questions, but those are better dealt with separately.

This Article will examine the problem of the standing of private litigants by putting the action for annulment in its context. It will describe briefly how the Treaty of Rome set up a complex system in which the acts of the EC Institutions could be reviewed, a task that is shared between the European Courts and the courts of the Member States.

It will also describe briefly the different correctives introduced by the Court of Justice and the Court of First Instance to the system as initially envisaged. It will be seen that a good deal of flexibility has been introduced into the position of private litigants.

---

6. Anthony Arnall, *The Action for Annulment: A Case of Double Standards?*, in *JUDICIAL REVIEW IN EUROPEAN UNION LAW* 177, 189 (David O’Keefe ed., 2000).

7. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, § 1, Nov. 4, 1950 [hereinafter *European Convention on Human Rights*] (“In the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law.”).

8. *Posti & Rahko v. Finland*, 27824 Eur. Ct. H.R. 95, ¶ 66 (2002).

Nevertheless, many consider the rules on the standing of individuals too restrictive and the alternative route of redress via the courts of Member States as inadequate. The Court of First Instance was unsuccessful in its attempt to broaden the standing of individuals. Its judgment liberalizing the rule on standing was quashed by the Court of Justice. But the matter did not end there. The Court of Justice has since shown in a tantalizing manner how the existing system can be improved to provide better judicial protection of private plaintiffs. Although the draft Constitution would have made certain changes to the rules on standing, those changes were not as sweeping as some would have hoped. Throughout the story, the Court of Justice showed its attachment to a system of redress for private plaintiffs through the courts of the Member States.

### I. THE DEFAULT SYSTEM FOR PRIVATE PLAINTIFFS

The requirement of judicial control is a general principle of EC law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>9</sup> It is also laid down by Article 47(1) of the Charter of Fundamental Rights of the European Union proclaimed on December 7, 2000.<sup>10</sup> The EC Treaty set up a unique system for reviewing the acts of the EC Institutions. It is a system that has two routes: the first is a direct route, which is reserved to a category of plaintiffs known as “privileged applicants” or “privileged plaintiffs” and leads to the Court of Justice and to the Court of First Instance directly; the second is indirect and is used by “non-privileged applicants”—in reality, private plaintiffs<sup>11</sup>—

---

9. See *Ministero delle Finanze v. Eribrand*, Case C-467/01, [2003] E.C.R. I-6471, ¶ 61; *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, [1986] E.C.R. 1651, ¶¶ 18-19; see also *Unibet (London) Ltd. & Unibet (Int'l) Ltd. v. Justitiekanslern*, Case C-432/05 (ECJ Mar. 13, 2007) (not yet reported), ¶ 37 (“[A]ccording to settled case law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”).

10. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, O.J. C 364/1, at 1 (2000).

11. “Private plaintiff” means, for the purpose of Article 230, Section 4, all persons who are not Institutions or Member States coming within the ambit of Article 230, Sections 2 or 3. Thus bodies of the Member States governed by public law and which have legal personality, such as regional authorities, are persons within the meaning of

and leads to the Court of Justice indirectly, via the courts of the Member States. The combination of the two routes led the Court of Justice to conclude that “every person has, or will have the opportunity to challenge a Community measure which forms the basis of a decision adversely affecting him.”<sup>12</sup> This two tier system is but a manifestation of the symbiotic relationship between EC law and the legal systems of the Member States, as clearly stated by the Court of Justice in *Amministrazione delle Finanze v. Simmenthal*.<sup>13</sup> In this case, the Court of Justice characterized the role of national courts as that of “an organ of a Member State [whose task it is] to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law.”<sup>14</sup> The use of one route or the other rests on the distinction between privileged and non-privileged applicants.

#### A. *The Distinction Between Privileged and Non-privileged Applicants*

Article 230 of the EC Treaty is the provision that grants the Court of Justice, and now the Court of First Instance, jurisdiction to review the legality of acts of the Institutions upon being seized of an action for annulment.

Article 230 treats institutional plaintiffs, known as privileged applicants, differently from private plaintiffs. Article 230, Section 2 permits actions brought by Member States, the European Parliament, the Council or the Commission without requiring those plaintiffs to fulfill any condition of standing. Consequently, Article 230, Section 2 grants institutional plaintiffs a general right to bring an action for annulment. In between the privileged applicants and the private plaintiffs are the Court of Auditors and the European Central Bank—semi-privileged applicants—which, according to Article 230, Section 3 must show that the action they bring is for “the purpose of protecting their prerogatives.”<sup>15</sup>

Private plaintiffs have only a limited right of access to the European courts. They can only bring an action for annulment

---

Article 230, Section 4. See *Regione Siciliana v. Commission*, Case C-417/04 P, [2006] E.C.R. I-3881, ¶ 24.

12. *Roquette Frères v. Ministre de l'Agriculture*, Case C-441/05, ¶ 40 (ECJ March 8, 2007) (not yet reported).

13. *Amministrazione delle Finanze dello Stato v. Simmenthal*, Case 106/77, [1978] E.C.R. 629.

14. *Id.* ¶ 16.

15. EC Treaty, *supra* note 5, art. 230, O.J. C 321 E/37, at 146 (2006).

in one of three narrowly defined circumstances: (1) a private plaintiff can seek annulment of a decision addressed to her; (2) she can seek annulment of a decision addressed to another person but that is of "direct and individual concern" to her; or (3) she may ask for the annulment of a decision "in the form of a regulation which is of direct and individual concern to her."<sup>16</sup> Thus, private plaintiffs must show standing. That need to show standing is the primary distinction between institutional and private plaintiffs made in Article 230. It is not the only distinction that is made between them, however.

It is that need to show standing imposed on private plaintiffs by Article 230, Section 4 that has been controversial and is the subject of this Article. The precise meaning of the terms "direct and individual concern" has been the subject of a great deal of litigation and the interpretation given by the Court of Justice to those terms has been controversial.

Yet the need to show standing must be seen in the context of a second important distinction between private plaintiffs and the privileged and semi-privileged applicants: the former can, according to the literal wording of Article 230, Section 4, only seek annulment of limited types of acts whereas the latter are not so limited. Article 230, Sections 1 and 2 do not list the type of acts that privileged and semi-privileged applicants can seek to have annulled. Consequently, Article 230, Section 1, read together with Section 2, provides that the privileged and semi-privileged applicants can seek the annulment of any act, whether a regulation, directive, decision, recommendation or opinion, or any other kind of measure.<sup>17</sup> Article 230, Section 4, unlike Sections 1 and 2, does enumerate the types of acts which may be challenged by private plaintiffs. Section 4 limits the action to one directed to the annulment of a decision addressed to the plaintiff, or of a decision addressed to another person or a regulation which is of "direct and individual concern" to the plaintiff. Thus, measures of general application are outside the scope of an annulment action brought by a private plaintiff. In particular, private plaintiffs cannot seek the annulment of directives.

---

16. See KPE LASOK QC & TIMOTHY MILLET, *JUDICIAL CONTROL IN THE EU: PROCEDURES AND PRINCIPLES* 48 (2004).

17. See EC Treaty, *supra* note 5, art. 249, O.J. C 321 E/37, at 153 (2006) (defining regulations, directives, decisions, recommendations and opinions).



The omission of directives from the list of acts that can be annulled under Article 230, Section 4 is significant, because many Treaty articles require the Community Institutions to adopt a measure in the form of a directive to the exclusion of any other type of measure.<sup>18</sup> Before the inclusion in the EC Treaty of what is now Article 95, formerly Article 100a, by the Single European Act,<sup>19</sup> Article 94 was the main legal basis permitting the Institutions to adopt measures of harmonization of law to bring about the common or internal market.<sup>20</sup> Thus, Article 94 coupled with Article 52, Section 1 on the harmonization of legislation relating to the free movement of services,<sup>21</sup> meant that the main domain of legislative activity by the Institutions was outside the scope of actions for annulment brought by private litigants. At least, according to the literal wording of Article 230, Section 4.

The combination of those two distinctions made between privileged and non-privileged applicants in Article 230 shows that the Treaty originally intended to separate annulment actions of a constitutional nature, brought by the Institutions and Member States on the one hand, from administrative actions brought by private litigants on the other. The latter would only be allowed before the Court of First Instance in exceptional circumstances, when the individual litigant was the addressee or could be considered to be the addressee of the decision impugned.

The second distinction is often played down by the critics of the case-law on standing. The fact that the distinction was made at all in the Treaty shows that it was clearly the intention of its drafters to treat private plaintiffs differently from the institutional plaintiffs. By playing down that distinction critics tend to ignore the fact that the jurisdiction of the Court of Justice (and the Court of First Instance) is not general, but limited to one of the procedures expressly prescribed by the Treaties.

---

18. See, e.g., *id.* arts. 44(1), 46(2), 47(1)-(2), 52(1), 63, 94, 96, 137(2), O.J. C 321 E/37, at 59, 61, 63, 79, 81, 108 (2006) (providing that the Institutions may adopt directives only).

19. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11).

20. See EC Treaty, *supra* note 5, art. 94, O.J. C 321 E/37, at 79 (2006).

21. See *id.* art. 52, §1, O.J. C 321 E/1, at 63 (2006).

The Court of Justice has had occasion to recall that basic principle. In *Confederation Francaise Democratique du Travail* (“CFDT”) *v. Council*, a French trade union, pursuant to Article 38 of the Treaty Establishing the European Coal and Steel Community (“ECSC Treaty”), sought the annulment of a decision of the Council requiring representative organizations to draw up lists of candidates for the consultative committee referred to in Article 18 of the ECSC Treaty.<sup>22</sup> The Court held that Article 38 provided that an act of the Council could only be annulled on an application of a Member State or of the High Authority.<sup>23</sup> The Court stated that:

Whilst the principles upon which the Applicant relies call for a wide interpretation of the provisions concerning the institution of proceedings before the Court with a view to ensuring individuals’ legal protection they do not permit the Court on its own authority to amend the actual terms of its jurisdiction.<sup>24</sup>

The fact that the Court’s judgment concerned the ECSC Treaty, not the EC Treaty, is immaterial. The important point the Court was making was that while it was sensitive to the need to ensure the legal protection of individuals, it could not provide that protection if the Treaty does not expressly confer jurisdiction on it to do so.

This rationale contrasts with how the Court sees the ambit of its jurisdiction to deal with institutional litigation—cases between Institutions and between Member States that concern the application of EC law. The way in which the Court has examined disputes between Member States, which concern the application of EC law, is particularly striking. In *Commission v. Ireland*, the Court held that disputes between Member States concerning the application of EC law should be brought exclusively before the Court of Justice and not before other international jurisdictions.<sup>25</sup> To reach that conclusion, the Court relied on Article 292 of the EC Treaty, which provides that: “Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of set-

---

22. *Confederation Francaise Democratique du Travail* (“CFDT”) *v. Council*, Case 66/76, [1977] E.C.R. 305.

23. The High Authority became the Commission.

24. See *CFDT*, [1977] E.C.R. 305, ¶ 8.

25. *Commission v. Ireland*, Case C-459/03, [2006] E.C.R. I-4635.

tlement other than those provided for therein.”<sup>26</sup> The practical consequence is that Member States must use the infringement procedure of Article 227, instead of bringing claims in international courts or tribunals when the proper application of EC law is at issue.

Thus the Court of Justice sees its jurisdiction to examine claims by the Institutions and by the Member States—the privileged applicants—as being the default jurisdiction. In contrast, it does not see its jurisdiction to deal with actions by private plaintiffs against the acts of the Institutions as being the default jurisdiction. On the contrary, actions for annulment by private litigants are permitted in limited circumstances only. A private litigant must be either the express addressee of the decision in order to seek its annulment or if she is not the addressee must, to have standing, demonstrate that the decision addressed to another person or the decision in the form of a regulation is of “direct and individual concern” to her.

