

Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?

Dr. Mariolina Eliantonio, LL.M.

Faculty of Law, Maastricht University (Netherlands)

PO Box 616 6200 MD Maastricht

Tel: 31-(0)43-388-3189 E-mail: m.eliantonio@maastrichtuniversity.nl

Betül Kas

Faculty of Law, Maastricht University (Netherlands)

Fronhofstr. 25, 52146 Wurselen, Germany

E-mail: B.Kas@student.maastrichtuniversity.nl

Abstract

The restrictions imposed on the possibility for an individual to challenge European law measures and the restrictive interpretation of the notion of ‘individual concern’ given by the European Court of Justice have been highly criticised by legal scholars and members of the European judiciary as being against the principle of effective judicial protection. This paper shows how the restrictive interpretation of the notion of ‘individual concern’ developed in the case law of the European Court of Justice. Furthermore, the paper discusses possible improvements to the current system of judicial protection, such as the possibility to introduce a fundamental rights complaint procedure and the obligation of Member States to provide for effective judicial remedies before national courts. Finally, the impact of the modifications made by the Lisbon Treaty to the annulment procedure is assessed.

Keywords: Annulment Procedure, Individual Concern, Judicial Protection of EU law, Lisbon Treaty, Reform Prospects

1. Introduction

Every developed legal system provides a mechanism to test the legality of measures adopted by its institutions. In the EU legal system, because of the democratic deficit and the limited supervisory role of the European Parliament, it is of even greater importance to create a system of control over the acts of the European institutions. In this regard, the central position rests on the European Court of Justice (hereafter ‘ECJ’) and the Court of First Instance (hereafter ‘CFI’). They are considered to be independent institutions, which are entrusted with the task of defending the rule of law in the European Union (Albors-Llorens (1996), 7).

Before the changes brought by the Lisbon Treaty, the action for annulment, the main procedure within the system of judicial review, was provided for in Article 230 EC Treaty. (Note 1) Paragraph four of Article 230 EC allowed the so-called ‘non-privileged’ applicants to directly challenge allegedly illegal Community acts of the Council, the Commission, the European Parliament and the European Central Bank. In theory, this mechanism was the main judicial review instrument open to individuals. In reality, however, this possibility has been limited due to very strict requirements concerning not only the standing conditions for an action for annulment imposed by the EC Treaty, but also by the severe interpretation of the requirement of ‘individual concern’ adopted by the Court of Justice in the *Plaumann* case (Albors-Llorens (1996), 8). (Note 2)

This restrictive approach has been at the core of a heated ongoing debate, and has been strongly criticised by scholars and members of the judiciary. (Note 3) In particular, the opponents of the current system have argued that this approach violates the principle of effective judicial protection and may even lead to a denial of justice (Albors-Llorens (2003), 72-92; Ragolle (2003), 90-101; Usher (2005), 575-600; Gormley (2006), 655-689).

The aim of this paper is to examine the restrictive approach of the Court of Justice to grant standing to individuals and the possible solutions on how to improve the system of judicial review. In the first part, a brief description of the long-standing requirements (and, in particular, the restrictive interpretation of the notion of ‘individual concern’) for access of private parties to the European courts will be provided. In addition, the rationale underlying the ECJ’s restrictive approach to direct actions and its reliance on the preliminary ruling procedure will be examined, and the criticisms to this approach will be highlighted. The second part will present possible solutions on how to improve the European system of judicial protection. In particular, the introduction

of a fundamental rights complaint procedure and the possibility to enshrine the obligation of the Member States to provide for effective judicial remedies before national courts will be discussed. Moreover, the second part will deal with the advantages and disadvantages of both solutions. In the third part of the paper, the changes to the current requirements of standing for private parties introduced by the Treaty of Lisbon will be analysed, and the potential consequences of these changes will be discussed.

2. Access to the European courts by private applicants under Article 230 EC and the ECJ's restrictive (yet justifiable?) approach

2.1 The locus standi requirements and their traditional interpretation

The action for annulment, provided for in Article 230 EC, was the main mechanism by which the legality of decisions and actions taken by the Community institutions could be judicially reviewed.

Article 230 EC divided potential applicants into three groups. First, Member States, the Council, the Commission and the European Parliament were regarded as 'privileged applicants', meaning that they were entitled to bring actions under Article 230 EC without any restrictions. Secondly, the European Court of Auditors and the European Central Bank were regarded as 'semi-privileged applicants': they were entitled to bring actions only if they did so for the purpose of protecting their prerogatives. Thirdly, natural and legal persons were considered to be 'non-privileged applicants'. The rules governing the legal standing of non-privileged applicants were to be found in Article 230(4) EC. The aim of Article 230(4) EC was to restrict access to judicial review of Community measures which were considered to be individual and not general, and in which applicants had a personal interest. An individual could bring review proceedings only in three cases. If a decision was directly addressed to the applicant, this decision could be challenged by the applicant without any restrictions. However, if a decision was addressed to third parties or a decision was in the form of a regulation, private parties could challenge it only if they successfully showed that the measure was of 'direct and individual concern' to them (Chalmers and Monti (2007), 416-420; Craig and de Búrca (2008), 507-517; Fairhurst (2007), 225-254).

The first requirement, direct concern, is relatively straightforward compared to the requirement of individual concern. (Note 4) The ECJ has consistently held that a measure is of direct concern only if it affects the applicant's legal position directly and leaves no discretion to the addressees of the measure who are entrusted with its implementation. In other words, a direct link between the challenged measure and the loss or damage that the applicant has suffered must be established. (Note 5) Moreover, the implementation must be automatic and result from Community rules without the application of other intermediate rules (Craig and de Búrca (2008), 509). If the measure leaves to the national authorities of the Member States a degree of discretion as to how the measure should be implemented, the applicant has not been considered to be directly concerned (Chalmers and Monti (2007), 419). (Note 6)

The second requirement is more problematic. The requirement of individual concern was defined by the Court of Justice in the *Plaumann* case. (Note 7) In this case, the ECJ established that private parties are able to seek judicial review of decisions not expressly addressed to them only if they can distinguish themselves from all other persons, not only actually but also potentially (Chalmers and Monti (2007), 420). In other words, the applicants must show that the decision "affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed" (*Plaumann v. Commission*, para 107). As a result, individual concern cannot be established when the applicant operates a trade which could be engaged in by any other person at any time. The *Plaumann* test constitutes a very restrictive approach to individual standing. (Note 8) The application of the *Plaumann* test results in the fact that the applicant has to show that it belongs to a 'closed class', which is differently affected by the Community measure than all other persons. (Note 9) Consequently, the *Plaumann* test rendered it virtually impossible for an applicant to ever succeed in obtaining standing before the European courts, except in very limited cases (Craig and de Búrca (2008), 512).

