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THE STANDING OF PRIVATE PARTIES TO CHALLENGE COMMUNITY MEASURES: HAS THE EUROPEAN COURT MISSED THE BOAT?

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I. INTRODUCTION

THIS article will consider recent case-law developments concerning the standing conditions that natural and legal persons must satisfy in order to bring annulment proceedings against acts of EC institutions. These conditions, set out in Article 230(4) EC, have been so narrowly interpreted by the European Court of Justice for over forty years that private parties have rarely been able to surmount this formidable admissibility barrier when challenging Community acts. In March 2002, Advocate General Jacobs delivered a compelling Opinion in *Unión de Pequeños Agricultores (UPA)* v. *Council*,[1] where he suggested a new interpretation of the test of individual concern, which stands at the core of the *locus standi* requirements in Article 230(4) EC. Only a few weeks later the Court of First Instance dramatically departed from previous case law and re-defined that same test in *Jégo Quéré* v. *Commission*,[2] although it did so in narrower terms than those proposed by Advocate General Jacobs. However, any hopes that the time was ripe for a re-examination of the case law on individual concern, were dashed by the European Court in its judgment in *UPA* v. *Council*.[3] The Court did not follow either the suggestions of Advocate General Jacobs or of the Court of First Instance, stating instead that it was for the Member States acting in the European Council and not for the Court, to reform the conditions of admissibility set out in Article 230(4) EC.

This article will consider the case law prior to these developments and summarise the main points of criticism levelled at it. It will then analyse the new standing tests proposed by

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1 Case C-50/00P, [2002] 3 C.M.L.R. 1,7.

2 Case T-177/01, judgment of 3 May 2002, not yet reported.

3 Case C-50/00P, note 1 above.

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Advocate General Jacobs and by the Court of First Instance respectively, and will argue that the former's test is more satisfactory in terms of clarity and legal certainty than the latter's. Finally, it will examine the judgment of the European Court in *UPA* and the implications of this judgment for the future of judicial review instigated on the initiative of private parties in the European Union.

II. The *Locus Standi* Conditions Provided in Article 230(4) EC and Their Interpretation by the Community Judicature

Article 230(4) EC imposes two main constraints on the right of private parties to bring annulment proceedings. First, it implicitly excludes any binding act, other than decisions, from the scope of challenge by natural and legal persons. In principle, therefore, this provision does not permit private applicants to challenge regulations or directives. Secondly, it provides that not all decisions are reviewable by private parties. While the addressees of a decision always have *locus standi* to challenge it, the standing of non-addressees is made contingent on their showing that it directly and individually concerns them.

The first of these limitations was based on the quasi-legislative nature of regulations,[4] and also reflected the concern that to allow private parties to challenge acts of general application would open the floodgates to incessant litigation. Although this restriction is embedded in the letter of Article 230(4) EC, it seems now effectively to have disappeared in the wake of a complex evolution of the case law.[5] Private parties were systematically denied *locus standi* whenever the Court concluded that the contested act was truly a regulation—as opposed to a disguised decision—and regardless of whether they were individually concerned by it.[6] However, after years of uncertainty, the Court finally departed from the wording of Article 230(4) EC, first in the context of anti-

[4] See the Opinion of Advocate General Lagrange in Joined Cases 16 and 17/62 *Confédération Nationale des producteurs de fruits et légumes* v. *Council* [1962] 471, 486 and J.V. Louis, *Les Règlements de la CEE* (Brussels, 1969), p. 121.

[5] On the divergent trends that emerged from the case law of the Court over three decades, see H.G. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities*, 5th edn. (Deventer, 1992), pp. 231–233; P. Craig, "Legality, Standing and Substantive Review in Community Law" (1992) 14 OJLS 507, 513; T. Hartley, *The Foundations of European Community Law*, 4th edn. (Oxford, 1998), pp. 358–362, and the Opinion of Advocate General Da Cruz Vilaça in *Mannesmann-Röhrenwerke* v. *Council* [1987] E.C.R. 1381, 1390.

[6] See Case 162/78 *Wagner* v. *Commission* [1979] E.C.R. 3467; Joined Cases 789–790/79 *Calpak* v. *Commission* [1980] E.C.R. 797 and Case 45/81 *Moskel* v. *Commission* [1982] E.C.R. 1129. See also R. Greaves, "*Locus Standi* under Article 173 when seeking annulment of a regulation" 11 E.L.Rev. [1986], 119. Exceptionally, the Court adopted a more lenient interpretation in some isolated cases (see Case 100/74 *CAM* v. *Commission* [1975] E.C.R. 1393; Case 264/81 *Agricola Commerciale Olio* v. *Commission* [1984] E.C.R. 3881 and Case C–152/88 *Sofrimport* v. *Commission* [1990] E.C.R. I-2477).

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dumping cases[7] and then in its landmark decision in *Codorniu* v. *Council*,[8] a case that fell within the framework of the common organisation of agricultural markets in the Community. There, the Court concluded that private parties could challenge genuine regulations that concerned them directly and individually. Furthermore, and despite the lack of guidance from the Treaty, the Court of First Instance extended the same approach to directives and ruled that these general acts are also reviewable by private applicants who fulfil those same tests.[9] These were welcome developments because they considerably extended the right of action of natural and legal persons. It is unfortunate, however, that the reasoning underlying such an important step was never clearly expounded by the Community courts[10] and that Article 230(4) EC was not the subject of a Treaty amendment either at Amsterdam or at Nice. Be that as it may, the position now seems to be that private parties may challenge not only decisions but also regulations and directives that concern them directly and individually.[11]

It follows from this that the tests of direct and individual concern are the sole obstacles that remain to the admissibility of annulment proceedings brought by private parties. With a few exceptions, the Court has interpreted these tests—and, in particular, the test of individual concern—very narrowly. This is surprising because this notion was not defined in the Treaty, giving the Court the option of adopting a flexible construction as it has done in relation to numerous other Treaty concepts[12] and even in the

[7] See Joined Cases 239 and 275/82 *Allied Corporation* v. *Commission* [1984] E.C.R. 1005, para. 11, and in even clearer terms, Case C-358/89 *Extramet* v. *Council* [1991] E.C.R. I-2501, para. 14.

[8] Case C-308/89 [1994] E.C.R. I-1853, para. 19.

[9] See Case T-135/96 *Union européenne de l'artisanat et des petites et moyennes entreprises (UEAPME)* v. *Council* [1998] E.C.R. II-2335, paras. 67–69, and Joined Cases T-172 and T-175–177/98 to T-177/98 *Salamander* v. *European Parliament and Council* [2000] E.C.R. II-2487, paras. 27–30.