What meaning has the Court of Justice attributed to the terms “direct and individual concern?” The principal case that set out the Court of Justice’s interpretation is *Plaumann v. Commission*.<sup>27</sup> The facts of this case were relatively simple. The Commission addressed a decision to Germany, refusing a request by the latter to suspend the collection of customs duties on the import of fresh clementines in the EC. Plaumann was a German company that imported clementines and sought to challenge the Commission’s decision addressed to Germany. The Court held that Plaumann’s action was inadmissible.<sup>28</sup> The Court found that the two conditions of “direct and individual concern” were cumulative, and consequently held that if Plaumann were not individually concerned it would not be necessary to examine whether it was directly concerned.<sup>29</sup> The Court of Justice stated that:

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 fac-

---

26. *Id.* ¶ 123.

27. *Plaumann v. Commission*, Case 25/62, [1963] E.C.R. 95.

28. *Id.* at 107-08.

29. *Id.* at 107.

tors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practiced by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of an addressee.<sup>30</sup>

What the Court of Justice was looking for and did not find in the particular circumstances of the Plaumann company was a unique feature which set it apart from all other importers, present and future, of fresh clementines. So the Court was forced to conclude that Plaumann was in the same position as any importer of clementines and anyone may engage in the activity of importing them.

Perhaps a little surprisingly in retrospect, the Court did not consider at the time that its interpretation of Article 230, Section 4 was a restrictive one. An issue that arose in that case was whether the plaintiff Plaumann could challenge the Commission decision addressed to Germany at all. The Commission, the defendant in the case, submitted that the wording of Article 230, Section 4 precluded an action for annulment against a decision addressed to a Member State because it was not addressed to "another person." Such decisions, the Commission claimed, could only be attacked if they were addressed to other private persons and not to Member States as sovereign authorities. The Court rejected such an argument. It held that the wording of the Article did not define or limit the scope of the term "addressed to another person" and "[t]he words and natural meaning of this provision justify the broadest interpretation. Moreover, provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively."<sup>31</sup> In contrast, the Court clearly thought that the term "individual concern" was capable of one interpretation only, according to its natural meaning.

That restrictive reading of "individual concern" has given rise to abundant case law in which applications have been dismissed for lack of standing because the plaintiff was unable to show that she had some unique or distinguishing feature. Thus,

---

30. *Id.*

31. *Id.* at 106-07.

the fact that the action is brought by a person who could be identified as a person to whom a regulation clearly applies is insufficient to confer that unique quality necessary for standing under the *Plaumann* rule.<sup>32</sup>

As for the meaning of the term “direct concern,” with which the Court did not deal in *Plaumann*, the Court has held that a measure can be of direct concern if it comprises “a complete set of rules which are sufficient in themselves and . . . require no implementing provisions.”<sup>33</sup> If a measure confers discretion on the national authorities charged with implementing it then it will not be of direct concern to a private litigant.<sup>34</sup> For example, the sole national isoglucose producer would not be “directly concerned” by an EC measure regarding the allocation of national production quantities of isoglucose, if such measure provides no guarantee to the sole producer in a given Member State, without a decision taken by the national authorities.<sup>35</sup> On the other hand, if a measure leaves no discretion to its addressee, its implementation being purely automatic and resulting from Community rules without the application of other intermediate rules, the measure will be of “direct concern” to a person whose legal situation is affected by it.<sup>36</sup>

### B. *The Indirect Route of Questioning Validity through National Courts*

So where should private litigants take their complaints about the illegality of a measure adopted by the Community Institutions which is not addressed to them? The first paragraph of Article 234 of the EC Treaty gives the answer. It provides that the Court of Justice has jurisdiction to give preliminary rulings on “the validity and interpretation of acts of the Institutions of the Community and of the [European Central Bank].”<sup>37</sup> Thus, private parties must bring an action before a court of a Member

32. See *Zuckerfabrik Watenstedt v. Council*, Case 6/68, [1968] E.C.R. 409.

33. *Partie Ecologiste “Les Verts” (“The Greens”) v. European Parliament*, Case 294/83, [1986] E.C.R. 1339, ¶ 31.

34. See *Int’l Fruit v. Commission*, Joined Cases 41-44/70, [1971] E.C.R. 411, ¶¶ 23-28.

35. See *Roquette Frères v. Ministre de l’Agriculture*, Case C-441/05, ¶ 46 (ECJ March 8, 2007) (not yet reported).

36. See *Regione Siciliana v. Commission*, Case C-417/04 P, [2006] E.C.R. I-3881, ¶ 28.

37. EC Treaty, *supra* note 5, art. 234, O.J. C 321 E/37, at 147 (2006).

State which can, in turn, seek a ruling from the Court of Justice on the validity of the EC measure.

The manner in which that procedure is understood and configured shows that it is in fact the primary or default route through which private plaintiffs should seek review of the validity of Community acts of general application.

Indeed, it is a procedure that applies more broadly than the action for annulment. The salient feature of Article 234, first paragraph, subsection (b) is that it employs the term “acts” of the Institutions. Thus, the Court of Justice can rule on the validity of any type or form of act adopted by the Institutions, whether they be regulations, directives, decisions or any other kind of measure. It would appear that the power of the EC to conclude an international agreement could be reviewed in the preliminary reference procedure.<sup>38</sup> Even non-binding acts can be reviewed under the preliminary reference procedure.<sup>39</sup> That of course differentiates the review of validity under the preliminary reference procedure from the action for annulment which can only be directed against a legally binding act.

A major difference between the review of the legality of an act under Article 234 and an action brought under Article 230 is that the Court is not constrained by any time limit to examine the issue of validity. Article 230, Section 5 provides that every action for annulment, regardless of who brings it, must be brought within two months of the publication of the measure or of its notification to the plaintiff, or if the measure is not published, of the day on which the plaintiff knew of it. There is no equivalent under Article 234 to that two month limitation period. Nor is the Court “limited by the grounds on which the validity of . . . measures [adopted by the Institutions] may be contested.”<sup>40</sup> Under Article 230, measures can only be annulled for the reasons set out in that provision. Under Article 234, on the other hand, the Court has reviewed the legality of a Community act in the light of customary international law.<sup>41</sup>

---

38. See Draft understanding on a Local Cost Standard drawn up under the auspices of the OECD, Opinion 1/75, [1975] E.C.R. 1355, ¶ 1361.

39. See *Grimaldi v. Fonds de Maladies Professionnelles*, Case C-322/88, [1989] E.C.R. 4407, ¶ 8.

40. See *Int'l Fruit v. Commission*, Joined Cases 41-44/70, [1971] E.C.R. 411, ¶ 5.

41. See *Racke GmbH & Co. v. Hauptzollamt*, Case C-162/96, [1998] E.C.R. I-3655, ¶ 26.

The juxtaposition of the action for annulment with that of the possibility of a preliminary reference procedure in which the Court can review the validity of Community acts led the Court of Justice to characterize the system of remedies and procedures in the EC as:

[A] complete system of legal remedies and procedures designed to permit the court of justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty.<sup>42</sup>

The Court of Justice itself placed one limitation on the right to raise a plea of invalidity of Community acts in national courts. In *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland*, the Court held that a person who could have brought an action to annul an act under Article 230, Section 4, but did not do so cannot subsequently question the validity of that same act before the national courts.<sup>43</sup> However, the Court of Justice made it clear in *Accrington Beef* that where it was improbable that the plaintiffs in the national court would have had standing to sue under Article 230, Section 4, they remain at liberty to question the validity of a regulation in the national proceedings.<sup>44</sup> The Court of Justice recently held that a private party is barred from pleading the illegality of an EC measure only if it is beyond doubt that she had standing to annul the measure under Article 230, Section 4.<sup>45</sup>

While the indirect route to challenge the validity of EC acts is not subject to any time limits, it inherently contains the means of filtering cases that are not ripe for litigation. The Court of

---

42. *Partie Ecologiste "Les Verts" ("The Greens") v. European Parliament*, Case 294/83, [1986] E.C.R. 1339, ¶ 23.

43. *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland*, Case C-188/92, [1994] E.C.R. I-833; *see also* *Nachi Europe GmbH Hauptzollamt Krefeld*, Case C-239/99, [2001] E.C.R. I-1197, ¶ 37.

44. *The Queen v. Intervention Board for Agricultural Produce, ex parte Accrington Beef Co.*, Case C-241/95, [1996] E.C.R. I-6699, ¶ 15. The Court of Justice handed down a similar ruling in respect of the validity of a directive. *See Eurotunnel SA v. SeaFrance*, Case C-408/95, [1997] E.C.R. I-6315, ¶¶ 29-30.

45. *See Roquette Frères v. Ministre de l'Agriculture*, Case C-441/05, ¶ 48 (ECJ March 8, 2007) (not yet reported).

Justice has held recently that it is for the national court to examine whether the claim made by the private litigant concerning the validity of the EC measure is meritorious or not. Only if the national court considers that a plausible case of invalidity is made does it need to refer the matter to the Court of Justice for a definitive ruling. In *The Queen on the application of: International Air Transport Association, European Low Fares Airline Association v. Department for Transport*, the Court stated that:

Article 234 EC does not constitute a means of redress available to the parties to a case pending before a national court and therefore the mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a question has been raised within the meaning of Article 234 EC (see, to this effect, Case 283/81 *Cilfit* [1982] ECR 3415, paragraph 9). Accordingly, the fact that the validity of a Community act is contested before a national court is not in itself sufficient to warrant referral of a question to the Court for a preliminary ruling.

The Court has held that courts against whose decisions there is a judicial remedy under national law may examine the validity of a Community act and, if they consider that the arguments put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the act is completely valid. In so doing, they are not calling into question the existence of the Community act.<sup>46</sup>

That inbuilt mechanism for deciding the most appropriate time for judicial review is an important element in the overall system. The time factor is one that is frequently overlooked in the discussions about judicial review, as pointed out by Mashaw:

[M]ost fights about judicial review of agency action have revolved around *who* could seek review, *what* could be reviewed, or *how* review should be focused or substantively constrained. A game-theoretical analysis, combined with the consideration of the likely efficacy of other reform approaches, suggests, by contrast, that *when* review can be sought may be the most important question to consider.<sup>47</sup>

---

46. *The Queen on the application of: Int'l Air Transp. Ass'n, European Low Fares Airline Ass'n v. Dep't for Transp.*, Case C-344/04, [2006] E.C.R. I-403, ¶¶ 28-29 (citing *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost*, Case 314/85, [1987] E.C.R. 4199, ¶ 14).

47. JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 160 (1997).



C. *The Accommodations Made to the Rules on  
Standing in Article 230, Section 4*

Over the years, both the Court of Justice and the Court of First Instance have found accommodations within the strict interpretation of the standing rule for private plaintiffs in Article 230, Section 4.

The most notable element of flexibility introduced by the case law of both the Court of Justice and of the Court of First Instance concerns the type of measures that can be annulled at the request of a private plaintiff under Article 230, Section 4. As early as 1967 the Court of Justice was ready to jettison the strict taxonomy of acts of Article 230, Section 4 to allow a challenge against a *sui generis* decision adopted by the Commission in the course of a competition proceeding. The Court of Justice has never held that a directive cannot be challenged as a matter of principle even though it is clearly absent from the list of acts in Article 230, Section 4 that can be annulled. In reality, the Court of Justice has treated a directive the same way as any other act and considered only whether it was of direct and individual concern to the private plaintiff.<sup>48</sup>

In *UEAPME v. Council*, the Court of First Instance accepted that a directive can be impugned under Article 230, Section 4.<sup>49</sup> The action in that case was dismissed as inadmissible on the ground that the measure in question conferred no specific rights on the plaintiff. Actions for the annulment of directives usually fail because the measure requires implementation by the Member States and therefore is not of "direct concern" to the plaintiffs.<sup>50</sup> In reality, the Court of Justice has abandoned characterizing the act the annulment of which is sought as a "decision:" it uses the terms "act" and "decision" synonymously and requires only that they are "measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position."<sup>51</sup>

---

48. *See* *Government of Gibraltar v. Council*, Case C-298/89, [1993] E.C.R. I-3605, ¶¶ 16-17.