Where a non-privileged applicant wished to challenge a regulation, as opposed to a decision, even greater hurdles had to be overcome. In such cases, private parties had to prove that a formally general measure was, in fact, a decision of direct and individual concern to them (Chalmers and Monti (2007), 424). In order to make this assessment, the Court elaborated, in the *Calpak* case (Note 10), the so-called 'abstract terminology test'. The abstract terminology test requires the Court to look behind the form of the measure in order to determine whether, in substance, it really is a regulation or not (Craig and de Búrca (2008), 515). A regulation would be accepted as a true regulation if, as stated in *Calpak*, it applied to "objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner" (*Calpak SpA and*

Società Emiliana Lavorazione Frutta SpA v. Commission, para 9). Nevertheless, it has to be taken into account that it is always possible to draft norms in this manner, and thus to immunise them from attack. If a regulation was found to be a true regulation on the abstract terminology test, then traditionally the case would stop and the Court of Justice would simply conclude that the applicant was not individually concerned (Craig and de Búrca (2008), 516).

The standing requirements to challenge regulations were partially loosened in the *Codorniu* case. (Note 11) As a consequence of the liberalization movement in *Codorniu*, it was clear that the European Courts were in principle willing to admit that a regulation might not qualify as a true regulation as judged by the abstract terminology test, but to accept that, nonetheless, it might be of individual concern to an applicant. Nevertheless, it has to be pointed out that, in such cases, an applicant had to still show individual concern in accordance with the *Plaumann* test. As a result, the question arose as to whether the Courts would interpret the *Plaumann* test more liberally than hitherto (Craig and de Búrca (2008), 516-517). Such a development could be seen in *Codorniu* itself. *Codorniu* was a Spanish producer of sparkling wines that had, since the 1920s, used the term ‘Grand Cremant’ as a trademark to describe one of its quality wines. When a 1989 Council Regulation provided that the term ‘cremant’ could only be used to describe certain sparkling wines of a particular quality coming from France and Luxembourg, *Codorniu* sought judicial review. The Court held that the regulation would prevent *Codorniu* from using its trademark and that this was enough to distinguish him from all other affected parties. Consequently, the ECJ established individual concern because the applicant possessed a right that was infringed (Albors-Llorens (2003), 80).

Aside from *Codorniu*, however, the ECJ has upheld the strict approach to individual concern as defined in *Plaumann*. In this context, the *Extramet* case (Note 12) can be seen as an exceptional case, since the ECJ considered the degree of factual injury to determine whether the applicant was individually concerned (Craig and de Búrca (2008), 517). In this case, *Extramet*, an importer of calcium metal, challenged a regulation which imposed an anti-dumping duty on the import of that product from outside the Community. The Court declared the action admissible because *Extramet* was the largest importer of the product and because the regulation would cause strong economic difficulties for the company (Albors-Llorens (2003), 80).

The *Les verts* case (Note 13) can be seen as a further exception, since the Court allowed standing to a political party with the intention to reinforce the democratic nature of the Community (Craig and de Búrca (2008), 517). In *Les verts*, a new political party challenged the decision of the European Parliament on the reimbursement of expenditure incurred by political parties in 1984, arguing the decision clearly discriminated against new parties. The Court pointed out that the applicants did not belong to a closed category of persons. Nevertheless, it admitted standing to avoid inequality in the protection afforded by the Court to the competing parties (Albors-Llorens (2003), 79).

It has to be pointed out that the rulings in *Codorniu*, *Extramet* and *Les verts* cannot be seen as the beginning of a more liberal approach. “They have remained just special strands of the case law that introduced a construction of individual concern limited to exceptional sets of fact” (Albors-Llorens (2003), 80-81). The dominant approach after *Codorniu* was based purely on the *Plaumann* test and, therefore, applicants were denied access because the Community courts applied *Plaumann* strictly (Craig and de Búrca (2008), 517).

2.2 The rationale underlying the ECJ’s restrictive approach and its shortcomings

The preceding section illustrated the strict approach of the ECJ with regard to the notion of individual concern, which had led to the inadmissibility of most actions brought by individuals under the Article 230 EC procedure. The ECJ has justified this restrictive approach by referring to the idea of a ‘complete system of remedies’ created by the Treaty. In the ECJ’s view, the system was complete because applicants who did not have standing for a direct action under Article 230 EC could nonetheless test the legality of a Community measure indirectly through the preliminary ruling procedure pursuant to Article 234 EC. (Note 14) As a result, according to the ECJ, the restrictive interpretation of the notion of ‘individual concern’ did not create a gap in the Community system of judicial protection, since individuals had the possibility to bring actions against the national implementation measures of EC measures before the national courts. Pursuant to Article 234 EC and the ECJ’s ruling in *Foto-Frost* (Note 15), the national courts had then the obligation to refer the questions of validity of Community measures to the ECJ (Albors-Llorens (2003), 81-82).

The appropriateness of the ECJ’s approach was questioned by Advocate General (AG) Jacobs in the *Union de Pequeños Agricultores (UPA)* case. (Note 16) In *UPA*, a trade association, representing interests of small Spanish agricultural businesses, brought an action for annulment against a regulation that amended the common organization of the olive markets by abolishing subsidies, which until then had been given to small products. The

CFI did not grant standing to UPA, since the members were not individually concerned by the regulation. Consequently, UPA argued that it was denied the right to effective judicial protection because it had no access to a legal remedy before a national court and hence no possibility of challenging the measure under Article 234 EC, since the regulation at stake did not require an act of implementation by the Member States. In the appeal proceedings before the ECJ, Advocate General Jacobs presented an opinion in which he criticised the current restrictive approach of the Court and made suggestions for a new interpretation of the test of individual concern. He recommended that the ECJ revise its case law, and in so doing consider that “a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests” (Opinion of the AG in *UPA*, para 102).

The issue of the incomplete system of judicial protection was raised again in the *Jégo-Quéré* case. (Note 17) This case concerned a French fishing company that contested a Commission regulation imposing a minimum mesh size for fishing nets used in Community waters. It was clear that the company was not individually concerned under the terms of the *Plaumann* test and would thus, under the traditional interpretation of the requirement of individual concern, be denied standing before the CFI. Furthermore, given the lack of implementing measures, the company would also be denied access to a legal remedy before the national courts, unless it would breach the provisions of the regulation. The CFI followed the opinion of Advocate General Jacobs in *UPA*, by holding that the test of individual concern had to be relaxed in order to guarantee effective judicial protection in the Community legal order (Albors-Llorens (2003), 83-84). According to the CFI, an individual should be considered to be individually concerned “if the provision in question affects his legal position in a definite and immediate manner by restricting his rights or imposing obligations on him” (*Jégo-Quéré & Cie v. Commission*, para 51). Since the company satisfied this test and the test of individual concern, it was granted standing.