[10] See A. Arnull, "Private Applicants and the Action for Annulment since *Codorniu*" (2001) 38 C.M.L.Rev. 7, 8–9. The terseness of the judgments of the Court on this point is startling, given the very comprehensive reasoning provided by Advocate General Jacobs in his Opinion in *Extramet* v. *Council* (Case C-358/89, note above,) and by Advocate General Lenz in *Codorniu* (Case C-308/89, note 8 above).

[11] The case law of the Community courts post-*Codorniu* is consistent on this point. See, for example, Case T-484/93 *Exporteurs in Levende Varkens* v. *Commission* [1995] E.C.R. II-2941; Case T-109/97 *Molkerei Großbraunshain* v. *Commission* [1998] E.C.R. II-3533; Case C-451/98 *Antillean Rice Mills* v. *Council*, judgment of 22 November 2001, not yet reported; Case T-47/00 *Rica Foods* v. *Commission*, judgment of 17 January 2002, not yet reported.

[12] See, for example, the Court's interpretation of the concept of measures having equivalent effect to quantitative restrictions in Article 28 EC in Case 8/74 *Procureur du Roi* v. *Dasonville* [1974] E.C.R. 837, para. 5, or of the notion of "worker" in Article 39 EC in Case 53/81 *Levin* v. *Staatssecretaris* [1982] E.C.R. 1035, paras. 9–17.

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context of Article 230 EC itself.[13] The Court's approach to each of these tests will be considered in turn.

A. The Test of Direct Concern

The test of direct concern has traditionally had a lower profile than the test of individual concern and a much less decisive role in the dismissal of actions for annulment brought by private parties. This is largely due to the fact that the Court has been comparatively less rigid and more consistent in the interpretation of that concept. Furthermore, and since the two admissibility tests are cumulative, the Court has frequently denied standing to natural and legal persons on the basis that they were not individually concerned, without having to consider also whether they were directly concerned.

Essentially, direct concern refers to the existence of a direct causal link between a Community measure and the effect of that measure on the legal position of the private party applying for its annulment. In practice, the Court has construed this to mean that a non-addressee of a Community decision satisfies the test where the addressee of the measure did not have any discretion as to its implementation.[14] Furthermore, and despite some early restrictive decisions,[15] the Court accepted that the same conclusion would follow in cases where some degree of discretion was bestowed on the addressee but the exercise of that discretion was purely theoretical.[16] The reason for the Court's approach is clear. The exercise of any real discretion by the addressee of a Community decision would cause a private applicant to be directly concerned not by the Community measure but by the act of the addressee and therefore it is the act of the addressee that should be challenged instead. This test has been applied to the majority of cases involving the challenge of decisions addressed to third parties.[17] Its application to actions for annulment against

[13] See, for example, the case-law evolution whereby—and despite the silence of Article 230 EC—the Court first recognised that acts of the European Parliament that produce legal effects *vis-à-vis* third parties were reviewable (Case 294/83 *Les Verts* v. *European Parliament* [1986] E.C.R. 1339) and then subsequently recognised that the Parliament had a limited capacity to bring annulment proceedings (Case C-70/88 *European Parliament* v. *Council* [1990] E.C.R. I-2041). These case-law developments culminated with the amendment of the letter of Article 230 EC by the Treaty on European Union.

[14] See Joined Cases 106–107/63 *Toepfer* v. *Commission* [1965] E.C.R. 405; Joined Cases 41–44/70 *International Fruit Company* v. *Commission* [1971] E.C.R. 411 and Case 92/78 *Simmenthal* v. *Commission* [1979] E.C.R. 777.

[15] See Joined Cases 10 and 18/68 *Eridania* v. *Commission* [1969] E.C.R. 459, para. 11, and Case 69/69 *Alcan* v. *Commission* [1970] E.C.R. 385.

[16] See Case 62/70 *Bock* v. *Commission* [1971] E.C.R. 897, and Case 11/82 *Piraiki-Patraiki* [1985] E.C.R. 207.

[17] This has been the case where private applicants have sought to challenge decisions addressed to Member States (see, for example, Joined Cases 106–107/63, note 14 above) and to other private parties (see Case 294/83, note 13 above).

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regulations has been straightforward, given the general and directly applicable nature of these acts, and the Court has frequently found that individuals and companies that managed to satisfy the test of individual concern were also directly concerned.[18]

The criterion of direct concern, however, could be more problematic in the case of directives, unless the Community courts are prepared to interpret it liberally. Directives always allow the Member States the choice as to the form and methods of their implementation.[19] Would this mean that the provisions of a directive can never be of direct concern to a private applicant? The truth is that directives are sometimes drafted in very prescriptive terms and therefore the discretion left to Member States is minimal.[20] It would follow that, in these cases, the Community courts should follow the same approach as in cases where the exercise of discretion by the addressee of a decision is purely theoretical.[21]

B. The Test of Individual Concern

The Court first interpreted the notion of individual concern in *Plaumann & Co.* v. *Commission*.[22] In this case, a Commission decision addressed to Germany refused to authorise Germany to suspend the collection of the customs duty set out in the Common Customs Tariff on the importation of clementines from non-Member States. A German importer of clementines sought the annulment of this decision. The Court framed the test of individual concern as follows:

> Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[23]

The Court then held that Plaumann was not individually concerned by the decision because the latter was affected by it

[18] See Joined Cases 41–44/70, note 14 above, and Case C-152/88, note 6 above.
[19] See Article 249 EC.
[20] See Arnull, *op. cit.*, note 10 above, p. 30.
[21] The European Court has yet to pronounce on this issue, but the Court of First Instance took a very narrow approach to directives in its judgment in *Salamander* v. *European Parliament and Council* (Joined Cases T-172- T-175/98 to T-177/98, note 9 above, paras. 54–71). See Arnull, who has convincingly argued that the Court of First Instance has in recent years adopted a progressively more severe interpretation of the test of direct concern (*op. cit.*, note 10 above, pp. 25–30).
[22] Case 25/62 [1963] E.C.R. 95.
[23] *Ibid.*, at p. 107.

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purely as an importer of clementines—that is, by reason of a commercial activity that anyone could practise in the future.[24] Therefore, although the decision had an adverse impact on Plaumann's interests, this did not suffice to render the applicant individually concerned. It followed from the Court's reasoning in *Plaumann* that a natural or legal person would only be individually concerned by a measure if it belonged to a group of people that could not be enlarged after the measure entered into force. This is known as the "closed class" test, and has attracted much criticism, in particular because of its formalistic and retroactive nature.[25] The only time it has been satisfied is where an applicant pursued a course of action *before* the enactment of a measure—for example by applying for an export or import licence[26]—and, by reason of that conduct, was specially affected by the Community act. The "closed class" test has been applied in a large number of cases and the general reluctance of the Court to depart from it has produced some unfortunate results.