49. *Union Européenne de l'Artisan et des Petites et Moyennes Entreprises ("UEAPME") v. Council*, Case T-135/96, [1998] E.C.R. II-2335, ¶¶ 63-69.

50. *See, e.g., Salamander v. European Parliament & Council*, Joined Cases T-172/98, T-175-178/98, [2000] E.C.R. II-2487, ¶¶ 54, 70.

51. *See* *R.J. Reynolds v. Commission*, Case C-131/03 P, ¶ 54 (ECJ Sept. 12, 2006) (not yet reported).

By adopting a much more flexible approach to the characterization of the act which the private plaintiff seeks to annul, the Courts have considerably enhanced the possibilities for judicial protection under Article 230, Section 4. In reality they have abandoned the distinction made originally in the Treaty between constitutional and administrative review. It has to be conceded, however, that such flexibility is not easily reconciled with the wording of Article 230, Section 4, and Albertina Albers-Llorens has pointed out that the result has been "a true re-drafting of the Treaty by the Court."<sup>52</sup>

It is not a foregone conclusion that an action for annulment of a generally applicable measure introduced by a private litigant will be rejected. In practice, the Courts engage in a meticulous examination of the measures impugned and the particular situation of the plaintiff to see if she has some unique characteristics that permit the action to be accepted. There are many instances in which the Courts have found such unique characteristics. Space does not permit a detailed review of all of them, but a few are notable.

For instance, the Court of Justice has held that the Community institution may have been under a duty to take account of the specific circumstances of the plaintiff before adopting a measure. If that is the case, the plaintiff will be granted standing to annul such measure. In *Piraiiki-Patraiki v. Commission*, the Court of Justice held that the Commission was under a duty to take account of the position of exporters, who had already concluded contracts for the sale of cotton from Greece, when adopting a decision,<sup>53</sup> under Article 130 of the Act of Accession of the Hellenic Republic, addressed to a Member State and authorizing it to impose a system of quotas.<sup>54</sup> Consequently, the Court of Justice held that those traders under contract at the time of the adoption of the decision impugned were granted standing to challenge it.<sup>55</sup>

As another example, the holder of a specific right, such as an intellectual property right, will be granted standing to seek the annulment of an act that adversely affects that right. In

---

52. ALBERTINA ALBORS-LLORENS, PRIVATE PARTIES IN EUROPEAN COMMUNITY LAW 104-05 (1996).

53. Commission Decision No. 81/988/EEC, O.J. L 362, at 33 (1981).

54. *Piraiiki-Patraiki v. Commission*, Case 11/82, [1985] E.C.R. 207, ¶ 31.

55. *Id.* ¶¶ 31-32.

*Codornú v. Council*, the Court of Justice held that a Spanish wine producer that owned the trademark *Gran Cremant de Codornú* was individually concerned by a regulation<sup>56</sup> that reserved the use of the term *crémant* to sparkling wine producers situated in France and Luxembourg.<sup>57</sup> The Court of First Instance recently went one step further and held, in *Infront WM AG v. Commission*, that the exclusive holder of broadcasting rights was individually concerned by a measure that affected the exclusive nature of the retransmission in a Member State.<sup>58</sup>

If a person is named in a measure and that person's particular situation was taken into account during the adoption of the measure, she will be individually concerned and will be granted standing to seek its annulment. In *Atlantean Ltd. v. Commission* and *Cathal Boyle v. Commission*, the owners of fishing vessels were granted standing to challenge a Commission decision,<sup>59</sup> addressed to Ireland, that refused to increase the fishing capacity of certain named vessels owned by them.<sup>60</sup>

In a similar manner, if a person has the legal right to participate in the procedure leading to the adoption of the measure it then seeks to challenge, that person will have standing to seek its annulment under Article 230, Section 4.<sup>61</sup> The salient point is that EC legislation must expressly provide that the private plaintiff had the right to participate in the legislative or administrative procedure. In practice, such participatory rights are exercised before the Commission. The considerable development of participatory rights has meant that many acts adopted by the Commission can in fact be annulled at the request of private plaintiffs.<sup>62</sup>

Another example that illustrates well the careful and de-

56. Council Regulation (EEC) No. 2045/89, *amending* Council Regulation No. 3309/85, O.J. 1989 L 202 (1989), at 12.

57. *Codornú SA v. Council*, Case C-309/89, [1994] E.C.R. I-1853.

58. *Infront WM AG v. Commission*, Case T-33/01, [2005] E.C.R. II-5897, ¶ 167. This case is currently under appeal. *See Commission v. Infront WM AG*, Case C-125/06 P, O.J. C 108, at 7 (2006).

59. *See* Commission Decision No. 2003/245/EC (2003), O.J. L 90, at 48 (2003).

60. *Atlantean Ltd. v. Commission*, Case T-192/03, [2006] E.C.R. II-42, ¶ 46; *Cathal Boyle v. Commission*, Joined Cases T-218-240/03, [2006] E.C.R. 1699, ¶ 49.

61. *See Gov't of the Netherlands Antilles v. Commission*, Joined Cases T-32, T-41/98, [2000] E.C.R. II-201, ¶¶ 51-56.

62. *See* Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 *COLUM. J. EUR. L.* 243, 258-336 (2005).

tailed analysis undertaken to see if a particular plaintiff is directly or individually concerned is that of operators who seek to challenge Commission regulations classifying goods in the Combined Nomenclature. Traditionally, the Court of Justice has held that individual operators lack standing to challenge such regulations, as they are measures having a general application which apply to situations determined objectively and entail legal effects for categories of persons regarded generally and in the abstract in a manner.<sup>63</sup> In one case, *Sony Computer Entertainment Europe Ltd. v. Commission*, the Court of First Instance undertook a detailed analysis of the facts and of the particular situation of the plaintiff and concluded that Sony was individually concerned by a regulation<sup>64</sup> classifying its Playstation in the Combined Nomenclature.<sup>65</sup>

In particular areas such as the control of state aids, competition law, merger control and anti-dumping law, the Court of Justice and the Court of First Instance have held that specific categories of persons can be individually concerned by measures taken by the Institutions in those fields and thus can have standing to annul them under Article 230, Section 4.<sup>66</sup> For example, in *Extramet Industrie v. Council*, the Court of Justice granted standing to an independent importer to challenge anti-dumping measures because its particular economic situation caused it to be individually concerned by those measures.<sup>67</sup>

Admittedly, those refinements made by the Court of Justice and the Court of First Instance to rules on standing for private plaintiffs are incremental in nature and do not shake the foundations of the interpretation of Article 230, Section 4 given in *Plaumann*. They are small steps compared to the considerable

---

63. See *Casteels PVBA v. Commission*, Case 40/84, [1985] E.C.R. 667; see also *Alce v. Commission*, Case T-120/98, [1999] E.C.R. II-1395; *Industria pugliese olive in salamoia erbe aromatiche Snc ("Iposea") v. Commission*, Case T-49/00, [2001] E.C.R. II-163, ¶ 31.

64. Commission Regulation (EC) No. 1400/2001, O.J. L 189, at 5 (2001).

65. *Sony Computer Ent. Europe Ltd. v. Commission*, Case T-243/01, [2003] E.C.R. II-4189. Two other cases are pending in which a similar claim is made by the plaintiff. See *Apple Computer Int'l v. Commission*, Case T-82/06, O.J. C 108, at 26 (2006); *Security Ireland Ltd. v. Commission*, Case T-227/06, O.J. C 249, at 15 (2006). *But see Tokai Europe GmbH v. Commission*, Case T-183/04 (CFI Order of Mar. 19, 2007) (declaring a similar action to be inadmissible).

66. See generally KOEN LENAERTS ET AL., *PROCEDURAL LAW OF THE EUROPEAN UNION* 264-80 (2006); ALBORS-LLORENS, *supra* note 52, at 152-70.

67. *Extramet Industrie SA v. Council*, Case C-358/89, [1991] E.C.R. I-2501.

improvement to the position of the European Parliament made by the Court of Justice in *European Parliament v. Council*.<sup>68</sup> In that case, the Court of Justice allowed the European Parliament to have standing to bring an action against acts of the Council or the Commission on condition “that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement.”<sup>69</sup> That judgment was remarkable because the right of the European Parliament to sue was not recognized by Article 230 as it was in force at the time.

One commentator has posed the question whether the liberal attitude of the Court of Justice to the standing of European Parliament, when contrasted with its fairly rigorous attitude towards private litigants, is a case of double standards.<sup>70</sup> It would seem not. There is a fundamental difference in the position of the two categories of plaintiffs: if the European Parliament cannot bring an action for annulment under Article 230, no alternative procedural route is open to it. Private litigants, however, have the courts of the Member States at their disposal via which the validity of Community acts, broadly defined, can be reviewed.

## II. *CRITICISMS, CHALLENGES AND REFORMS* (OR LACK THEREOF)

### A. *Criticisms*

The requirement of standing for private plaintiffs and the need for them to show “direct and individual concern” has been almost universally criticized by commentators. Typical is the statement by Gráinne de Burca, who writes:

There are few questions on which the EU law academic world (not to mention the CFI and Advocate Generals of the ECJ) is so united as that the right of individuals to seek judicial review by the ECJ under Article 230 is excessively restrictive and that it undermines respect for the principle of access to justice in the EU.<sup>71</sup>

---

68. *European Parliament v. Council*, Case C-70/88, [1990] E.C.R. I-2041.

69. *Id.* ¶ 27.

70. See Arnall, *supra* note 6, at 177-90. He concludes it is not a case of double standards. See *id.* at 189.

71. Gráinne De Burca, *Fundamental Rights and Citizenship*, in *TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE 26* (Bruno de Witte ed., 2003), available at <http://www.iue.it/RSCAS/e-texts/200304-10RefConsTreaty.pdf>.

This assertion is certainly true for academic writers as they tend to consider that the Court has interpreted Article 230, Section 4 too restrictively. Paul Craig criticizes the reasoning of the Court of Justice in conceptual terms because it renders "it literally impossible for an applicant *ever* to succeed, except in a very limited category of retrospective cases."<sup>72</sup>

Indeed, a plethora of distinguished writers have deplored over the years the restrictive interpretation of the rule of standing for private litigants by the Court of Justice.<sup>73</sup> One notable exception is Stefan Enchelmaier who concludes a thoughtful study of the standing of private plaintiffs by stating that "[t]he Community system for the protection of individual rights, as interpreted by the European Court of Justice is better than the criticism of the jurisprudence on Art. 230(4) EC may lead one to believe."<sup>74</sup>

Criticisms have not been the exclusive domain of academic writers. In the second paragraph of his famous Opinion in *Unión de Pequeños Agricultores ("UPA") v. Council*, Advocate General Jacobs pointed out not only that five other members of the Court of Justice or the Court of First Instance had criticized the requirements of standing in their personal capacity in extra-judicial writings, but that various opinions of other Advocates Gen-

---

72. Paul Craig, *Legality, Standing and Substantive Review in Community Law*, 14 OXFORD J. LEGAL STUD. 507, 509 (1994).

73. See generally Anthony Arnall, *Private Applicants and the Action for Annulment Under Article 173 of the EEC Treaty*, 32 COMMON MKT. L. REV. 7, (1995); Anthony Arnall, *Private Applications and the Action for Annulment Since Codorniu*, 28 COMMON MKT. L. REV. 7 (2001); Anthony Arnall, *Challenging EC Anti-Dumping Regulations: The Problem of Admissibility*, 13 EUR. COMPETITION L. REV. 73 (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); Laurence W. Gormley, *Judicial Review in EC and EU Law—Some Architectural Malfunctions and Design Improvements?*, 4 CAMBRIDGE Y.B. EUR. LEGAL STUD. 167 (2001); Carol Harlow, *Towards a Theory of Access for the European Court of Justice*, 12 Y.B. EUR. L. 213 (1992); Hjalte Reasmussen, *Why is Art. 173 Interpreted Against Private Plaintiffs?*, 5 EUR. L. REV. 112 (1980); Georges Vandensanden, *Pour un Elargissement du Droit des Particuliers D'Agir en Annulation Contre des Actes Autres que les Décisions qui leur sont Adressés*, 31 CAHIERS DE DROIT EUROPÉEN [CAH. DR. EUR.] 535 (1995); Denis Waelbroeck & A.M. Verheyden, *Les Conditions de Recevabilité des Recours en Annulation des Particuliers Contre des Actes Normatifs Communautaires: A La Lumière du Droit Comparé et de la Convention des Droits de l'Homme*, 31 CAH. DR. EUR. 399 (1995).