On 25 July 2002, the ECJ rendered its judgment in the appeal proceedings of *UPA*. The Court acknowledged the right to effective judicial protection, but refused to liberalise the standing requirements and ruled in favour of maintaining the traditional interpretation of the ‘individual concern’ test. (Note 18) The ECJ declined to follow the opinion of Advocate General Jacobs and the approach adopted by the CFI. In particular, with regard to the approach of the CFI, the ECJ held that the interpretation of the conditions set out in Article 230(4) could not have the effect of setting aside these conditions, which were expressly laid down in the Treaty, since otherwise the Community Courts would go beyond the jurisdiction conferred to them by the EC Treaty (*Commission v. Jégo-Quéré*, para 36). According to the ECJ, if the ‘individual concern’ test needed reform, such change had to come from a Treaty revision initiated by the Member States rather than from judicial decision-making (*Unión de Pequeños Agricultores v. Council*, paras 44-45). (Note 19)

As already pointed out, the ECJ has relied heavily on the argument that applicants who did not have standing for a direct action under Article 230(4) EC could nonetheless test the legality of a Community measure indirectly through Article 234 EC. Several points of criticisms can be highlighted with regard to the ECJ’s approach to the review of Community measures. In particular, the reliance on the preliminary ruling procedure could, in some situations, lead to a complete denial of a remedy or, at least, of an effective remedy (Koch (2005), 515).

The first situation could occur when the contested Community measure did not require any national implementation act as was the situation in *Jégo-Quéré* and *UPA*. In both cases, the applicants did not have the ability to challenge the Community measure before a national court because there were no measures which could form the basis of a challenge at the national level. The applicants could only have access to a national court by breaching the rules laid down in the contested EC measure and by relying on the invalidity of this measure in domestic proceedings. Nevertheless, such an option cannot be upheld in a Community based on the rule of law (Albors-Llorens (2003), 87; Corthaut (2002/2003), 143; Koch (2005), 515; Ragolle (2003), 91). As Advocate General Jacobs pointed out, individuals “cannot be required to breach the law in order to gain access to justice” (Opinion of the AG in *UPA*, para 43). As a result, in such situations, the ECJ’s reliance on the preliminary ruling procedure would result in a complete lack of judicial protection.

The second situation was likely to occur in cases in which applicants were able to gain access to national courts, since there were national implementing measures available. The ECJ held that, in such situations, “it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection” (*Unión de Pequeños Agricultores*, para 41). However, shifting the responsibility of ensuring effective judicial protection to the national courts could not be seen as an acceptable solution (Brown and Morijn (2004), 1654; Corthaut (2002/2003), 163).

Indeed, several problems (many of which have been highlighted by Advocate General Jacobs in his opinion on the *UPA* case) can be observed with regard to the ECJ's reliance on national courts as a correct forum for cases in which the validity of Community legislation is in question. As pointed out by Advocate General Jacobs, under the preliminary ruling procedure, the applicant has no right to decide whether a reference is made to the ECJ by the national court, which measures are referred for review, or what grounds of invalidity are raised (Opinion of the AG in *UPA*, para 102). National courts (with the exclusion of courts of last instance) may refuse to refer a question of validity of an EC measure to the ECJ or might err in their assessment of the validity of a Community measure and decline to refer a question to the ECJ on that basis. In addition, even where a reference is made, the preliminary questions are formulated by the national courts, with the consequence that applicants' claims might be redefined or that the questions referred might limit the range of measures whose validity is being challenged before the national court (Opinion of the AG in *UPA*, para 42). As a result, the individual is highly dependent upon the national court. Moreover, the Article 234 procedures are generally lengthier and more costly than the Article 230 EC procedures. Consequently, the preliminary ruling procedure cannot be considered as guaranteeing an effective remedy to applicants (Cortés Martín (2004), 239; Koch (2005), 515; Heffernan (2006), 288-289; Knight (2006), 94-97).

3. How could the system of judicial protection be improved at the European level?

In the following part of the paper, the fundamental rights complaint procedure and the possibility to enshrine the obligations of Member States to provide for effective judicial remedies before national courts will be presented as possible improvements to the system of legal protection at the European level. These two proposals have been discussed in the context of the drafting of the Constitutional Treaty. Even though the Convention did not set up a Working Group on judicial remedies, this issue was taken up by Working Group II on the 'Incorporation of the Charter/Accession to the ECHR'. Whereas the solution to introduce a fundamental rights complaint procedure was rejected by Working Group II, the possibility to enshrine the obligations of Member States to provide for effective judicial remedies before national courts was incorporated into the Constitution (Biernat (2003), 43-44). After the failure of the Constitutional Treaty, the same idea was taken over by the Lisbon Treaty.

3.1 The Fundamental Rights Complaint Procedure

When an individual cannot obtain direct access to courts through the judicial review procedures, some legal systems try to compensate this shortcoming by introducing a separate special procedure through which an individual can apply directly to the constitutional court. The constitutional complaint procedure is directly linked with the protection of the rights of individuals. It has to be stressed that only an infringement of a constitutional right can constitute the basis for a complaint (Biernat (2003), 45).

A special procedure for the judicial protection of fundamental rights had been already proposed in the first progress report of the Intergovernmental Conference, submitted by the Italian Presidency at the end of its term, in June 1996. Models of such a fundamental rights complaint procedure can be found in the legal systems of certain Member States, such as Germany and Spain (De Witte, B. (1999), 893-894). In Germany, the constitutional complaint procedure (*Verfassungsbeschwerde*) has its legal basis in Article 93 I No 4a of the German Constitution, which provides that every citizen is entitled to file a constitutional complaint to the Constitutional Court regarding alleged violations of their basic rights or certain rights provided for in the Constitution by the actions of the public authorities (Biernat (2003), 45). The aim of the Spanish constitutional complaint (*recurso de amparo*) is to offer citizens protection against violations by public authorities of the fundamental rights and public liberties listed in the Spanish Constitution (Biernat (2003), 46).

These two constitutional complaint procedures have important common features. Firstly, they are subsidiary procedures, meaning that an individual can only directly bring a complaint before the Constitutional Court if he or she has exhausted all remedies possible in all instances. Secondly, the applicant must show that he or she is directly and individually concerned by the measure (De Witte, B. (1999), 894).