For example, in *Getreide-Import Gesellschaft* v. *Commission*,[27] only one importer of cereals applied for a licence during the period of validity of a Commission decision fixing rates of levy for the importation of cereals. The Court held that the importer was not individually concerned by the decision because, at the time the decision was enacted, *any* importer *could* have decided to apply for a licence. The same approach has been followed in cases where the possibility of new members joining a certain category of people after the enactment of a measure has been entirely theoretical.[28] Competitors of undertakings favoured by Community measures have not fared any better and their applications for the annulment of these measures have been dismissed as inadmissible because they belonged to open categories.[29] The test has even been extended to environmental cases where, given the general and collective nature of environmental rights, it would be almost impossible for private applicants to show that they belong to a closed group of people.[30] Finally, one matrix where the application of the "closed class" test

[24] *Ibid.*, at p. 107.

[25] See P. Craig, *op. cit.*, note 5 above, 509; A. Arnull, "Private Applicants and the Action for Annulment under Article 173 EEC" (1995) 32 C.M.L.Rev. 7, 44–49; A. Barav, "Direct and Individual Concern: an Almost Insurmountable Barrier to the Admissibility of Individual Appeals to the European Court" (1974) 11 C.M.L.Rev. 191, 191–192, 198.

[26] See, for example, Case 100/74 *Cam* v. *Commission* [1975] E.C.R. 1393, and Case C-354/87 *Weddel* v. *Commission* [1990] E.C.R. I-3847.

[27] Case 38/64 [1965] E.C.R. 203; see also Case 231/82 *Spijker* v. *Commission* [1983] E.C.R. 2559.

[28] See Case 1/64 *Glucoseries Réunies* v. *Commission* [1964] E.C.R. 413.

[29] Joined Cases 10 and 18/68, note 15 above; Case T-268/99 *Fédération nationale d'agriculture biologique des régions de France* v. *Council* [2001] E.C.R. II-2893. Direct competitors, particularly if there is only one of them, have been treated more leniently in some cases (see Case C-354/89 *Schiocchet* v. *Commission* [1991] E.C.R. I-1775).

[30] See Case C-321/95P *Greenpeace* v. *Commission* [1998] E.C.R. I-1651, at para. 28.

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has had particularly damaging effects has been the standing of associations which might wish to bring actions for annulment.[31]

Although the "closed class" test has frequently been used as the sole criterion for deciding whether or not a private applicant is individually concerned, the case law has not always been consistent. Two main groups of divergent cases can be distinguished.

On the one hand, there have been cases where membership of a closed class alone has not sufficed to satisfy the *Plaumann* formula.[32] These cases have significantly enhanced the *per se* limiting nature of the "closed class" test. For example, in some cases[33] the Court has found that some of the applicants were individually concerned because they belonged to closed classes *and* because the Commission was in a position to know who would be affected by the measure. In other words, it would seem that the applicants had to prove that the measure was aimed specifically at them in order to be individually concerned by it. This construction of the test of individual concern was confined to the early case law and has re-emerged only in some of the most notoriously restrictive decisions on standing.[34] In other cases, the test was based not only on the membership of a closed group but also on the fact that the enacting institution failed to observe a legal duty to take account of the impact of the measure on those belonging to that group.[35] In these cases, therefore, the Court seemed to be asking applicants belonging to closed classes to show, as an additional element, the breach of a procedural equivalent to the principle of legitimate expectations in order to gain standing.[36] This demanding benchmark

[31] See Joined Cases 16 and 17/62, note 4 above, and Case C-321/95P, note above. Actions brought by associations are only admissible in three cases: (a) when a legal provision grants procedural rights to these associations; (b) where every single member of the association would be directly and individually concerned, and (c) where the association's position as a negotiator is affected by the measure which it seeks to annul (see Case C-122/96 *Federolio* v. *Commission* [1997] E.C.R. II-1559, at para. 61). These criteria have proved almost impossible to satisfy in practice and their severity is striking when compared with the approach followed in the national legal systems regarding the *locus standi* of associations (see, for example, under English law, *R.* v. *Her Majesty's Inspectorate of Pollution, ex parte Greenpeace Ltd. (no. 2)* [1994] 4 All E.R. 329, and J. Miles, "Standing in a Multi-Layered Constitution" in P. Leyland and N. Bamforth (eds.) *Public Law in a Multi-layered Constitution* (Oxford 2003, forthcoming).

[32] See Case T-298/94 *Roquette Frères* v. *Council* [1996] E.C.R. II-1531, at para. 41.

[33] See Joined Cases 106–107/63 *Toepfer* v. *Commission*, note 14 above; Case 62/70 *Bock* v. *Commission*, note 16 above.

[34] See Case C-321/95P, note 30 above, at para. 28 of the judgment and Case T-100/94 *Michailidis* v. *Commission* [1998] E.C.R. II-3115 at para. 59 of the Order of the Court of First Instance.

[35] See Case 11/82, note 16 above; Case C-152/88, note 6 above; Joined Cases T-480 and T-483/93 *Antillean Rice Mills and others* v. *Commission* [1995] E.C.R. II-2305.

[36] It became very clear in a series of cases that the two requirements were, indeed, cumulative (see Case T-489/93 *Unifruit Hellas* v. *Commission* [1994] E.C.R. II-1201; Case C-209/94P *Buralux and others* v. *Council* [1996] E.C.R. I-615; Case T-60/96 *Merck* v. *Commission* [1997] E.C.R. II-849; Case C-451/98 *Antillean Rice Mills* v. *Council*, note 11 above). In some of these cases the applicants did belong to closed categories, but their applications were dismissed as inadmissible because they failed to prove that the Community institution in question had a legal duty to take their situation into account.

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was initially applied in some isolated cases where the applicants satisfied the test.[37] However, the most recent case law on Article 230(4) EC consistently seems to favour this cumulative construction of individual concern over the classic—and already exacting—"closed class" test.[38] This has the effect of precluding nearly all challenges by non-privileged applicants.

On the other hand, there have been cases where the Community judicature has based the test of individual concern on different parameters from those dictated by the "closed class" test. A common denominator of these cases is a more liberal construction of individual concern, which has frequently resulted in actions for annulment being declared admissible.