74. Stefan Enchelmaier, *No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC* 62 (Inst. Eur. & Comp. L., Univ. of Oxford, Working Paper 3, 2004), available at <http://denning.law.ox.ac.uk/iecl/pdfs/working3enchelmaier.pdf>.

eral were critical of them also.<sup>75</sup>

The Courts themselves seemed to pay little heed to those criticisms. Until its judgment in *Jégo-Quééré & Cie SA v. Commission*, even the Court of First Instance had not seriously and openly challenged the Court of Justice to modify the requirements of standing for private plaintiffs.<sup>76</sup>

### B. Challenges: *The Summer of 2002 and the UPA and Jégo Quééré Cases*

When the Court of First Instance did challenge the rule of standing in 2002, the results were surprising. The sequence of events is revelatory in itself and casts an interesting light on the outcome of the Court of First Instance's challenge. Above all, the events of 2002 reveal in a fascinating way how the Court of Justice envisages the system of judicial review.

The opportunity presented itself almost accidentally because of the sequential examination of two similar sets of cases: *Unión de Pequeños Agricultores ("UPA") v. Council* at first instance,<sup>77</sup> *UPA v. Council* on appeal;<sup>78</sup> and *Jégo-Quééré & Cie SA v. Commission* at first instance,<sup>79</sup> and *Commission v. Jégo-Quééré & Cie SA* on appeal.<sup>80</sup>

The previous case-law of the Court of First Instance shows that it did not consistently and deliberately look for an opportunity to challenge the fundamentals of the ruling of the Court of Justice in *Plaumann*. After all, the Court of First Instance was invited by Greenpeace some years before, in *Greenpeace v. Commission*, to interpret the terms "direct and individual concern" more broadly in environmental cases.<sup>81</sup> The Court of First Instance categorically refused to do so.<sup>82</sup> It was upheld by the

---

75. See Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores ("UPA") v. Council*, Case C-50/00P, [2003] Q.B. 893, 897-98.

76. *Jégo-Quééré & Cie SA v. Commission*, Case T-177/01, [2002] E.C.R. II-2365.

77. *Unión de Pequeños Agricultores ("UPA") v. Council*, Case T-173/98, [1999] E.C.R. II-3353.

78. *Unión de Pequeños Agricultores ("UPA") v. Council*, Case C-50/00 P, [2002] E.C.R. I-6677.

79. *Jégo-Quééré*, [2002] E.C.R. II-2365.

80. *Commission v. Jégo-Quééré & Cie SA*, Case C-263/02 P, [2004] E.C.R. I-3425.

81. *Stichting Greenpeace Council (Greenpeace Int'l) v. Commission*, Case T-585/93, [1995] E.C.R. II-2205.

82. *Id.* ¶¶ 62-65.

Court of Justice on appeal by Greenpeace.<sup>83</sup> In fact, the Court of First Instance had a number of opportunities to reinterpret Article 230, Section 4 in light of the need to ensure effective judicial review. Each time it declined to do so.<sup>84</sup>

Nor at first did it seem from the attitude of the Court of First Instance that it would seek to question the *Plaumann* interpretation of Article 230, Section 4 when it ruled on the first case, *UPA*.<sup>85</sup> In that case, the applicant, UPA, was a Spanish association of farmers who sought to annul a regulation on the granting of aid for the production of olive oil.<sup>86</sup> The Court of First Instance summarily dismissed the case as inadmissible by an Order made under Article 111 of the Rules of Procedure of the Court of First Instance on the ground that the applicant was not individually concerned by the regulation in question.<sup>87</sup> In so doing, the Court of First Instance was doing no more than scrupulously following the existing case-law on standing.

Then, UPA appealed to the Court of Justice. It claimed that if it were not granted standing to challenge the regulation it would be deprived of any right of access to a court: Because the measure in question was a regulation, it did not entail any implementing measure by the national authorities which they could challenge before the Spanish courts.<sup>88</sup> Thus, an action for annulment in the Court of First Instance under Article 230, Section 4 was its only hope of seeking redress.

Serendipitously, the case in the Court of Justice was allocated to Advocate General Jacobs. His opinion of March 21,

---

83. See *Stichting Greenpeace Council (Greenpeace Int'l) v. Commission*, Case C-321/95, [1998] E.C.R. I-1651.

84. See *Berthu v. Council*, Case T-207/97, [1998] E.C.R. II-509, ¶ 29; *Van Parijs v. Commission*, Case T-11/99, [1999] E.C.R. II-2653, ¶ 54; see also *Société des plantations de Mbanga SA (SPM) v. Commission*, Case T-447/05, ¶ 82 (CFI Jan. 12, 2007) (not yet reported); *Société des plantations de Mbanga SA (SPM) v. Commission*, Case T-104/06, ¶ 82 (CFI Jan. 12, 2007) (not yet reported).

85. *Unión de Pequeños Agricultores ("UPA") v. Council*, Case T-173/98, [1999] E.C.R. II-3357.

86. See *Council Regulation (EC) No. 1639/98*, O.J. L 210/32 (1998), amending Regulation (EEC) No 2261/84.

87. See *UPA*, [1999] E.C.R. II-3357; Consolidated Version of the Rules of Procedure of the Court of First Instance of the European Communities, art. 111, O.J. L 103, at 6 (1997), available at <http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txt7.pdf>.

88. See *Unión de Pequeños Agricultores ("UPA") v. Council*, Case C-50/00 P, [2002] E.C.R. I-6677, ¶ 61.



2002 contains a most fully reasoned and thoughtful critique of the existing case-law on standing.<sup>89</sup> He considered that the existing case-law on standing of individual applicants was “problematic.”<sup>90</sup> He opined that proceedings before national courts may not in reality provide effective judicial protection with the result that in some cases no legal protection of individuals will be available at all,<sup>91</sup> and considered that actions for annulment under Article 230 are more “appropriate” for determining the validity of EC acts than reference proceedings under Article 234.<sup>92</sup> Yet, Advocate General Jacobs disagreed with the submission of UPA that standing should be granted to challenge a regulation where the circumstances of the case reveal that the plaintiff would otherwise be denied effective judicial protection. He found no basis for that interpretation in the wording of Article 230, Section 4.<sup>93</sup> In particular, he found it unsatisfactory to make standing in the EC Courts contingent upon the lack of it in a national court.<sup>94</sup> Thus, the Advocate General did not wish to change the relationship between national courts and the EC courts fundamentally by turning the annulment action before the EC courts into the default procedure for private litigants to challenge EC measures of general application. The only solution, according to Advocate General Jacobs was to change the interpretation of the term “individual concern.” He proposed that “a person is to be regarded as individually concerned by a Community measure where, by reason of particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.”<sup>95</sup>

One feature of Advocate General Jacobs’ opinion is particularly interesting. Notwithstanding his trenchant criticisms of the rule on standing of private litigants, he considered that a satisfactory solution could be found within the existing wording of Article 230, Section 4. He did not contemplate jettisoning completely all restrictions on standing for private litigants so that

---

89. See Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores (“UPA”) v. Council*, Case C-50/00 P, [2002] E.C.R. I-6677.

90. *Id.* ¶ 37.

91. See *id.* ¶¶ 38-44.

92. *Id.* ¶¶ 45-48.

93. See *id.* ¶¶ 50-52.

94. *Id.* ¶ 53.

95. *Id.* ¶ 60.

“any person adversely affected by a measure has standing to challenge it” as is the case in French law.<sup>96</sup> His criticism was aimed at the case law of the Court of Justice, not at the scheme of the Treaty itself. Clearly he thought that his “substantial adverse effect” test could replace the rule set out in *Plaumann* without changing the terms of Article 230, Section 4. After all, he saw no reason why the notion of individual concern requires that an individual applicant seeking the annulment of a measure of general application must be differentiated from all others affected by it in the same way as an addressee.<sup>97</sup>

The problem is that any rule limiting standing, even the one proposed by Advocate General Jacobs, may have a degree of indeterminacy and requires interpretation. He did not explain what would happen to litigants who failed his “substantial adverse effect” test. Presumably they would be left to fend for themselves in the national courts. Nor did he give any reassurance to the Court, other than stating that his test could be accommodated by the terms of Article 230, Section 4, that the test he proposed to replace the *Plaumann* rule would not lead to a fundamental transformation of a decentralized system of enforcement and turn the Community courts into the default system for enforcing individual rights. That difficulty, which is explored further below, was not lost on the Court of First Instance which in the meantime was confronted with another case.

By that time, a second case had been lodged with the Court of First Instance—*Jégo-Quéré*.<sup>98</sup> It concerned an action brought by a French fishing company to annul parts of a Commission regulation imposing minimum fish net mesh sizes in order to reduce catches of juvenile hake.<sup>99</sup> The plaintiff asserted that the regulation would have serious consequences on its fishing activities, that it required no implementing measure at the national level, and if it were denied standing under Article 230, Section 4 it would be bereft of any remedy.

Clearly, the same issue of standing was raised in *Jégo-Quéré* as in *UPA*. And the sequence of events becomes important and reveals its own moral of the story. The action in *Jégo-Quéré* was

---

96. *Id.* ¶ 85.

97. *Id.* ¶ 59.

98. *Jégo-Quéré & Cie SA v. Commission*, Case T-177/01, [2002] E.C.R. II-2365.

99. *See Commission Regulation (EC) No. 1162/2001*, O.J. L 159/4 (2001).

commenced on August 2, 2001. The written procedure was closed and the hearing was held on April 16, 2002, less than a month after Advocate General Jacobs' opinion in *UPA*. The Court of First Instance did not issue an order declaring Jégo-Quééré's action clearly inadmissible as it had done in *UPA*. Nor did the Court of First Instance stay the proceedings in *Jégo-Quééré* until the judgment of the Court of Justice in *UPA* as it could have done under Article 54, Section 3 of the Protocol on the Statute of the Court of Justice.<sup>100</sup> The Court of First Instance probably sensed that a unique opportunity offered itself to reconsider the whole issue of standing of private litigants seeking the annulment of measures of general application. Advocate General Jacobs' opinion was after all trenchant, fully reasoned and very persuasive.

The Court of First Instance went right ahead and handed down a judgment in *Jégo-Quééré* on May 3, 2002. It held that the action was admissible, but it did not adopt Advocate General Jacobs' "substantial adverse effect" test. Instead, it held that:

[An individual] is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.<sup>101</sup>

Presumably, the Court of First Instance thought that its reinterpretation of Article 230, Section 4 would not fundamentally change the system and yet could accommodate the plaintiff Jégo-Quééré satisfactorily.