The question thus arises as to whether the introduction of a fundamental rights complaint procedure, based on the common traditions of the Member States, would be of value for the European Union. One may conclude that the introduction of this procedure would not have any discernible purpose. As already stated, the constitutional complaint procedure in Spain and Germany is based on the subsidiarity principle. Nevertheless, under the judicial review system of European Union acts, "the issue of validity is not decided by the ordinary courts first, but directly by the European Courts themselves" (De Witte, B. (1999), 894). Furthermore, against the judgments of the CFI, there is the possibility of appeal to the ECJ on points of law. As a result, the aim which the national constitutional complaint procedures want to achieve, namely to open the possibility for individuals to bring actions directly before the constitutional court, is already in existence in the EU legal order.

However, before concluding that this procedure has no added value, two features of the EU system have to be taken into account. Under the Article 230 EC procedure, private parties had to show that they were directly and individually concerned by the measure challenged. This notion is formally similar to that used in the Member States. Nevertheless, the interpretation of the Court of Justice is much stricter than that of the constitutional courts of Germany and Spain. Moreover, if an individual has exhausted all national remedies, he or she cannot bring itself a complaint to the Court of Justice under the preliminary ruling procedure. Instead, such a challenge depends on the willingness of the national court to refer a question. As a result, the introduction of a fundamental rights complaint procedure could be generally of value to the EU (De Witte, B. (1999), 895).

Advocates of the introduction of the fundamental rights complaint procedure at the EU level have posited two arguments in favour of such a system. Firstly, they have argued that it would not disturb the 'normal' system of direct actions as established by Article 230 EC, which focuses on individual acts of administrative character. Secondly, such a system would add a special remedy of a truly constitutional character (Working Group II, Working Document 21, p. 4).

The introduction of this model was highly criticised by the current President of the ECJ, Vassilios Skouris. He referred to the experience Germany had with the constitutional complaint procedure, and argued that that this is not the best solution for the European Union, since it is practically difficult to draw a clear distinction between grounds of action relating to the procedure of fundamental rights and other grounds of action for challenging European acts. In Skouris' opinion, it would be impossible to restrict the initiation of actions solely to cases where there has been a violation of a fundamental right. Moreover, Skouris argued that it would be difficult to determine the court which would have jurisdiction to take cognisance of a fundamental rights complaint. This mechanism could lead to a conflict of jurisdictions if a court other than the Court of Justice would have jurisdiction (Working Group II, Working Document 19, p. 4-5).

The former President of the ECJ, Gil Carlos Rodriguez Iglesias, held that a remedy aimed specifically at the protection of fundamental rights was not needed at EU level. According to him, fundamental rights should be protected within the existing system of remedies. If the remedies are considered to be inadequate, they should be improved in relation to the protection of all individual rights, and not only in the context of fundamental rights (CONV 572/03, p. 4-5).

Advocate General Jacobs held the introduction of a fundamental rights complaint procedure to be unnecessary and inappropriate, since "issues of fundamental rights already arise in connection with the application of the ordinary remedies, and in combination with other issues (e.g. equal treatment, proportionality etc.), and can and should continue to be dealt with in principle within the habitual procedural framework" (Working Group II, Working Document 20, p. 3).

As shown, even though the introduction of the fundamental rights complaint procedure could be of value to the EU, it was strongly criticised by the members of the European judiciary. Consequently, Working Group II did not recommend its introduction to the Convention in the Final Report.

3.2 Enshrining the obligation of the Member States to provide for effective judicial remedies before national courts in the Treaties

In *UPA*, the ECJ held that it was for the Member States to establish a system of legal remedies and procedures to ensure respect for the right to effective judicial protection (Groussot (2003), 221; Temple Lang (2003)a, 102). At first sight, this suggests that Member States will be expected to reform their own rules on standing, so as to ensure effective judicial protection for individuals unable either to demonstrate direct and individual concern under Article 230(4) EC or to identify any specific national implementing measure capable of being challenged before the national courts. The Court continued to observe that the principle of loyal cooperation (Article 10 EC) requires the national courts to interpret and apply national procedural rules in a way that enables individuals to challenge 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 (Dougan (2004), 336-337; Ragolle (2003), 94; Temple Lang (2003)b, 1904). Such a solution to the incomplete system of judicial protection at the European level reflects not only "the strongly decentralized nature of the European judicial system, but also the important role played by national courts in the overall system of effective judicial protection of Union rights" (De Witte, F. (2008), 51-52).

The obligation of Member States to provide for a system of national remedies could have the consequence that "in order to protect the principle of effective legal protection, Member State autonomy in deciding on its judicial procedure and remedies may be set aside" (De Witte, F. (2008), 52). This solution was incorporated by the Lisbon Treaty in the current version of Article 19(1) of the Treaty on the European Union ('TEU'), which

requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. The question arises as to whether this solution is sufficient to ensure a system of effective judicial protection in the European legal order.

In *Unibet* (Note 20), the ECJ held that Member States are obliged “to create new remedies, if, and only if, no legal remedy exists in national procedural law to ensure, even indirectly, the possibility of disputing the compatibility of national law with Community law” (De Witte, F. (2008), 52). The same reasoning could be applied to requiring national courts to provide for such a new remedy where private parties seek to challenge EU acts. The result of such a requirement would be that, if direct access to the European courts via the Article 230 procedure fails because of the restrictive notion of individual concern, national judges might be required to ensure the possibility for individuals to have their rights, which are derived from European law, protected through indirect actions. Consequently, national procedural rules would have to provide for indirect means to challenge a EU act and, if necessary, to refer the dispute to the ECJ. As a result, it would be no longer necessary for individuals to violate Union law in order to gain access to a national court (De Witte, F. (2008), 52-53).

The advantages of this approach are that the workload of the ECJ might be reduced and it will keep lower national judges involved in the application and interpretation of European law. Such a solution would also best correspond to the principle of subsidiarity (Heffernan (2006), 296).

However, the reliance on the effectiveness of indirect actions in national courts over more direct legal remedies before the European court can be questioned on grounds of judicial efficiency and access to justice (De Witte, F. (2008), 53-54). It requires Member States to change their national procedural law in order for individuals’ access to the national courts to become easier. Nevertheless, since “Member States are often hesitant and slow in their compliance with Union requirements to reform their legal systems” (Koch (2005), 512), private parties might be refused access to national courts until the Member States incorporate the required legal structures. Furthermore, it has to be pointed out that it is unlikely that every country will adopt rules which provide access to the national courts for individuals to the same extent. This will result in an inequality between applicants bringing actions in different Member States, since the national procedural laws in some Member States will allow access easier than those in others (Koch (2004), 819).

Consequently, it could be concluded that, while this solution solves the problem of a complete denial of any remedy to an individual, it is questionable whether this remedy is sufficiently effective (Koch (2004), 819).

4. Access to European courts by private applicants after the Lisbon Treaty: is the gap in the European system of judicial protection closed?