First, the Court openly departed from the closed category test in response to the compelling arguments arising from the substance of one case. In *Les Verts* v. *European Parliament*,[39] a new political party challenged two decisions of the European Parliament on the reimbursement of expenditure incurred by political parties in the 1984 European elections. The decisions clearly discriminated against new parties in favour of those already present in the European Parliament and which had participated in the adoption of the contested measures. The Court acknowledged that the applicants did not belong to a closed class but decided that, unless they were given *locus standi* to bring an Article 230(4) EC action, a situation of profound inequality would arise in the protection afforded by the Court to the parties competing in the elections.[40] On this basis, the application was held admissible and the Court subsequently annulled the decisions.[41] The Court made no attempt to formulate a new construction of individual concern tailored to the situation in hand, but simply circumvented the traditional test. This is a unique case where the public interest in having the decisions reviewed prevailed over the restrictive nature of the Article 230(4) EC conditions.

Secondly, there have been certain legal areas—namely competition, state aids and anti-dumping—where the Court took the view that natural and legal persons which participated[42]—or

[37] See Case 11/82, note 16 above; Case C-152/88, note 6 above, and Joined Cases T-480 and T-483/93, note 35 above. Significantly, the European Court, having considered the merits of the first two cases, found a breach of the principle of legitimate expectations, thereby highlighting a clear overlap between issues of admissibility and of substance.

[38] See Case C-300/00 P (R) *Federación de Cofradías de Pescadores de Guipúzcoa* v. *Council* [2000] E.C.R. I-8797; Case T-166/99 *Luis Fernando Andres de Dios* v. *Council*, judgment of 27 June 2001, not yet reported; Case C-351/99P *Eridania* v. *Council*, judgment of 28 June 2001, not yet reported; Case C-451/98, note 11, above; Case T-47/00, note 11 above.

[39] Case 294/83 [1986] E.C.R. 1339.

[40] *Ibid.*, at paras. 35–36 of the judgment.

[41] On the special nature of this case see Craig, *op. cit.*, note 5 above at pp. 519–520 and Arnull, *op. cit.*, note 25 above, at pp. 28–30.

[42] See for example, Case 26/76 *Metro* v. *Commission* [1977] E.C.R. 1875 (competition proceedings); Case 169/84 *Compagnie Française de l'Azote (COFAZ)* v. *Commission* [1986]

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had the right to participate[43]—in the administrative proceedings leading to the adoption of a measure had standing to challenge it before the Community courts. Moreover, there were a few decisions in the early and mid nineties where the Court seemed to go even further and granted standing on the basis of the adverse effect that the measure would have on the applicant.[44] In this context, the leading case is *Extramet* v. *Council*,[45] where the largest Community importer of calcium metal challenged a Council regulation imposing an anti-dumping duty on the importation of that product from China and Russia. Although the applicant had been procedurally involved in the adoption of the regulation, the Court chose to declare the action admissible because of the size of Extramet and because the regulation would have devastating economic consequences for the company.[46]

Finally, and outside these specific areas, the Court adopted a completely new construction of the test of individual concern in *Codorniu* v. *Council*.[47] In that case, the Court held that Codorniu, a Spanish manufacturer of sparkling wine, was individually concerned by a provision in a Council regulation that would have prevented using the term "crémant" in the description of its products. Other Spanish producers used that word as a designation of quality for their wines and the only distinguishing factor attributable to Codorniu was the fact that since 1924 it had held a trade mark that included the mention "crémant". The Court took the view that the Council regulation would prevent Codorniu from using its trade mark and that was enough to distinguish it from everybody else affected by that measure.[48] At the time, and given the flexible terms in which the judgment in *Codorniu* was couched, this could have been interpreted as meaning that the applicant was individually concerned on account of the particularly damaging effects that the measure would have on its situation.[49]

The rulings in *Extramet* and *Codorniu*, however, did not signal the beginning of a new and more liberal approach to individual concern. They have remained just special strands of the case law

E.C.R. 391 (state aids proceedings); Case 264/82 *Timex* v. *Commission* [1985] E.C.R. 849 (anti-dumping proceedings).

[43] Case C-198/91 *Cook* v. *Commission* [1993] E.C.R. I-2486.

[44] See Case C-358/89, note 7 above. See also, in the framework of competition and state aid proceedings respectively, Cases T-528, 542–543 and 546/93 *Metropole* v. *Commission* [1996] II-649 and Case T-435/93 *Association of Sorbitol Producers within the EC (ASPEC)* v. *Commission* [1995] E.C.R. II-1281.

[45] Case C-358/89, note 7 above.

[46] *Ibid.*, at para. 17 of the judgment. See the Opinion of Advocate General Jacobs in that case, at paras. 54–68.

[47] Case C-308/89, note 8 above.

[48] *Ibid.*, at para. 21 of the judgment.

[49] See A. Arnull, *op. cit.*, note 10 above, at p. 43. See also the Opinion of Advocate General Lenz in *Codorniu* (Case C-308/89, note 8 above) at pp. 1861–1871.

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that introduced a construction of individual concern limited to exceptional sets of facts. Subsequent decisions established that Codorniu was individually concerned because the regulation affected its "specific right", namely its trademark. There has been no firm clarification of what would constitute a "specific right"—other than a trademark—nor has any other applicant been successful on this basis.[50] As far as anti-dumping cases are concerned, recent case law has also limited the potential of the *Extramet* judgment. For example, the Court of First Instance has implied that only the exceptional facts at issue in *Extramet* warranted the construction of individual concern adopted in that case and that the decision did not introduce a wider test based on economic damage.[51]

The overall picture that emerges from the case law on individual concern is, therefore, one of bleak predictability. Private parties are faced with the challenge of showing that one of the various constructions of individual concern adopted by the Court applies to their situation.[52] The severity of the closed category test and its variants, coupled with the limited potential of more lenient interpretations such as those in *Les Verts*, *Extramet* and *Codorniu*, mean that more often than not, these applicants fail to prove standing.

I. Grasping the Nettle: Two Proposals for a New Construction of the Test of Individual Concern

In the preceding pages we have seen how the strict interpretation of the test of individual concern led to the inadmissibility of most actions brought by private parties under Article 230(4) EC. This is an anomalous and deeply unsatisfactory result, particularly because the action for annulment occupies a central position in the system of judicial review allowed by the Treaty. In many of these cases, the European Court suggested that applicants could turn to alternative avenues—such as the system of preliminary rulings—to obtain the review of a Community measure.[53] However, this is a flawed argument.

[50] Case T-99/94 *Asocarne* v. *Council* [1994] E.C.R. II-873, para. 24; Case C-87/95P *Cassa Nazionale* v. *Council* [1996] E.C.R. I-2003, para. 36; Case T-482/93 *Webber* v. *Commission* [1996] E.C.R. II-609; Case T-109/97, note 11 above, at para. 70.

[51] See Case T-597/97 *Euromin* v. *Council*, [2000] E.C.R. II- 2419, and Case T-598/97 *British Shoe Corporation* v. *Council*, judgment of 28 February 2002, not yet reported.