The important twist in the rules on standing brought about by the Court of First Instance was the requirement that the private litigant be affected in a manner that is "definite and immediate." The Court of First Instance had noted in Paragraph 45 of its judgment that there were "no acts of implementation capable of forming the basis of an action before national courts."<sup>102</sup> In

---

100. See Consolidated Version of the Treaty on European Union, Dec. 24, 2003, O.J. C 325/5, at 179 (2002).

101. *Jégo-Quééré*, [2002] E.C.R. II-2365, ¶ 51.

102. *Id.* ¶ 45

those circumstances an individual would have to breach the rules imposed by the EC before she could assert their illegality in subsequent national proceedings. Presciently, the Court of First Instance found that such a *modus operandi* did not constitute an adequate means of judicial protection.

The reasoning and solution of the Court of First Instance in its judgment in *Jégo-Quéré* meant taking a risk. It was navigating remarkably close to accepting the submission UPA had made that standing should be granted to challenge a regulation where the circumstances of the case reveal that the plaintiff would otherwise be denied effective judicial protection.<sup>103</sup> And Advocate General Jacobs had rejected this argument as having no basis in the wording of Article 230, Section 4.<sup>104</sup> Perhaps that seemed like a risk worth taking for the Court of First Instance. The solution it adopted seemed like an incremental change that could be made in the light of the principle of effective judicial protection by a first instance court. If it had adopted the “substantial harm” test the Court of First Instance would clearly have put itself at odds with the existing case-law of the higher court.

The appeal in the *UPA* case was still pending when the Court of First Instance handed down its judgment in *Jégo-Quéré*. The Court of Justice spotted that difficulty in the Court of First Instance’s judgment in *Jégo-Quéré* and moved swiftly, handing down its adamant judgment on July 25, 2002.<sup>105</sup> It held in paragraph 43 of its judgment:

As the Advocate General has pointed out in paragraphs 50 to 53 of his Opinion, it is not acceptable to adopt an interpretation of the system of remedies, such as that favoured by the appellant, to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That

---

103. See *Unión de Pequeños Agricultores (“UPA”) v. Council*, Case C-50/00 P, [2002] E.C.R. I-6677.

104. See Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores (“UPA”) v. Council*, Case C-50/00 P, [2002] E.C.R. I-6677, ¶¶ 50-52.

105. See *UPA*, [2002] E.C.R. I-6677.

would go beyond its jurisdiction when reviewing the legality of Community measures.<sup>106</sup>

It upheld the Court of First Instance's order in that case and declared that UPA lacked standing to annul Regulation 1638/98. It seemed to overrule the judgment of the Court of First Instance in *Jégo-Quéré*.

The Court of Justice reviewed the existing case-law on standing in its judgment and pointed out that Articles 230, 241 and 234 established a complete system of remedies and procedures designed to ensure judicial review of the legality of the acts of the Institutions.<sup>107</sup> The right to effective judicial protection is one of the general principles of law stemming from the constitutional traditions of the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the protection of Human Rights and Fundamental Freedoms.<sup>108</sup> When private plaintiffs cannot obtain redress via Article 230, Section 4, the Court points out that they may, depending on the case, either indirectly plead the invalidity of those acts in the EC courts under Article 241 or plead their invalidity before the national courts and seek a reference to the Court of Justice for a ruling on their validity under Article 234.<sup>109</sup> The Court thus reaffirmed the decentralized system for enforcing the rights of private litigants. It brushed aside any criticism that the indirect, decentralized system was inadequate by stating "it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right of effective judicial protection."<sup>110</sup>

The Court of Justice also held that the interpretation given in *Plaumann* was the only one possible of Article 230, Section 4 and rejected the alternatives proposed by Advocate General Jacobs and the Court of First Instance as going "beyond the jurisdiction conferred by the Treaty on the Community Courts."<sup>111</sup>

The fate of the outcome of the appeal lodged by the Commission against the judgment in *Jégo-Quéré* was thus sealed. Advocate General Jacobs was once again appointed to deliver an

---

106. *Id.* ¶ 43.

107. *See id.* ¶ 40.

108. *See id.* ¶ 39.

109. *See id.* ¶ 40.

110. *Id.* ¶ 41.

111. *Id.* ¶ 44.

opinion.<sup>112</sup> When he delivered it on July 10, 2003 he was resigned to the fact that:

[I]t 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.<sup>113</sup>

It came as no surprise therefore that the Court of Justice later allowed the appeal of the Commission and set aside the judgment of the Court of First Instance in *Jégo-Quéré*.<sup>114</sup> In particular, the Court of Justice reaffirmed strongly that the default system for redress by private litigants was via the national courts. The Court emphasized that "an action for annulment before the Community Court should not on any view be available, even where it is apparent that the national procedural rules do not allow the individual to contest the validity of the Community measure at issue unless he has first contravened it."<sup>115</sup> It added that the Court of Justice could not remedy any defect in the national legal order which deprived private litigants of the right of redress by granting standing to them under Article 230, Section 4: To do so would require the Court to review national procedure and that would go beyond its jurisdiction when reviewing the legality of Community measures.<sup>116</sup> It took up the theme that it had relied on in its judgment in *UPA* once again that it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right of effective judicial protection.

There is one idea put forward by the Court of Justice in its judgment in *UPA* that was not repeated in its judgment in *Jégo-Quéré*. That idea concerned the possibility of a change being made to the wording of Article 230, Section 4 itself. In its judgment in *UPA*, the Court had added as a sort of coda:

While it is, admittedly possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding

---

112. See Opinion of Advocate General Jacobs, *Commission v. Jégo-Quéré & Cie SA*, Case C-263/02, [2004] E.C.R. I-3425.

113. *Id.* ¶ 45.

114. *Commission v. Jégo-Quéré & Cie SA*, Case C-263/02, [2004] E.C.R. I-3425.

115. *Id.* ¶ 34.

116. See *id.* ¶ 33.

Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.<sup>117</sup>

The Court of Justice made no such remark in its judgment of July 10, 2003 in *Jégo-Quéré*, because by that time as we shall see, no sweeping change to the wording of Article 230, Section 4 was going to be proposed by the Convention.

Some authors consider that the Court of Justice was cautious not to change the rules on standing because of the discussions taking place in the Convention with a view to the drafting of a Constitution.<sup>118</sup> Such a motive for caution by the Court is unlikely as the criticisms of the restrictive rules on standing were well known and the Court was required to work within the confines of the existing wording of Article 230, Section 4. Rather, the reluctance to change the rules on standing indicates the deep seated attachment of the Court of Justice to the existing decentralized system in which the enforcement of the rights of private litigants is to take place by default in the courts of the Member States. After all, the Court itself through its President had, by that time, made representations to the Convention Discussion Circle on the Court of Justice that were hardly an encouragement to change the system.<sup>119</sup> In any case, the terms of the debate before the Court of Justice in both *UPA* and *Jégo-Quéré* were not whether the rules on standing *should* be changed but whether they *could* be changed within the existing wording of Article 230, Section 4. Nor can Paragraph 45 of the judgment in *UPA* be viewed as a pressing invitation to the Member States to amend Article 230, Section 4. The Court of Justice has referred to the possibility that the Member States or EC Institu-

---

117. Unión de Pequeños Agricultores (“UPA”) v. Council, Case C-50/00 P, [2002] E.C.R. I-6677, ¶ 45.

118. See, e.g., Ewa Biernat, *The Locus Standi of Private Applicants under article 230(4) EC and the Principle of Judicial Protection in the European Community* 43 (Jean Monnet Cent. Int'l & Regional Econ. L. & Justice, NYU School of Law, Working Paper No. 12/03), at <http://www.jeanmonnetprogram.org/papers/papers03.html> (last visited Apr. 15, 2007); Dominik Hanf, *Talking with the “Pouvoir Constituant” in Times of Constitutional Reform: The European Court of Justice on Private Applicants’ Access to Justice*, EUR. LEGAL STUD., Mar. 2003, at [http://www.coleurop.be/content/studyprogrammes/law/studyprog/pdf/ResearchPaper\\_3\\_2003\\_Hanf.pdf](http://www.coleurop.be/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_3_2003_Hanf.pdf) (last visited Apr. 15, 2007).

119. 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) [hereinafter *Iglesias Presentation*].

tions could amend provisions of Community law before,<sup>120</sup> and it did so in a more neutral manner without remarking that an amendment would entail a change of principles that had never been amended.

The Court of Justice did not extend an invitation to the Member States to change the wording of Article 230, Section 4 so that private litigants could seek redress in the Community courts rather than in national courts. Nor was it an invitation the Member States ever would have accepted.

*C. Reforms: The Changes Made to the Treaty and the Constitution*

One of the striking aspects of the whole controversy surrounding the limited access of private litigants to the European Courts is the little desire by the Member States to amend the wording of Article 230, Section 4. The Court of Justice made that very point in Paragraph 45 of its judgment in *UPA* when it referred to the system of procedures as having been “never amended.”<sup>121</sup>

Over the years, the Member States have modified many parts of the Treaty of Rome. Relatively few modifications have been made to the section on the Court of Justice. The Single European Act introduced a new Treaty article providing for the creation of the Court of First Instance.<sup>122</sup>

The pace of change accelerated with the Treaty of Nice. It amended a number of provisions dealing with the Court of Justice. In fact, eight articles were modified by the Nice Treaty,<sup>123</sup> and two new provisions were inserted.<sup>124</sup>

Of particular relevance is the fact that the Treaty of Nice modified the second and third paragraphs of Article 230 to elevate the European Parliament to the status of a fully privileged

---

120. See *GIE Groupe Concorde v. The Master of the vessel “Suhadwarno Panjan,”* Case C-440/97, [1999] E.C.R. I-6307, ¶¶ 21-22.

121. See *Unión de Pequeños Agricultores (“UPA”) v. Council*, Case C-50/00 P, [2002] E.C.R. I-6677, ¶ 45.

122. Formerly Article 168, subsequently Article 225 of the EC Treaty, but before modification by the Treaty of Nice.

123. See EC Treaty, *supra* note 5, arts. 220-25, 230(2)-(3), 245, O.J. C 321 E/37, at 141-44, 146, 150 (2006).

124. See *id.* arts. 225a, 229a, O.J. C 321 E/37, at 144, 146 (2006); see also J-V Louis, *La Fonction Juridictionnelle: De Nice à Rome*, in *UNE CONSTITUTION POUR L'EUROPE: RÉFLEXIONS SUR LES TRANSFORMATIONS DU DROIT DE L'UNION EUROPÉENNE* 119-40 (Olivier de Schutter & Paul Nihoul eds., 2004).



applicant rather than a semi-privileged applicant.<sup>125</sup> But no change was made to Article 230, Section 4. Thus, the wording of that particular provision has remained unaltered for half a century.

Hopes were raised by the work of the Convention on the Future of Europe (“Convention”) that had the task of drafting the Constitution.<sup>126</sup> Those hopes have been dashed because the outcome did not result in a considerable improvement of the standing of private litigants. The modesty of the outcome is all the more significant when seen in the light of the number of contributions and representations made signaling the difficulties raised by the current wording of Article 230, Section 4 and urging that standing for private litigants be broadened.<sup>127</sup>

Once again, the sequence of events is revelatory. It is possible to discern two phases in the work of the Convention. During the first phase up to the formation of the “Discussion Circle” on the Court of Justice in early 2003, the Convention and in particular its Working Group II on the Charter and European Convention on Human Rights received many contributions on the issue of standing. Most of those contributions recommended that Article 230, Section 4 be modified to grant private litigants broader standing. For instance, on May 14, 2002, a member of the Convention, Mr. Farnleitner, sent in a contribution on the need to examine the wording of Article 230, Section 4 and suggested that the condition of “individual concern” be deleted thus allowing individuals to challenge acts that were of “direct” concern to them.<sup>128</sup> Working Group II received an extensive note from Advocate General Jacobs outlining the “Necessary changes to the system of judicial remedies.”<sup>129</sup> On November 14, 2002, Messrs.