In the following part, it will be discussed whether the Lisbon Treaty (Note 21) has improved the European system of judicial protection, by considering the modification made by it to the annulment procedure. The Lisbon Treaty modifies the standing requirements for non-privileged applicants by providing that “[a]ny natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures” (Article 263(4) Treaty on the Functioning of the European Union, hereafter ‘TFEU’).

From an examination of this provision, it seems clear that the basic policy underlying the system of judicial review has not been changed: individuals wishing to challenge acts that are not addressed to them still have to prove individual and direct concern (Lewis (2006/2007), 1532). Hence, their only avenue to challenge Union measures (Note 22) will often still only be the preliminary reference procedure. The relaxation of the standing rules will only apply to situations in which two requirements are met: first, when the measure under challenge is a regulatory act, and, second, when the measure is question does not entail implementing measures.

In order to assess the impact of the modifications, one has to determine firstly the meaning of the term ‘regulatory act’. The Lisbon Treaty itself does not contain a definition of this term (Koch (2005), 520). The term ‘regulatory act’ originates from the work done by the Working Group II of the Convention with regard to improving the standing requirements of individuals under the annulment procedure. The work involved hearings of the President of the Court of Justice, Gil Carlos Rodríguez Iglesias, and the President of the Court of First Instance, Bo Vesterdorf. Both Presidents referred to the new distinction between legislative and non-legislative acts (Griller and Ziller (2008), 77) (Note 23) and argued that it would be appropriate to continue to take a restrictive approach to actions by individuals against legislative measures and to provide for a more open approach with regard to actions against regulatory measures (CONV 572/03, p. 4; CONV 575/03, p. 5). By using the term regulatory measures, the presidents referred to non-legislative acts of general application (Lüsberg (2006), 38). The discussion circle suggested the following wording to the Convention:

“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” (CONV 636/03, pp.7-8, para. 20).

Since the discussion circle could not reach an agreement on whether to use the term ‘regulatory act’ or ‘act of general application’, this decision was left to the Convention. In the first draft provisions of Part III on the Court of Justice, which were submitted in the middle of May 2003, it was decided for the term ‘regulatory act’, rather than the broader expression ‘act of general application’ (CONV 734/03, p. 20). The choice of the term ‘regulatory act’ was maintained in the final version of the Convention draft and taken over by the Lisbon Treaty. Consequently, it can be concluded that the term ‘regulatory act’ encompasses all non-legislative acts of general application (Barents (2004), 132-134; Brown and Morijn (2004), 1655; Lüsberg (2006), 38-39).

With regard to Article 263(4) TFEU, it has to be pointed out that the standing requirements for individuals are only loosened with regard to those regulatory acts which do not require implementing measures by the Member States. In this situation, the individual is required to prove only direct concern and not individual concern. This provision, therefore, does not apply to the following two situations.

First, if an individual wants to challenge a non-regulatory act, which requires no implementation measures, it still has to prove direct and individual concern to acquire standing before the European Courts. If the individual is not able to prove individual concern, the situation of a complete lack of remedy would arise, since there would be no national implementing measure available which the individual could challenge. As a result, the indirect way to challenge a European measure via the preliminary ruling procedure would not be open to the individual. An applicant such as UPA would, therefore, still face great difficulties in exercising its right to an effective legal remedy, since it would not be challenging a regulatory act, and would thus still need to demonstrate individual concern – the lack of which was the very reason why it was not granted standing. This situation would consequently lead to a complete lack of remedy, since there would not be any national measure which UPA could have challenged (Cortés Martín (2004), 233; Parfouru (2007), 401; Usher (2005), 599; Dougan (2008), 677). (Note 24)

Second, if an individual wants to challenge a regulatory or non-regulatory act, which requires an implementation act, the individual needs, just like in the situation described above, to prove individual and direct concern. If the individual is not able to meet those requirements, the preliminary ruling procedure would be open to it. Nevertheless, this situation still leads to a lack of an effective remedy, since the problems of the use of the preliminary ruling procedure pointed out by Advocate General Jacobs still remain unresolved (Brown and Morijn (2004), 1659; Koch (2005), 519; Parfouru (2007), 401-402).

It could thus be concluded that the modifications made by the Lisbon Treaty do not close the gap in the European system of judicial protection. The Lisbon Treaty only broadens the standing requirements of individuals with regard to regulatory acts which require no implementation measure at the national level. An applicant such as Jégo-Quéré will thus, under the new regime, be granted standing, since he would be challenging a regulatory measure which does not entail implementing measures. Hence, under the new formulation of Article 230(4), he would only need to demonstrate direct concern.

The result of the modifications is, therefore, that the legal protection of individuals becomes dependent upon the form of the act in question (Barents (2004), 134; Koch (2005), 526). This can be seen as in contradiction with the case law of the European courts according to which only the content of the act is decisive for the interpretation of the requirement of direct and individual concern (Barents (2004), 134).

5. Conclusion

This paper has shown that the current system does not provide for complete judicial protection in the European legal order. Before the entry into force of the Lisbon Treaty, the fourth paragraph of Article 230 EC, which was the main procedure within the EC system of judicial protection, left the individual with limited opportunities to bring direct challenges before the Community judiciary. Moreover, the ECJ has taken a narrow approach to the interpretation of Article 230(4) EC. This approach has been criticised by scholars and members of the judiciary as being too restrictive. Therefore, it can be argued that the Community did not guarantee individuals an effective remedy against Community measures.

Two possible solutions to this problem have been presented, namely the introduction of a fundamental rights complaint procedure and the possibility to enshrine the obligations of the Member States to provide for effective judicial remedies before national courts. Both proposals have advantages and disadvantages.

The fundamental rights complaint procedure would create a special remedy at the European level, while not disturbing the established system of judicial review. Nevertheless, it has to be pointed out that this remedy presents several shortcomings which make it doubtful to regard such an addition as an actual improvement to the current system. First of all, this mechanism would have a problematic application *ratione materiae* as it would be limited to fundamental rights and it would often be difficult to draw a clear distinction between grounds of action relating to the procedure of fundamental rights and other grounds of action for challenging an EU act. Moreover, it would be difficult to determine which court would have jurisdiction to hear a fundamental rights complaint. Additionally, one can also argue that fundamental rights should be protected within the existing system of remedies. If the remedies are considered to be inadequate, they should be improved in relation to the protection of all individual rights, and not only in the context of fundamental rights.