[52] For some recent examples, see Case T-47/00, note 11 above, at paras. 27–31, and Case C-96/01 *The Galileo company* v. *Council*, judgment of 25 April 2002, not yet reported.

[53] See Case 123/77 *UNICME* v. *Council* [1978] E.C.R. 845, at para. 12, and Case C-321/95P, note 30 above, at para. 33.

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First, these avenues are not endowed with the advantages of a direct action. Advocate General Jacobs highlighted in his Opinions in *Extramet* and in *UPA* that an action for annulment is more beneficial not only because it involves a full exchange of pleadings but also—as a result of the short time limits laid down in Article 230(5) EC—in terms of legal certainty.[54] Furthermore, access to judicial review by means of a preliminary reference is not guaranteed, as it is ultimately the national court which decides whether to make a reference and which grounds of invalidity to invoke before the European Court.[55] Finally, Article 234 EC proceedings tend to be both lengthier and more costly.[56]

Secondly, recourse to the national courts is not always possible, as private applicants have argued before the Court on several occasions.[57] Typical cases would be where a Community regulation does not require any national act of implementation that could form the basis of a claim before the national court or where there are no national procedures through which the national measure can be challenged.[58] Private parties can therefore find themselves deprived of any judicial protection—a result incompatible with the principle that the Community is based upon the rule of law and with the principle of effective judicial protection. This was precisely the argument that underlined the two sweeping proposals for reform by Advocate General Jacobs in *UPA* and by the Court of First Instance in *Jégo Quéré*, that advocated a re-definition of the test of individual concern.

In *Unión de Pequeños Agricultores (UPA)* v. *Council*[59] a Spanish trade association appealed against an Order of the President of the Court of First Instance[60] that dismissed as inadmissible their application for the annulment of a Council regulation on the common organisation of the market in olive oil. *Inter alia*, the regulation discontinued the allocation of certain aids to small agricultural producers. The President of the Court held that,

[54] See the Opinions of Advocate General Jacobs in *Extramet* v. *Council* (Case C-358/89, note 7 above, at paras. 69–74) and in *UPA* v. *Council* (Case C-50/00P, note 1 above, at paras. 38–44 of his Opinion).

[55] *Ibid.* See also Albors-Llorens, *Private Parties in European Community Law* (Oxford, 1996, 188–195).

[56] *Ibid.*

[57] See Case 40/64 *Sgarlata* v. *Commission* [1965] E.C.R. 215; Case C-321/95P, note 30 above; Case T-173/98, *Unión de Pequeños Agricultores* v. *Council* [1999] E.C.R. II-3357, and Case T-177/01, note 2 above.

[58] In a recent case pending before the European Court, however, a challenge to the validity of a Community directive has been mounted in the national courts before any measures of implementation were adopted (See the Opinion of Advocate General Geelhoed of 10 September 2002 in Case C-491/01 *The Queen* v. *Secretary of State for Health, ex parte British American Tobacco*, not yet reported).

[59] Case C-50/00P, note 1 above.

[60] Case T-173/98, note 57 above.

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although the measure was likely to have a very damaging impact on some producers, to the point of causing them to cease trading, the applicants were not individually concerned within the meaning of the case law.

The thrust of the applicants' argument on appeal was that, if their application was held inadmissible, they would effectively be deprived of any judicial protection. The reason for this was that the regulation did not call for any implementing measures and therefore there would be no national procedures through which a preliminary reference under Article 234 EC could be made to the European Court. UPA concluded that actions for annulment should automatically be declared admissible when private applicants would have no recourse to alternative means for the review of a Community act. In other words, they argued that the standing conditions in Article 230(4) EC should not be applied in these situations. Advocate General Jacobs delivered a landmark Opinion[61] which rejected the applicants' contention and suggested that problems of lack of judicial protection would best be addressed by adopting a liberal interpretation of the test of individual concern in Article 230(4) EC. He proposed that a private party should 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".[62]

The facts in *Jégo Quéré* v. *Commission*[63] were similar. In this case, a French company brought annulment proceedings against a Commission regulation imposing a minimum mesh size for fishing nets used in certain Community waters. As in *UPA*, it was clear that the company was not individually concerned according to the traditional case law and also that, unless *Jégo Quéré* infringed the provisions of the regulation, it would not have access to alternative means of review.

The Court of First Instance vigorously argued that the right to an effective judicial remedy was supported not only by the constitutional traditions of the Member States, but also by Articles 6 and 13 of the European Convention of Human Rights and by Article 47 of the Charter of Fundamental Rights of the European Union.[64] Then, and in an unprecedented move for a court normally reluctant to depart from established case law, it followed Advocate General Jacobs in *UPA* in suggesting that the general relaxation of

[61] Case C-50/00P, note 1 above.
[62] *Ibid.*, at para. 60 of the Opinion. See also Arnull, *op. cit.*, note 25 above, at p. 49.
[63] Case T-177/01, note 2 above.
[64] *Ibid.*, at para. 47.

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the test of individual concern would be the only means of guaranteeing effective judicial protection for Community citizens.[65] It held that a natural or legal person should be regarded as individually concerned if a Community measure of general application "affects his legal position, in a manner which is both definite and immediate, by restricting his rights or imposing obligations on him."[66] The Court pointedly continued, clearly to emphasise a radical departure from the "closed class" test, that "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".[67] The French company satisfied the new test—as well as the test of direct concern—and the action for annulment was therefore held admissible.[68]

The Opinion of the Advocate General in *UPA* and the judgment in *Jégo Quéré*, had important points in common. Both made use of the applicants' concerns about the lack of effective judicial protection of individuals in order to highlight the inadequacy of the alternative routes provided by the Treaty for the review of Community acts.[69] Furthermore, neither of them accepted that greater flexibility in the interpretation of the standing rules should be contingent on whether those alternative routes are available.[70] They therefore resisted the creation of yet another variant of the case law that would allow the Court to forgo the application of the traditional case law on individual and direct concern only if it had been established that the applicants would have no access to any alternative remedies.[71] Instead, they questioned the very essence of the *Plaumann* formula and suggested a radical new interpretation of the test of individual concern that would have general application.