125. Article 2, Section 42 of the Treaty of Amsterdam had already formalized the status of the European Parliament as a semi-privileged applicant. See Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997).

126. For details on the work of the Convention and the Discussion Circle in particular, see Marton Varju, *The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention*, 10 EUR. PUB. L. 43, 48-53 (2004).

127. See generally 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).

128. See European Convention, Secretariat, Hannes Farnleitner, *Facilitating Individual Actions Before the European Court of Justice and the Court of First Instance*, CONV 45/02 25 (May 14, 2002) [hereinafter *Contribution 25*].

129. See European Convention, Working Group II, Francis G. Jacobs, *Note for the*

Farnleitner and Rack made a clarification of a previous contribution,<sup>130</sup> suggesting that only the condition of “direct concern” remain in the requirement of standing.<sup>131</sup> Jürgen Meyer, a member of the Convention, suggested that the requirements of being “directly and individually concerned” should be changed to become alternative, not cumulative, conditions.<sup>132</sup> Practically the sole dissenter was Judge Skouris, when he was heard by Working Group II on September 17, 2002 in his personal capacity. He considered that the existing system of remedies complied with the need to respect fundamental rights but did not exclude the possibility of an amendment to Article 230, Section 4.<sup>133</sup>

The strong tendency of the different contributions therefore was to suggest amendments, some more sweeping than others, to the wording of Article 230, Section 4 to broaden the rules on standing. The Convention did not content itself with those contributions, however.

Instead, it decided to form a “Discussion Circle on the Court of Justice” to hear a broader range of views of experts and to hear those of the Court of Justice and of the Court of First Instance.<sup>134</sup> The establishment of the Discussion Circle marks the second phase in the work of the Convention. The Discussion Circle was tasked to examine, among other topics, whether the wording of Article 230, Section 4 on direct appeals by individuals against general acts of the Institutions should be amended.<sup>135</sup>

As the Discussion Circle gathered a wider range of views in a more systematic manner than that in which contributions were

---

*Working Group on the Charter/ECHR: Necessary Changes to the System of Judicial Remedies*, WG II– WD 020 (Sept. 27, 2002) [hereinafter *Working Document 20*].

130. See *Working Document 20*, *supra* note 128.

131. See European Convention, Secretariat, Hannes Farnleitner & Reinhard Rack, *Extending the Right of Action for Individuals Before the European Court of Justice and the Court of First Instance*, CONV 402/02 (Nov. 14, 2002) [hereinafter *Contribution 141*].

132. See European Convention, Secretariat, Jürgen Meyer, *Enforceability of the Charter of Fundamental Rights and Improvement of the Individual’s Right to Legal Redress*, CONV 439/02 (Nov. 29, 2002) [hereinafter *Contribution 160*].

133. See European Convention, Working Group II, Judge Vassilios Skouris, *Speaking Note: Hearing of 17 September 2002*, WG II– WD 019 (Sept. 27, 2002), at 4-5 [hereinafter *Working Document 19*].

134. See European Convention, Secretariat, “*Discussion Circle*” on the Court of Justice: *Framework of Proceedings*, CONV 543/03 (Feb. 7, 2003).

135. *Id.* at 2.

presented to the Working Group of the Convention, a more nuanced, complex picture began to emerge.

President Rodriguez Iglesias, then-President of the Court of Justice, made a presentation to the Discussion Circle on February 17, 2003.<sup>136</sup> He pointed out that the current system of actions and remedies for private litigants was based on the principle of “subsidiarity” in which the courts of the Member States were primarily responsible for protecting the rights of individuals.<sup>137</sup> He conceded that certain amendments could be made to Article 230, Section 4 to improve the protection of individuals at the EC level. But to do so, he emphasized, would involve a change in policy because in the past the policy was that actions brought by individuals should not be brought before the Court of Justice but before national courts.<sup>138</sup>

President Vesterdorf presented his views to the Discussion Circle on February 24, 2003.<sup>139</sup> He too presented a nuanced view. A change in wording of Article 230, Section 4 to broaden the rules on standing meant a change in policy. He candidly admitted that the members of the Court of First Instance were divided on the issue of an amendment to Article 230, Section 4: Some members considered that the existing system was adequate while others disagreed.<sup>140</sup> If a change were to be made, he expressed the hope that a distinction would be made between legislative and regulatory measures. He suggested that individuals be permitted to challenge “regulatory measures,” while the current restrictions on standing for private plaintiffs be carried over to actions against “legislative measures.”<sup>141</sup>

Clearly the idea emerged that a change to the rules on standing would entail a shift in policy and would change the center of gravity of the relationship between the EC Courts and the courts of the Member States. The magnitude of that shift had an impact.

It rapidly became clear that the Discussion Circle was di-

---

136. See *Iglesias Presentation*, *supra* note 119.

137. *Id.* at 3.

138. See *id.* at 3-4.

139. See 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) (Mar. 10, 2003).

140. See *id.* at 4.

141. *Id.* at 5.

vided into two groups. For the first group, no change to the wording of Article 230, Section 4 was required.<sup>142</sup> That first group considered that the existing system was adequate and reliance could be placed on national courts in a decentralized system to defend the rights of individuals. The national courts could (or should, if at last instance) refer questions to the Court of Justice for a preliminary ruling on the validity of a Union act. Those members did suggest however that the Constitution should:

mention explicitly that, in accordance with the principle of loyal cooperation as interpreted by the Court of Justice, national courts are required 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. It is in fact for the Member States to establish a system of legal remedies and procedures which ensures respect for the right of individuals to effective judicial protection as regards rights resulting from Union law.<sup>143</sup>

According to the second group, on the other hand, the rules on standing for proceedings by individuals against measures of general application were too restrictive.<sup>144</sup> That group did not appear to agree on a single, satisfactory amendment. Instead, its members came up with the following solutions:

- (a) separate the two conditions [of individual and direct concern,] which would no longer be cumulative;
- (b) replace “and individual” by “and affects his legal situation;”
- (c) maintain the current wording and add “or against a measure of general application which is of direct concern to him without entailing any implementing measure;”
- (d) leave the current wording for legislative acts (henceforth laws and framework laws) and allow referral to the Court of Justice for regulatory acts; these could be the subject of pro-

---

142. See European Convention, Chairman of the Discussion Circle on the Court of Justice, *Final Report of the Discussion Circle on the Court of Justice*, CONV 636/03, CERCLE I 13 (Mar. 25, 2003).

143. *Id.* at 6.

144. See *id.* at 7.

ceedings where they are of direct or individual concern to an individual;

(e) same as above, but giving individuals the right to bring proceedings against legislative acts of the Union which do not entail any implementing measure.<sup>145</sup>

The introduction of a specific right to bring proceedings for the defence of fundamental rights was proposed by some members. A majority of members of the second group were in favor of re-drafting Article 230, Section 4 as follows:

Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, and against [an act of general application] [a regulatory act] which is of direct concern to him without entailing implementing measures.<sup>146</sup>

The additional words “without entailing implementing measures” seek to ensure that the extension of a private individual’s right to institute proceedings would apply only to cases where the individual concerned must first infringe the law before he can have access to a court.

The draft forwarded to the Convention contained the amendment suggested by the majority of the second group who were in favor of a change to the wording of Article 230, Section 4.<sup>147</sup> The only change was the use of the term “regulatory act” instead of “act of general application.” It was also suggested to the Convention that the Constitution should include a new Article 20, Section 1 on the Court of Justice reading: “Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law.”<sup>148</sup>

In the end, the Constitution included the following provision in Article III-365:

4. Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which

145. *Id.* at 7.

146. *Id.*

147. See European Convention, Praesidium, *Articles on the Court of Justice and the High Court*, CONV 734/03 (May 12, 2003) [hereinafter *Draft Articles*].

148. *Id.* at 5; see also European Convention, The Praesidium, *Institutions—Draft Articles for Title IV of Part I of the Constitution*, CONV 691/03 (Apr. 23, 2003).

is of direct concern to him or her and does not entail implementing measures.<sup>149</sup>

That wording is of course the same as that suggested by the Discussion Circle. It is not the significant broadening of the scope of standing of private litigants that many had hoped for.<sup>150</sup>

Article III-365 and in particular its Section 4 has four salient features. First it reintroduced the distinction originally made in the EC Treaty between constitutional type litigation and administrative actions by individuals. The Constitution sought, in its Article I-33, to introduce a new taxonomy of acts that could be adopted. Article I-33 provided for “legislative acts” comprising “European laws” of general application and “European framework laws” binding as to the result to be achieved.<sup>151</sup> It also provided for non-legislative acts comprising “European regulations” which implement legislative acts and certain provisions of the Constitution and “European decisions,” as well as non-binding measures such as “recommendations” and “opinions.”<sup>152</sup> The result of Article III-365, Section 4 was to leave unchanged the position of private litigants seeking annulment of legislative acts: They must still show that the measure is of direct and individual concern to them.

The second feature is that Article III-365, Section 4 introduced a new category of act—a “regulatory act”—which is not defined in Article I-33 of the Constitution.<sup>153</sup> When seeking annulment of such a “regulatory act,” the private applicant need only show that it is of direct concern to her and does not entail implementing measures.<sup>154</sup> According to the comment included in Document CONV 734/03, dated May 12, 2003, the term “regulatory act” was used:

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 ap-

---

149. Draft Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. C 310/1, at 159-60 (2004) (not yet ratified) [hereinafter Draft Treaty].

150. See Koch, *supra* note 127, at 527.

151. Draft Treaty, *supra* note 149, art. I-33, O.J. C 310/1, at 26-27 (2004).

152. *Id.*

153. *Id.* art. III-365, § 4, O.J. C 310/1, at 160 (2004).

154. *Id.*

proach to actions against regulatory acts.<sup>155</sup>

That would seem to indicate that “regulatory acts” are a broader category of generally applicable acts than “European regulations” as defined in Article I-33, Section 1, fourth subparagraph and could comprise “European decisions” as defined in Article I-33, Section 1, fifth subparagraph, if they do not have any particular addressee and thus apply generally. If that is so, a European decision addressed to a particular addressee would not be a “regulatory act” but an individual one for its addressee. Consequently, if a private litigant who is not the addressee sought to annul that European decision, she would have to show that it was an act of direct and individual concern to her.<sup>156</sup>

The third feature of Article III-365, Section 4 is that it broadens the rule on standing for an action against a regulatory act that “does not entail implementing measures.” Such a change would seem, at first glance, to incorporate what the Court of First Instance had held in its judgment in *Jégo-Quéré*.<sup>157</sup> But it does not. It is more restrictive than the rule adumbrated by the Court of First Instance because it applies only to “regulatory acts” to the exclusion of legislative acts, such as European laws and European framework laws. The ruling of the Court of First Instance in *Jégo-Quéré* applied to both legislative and implementing measures. Thus a private litigant seeking the annulment of a European law, which does not entail any implementing measure, would have to show that she is directly and individually concerned under Article III-365, Section 4 of the Constitution whereas according to the judgment in *Jégo-Quéré*, if she were seeking the annulment of a regulation, she would only have to show she was directly concerned by the regulation.

The fourth salient feature is that Article III-365, Section 4 sought to preserve the traditional, decentralized system of the protection of the rights of private parties in which the default procedure is that of an action before a national court. That characteristic of Article III-365, Section 4 is more manifest when it is juxtaposed with Article I-29, Section 1, second subpara-

---

155. *Draft Articles*, *supra* note 147, at 20.

156. See Koen Lenaerts & Ignace Maselis, *Le Système Juridictionnel de l'Union*, in *COMMENTAIRE DE LA CONSTITUTION DE L'UNION EUROPÉENNE* 231 (Marianne Dony & Emmanuelle Bribosia eds., 2005).