The main advantage of the possibility to enshrine the obligations of the Member States is that it would be no longer necessary for individuals to violate European law in order to gain access to a national court. The obligation for Member States to protect the right to an effective remedy has now been incorporated into Article 19 TEU: this provision might help to overcome the problems created in the situation of ‘complete lack of remedy’, but its success is highly dependent upon the compliance of the Member States with their duty to reform their national procedural system. Such compliance might be slow and could result in an inequality between applicants bringing actions in different Member States. Finally, the reliance on the effectiveness of indirect actions before Member States courts can still be questioned and the problems related to the situations of ‘lack of an effective remedy’ remain unresolved.

Therefore, it can be concluded that both systems do not provide an absolute solution to the problem of the incomplete system of judicial protection at the European level. That being said, while not entirely closing the gap, both systems could diminish the gap in the protection of individuals’ right to an effective remedy. Aside from Article 19 TEU, a concrete step in closing the gap in the EU system of judicial protection has been taken by the reform of the standing requirements for direct actions brought by the Lisbon Treaty.

Although the basic policy underlying the system of judicial review before the European courts has remained unchanged, individuals will be able, under the new regime established by the Treaty of Lisbon, to have easier access to court when they are challenging regulatory acts which do not entail implementing measures. However, these changes are only a small step in the right direction: the opening of the test of standing is minimal, and for many applicants the threshold of standing will remain unchanged (Koch (2005), 527).

As a conclusion, one has to remind oneself of how the problem of the incomplete system of judicial protection came into being at the European level. Article 263 TFEU could be seen as sufficient to provide for a complete system of judicial protection at the European level. However, it has been the Court of Justice who has interpreted the requirements of ‘individual and direct concern’ in a severe manner and who, therefore, precludes a complete system at the EU level. As a result, the question arises as whether one should try to tackle the origin of the problem rather than fight its consequences. As shown above, it seems that the problem could not be solved solely by introducing a fundamental rights complaint procedure or by enshrining in the Treaties the obligation of the Member States to provide for effective remedies before national courts. Hence, in order to close the gap in the protection of individuals’ rights completely, it would be advisable for the ECJ to relax its test of ‘individual and direct concern’. Looser rules on standing and imposing an obligation upon the Member States to provide for effective judicial remedies at the national level might then ensure a more complete EU system of judicial protection.

References

- Albors-Llorens, A. (1996). *Private parties in European Community Law. Challenging Community Measures*. Clarendon Press.
- Albors-Llorens, A. (2003). The Standing of private parties to challenge Community Measures: Has the European Court Missed the Boat? *Cambridge Law Journal*, 62(1), 72-92.
- Arnall, A. (1995). Private applicants and the action for annulment under Article 173 of the EC Treaty. *Common Market Law Review*, 32(1), 7-49.
- Barents, R. (2004). The Court of Justice in the draft Constitution. *Maastricht Journal of European and Comparative Law*, 11(2), 121-142.
- Biernat, E. (2003). The Locus Standi of Private Applicants under Article 230 (4) EC and the Principle of Judicial Protection in the European Community. Jean Monnet Working Paper 12/03. [Online] Available: <http://www.jeanmonnetprogram.org/papers/03/031201.rtf> (March 27, 2010).
- Brown, C. & Morijn, J. (2004). Comment on *Jégo-Quéré*. *Common Market Law Review*, 41(6), 1639-1659.

- Case 11/82 *Piraiki-Patraiki v. Commission* [1985] ECR 207.
- Case 294/83 *Parti Ecologiste les Verts v. European Parliament* [1986] ECR I-1368.
- Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.
- Case 5/62 *Plaumann v. Commission* [1963] ECR-95.
- Case 69/69 *Alcan Aluminium Raeren v. Commission* [1970] ECR 385.
- Case C-263/02 P *Commission v. Jégo-Quéré* [2002] ECR I-3425.
- Case C-309/89 *Codorniu SA v. Commission* [1994] ECR I-1853.
- Case C-358/89 *Extramet Industrie SA v. Council* [1991] ECR I-2501.
- Case C-432/05 *Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern* [2007] ECR I-2771.
- Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677.
- Case T-173/98 *Unión de Pequeños Agricultores v. Council* [1999] ECR II-3357.
- Case T-177/01 *Jégo-Quéré & Cie v. Commission* [2002] ECR II-2365.
- Cases 41-44/70 *International Fruit Company BV v. Commission* [1971] ECR 411.
- Cases 789-790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission* [1980] ECR 1949.
- Chalmers, D. & Monti, G. (2007). *European Union Law*. (4th ed.). Cambridge University Press.
- CONV 572/03, 10 March 2003, Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the “discussion circle” on the Court of Justice on 17 February 2003.
- CONV 575/03, 10 March 2003, Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the “discussion circle” on the Court of Justice on 24 February 2003.
- CONV 636/03, 25 March 2003, ‘Framework of proceedings’, Annex to the Final report of the discussion circle on the Court of Justice .
- CONV 734/03, 2 May 2003, ‘The Court of Justice and the High Court’.
- Cortés Martin, J.M. & Manuel, J. (2004). Ubi ius, Ibi Remedium? – Locus standi of private applicants under Art. 230 (4) EC Treaty at a European Constitutional Crossroad. *Maastricht Journal of European and Comparative Law*, 11(3), 233-261.
- Corthaut, T. (2002/2003). Comment on *Jégo-Quéré*. *Columbia Journal of European Law*, 9(1), 141-166.
- Craig, P. & De Búrca, G. (2008). *EU Law: Text, Cases and Materials*. (5th ed.). Oxford University Press.
- Craig, P. (2008). The Treaty of Lisbon, process, architecture and substance. *European Law Review*, 33(2), 137-166.
- Cygan, A. (2003). Protecting the interests of civil society in Community decision-making – the limits of article 230 EC. *International and Comparative Law Quarterly*, 52(4), 995-1012.
- Dashwood, A. & Johnston A. (2004). The institutions of the enlarged EU under the regime of the Constitutional Treaty. *Common Market Law Review*, 41(6), 1481-1518.
- De Witte, B. (1999). The Past and Future Role of the European Court of Justice in the Protection of Human Rights. In P. Alston (Ed.), *The EU and Human Rights* (pp. 859-897). Oxford University Press.
- De Witte, F. (2008). The European Judiciary after Lisbon. *Maastricht Journal of European and Comparative Law*, 15(1), 43-54.
- Dougan, M. (2004). *National Remedies before the Court of Justice- Issues of Harmonization and Differentiation*. Hart Publishing.
- Dougan, M. (2008). The Treaty of Lisbon 2007: Winning Minds, not Hearts. *Common Market Law Review*, 45(5), 617-703.
- Fairhurst, J. (2007). *Law of the European Union*. (6th ed.). Pearson Education Limited.
- Gormley, L.W. (2006). Judicial Review: Advice for the Deaf? *Fordham Internatioal Law Journal*, 29(4), 655-689.
- Griller, S. & Ziller, J. (2008). *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Springer-Verlag.