While the two proposals shared a common ethos, they differed essentially in the formulation of the tests they propounded as substitutes for the *Plaumann* formula. The test suggested by Advocate General Jacobs was broader than the one adopted by the Court of First Instance in *Jégo Quéré*. First, Advocate General Jacobs' test was based on "substantial adverse effect" on the

[65] The judgment expressly refers to the Opinion of Advocate General Jacobs on this point (see paras. 49 and 50).
[66] *Ibid.*, at para. 51.
[67] *Ibid.*
[68] The Commission, however, lodged an appeal against the judgment of the Court of First Instance on 17 July 2002 (Case C-263/02, pending appeal).
[69] See paras. 36 to 44 of the Advocate General's Opinion in *UPA*, and paras. 45–47 of the judgment of the Court of First Instance in *Jégo Quéré*.
[70] *Ibid.*, at paras. 50–53 and at para. 48 respectively.
[71] The Opinion of Advocate General Jacobs outlined the disadvantages that would follow from such an approach (see paras. 50–53 of the Opinion, to which the Court expressly referred in its judgment and note 84 below and corresponding text).

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applicant's interests, and therefore it was wide enough to give standing to applicants who suffer grave economic damage as a result of a Community measure. Secondly, it allowed an applicant to be individually concerned not only if a measure has already affected its situation, but also if the measure has the potential to do so. Thirdly, it made no distinction between challenges to general measures (regulations and directives) and challenges to individual Community measures (decisions).

The test suggested by the Court of First Instance was considerably narrower. It was based not on the effect that a measure has on the interests of an applicant, but on the effect it has on his legal position. Thus, the Court established that in order to be individually concerned, an applicant had to show that the Community measure either restricted his rights or imposed obligations on him. Furthermore, that effect should be "definite" and "immediate", which seemed to exclude the possibility of a potential effect. Finally, the test was formulated with specific reference to Community measures of general application, thereby raising the question of whether the same approach would apply to individual measures.

It is submitted that the test proposed by Advocate General Jacobs offered significant advantages. As it was a test based on damage to interest it was more realistic in economic terms than the one suggested in *Jégo Quéré*. For example, the competitor of an undertaking benefiting from Community aid might not satisfy the *Jégo Quéré* test, but its interests could be affected negatively by the measure and it would seem unfair to exclude it from the possibility of bringing an Article 230(4) EC challenge. Moreover, the Jacobs test would not only eliminate the obscurity inherent in the current body of case law but would also be easy to apply,[72] only requiring the delimitation of when would the adverse effect be "substantial". Hence, it would significantly increase legal certainty for private parties—and facilitate the task of their legal advisers. In contrast, the *Jégo Quéré* test would leave scope for further debate and interpretation. While it was clear that the regulation at issue in this case imposed obligations on the applicants by requiring them to increase the size of their nets, that might not always be so. Questions would soon follow about when a Community measure restricted a right or imposed an obligation, an issue that would have to be decided on a case-to-case basis. Finally, although the standing of pressure groups such as environmental associations

[72] In this respect, see the "sufficient interest" test applied in English law which has been on the whole, though not entirely, unproblematic. See Wade and Forsyth, *Administrative Law*, 8th edn. (Oxford, 2000), pp. 678–687.

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would be difficult to establish under either test, the Jacobs test seemed more suitable for assessing the *locus standi* of trade associations. It will be generally clear when the interests of a trade association are adversely affected by a Community measure, but the application of the *Jégo Quéré* test would be a more challenging undertaking in that context.

II. A Step Backwards: the Judgment in *UPA* v. *Council*

On 25 July 2002, in a special plenary session, the European Court delivered its eagerly awaited judgment in *UPA* v. *Council*.[73] This was not, however, the ground-breaking and liberating decision that many had hoped for, but a thoroughly conservative one.

Given the terseness of its reasoning, the judgment is difficult to follow—a fact that, in a system where no dissenting judgments are permitted, could indicate a degree of disagreement between the members of the Court. The judgment can be divided into two parts.

In the first part, the Court considered the specific argument of the applicants, that a private party should have an automatic right to bring Article 230(4) EC proceedings—even if it is not individually and directly concerned—when no alternative remedy is available. The Court rejected this approach on the basis of two different sets of considerations.

First, the Court re-stated the *Plaumann* formula and emphasised that only those private parties who could satisfy the *Plaumann* test could bring annulment proceedings under Article 230(4) EC.[74] It seemed as if Court was ready to give short shrift to the applicants' contention.[75] Instead, it took the opportunity to examine related concerns about the lack of effective judicial protection of individuals and companies in relation to Community acts. The Court acknowledged that the right to such protection was a general principle of Community law and that the Treaty had intended to create a complete set of legal remedies to guarantee the judicial review of Community measures.[76] It then stated that it was for the Member States and their national courts to ensure that their systems of legal remedies and procedures were designed and

[73] Case C-50/00 P, see note 1 above.
[74] *Ibid.*, at paras. 36–37 of the judgment.
[75] See, for example, the approach followed by the Court in earlier cases where the applicants had put forward similar arguments (Case 40/64, note 57 above, at 227, and Case C-87/95P *CNPAAP* v. *Council* [1996] E.C.R. I-2003, at para. 38).
[76] Case C-50/00P, note 1 above, at paras. 39 and 40 of the judgment. The Court referred expressly to the constitutional traditions of the Member States and to Articles 6 and 13 of the ECHR.

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interpreted always to permit private parties to plead the illegality of Community measures in proceedings before national courts.[77]

In effect, the Court implicitly and the Advocate General explicitly accepted that instances of lack of effective judicial protection might arise in the Community legal order.[78] They differed essentially, however, in their assessment of how this situation should be addressed. Thus, Advocate General Jacobs had explained that even where the preliminary reference route was available, this was by nature a less satisfactory option than a direct action for judicial review.[79] Consequently, and in a move that would ultimately direct most applications for judicial review to the action for annulment, he favoured the relaxation of the test of individual concern in Article 230(4) EC as the only mechanism that would ensure an adequate degree of protection for individuals.[80] The Court, on the other hand, did not acknowledge any disadvantages inherent in preliminary rulings on validity and treated this indirect system of judicial review as an adequate substitute for annulment proceedings. For the Court, therefore, the solution lay in the hands of the Member States and their national courts, which should strive to facilitate the access of private parties to national proceedings when the validity of Community measures is at issue.

The line of reasoning followed by the Court, similar to the one taken by the President of the Court of First Instance in *UPA*,[81] seems unrealistic. Consider a Community regulation like the ones at issue in *UPA* or in *Jégo Quéré*, or one has that fixed a common price for a certain agricultural product. These regulations would not require implementation by the national authorities. Would a Member State be expected artificially to enact measures of implementation so as to ensure access of individuals to national proceedings? Would this not be, moreover, contrary to the principle of direct applicability of regulations recognised in Article 249 EC? The Court's analysis also raises the question of whether the Court's interference in the national domain—by suggesting that Member

[77] *Ibid.*, at paras. 41–42 of the judgment.

[78] This was also the express conclusion of the Court of First Instance in *Jégo Quéré* (Case T-177/01, note 2 above) at para. 47.