157. *Jégo-Quéré & Cie SA v. Commission*, Case T-177/01, [2002] E.C.R. II-2365.

graph, which provided “Member States shall provide remedies sufficient to ensure effective legal protection in the field covered by Union law.”<sup>158</sup> Further evidence that enforcement through the national courts together with the possibility of referring a preliminary question to the Court of Justice remains the default system for enforcement of private rights is provided by the wording of Article III-369.<sup>159</sup> That provision, like Article 234, confers jurisdiction on the Court of Justice to rule on the validity of all types of acts, without restriction.

The drafters of the Constitution were attached to the decentralized system of enforcement as the default procedure for protecting the rights of private litigants because they considered the system to be robust and effective. And the Court of Justice has made it more so.

### III. THE INDIRECT ROUTE STRIKES BACK

#### A. *The Court of Justice Reinforces It*

A number of commentators consider that the Court of Justice failed to take the opportunity in *UPA* to improve the position of private plaintiffs.<sup>160</sup> Recently, in this Journal, Laurence Gormley wrote: “The present state of judicial review in relation to the fourth paragraph of Article 230 of the EC Treaty is still fundamentally unsatisfactory.”<sup>161</sup>

As the outcome of the work on the Constitution shows, a substantial reform of Article 230, Section 4 in the near future is unlikely. Yet, the Constitution itself points to the direction that future modifications may take. Article I-29, Section 1 of the Constitution states clearly that it is for the Member States to ensure that private plaintiffs can seek redress.

The terms of Article I-29, Section 1, second subparagraph of

---

158. Draft Treaty, *supra* note 149, art. I-29, § 1, O.J. C 310/1, at 24 (2004).

159. *Id.* art. III-369, O.J. C 310/1, at 161 (2004).

160. See, e.g., Marie-Pierre Granger, *Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts*: *Jégo-Quére et Cie v Commission and Unión de Pequeños Agricultores v Council*, 66 MOD. L. REV. 124 (2003); Albertina Albers-Llorens, *The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?*, 62 CAMBRIDGE L.J. 72 (2003); Filip Ragolle, *Access to Justice for Private Applicants in the Community Legal Order: Recent (R)evolutions*, 28 EUR. L. REV. 90, 101 (2003).

161. Laurence W. Gormley, *Judicial Review: Advice for the Deaf*, 29 FORDHAM INT'L L.J. 655, 687 (2006).



the Constitution recall a passage couched in similar terms in the judgments of the Court of Justice in *UPA* and *Jégo-Quéré*. The Court stated:

[I]t is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.

In that context, in accordance with the principle of sincere cooperation laid down in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.<sup>162</sup>

The Court of Justice then gave the idea greater impact in its judgment in *R. v. Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco Ltd.*<sup>163</sup> It reinforced the idea that the review of the validity of Community acts in the national courts is the default system and firmly rejected any notion that that procedure could be used as a means to circumvent the restrictive rules on standing for private litigants in Article 230, Section 4.

In this case, two British tobacco companies, British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd., sought permission to apply for judicial review of the intention and/or obligation of the United Kingdom Government to transpose Directive 2001/37/EC of the European Parliament and of the Council of June 5, 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products.<sup>164</sup> They sought judicial review in the English High Court on September 3, 2001, over a year before the United Kingdom was under an obligation to bring Directive 2001/37/EC into force by September 30, 2002 in accordance with its Article 14, Section 1. They alleged that Directive 2001/37/EC was inva-

---

162. *Unión de Pequeños Agricultores ("UPA") v. Council*, Case C-50/00 P, [2002] E.C.R. I-6677, ¶¶ 41-42.

163. *R. v. Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco Ltd.*, Case C-491/01, [2002] E.C.R. I-11453.

164. *See* Council Directive No. 2001/37/EC, O.J. L 194/1, at 26 (2001).

lid.<sup>165</sup> The English High Court then referred the matter of the validity of Directive 2001/37/EC to the Court of Justice pursuant to Article 234.

The French Government and the Commission intervened before the Court of Justice and submitted that the preliminary reference was inadmissible.<sup>166</sup> They claimed that it should not be possible for the issue of the validity of directives to be raised before the time-limit set for implementation expired and before national legislation transposing Directive 2001/37/EC in the United Kingdom had yet been adopted. They pointed out that a directive can be relied on by individuals before national courts only after the expiry of the time-limit laid down for its transposition into national law and that its provisions cannot before that date create rights for individuals which the national courts must protect.<sup>167</sup>

Consequently, they submitted that the dispute was not ripe for resolution by the Court of Justice. Even more significantly, the French Government and the Commission submitted that to permit an individual to challenge the validity of a directive before a national court before the expiry of the period prescribed for its implementation and when no measures have been adopted to transpose it into national law could constitute a means of circumventing Article 230, which would be contrary to the system of legal remedies established by the Treaty.<sup>168</sup>

The Court of Justice roundly rejected both arguments. It dealt first with the issue of ripeness of the reference to the Court of Justice. It reaffirmed the principle that it is for the referring, national court to decide whether it is necessary to obtain a ruling from the Court of Justice on the validity of a Community act and when it does so the Court of Justice must in principle give the ruling requested.<sup>169</sup> The Court found that in this particular case the ruling on the validity of Directive 2001/37/EC could have an influence both on the need to transpose it into English law and

---

165. See *British American Tobacco*, [2002] E.C.R. I-11453, ¶ 1.

166. See *Nicole Vaneetveld v. Le Foyer SA & Le Foyer SA v. Federation de Mutualities Socialistes et Syndicales de la Province de Liege*, Case C-316/93, [1994] E.C.R. I-763.

167. *Id.* ¶¶ 16, 19.

168. See *British American Tobacco*, [2002] E.C.R. I-11453, ¶ 31.

169. *Id.* ¶ 34; see also *Eurotunnel SA v. SeaFrance*, Case C-408/95, [1997] E.C.R. I-6315, ¶ 19.

on the proceedings before the High Court.<sup>170</sup>

Next, the Court dealt with the argument on the circumvention of Article 230. The Court of Justice responded in a way that resolutely reinforces the idea that actions in the national courts and references from them on the validity of Community acts pursuant to Article 234 is the default system that private plaintiffs should use. The Court held:

As for the argument that to accept the admissibility of the order for reference seeking a decision on validity in a situation such as that in the main proceedings could be tantamount to circumventing the requirements of Article 230 EC, it must be stated that, in the complete system of legal remedies and procedures established by the EC Treaty with a view to ensuring judicial review of the legality of acts of the institutions, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of that article, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community judicature under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity.<sup>171</sup>

Significantly, the Court of Justice added that the right of private litigants to claim that Community acts are invalid is not subject, as a matter of EC law, to any form of ripeness<sup>172</sup> test before those courts:

The opportunity open to individuals to plead the invalidity of a Community act of general application before national courts is not conditional upon that act's actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly. That condition is amply fulfilled in the circumstances of the

---

170. *British American Tobacco*, [2002] E.C.R. I-11453, ¶¶ 36-37.

171. *Id.* ¶ 39 (citing *Unión de Pequeños Agricultores v. Council*, Case C-50/00, [2002] E.C.R. I-6677, ¶ 40).

172. "Ripeness" is not a term of art used in EC law. It is used in this Article in the sense in which it is used by the U.S. Supreme Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (explaining ripeness as "fitness of the issues for judicial decision").

case in the main proceedings.<sup>173</sup>

What are the implications of that passage exactly? One commentator claims that the Court of Justice seeks to oblige the Member States to amend their procedures so that private litigants can challenge national measures pre-emptively if that is necessary to allow them to question the validity of generally applicable Community acts by means of the preliminary reference procedure.<sup>174</sup> That interpretation is seductive. There would seem no particular reason why the Court of Justice would have included that passage in its judgment otherwise. The pre-emptive challenge was permitted as a matter of English law by the High Court in the form of declaratory relief so there was no need to examine whether it should be permitted. And the Court of Justice had already held in the previous paragraphs of the judgment that the preliminary reference was admissible in the circumstances of the case. There was no necessity for the Court of Justice to examine how the issue of ripeness should be dealt with by the national court.

If that is the correct interpretation of paragraph 40 of the judgment in *British American Tobacco*, then the Court of Justice will have dealt, albeit implicitly, with the problem faced by the plaintiffs identified by the Court of First Instance in paragraph 45 of its judgment in *Jégo-Quéré*: The absence of “acts of implementation capable of forming the basis of an action before national courts,” which meant that she would have to violate the rules imposed by the EC before being able to assert their illegality in subsequent national proceedings.<sup>175</sup>

Others, on the other hand, do not consider that it was the intention of the Court to go so far.<sup>176</sup> They submit that if it were interpreted in that manner, the Court would be contradicting its statements in the judgments in *UPA* and *Jégo-Quéré*, in which it did not declare unacceptable national procedural rules which have the result of obliging a private plaintiff to wait until she has

---

173. *British American Tobacco*, [2002] E.C.R. I-11453, ¶ 40.

174. See Paul Nihoul, *Le Recours des Particuliers Contres les Actes Communautaires de Portée Générale. Nouveaux Développements dans la Jurisprudence*, JOURN. DES TRIBUNAUX DROIT EUROPÉEN 38, 43 (2003).

175. *Jégo-Quéré & Cie SA v. Commission*, Case T-177/01, [2002] E.C.R. II-2365, ¶ 45.

176. See, e.g., *Lenaerts & Maselis*, *supra* note 156, at 234 n.87.

infringed the law before challenging it.<sup>177</sup> The difficulty presented with this view is that the Court of Justice never expressly condoned a national system of remedies in which the private plaintiff would have to breach the rule of Community law first before being able to challenge it. What the Court of Justice held was that such a circumstance was insufficient of itself to justify a change in the interpretation of Article 230, Section 4. The Court of Justice in both *UPA* and *Jégo-Quéré* emphasized that the onus was on the Member States to establish an adequate system of remedies and procedures that ensure effective judicial protection.<sup>178</sup>

Even if the Court of Justice had considered acceptable a system in which a private plaintiff had first to breach a rule of law before being able to challenge it, that system would no longer comply with the requirements of Article 6, Section 1 of the European Convention on Human Rights.<sup>179</sup> The European Court of Human Rights had specifically considered that possibility in the case of *Posti and Rahko v. Finland* and held in Paragraph 64 of its judgment that:

Finally, in so far as it might be argued that the applicants could have obtained access to a court by violating the 1996 and the 1998 Decrees and awaiting prosecution, the Court considers that no one can be required to breach the law so as to be able to have a "civil right" determined in accordance with Article 6 § 1.<sup>180</sup>

It is possible that the Court of Justice added paragraph 40 to its judgment in *British American Tobacco*, in order to take account of that passage in the judgment of the European Court of Human Rights in *Posti and Rahko*. Once again, the chronology of events is significant. The European Court of Human Rights handed down its judgment on September 24, 2002, and the Court of Justice handed down its judgment on December 10, 2002. If indeed the Court of Justice wanted to take account of the evolving standard of access of private plaintiffs to judicial redress, its judg-

---

177. *Unión de Pequeños Agricultores ("UPA") v. Council*, Case C-50/00 P, [2002] E.C.R. I-6677; see *Commission v. Jégo-Quéré & Cie SA*, Case C-263/02, [2004] E.C.R. I-3425.

178. *UPA*, [2002] E.C.R. I-6677, ¶ 41; *Jégo-Quéré*, [2004] E.C.R. I-3425, ¶ 31.

179. European Convention on Human Rights, *supra* note 7, art. 6, § 1.

180. *Posti & Rahko v. Finland*, 27824 Eur. Ct. H.R. 95, ¶ 66 (2002). The relevant decrees in this case were Finnish decrees limiting the fishing rights the Applicants had from leases conferring fishing rights.

ment in *British American Tobacco* could be seen as a signal to the Member States that they too should beware that their systems and procedures could come under scrutiny as a matter of EC law.