- Groussot, X. (2003). The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform? *Legal Issues of Economic Integration*, 30, 221-248.
- Heffernan, L. (2006). Effective Judicial Remedies: The Limits of Direct and Indirect Access to the European Community Courts. *The Law and Practice of International Courts and Tribunals*, 5(2), 285-304.
- Koch, C. (2004). European Community - Challenge of Community Fisheries Regulation – Admissibility of Individual Applicants under Art 230(4). *The American Journal of International Law*, 98(4), 814-819.
- Koch, C. (2005). Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' rights to an effective remedy. *European Law Review*, 30(4), 511-527.
- Lewis, X. (2006/2007). Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: if the System is Broken, where Should it be Fixed? *Fordham International Law Journal*, 30(5), 1496-1544.
- Lüsberg, J.B. (2006). The EU Constitutional Treaty and its distinction between legislative and non-legislative acts – Oranges into apples? Jean Monnet Working Paper 01/06. [Online] Available <http://centers.law.nyu.edu/jeanmonnet/papers/06/060101.pdf> (March 27, 2010).
- Maganza, G. (2008). The Lisbon Treaty: A short outline. *Fordham International Law Journal*, 31(6), 1603-1613.
- Opinion of Advocate General Jacobs in case C-50/00 *Union de Pequeños Agricultores* [2002] ECR I-6677, delivered on 21 March 2002.
- Parfouru, A.A. (2007). *Locus Standi* of Private Applicants Under the Article 230 EC Action for Annulment : Any Lessons to be Learnt From France? *Maastricht Journal of European and Comparative Law*, 14(4), 361-402.
- Ragolle, F. (2003). Access to justice for private applicants in the Community legal order: Recent (R)evolutions. *European Law Review*, 28(1), 90-101.
- Temple Lang, J. (2003)a. Actions for Declaration that Community Regulations are Invalid: The Duties of National Courts under Art 10 EC. *European Law Review*, 28(1), 102-111.
- Temple Lang, J. (2003)b. Developments, Issues, and New Remedies – The Duties of National Authorities and Courts under Article 10 of the EC Treaty. *Fordham International Law Journal*, 27, 1904-1939.
- Tridimas, T. & Poli, S. *Locus Standi* of Individuals under Article 230(4): the Return of Euridice? In T. Tridimas, & S. Poli, *Making community law: the legacy of Advocate General Francis Jacobs at the European Court of Justice* (pp. 77-99). Edward Elgar Publishing.
- Usher, J.A. (2005). Direct and Individual Concern – An Effective Remedy or a Conventional Solution. *European Law Review*, 28(4), 575-600.
- Ward, A. (2001). Amsterdam and amendment to article 230: an opportunity lost or simply deferred? In A. Dashwood & A. Johnston (Eds.), *The future of the judicial system of the European Union* (pp. 37-40). Cambridge: Hart Publishing.
- Ward, A. (2003). *Locus standi* under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity. *Yearbook of European Law*, 22, 45-77.
- WG II ,Working Document 19, Hearing of Judge Mr. Vassilios Skouris, 17 September 2002.
- WG II ,Working Document 20, F.G. Jacobs, 'Necessary changes to the system of judicial remedies', note to the WG II presented by group member, Mr. Ben Fayot .
- WG II, Working Document 21, 'The question of effective judicial remedies and access of individuals to the European Court of Justice'.

Notes

Note 1. On Article 230 EC in general, see Chalmers, D. & Monti, G. (2007). *European Union Law*. (4th ed.). Cambridge University Press, (pp. 416-420); Craig, P. & De Búrca, G. (2008). *EU Law: Text, Cases and Materials*. (5th ed.). Oxford University Press, (pp. 507-517); Fairhurst, J. (2007). *Law of the European Union*. (6th ed.). Pearson Education Limited, (pp. 225-254).

Note 2. Case 25/62 *Plaumann v. Commission* [1963] ECR-95.

Note 3. For criticism on the standing requirements of individual applicants under Article 230 EC, see Arnull, A. (1995). Private applicants and the action for annulment under Article 173 of the EC Treaty. *Common Market Law Review*, 32(1), 7-49; Cortés, M., & Manuel, J. (2004). Ubi ius, Ibi Remedium? – Locus standi of private applicants under Art. 230 (4) EC Treaty at a European Constitutional Crossroad. *Maastricht Journal of*

European and Comparative Law, 11(3), 233-261; Cygan, A. (2003). Protecting the interests of civil society in Community decision-making – the limits of article 230 EC. *International and Comparative Law Quarterly*, 52(4), 995-1012; Lewis, X. (2006/2007). Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: if the System is Broken, where Should it be Fixed? *Fordham International Law Journal*, 30(5), 1496-1544; Parfouru, A.A. (2007). *Locus Standi* of Private Applicants Under the Article 230 EC Action for Annulment : Any Lessons to be Learnt From France? *Maastricht Journal of European and Comparative Law*, 14(4), 361-402; Ward, A. (2001). Amsterdam and amendment to article 230: an opportunity lost or simply deferred? In A. Dashwood & A. Johnston (Eds.), *The future of the judicial system of the European Union* (pp. 37-40). Hart Publishing; Ward, A. (2003). *Locus standi* under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity. *Yearbook of European Law*, 22, 45-77.

Note 4. Albers-Llorens correctly notes that the lower profile of the test of direct concern is due to the fact that the ECJ has been less rigid and more consistent in the interpretation of this concept. Furthermore, since the tests of individual and direct concern are cumulative, the Court has frequently denied standing to private applicant on grounds of lack of individual concern, without even considering the requirement of direct concern. Albers-Llorens, A. (2003). The Standing of private parties to challenge Community Measures: Has the European Court Missed the Boat? *Cambridge Law Journal*, 62(1), 72-92.

Note 5. Cases 41-44/70, *International Fruit Company BV v. Commission* [1971] ECR 411. The case dealt with employees of a merging company who were not granted standing to challenge a Commission decision allowing the merger. The Court of Justice denied standing to them because of the fact that possible employment terminations would not be the direct consequence of the Commission decision.

Note 6. See, for example, case 69/69, *Alcan Aluminium Raeren v. Commission* [1970] ECR 385; case 222/83, *Municipality of Differdange v. Commission* [1984] ECR 2889.

Note 7. The Plaumann case concerned the import of clementines. The German Government asked the Commission to allow it to suspend the duty on clementines imported from non-member states, but the Commission refused them permission to do so. The applicant company was an importer of clementines who sought judicial review of the Commission's decision addressed to the German authorities.

Note 8. When applied to the facts of the *Plaumann* case, this meant that, although the company in question was actually among the few companies importing clementines into the Community area, any person could *potentially* engage in such business activity. Hence, the Court found that Plaumann was not individually concerned.