[79] See Advocate General Jacobs' Opinion at paras. 38–49 and notes 52–57 above and corresponding text. See also the judgment of the Court of First Instance in *Jégo Quéré* (Case T-177/01, note 2 above) at paras. 44–47. The Court considered not only the adequacy of the system of preliminary rulings as an alternative to annulment proceedings but also that of the action for damages provided in Articles 235 and 288(2) EC. See, by way of contrast, the approach of the Court of First Instance to this argument in earlier cases (Joined Cases T-172 and 175/98 to T-177/98, note 21 above at paras. 74–75).

[80] *Ibid.*, at para. 59. See also the judgment of the Court of First Instance in *Jégo Quéré* (Case T-177/01, note 2 above) at para. 49.

[81] See Case T-173/98, note 57 above, at paras. 61–64 of the Order. See also Joined Cases T-172 and T-175/98 to T-177/98, note 21 above, at para. 74.

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States should adapt their national procedural rules—is justified when the Court itself has consistently refused to broaden the access of individuals to the principal avenue of judicial review of Community acts.[82] More importantly, and given the less satisfactory character of the system of preliminary rulings as a channel of judicial review, it is questionable that these should be turned into the main port of call for Community citizens[83] when a direct route to the Community courts exists in the Treaty.

The Court strengthened its rejection of the applicants' contention by using a second argument based on consequence rather than on principle. This time, it echoed the Advocate General's conclusions.[84] It held that, should the approach suggested by the applicants be endorsed, the Community judicature would be required to examine national law in each case in order to determine whether or not a private applicant could bring national proceedings if standing was refused under Article 230(4) EC. The Court concluded that this was a task beyond the jurisdiction of the Court when reviewing the legality of Community acts.[85]

Only in the second part of the judgment, and in the briefest terms, did the Court consider a general re-formulation of the test of individual concern. Admittedly, such a step had not been argued for by the applicants but it was the very core of the Advocate General's Opinion and the main reason why the judgment was expected with such unprecedented interest, especially after the decision of the Court of First Instance in *Jégo Quéré*.[86] The Court held:

> ... according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually ..., such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty,

[82] This observation was made by Advocate General Jacobs in a paper presented at a Conference of référendaires and former référendaires at the Court of Justice, Luxembourg, on 5 October 2002.

[83] See the Opinion of Advocate General Geelhoed in Case C-491/01, note 58 above, which reflects the impact of the Court's interpretation of Article 230(4) EC on the admissibility of preliminary references.

[84] Case C-50/00P, note 1 above, at para. 43.

[85] *Ibid.* Another important reason why UPA's approach should be rejected, which the Court did not mention expressly, was that its adoption would result in unequal levels of access to Article 230(4) EC proceedings in the different Member States (see the conclusions of the Advocate General, at para. 53).

[86] Advocate General Cosmas suggested in *Greenpeace* v. *Commission* (Case C-321/95, note 30 above, at paras. 107–108 of the Opinion) a different construction of the test of individual concern that would be applicable to environmental cases, but the Court did not consider this argument and applied the traditional "closed category" test.

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> without going beyond the jurisdiction conferred by the Treaty on the Community courts.
>
> 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 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[87]

Clearly, the reason why the Court declined to re-examine the test of individual concern was that it felt that such a move would be tantamount to an amendment of the Treaty and therefore not within its competence. It does not seem that other motivations determined the Court's unwillingness to follow the lead of its Advocate General.[88] Some may point to the Court's negative reaction to the political pressure exerted by the Court of First Instance, which seemed uncharacteristically eager, in an issue of such crucial importance, to jump the gun in *Jégo Quéré*. While the ruling may have taken the European Court by surprise, it is improbable that this consideration would take precedence over the judicial protection of individuals. Likewise, it is unlikely that unease in departing from established case law could have been a decisive factor. The Court has, on a few occasions, and generally for very good reasons, expressly reconsidered its interpretations of some Treaty provisions or even doctrines it elaborated in earlier cases.[89] A review of its case law on individual concern would therefore not be an unparalleled step, especially given the weighty considerations that advocate a reform of the *status quo*. Finally, and although they might have had some influence, it is doubtful that practical concerns, such as the increase of the workload of the Court lie at the heart of its refusal to re-define individual concern. The Court of First Instance, before which actions for annulment are brought, clearly supported the move. Furthermore, in his Opinion in *UPA*[90] Advocate General Jacobs persuasively demonstrated that a more generous interpretation of that test

[87] *Ibid.*, at paras. [44]–[45] of the judgment.

[88] For a survey of the possible explanations for the standing limitations in Article 230(4) EC and for the Court's traditionally restrictive construction of these conditions, see Harlow, "Towards a Theory of Access for the European Court of Justice", (1992) 12 Y.E.L. 213, 227–231; Craig, *op. cit.*, note 5 above, pp. 520–527; Arnull, *op. cit.*, note 25 above, at pp. 44–46.

[89] Perhaps one of the most striking examples is the judgment in *CNL-SUCAL* v. *HAG (Hag II)* (Case C-10/89 [1990] E.C.R. I-3711), concerning the relationship between intellectual property rights and the Treaty provisions on free movement of goods. In this case, and following the Opinion of Advocate General Jacobs, the Court abolished the so-called common origin doctrine (*Ibid.*, at paras. 10–20 of the judgment) established in its judgment in *Van Zuylen* v. *HAG (Hag I)* (Case 192/73 [1974] E.C.R. 731). Other examples include the ruling in *Keck and Mithouard* (Cases C-267 and 269/91 [1993] E.C.R. I-6097), where the Court re-examined its case law on the interpretation of indistinctly applicable rules in the context of Article 28 EC (*Ibid.*, at paras. 14–17 of the judgment).

[90] Case C-50/00P, note 1 above at paras. 75–81 of the Advocate General's Opinion.

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would not necessarily lead to a deluge of private applications for annulment. In particular, he referred to various techniques—such as joinder of cases—that would ease the task of the Community judicature.[91] He also noted the increased importance that the test of direct concern and the time-limits in Article 230(5) EC would acquire as filters for private actions.[92]

It is submitted that the approach of the Court can be appraised from two contrasting perspectives. One the one hand, it can easily be criticised. Would the acceptance of the Advocate General's proposal really signify a departure from the letter of Article 230(4) EC? It is true that this provision requires applicants to be individually concerned by a Community decision, but the actual substance of that test is the result of the case law of the Court itself.[93] The Advocate General—and the Court of First Instance in *Jégo Quéré*—supported not the abolition of the condition but a re-definition of its content. Theirs was a logical proposition, especially as the letter of Article 230(4) EC does not bind the Court to a particular interpretation of that test.[94] After all, it could be argued that the Court took a bolder, if less publicised, step when it accepted that private parties could challenge general acts that concerned them directly and individually by means of an Article 230 EC action.[95]

Moreover, the European Court has always had a reputation for reading the law teleologically. This is the Court that established the principles of the direct effect and the supremacy of Community law and of state liability in damages, largely to safeguard the rights of Community citizens against illegal action of the Member States.[96] Welcome and necessary as these principles were, it is unquestionable that no explicit Treaty basis existed for them. Would it not follow from this that, where the effective judicial protection of Community citizens against potentially unlawful Community acts is at stake, the Court should also be willing to interpret the Treaty with maximum flexibility?[97]

[91] *Ibid.*, at paras. 80–81.