Moreover, in a recent and significant judgment in *Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern*, the Court of Justice indicated that if no procedure or legal remedy existed in the national legal order at all, rendering it impossible for an individual to ensure respect for her rights under EC law, then the principle of effective judicial protection would require the creation of a procedure or remedy for that purpose.<sup>181</sup> That case dealt with the question of whether a remedy provided under Swedish law—permitting an individual to challenge a national measure alleged to be incompatible with EC law by an indirect route only—actually provided effective judicial protection. It did not therefore expressly deal with the issue of an individual having to breach the law first before having the right to challenge it.

Nevertheless, the Court of Justice made broad statements of principle according to which Member States must establish a system of legal remedies to ensure effective judicial protection and that national law does not undermine that protection.<sup>182</sup> As a result, it is permitted to conclude that the Court of Justice would likely take the view that the impossibility of challenging a measure without breaching it first would not be conducive to ensuring effective judicial protection.

In the light of those developments, the amendment of the national procedures to permit pre-emptive judicial review would be one step in dealing with the gap identified in the system of judicial protection afforded by Community law.

### B. *National Courts Take the Indirect Route Seriously*

National courts too can make and indeed have made the indirect route more effective. The French Conseil d'Etat recently handed down a significant judgment on February 8, 2007

---

181. *Unibet (London) Ltd. & Unibet (Int'l) Ltd. v. Justitiekanslern*, Case C-432/05, ¶ 41 (ECJ Mar. 13, 2007) (not yet reported).

182. *Id.* ¶ 42.

in the *Arcelor* case.<sup>183</sup> That judgment shows that national courts can change their practice in order to ensure rights and obligations that flow ultimately from EC law are enforced in a manner respectful of individual rights. In this case, Arcelor and the other plaintiffs requested the French President, the Prime Minister and other competent ministers repeal the decree number 2004-832 of August 19, 2004.<sup>184</sup> That decree was adopted by the French Government in order to implement Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.<sup>185</sup> Directive 2003/87/EC was adopted in turn in order to implement the Kyoto Protocol. When they received no response to their request for repeal, they brought an action before the Conseil d'Etat to annul the implicit rejection of their request. They alleged that decree number 2004-832 was illegal because it applied to steel producers and infringed the principles of the right to property and to trade freely and the principle of equality guaranteed by the French Constitution.<sup>186</sup>

In its judgment, the Conseil d'Etat noted that decree number 2004-832 applied to steel producers because Directive 2003/87/EC required that it should.<sup>187</sup> Thus, if it declared decree number 2004-832 to be unconstitutional, it would in effect be declaring invalid a measure adopted by an EC institution. But it did not have jurisdiction to do that. Consequently, the Conseil d'Etat looked to see if EC law contains principles that protected the applicant steel producers in a manner equivalent to that of the French Constitution. It found that the right to property and to trade freely as well as the principle of non-discrimination were general principles upheld by EC law in the same way as they were protected by the French Constitution.<sup>188</sup> Therefore, in order to give full effect to the supremacy of EC law, the Conseil d'Etat

---

183. *Societe Arcelor Atlantique et Lorraine*, No. 287110 (Conseil d'État, Feb. 8, 2007) (not yet reported).

184. See *Décret No. 2004-832 du 19 Août 2004 pris pour l'Application des Articles L. 229-5 à L. 229-19 du Code de l'Environnement et Relatif au Système d'Échange de Quotas d'Émission de Gaz à Effet de Serre*, 194 J.O. RÉPUBLIQUE FRANÇAISE 14979 (Aug. 21, 2004).

185. Council Directive No. 2003/87/EC, O.J. L 275/32 (2003).

186. See 1958 CONST. pmbl., available at <http://www.conseil-constitutionnel.fr/textes/constit.htm>.

187. See *Arcelor*, No. 287110.

188. *Id.*

decided to refer a question to the Court of Justice under Article 234 on the validity of Directive 2003/87/EC.<sup>189</sup>

The Conseil d'Etat issued a press release that explains the importance of this judgment and how it marks a significant departure from its previous practice:<sup>190</sup> Previously, it would simply have ruled on the constitutionality of the French decree without examining whether the decree was a measure implementing a superior rule of EC law.

An interesting aspect of this case is that Arcelor had brought an action before the Court of First Instance under Article 230, Section 4 to annul Directive 2003/87/EC on January 15, 2004.<sup>191</sup>

### C. *The Hidden Strength of the Indirect Route*

That litigation before the French Conseil d'Etat also highlights another significant advantage of the indirect route of challenging the validity of Community acts via the national courts. If Arcelor were successful in its direct action for annulment and the Court of First Instance were to annul Directive 2003/87/EC, the French decree of implementation would still be in force in the French legal order and applicable to Arcelor. In practical terms therefore, a victory in the Court of First Instance would not result in Arcelor being freed automatically from the obligations that Decree No. 2004-832 imposed on it. It is arguable that the French authorities would be under an obligation to repeal the decree as a consequence of their obligation to cooperate sincerely with the Community Institutions under Article 10 of the EC Treaty. The French authorities could decide, however, that they wish to maintain the decree in force under their own, autonomous powers. Moreover, in the environmental field, as a matter of EC law, the Member States are entitled to adopt or maintain measures that provide for more stringent protection of the environment than that provided by EC law.<sup>192</sup> Arcelor would then still need to commence proceedings before the French courts in order to challenge Decree No. 2004-832.

---

189. See Case C-127/07, O.J. C 117, at 8 (2007) (case pending).

190. See Press Release, Conseil d'État (Feb. 8, 2007), [http://www.conseil-etat.fr/ce/actual/index\\_ac\\_lc0704.shtml](http://www.conseil-etat.fr/ce/actual/index_ac_lc0704.shtml) (last visited Apr. 18, 2007).

191. See *Arcelor v. European Parliament and Council*, Case T-16/04, O.J. C 71, at 36 (filed Jan. 15, 2004).

192. See EC Treaty, *supra* note 5, art. 176, O.J. C 321 E/37, at 125 (2006).



The indirect challenge to the validity of Community acts via the national courts has the advantage of concentrating the litigation in one forum. It allows the national court seized to refer a question on the validity of the Community measure under Article 234 and to draw all the necessary practical consequences in domestic law should the Court of Justice decide the Community act is invalid. The indirect route thus obviates the need to commence separate and parallel proceedings in two different courts.

Another major advantage of the challenge to the validity of Community acts through the preliminary reference procedure is that the issue of validity can be raised at any time and is not subject to any limitation period. Direct actions for annulment, on the other hand, must be brought within two months.<sup>193</sup> The absence of a limitation period renders the indirect route more conducive to the protection of individuals in many practical circumstances than a direct action for annulment. One of the intriguing aspects on the debate on the broadening of rules on standing for private plaintiffs under Article 230, Section 4 is that there is apparently no criticism of that short limitation period. If access to justice is a right that is so fundamental, the question must be posed whether the imposition of such a limitation period is an undue restriction of the exercise of that right. In many cases, the requirement of bringing an application to annul a measure within two months can constitute an insurmountable barrier to challenging that act. That point is neatly illustrated by the joined cases, *Thomson Multimedia and Vestel France v. Administration des Douanes et Droits Indirects*.<sup>194</sup> In those cases, importers of television sets into France challenged the validity in a French court of an annex to a Commission Regulation,<sup>195</sup> setting out how the origin of television sets should be defined for the purposes of determining the proper rate of customs duties applicable to them. The Regulation in question was published on November 10, 1993 and entered into force on January 1, 1994. The French court seized of the litigation referred a question to the

---

193. *Id.* art. 230, § 5, O.J. C 321 E/37, at 146 (2006).

194. *Thomson Multimedia and Vestel France v. Administration des Douanes et Droits Indirects*, Joined Cases C-447-448/05 (ECJ Mar. 8, 2007) (not yet reported).

195. Commission Regulation (EEC) No. 2454/93, O.J. L 253/1 (1993) (laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92, establishing the Community Customs Code).

Court of Justice on December 16, 2005 on the validity of the applicable annex to the Commission Regulation.

It is highly unlikely that the importers in this case, or any other importer of television sets for that matter, could realistically have mounted a direct action for annulment against the relevant provision of the Commission Regulation within two months of its publication. No trader could have genuinely foreseen the practical consequences of that provision of the Commission Regulation and how it would affect its commercial behavior with sufficient clarity to decide whether an action for annulment would be a viable strategy. As a matter of fact, the plaintiffs in the main French proceedings in *Thomson Multimedia* did not actually import television sets until some years after the Commission Regulation had entered into force. Had those importers been able to annul the Commission Regulation under more generous standing rules, they would then have been barred from questioning its validity in the national courts.<sup>196</sup> The practical consequence of a more generous standing rule without amendment of the limitation period would therefore be to bar an examination of the validity of the measure forever.

A pre-emptive annulment action against the Commission Regulation runs the risk, if successful, of ridding the legal order of a measure before the full consequences of the measure have been felt and evaluated by traders.

### CONCLUSION

Many recognize that the European Community has become more transparent and accountable. The fact that it remains relatively exceptional for a private plaintiff to succeed in the quest for standing to annul a generally applicable measure is still, to some, a cause for lamentations.<sup>197</sup> Nevertheless, the European Court of Human Rights has held in its judgment of June 30, 2005 in the case of *Bosphorus Hava Yollari Turzüm ve Tikaret Anonim Şirketi v. Ireland*, that the system according to which individuals exercise a remedy through the national courts is one which *prima facie* provides equivalent protection to individuals to that provided by the European Convention on Human Rights

---

196. See *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland*, Case C-188/92, [1994] E.C.R. I-833.

197. See, e.g., Arnulf, *supra* note 6, at 189.

itself.<sup>198</sup>

Whether the sum total of the procedures provided for by national law and those provided for in the EC Treaty provide effective judicial protection is a matter of opinion and judgement. And that is not the issue addressed here. The subject of this inquiry is where the defect, if there is any, should be repaired. Those who propose changing the rule on standing of private plaintiffs would prefer to see actions brought before the EC courts as the default system in which private plaintiffs can seek protection of their rights.

A switch in the role of the EC courts as the principal or default forum in which private plaintiffs can bring all their actions for annulment may well set in motion another deep rooted and fundamental change in the relationship between EC law and the laws of the Member States. As the Court of Justice held very early on in *Flaminio Costa v. ENEL*, “the EEC Treaty has created its own legal system which . . . became an integral part of the legal systems of the Member States and which their courts are bound to apply.”<sup>199</sup> What the Court meant was that the creation of EC law did not entail the creation of a new and discrete system for the enforcement of rights and obligations. Instead it created a body of law to constrain the Member States and which was to be enforced through their existing judicial apparatus.<sup>200</sup> The transfer of actions from the national courts to the EC courts could result in moves to disjoin EC law from the legal systems of the Member States. Whether such a transfer is made in the name of constitutionalism,<sup>201</sup> or to make up for some democratic deficit,<sup>202</sup> the result would be a fundamental change in the character of EC law.

---

198. *Bosphorus Hava Yollari Turzimi ve Tikaret Anonim Sirketi v. Ireland*, 45036 Eur. Ct. H.R. 98, ¶¶ 164-165 (2005).

199. *Flaminio Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, at 593.

200. The Court in *Costa* went on to describe that the Member States had limited their sovereign rights by creating the EC. *Id.*

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

202. See generally Luigi Malferrari, *The Functional Representation of the Individual's Interests Before the EC Courts: The Evolution of the Remedies System and the Pluralistic deficit in the EC*, IND. J. GLOBAL LEGAL STUD. 667 (2005).