Note 9. For example, in a case concerning seven Greek cotton traders who sought judicial review of a Commission decision that authorised France to impose a fixed-term quota on cotton yarn imports from Greece to France, the Court found that pre-existing import contracts differentiated the applicant from *potential* importers and thus granted standing to the applicants. Case 11/82, *Piraiki-Patraiki v. Commission* [1985] ECR 207. The 'closed class' test was highly criticised because of its formalistic and artificial nature. See, e.g., Arnall, A. (1995). Private applicants and the action for annulment under Article 173 of the EC Treaty. *Common Market Law Review*, 32(1), 7-49.

Note 10. Case 789-790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission* [1980] ECR 1949. The applicants were Italian producers of William pears. They sought to annul a regulation which calculated the production aid on the basis of one marketing year, while the previous regulation calculated it on the basis of the average production over the previous three years. The applicants claimed that they were a closed and definable group, the members of which were identifiable by the Commission. Nevertheless, the ECJ held that the nature of the measure as a regulation was not called in question by the mere fact that it was possible to determine the number or even identity of the producers to be granted the aid.

Note 11. Case C-309/89 *Codorniu SA v. Commission* [1994] ECR I-1853.

Note 12. Case C-358/89 *Extramet Industrie SA v. Council* [1991] ECR I-2501.

Note 13. Case 294/83 *Parti Ecologiste les Verts v. European Parliament* [1986] ECR I-1368.

Note 14. Art 234 EC established for the preliminary ruling procedure, which enables national courts to question the ECJ about the interpretation or validity of Community law in the context of a dispute submitted to the national Court. Article 234 provides that courts of final instance are obliged to bring such matters before the ECJ, whereas this is optional for courts other than those of final instance.

Note 15. Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

Note 16. Case T-173/98 *UPA v. Council* [1999] ECR II-3357.

Note 17. T-177/01 *Jégo-Quééré & Cie v. Commission* [2002] ECR II-2365.

Note 18. Many scholars have considered this ruling by the ECJ as a missed opportunity to liberalise the standing requirements for individuals: Albors-Llorens, A. (2003). The Standing of private parties to challenge Community Measures: Has the European Court Missed the Boat? *Cambridge Law Journal*, 62(1), 72-92, 92; Brown, C., & Morijn, J. (2004). Comment on *Jégo-Quéré*. *Common Market Law Review*, 41(6), 1639-1659; Chalmers, D., & Monti, G. (2007). *European Union Law*. (4th ed.). Cambridge University Press, (pp. 432-433); Cortés, M., & Manuel, J. (2004). Ubi ius, Ibi Remedium? – Locus standi of private applicants under Art. 230 (4) EC Treaty at a European Constitutional Crossroad. *Maastricht Journal of European and Comparative Law*, 11(3), 233-261, 245; Koch, C. (2004). European Community - Challenge of Community Fisheries Regulation – Admissibility of Individual Applicants under Art 230(4). *The American Journal of International Law*, 98, 814-819; Ragolle, F. (2003). Access to justice for private applicants in the Community legal order: Recent (R)volutions. *European Law Review*, 28(1), 90-101.

Note 19. This position has been criticised by many scholars, who have argued that the notion of ‘individual concern’ is not expressly defined in Article 230 EC nor in any other article of the EC Treaty. Indeed, while the notion of individual concern is provided by the Treaty, the Treaty does not provide for the restrictive interpretation of the notion of individual concern as adopted by the ECJ. Nothing in Article 230 suggests that an applicant needs to prove that it is differentiated from all other persons not only actually but also potentially. See, e.g., Albors-Llorens, A. (2003). The Standing of private parties to challenge Community Measures: Has the European Court Missed the Boat? *Cambridge Law Journal*, 62(1), 72-92, 90; Chalmers, D., & Monti, G. (2007). *European Union Law*. (4th ed.). Cambridge University Press, (p. 433); Parfouru, A.A. (2007). Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France? *Maastricht Journal of European and Comparative Law*, 14(4), 361-402, 387; Ragolle, F. (2003). Access to justice for private applicants in the Community legal order: Recent (R)volutions. *European Law Review*, 28(1), 90-101, 100; Tridimas, T. & Poli, S. Locus Standi of Individuals under Article 230(4): the Return of Euridice? In T. Tridimas & S. Poli, *Making community law: the legacy of Advocate General Francis Jacobs at the European Court of Justice* (pp. 77-99). Edward Elgar Publishing, 81.

Note 20. Case C-432/05 *Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern* [2007] ECR I-2771.

Note 21. The Treaty of Lisbon (initially known as the Reform Treaty) was signed on 13 December 2007 and entered into force on 1 December 2009. It amends the Treaty on European Union and the Treaty establishing the European Community (‘TEC’). In this process, the TEC was renamed to Treaty on the Functioning of the European Union. For an analysis of the changes brought by the Lisbon Treaty, see Craig, P. (2008). The Treaty of Lisbon, process, architecture and substance. *European Law Review*, 33(2), 137-166; Maganza, G. (2008). The Lisbon Treaty: A short outline. *Fordham International Law Journal*, 31(6), 1603-1613.

Note 22. The Treaty of Lisbon abolishes the European Communities. Therefore, while the parts of this paper which deal with the situation under the old EC Treaty refer to the ‘Community’, this part will refer to the ‘Union’.

Note 23. Art 289 TFEU defines legislative acts as acts adopted in accordance with the legislative procedure, either the ordinary legislative procedure or a special legislative procedure. Art 290 TFEU deals with non-legislative acts of general application, whereby the power to adopt such acts is delegated to the Commission by a legislative act. Such non-legislative acts can supplement or amend certain non-essential elements of the legislative act, but the legislative act must define the objectives, content, scope and duration of the delegation of power. See Griller, S. & Ziller, J. (2008). *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Springer-Verlag, (p. 77).

Note 24. This test is thus much stricter than that proposed by both the AG in *UPA* and the CFI in *Jégo-Quéré*. As Lewis points out, this test is more restrictive, since the more generous rules of standing only apply to challenges against regulatory acts. Lewis, X. (2006/2007). Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: if the System is Broken, where Should it be Fixed? *Fordham International Law Journal*, 30(5), 1496-1544. See also Dashwood, A. & Johnston, A. (2004). The institutions of the enlarged EU under the regime of the Constitutional Treaty. *Common Market Law Review*, 41(6), 1481-1518, 1509. For an enlightening explanation as to why the choice made by the Member States in Article 263 TFEU is flawed from many perspectives, see Dougan, M. (2008). The Treaty of Lisbon 2007: Winning Minds, not Hearts. *Common Market Law Review*, 45(5), 677-679.