[92] *Ibid.*, at para. 79. Furthermore, as some authors have argued, an increase of applications for judicial review *via* Article 234 EC proceedings could equally impose a considerable burden on the European Court (see Harlow, *op. cit.*, note 88 above, at 246).

[93] See section II.B above.

[94] In this respect, see the Opinion of Advocate General Jacobs in *UPA* (note 1 above) at para. 75.

[95] See Section II above.

[96] See also the recent decision of the Court in Case C-253/00 *Muñoz* v. *Frumar*, (Judgment of 17 September 2002, not yet reported) where the Court held that, in order to ensure the effectiveness of Community rules, compliance with the provisions of a Council regulation should be capable of enforcement by means of civil proceedings instituted before the national court by a trader against a competitor. See also the Opinion of Advocate General Geelhoed in that case (Opinion of 13 December 2001, not yet reported), at paras. 63–77.

[97] See further A. Arnull, "The Action for Annulment: a Case of Double Standards?" in D. O'Keefe and A. Bavasso (eds.), *Judicial Review in European Union Law*, (Liber Amicorum in honour of Lord Slynn of Hadley, Volume I) (The Hague, 2000), 177, 188.

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On the other hand, the judicial self-restraint shown by the Court may be conveying a vigorous message. The Court was undoubtedly aware that delivering such a high profile judgment would lay it open to severe criticism and would cause it to be seen as an institution unsympathetic to the plea of Community citizens seeking redress against Community acts. This effect would be enhanced by the enthusiastic support of the Court of First Instance for a reform of the current rules on *locus standi*. However, in consciously deciding to take such a step, the Court has certainly emphasised the role of Member States as main actors in the evolution of Community law and in the resolution of questions of such clear weight. This approach of the Court, if dramatic, is not new. In recent years, the Court's judgments in *Grant* v. *South West Trains*[98] and in the *Tobacco Advertising Directive* case[99] and its Opinion 2/94 on the Accession of the Community to the ECHR,[100] indicate that there are certain Treaty boundaries that the European Court is not prepared to cross.

In scrutinising the Court's decision in *UPA*, it should be acknowledged that the judgment does not convincingly demonstrate that the Court opposes the relaxation of the standing requirements in Article 230(4) EC. It only confirms that the Court considers this a task for the Member States. In fact, as early as 1975, the Court had suggested that in order to safeguard individual rights, private parties should be able to challenge Community acts that directly affected their interests—a suggestion remarkably close to that of Advocate General Jacobs in *UPA*.[101] Furthermore, and on the eve of the 1996 Intergovernmental Conference, the Court invited Member States to consider the reform of Article 230(4) EC, specifically questioning whether that provision was adequate to guarantee effective judicial protection in cases where Community measures could be in breach of fundamental rights.[102] These suggestions fell on deaf ears and Article 230(4) EC was never amended.[103] It seemed that, at the time, Member States were not particularly interested in reassessing the

[98] Case C-294/96 [1998] E.C.R. I-621.

[99] Case C-376/98 *Germany* v. *European Parliament and Council* [2000] E.C.R. I-8419.

[100] [1996] E.C.R. I-1759.

[101] See "Suggestions of the Court of Justice on European Union", *Bulletin of the European Communities*, Suppl. 9/75, 17, 18.

[102] "Report of the Court of Justice on certain aspects of the application of the Treaty on European Union", *Annual Report of the Court of Justice of the European Communities* [1995] 19, 30. This is an argument that has been raised by private applicants in several cases (See, for example, Case C-345/00 P, *Fédération d'agriculture biologique des regions de France* v. *Council*, Order of 10 May 2001, not yet reported at paras. 35–40 of the Order of the Court).

[103] For other calls for the relaxation of the conditions of Article 230(4) via a Treaty amendment, see N. Neuwahl, "Article 173 Paragraph 4 EC: Past, Present and Possible Future" (1996) 21 ELRev 17, 30–31.

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position of private parties in Community law or in paying heed to the Court's advice.[104]

III. Concluding Remarks

This article has attempted to stress the unsatisfactory position of private parties who might wish to challenge Community acts, as well as the inflexibility and complexity of the current body of case law. This predicament was recently highlighted by the express pleas for reform put forward by Advocate General Jacobs in his Opinion in *UPA* and by the Court of First Instance in *Jégo Quéré*. All eyes then turned to the European Court, which was presented with a unique opportunity to revise its approach to the standing of private applicants to bring annulment proceedings. The Court could have easily grasped it, particularly in the absence of any real textual impediments in Article 230(4) EC, but decided instead to reinforce the established case law and to shift the responsibility for change to the Member States. In doing so, the judgment suggested two avenues: first, a conservative one, where Member States should interpret their national procedural rules so as to ensure maximum access of private litigants to the system of preliminary references; and secondly, a radical one, through the amendment of the letter of Article 230(4) EC, following the appropriate procedures set out in the Treaties.

Looking to the future, the decision in *UPA* constitutes an uninviting prospect for natural and legal persons. More so, because a re-definition of the test of individual concern would immediately have heralded a new era in the challenge of Community acts. From this point of view, the decision clearly represents a missed opportunity. The ruling, however, can also be construed as a resolute move by the Court to underline permanently that this is not an issue that will ever be resolved by judicial interpretation but through political debate and constitutional reform.[105] It seems very clear now that unless the Member States are prepared to amend radically Article 230(4) EC, the Court will not change its approach to that provision.

[104] Member States have been, on occasions, highly suspicious of the Court. See, for example, the reaction of the Member States to the judgment of the Court in *Barber* v. *Guardian Royal Exchange Assurance Group* [1990] E.C.R. I-1889, which resulted in the annexation of the *Barber Protocol* to the EC Treaty by the Treaty on European Union.

[105] This is a conclusion that the Community courts have reached on several occasions, but to which the particular circumstances surrounding the *UPA* judgment are likely to give a definitive force (see Case 40/74, note 57 above, and Joined Cases T-172/98 and T-175/98- T-177/98, note 9 above, at para. 74).

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