

Working Paper 3

No-One Slips Through the Net? Latest Developments, And Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC

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I. Introduction: the Court's Judgments in *Jégo-Quéré* and *Unión de Pequeños Agricultores*

The capacity to bring actions (or *locus standi*) in order to challenge the validity of secondary Community law, accorded to individuals in Art. 230(4) EC,¹ has been the subject of many academic studies.² Most commentators are critical of the European

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¹ Previously Art. 173(2), later 173(4) EEC.

² Without any claim to completeness, the following may be mentioned: ALBORS-LLORENS, *Private Parties in European Community Law*, OUP 1996; ARNULL, *Private Applicants and the Action for Annulment under Art. 173 of the EC Treaty*, (1995) 32 CMLRev 7; ARNULL, *Private Applicants and the Action for Annulment since Codorníu*, (2001) 38 CMLRev 7; COOKE, *Locus standi of private parties under Art. 173(4)*, [1997] IJEL 4; CRAIG, *Legality, Standing, and Substantive Review in Community Law*, (1994) 14 OJLS 507; DAIG, *Zum Klagerecht von Privatpersonen nach Art. 173(2) EWGV, 146 EAGV*, in: Aubin *et al.* (eds.), *Festschrift für Otto Riese*, Heidelberg 1964, p. 187; HARDING, *The private interest in challenging Community action*, (1980) 5 ELRev 354; HARLOW, *Towards a Theory of Access to the European Court of Justice*, (1992) 12 YEL 213; MOITINHO DE ALMEIDA, *Le recours en annulation des particuliers (art. 173, 2ème alinéa, du traité CE): nouvelle réflexions sur l'expression 'la concernant ... individuellement'*, in: Lutter *et al.* (eds.), *Festschrift für Ulrich Everling*, Baden-Baden 1995, p. 849; NEUWAHL, *Article 174 Par. 4 EC: Past, Present, and Possible Future*, (1996) 21 ELR 17; NIHOUL, *La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale*, (1994) 30 Revue Trimestrielle de Droit Européen 171; RAGOLLE, *Access to justice for private applicants in the Community legal order: recent (r)evolutions*, (2003) 28 ELRev 90; RASMUSSEN, *Why is Art. 173 interpreted against private applicants?* (1980) 5 ELRev 112; TEMPLE LANG, *Actions for declarations that Community Regulations are invalid: the duties of national courts under Article 10 EC*, (2003) 28 ELRev 102; USHER, *Direct and individual concern – an effective remedy or a conventional solution?* (2003) 28 ELRev 575; VANDERSANDEN, *Pour un Élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont adressées*, (1995) 31 Cahiers de Droit Européen 535; VON DANWITZ, *Die Garantie effektiven Rechtsschutzes im Recht der Europäischen Gemeinschaft*, [1993] Neue Juristische Wochenschrift 1108; WAELBROECK, *Editorial – Le droit au recours juridictionnel effectif du particulier – trois pas en avant, deux pas en arrière*, (2002) 38 Cahiers de Droit Européen, p. 3; WAELBROECK AND VERHEYDEN, *Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaire*,

Court of Justice's (ECJ's) approach, which they see as too restrictive. The criticism is fairly old, yet the Court for decades seemed unperturbed. This seems odd, given that the Court has not been shy, particularly during the 1990s, to introduce important innovations into other areas of the law. Notable examples are its jurisprudence on Member States' liability for breaches of Community law (*Francovich* and its progeny),³ national procedural law (*Factortame II*⁴), and free movement (*Keck*,⁵ *Angonese*⁶). Some of these developments were instigated by voices in the academic literature.⁷ Sheer judicial conservatism might, of course, be one explanation for the absence of development in the Court's case law on Art. 230(4). It is, however, worth asking whether the jurisprudence is as problematic as is made out, or whether the ECJ might not have better reasons to 'stick to its guns' than it is often given credit for.

Taking stock is justified for another reason, too: the year 2002 saw two judgments in short sequence, in cases *Jégo-Quéré*⁸ and *Unión de Pequeños Agricultores*⁹ which brought new momentum to the debate. These cases, however, appear to point in opposite directions: the first, *Jégo-Quéré*, breaks new ground, whereas the second, *Unión de Pequeños Agricultores*, refuses to do so. This paper will analyse the two cases as part of a wider contemplation of the judicial system as established by the Treaty.

II. The Case-Law before *Jégo-Quéré* and *Unión de Pequeños Agricultores*

Art. 230(4) provides: 'Any natural or legal person may [...] institute proceedings against a decision addressed to that person or against a decision which, although in the

(1995) 31 *Cahiers de Droit Européen* 399; WARD, *Judicial Review and the Rights of Private Parties in EC Law*, OUP 2000. Older references can be found in Rasmussen, *loc. cit.*, p. 113, fn. 6.

³ Joined Cases C-6&9/90, *Francovich and Bonifaci*, [1991] ECR I-5357; C-46 & 48/93, *Brasserie de Pêcheur and Factortame*, [1996] ECR I-1029; C-319/96, *Brinkmann Tabakfabriken*, [1998] ECR I-5255; this case has now started to feed back into the jurisprudence on Arts. 235/288(2) EC (non-contractual liability of the Community), on which it was originally modelled: Case C-312/00P, *Commission v Camar et al.*, [2002] ECR I-11355, para. 54.

⁴ Case C-213/89, *Factortame* (No. 2), [1990] ECR I-2433, paras. 19-22.

⁵ Joined Cases C-267 & 268/91, *Keck and Mithouard*, [1993] ECR I-6079.

⁶ C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano*, [2000] ECR I-4139.

⁷ Eric White, *In search of the limits to Art. 30 EEC*, [1989] 26 CMLRev 235, and Josephine Steiner, *Drawing the line: Uses and abuses of Art. 30*, [1992] 29 CMLRev 749, for instance, inspired the Court's judgment in *Keck*.

⁸ Case T-177/01, *Jégo-Quéré v Commission*, [2002] ECR II-2365.

form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.’ Two elements of this require clarification: which acts are open to challenge, or more precisely, what is the legal nature of such acts; and the notion of individual and direct concern.

1. The legal nature of acts open to challenge

The starting point for any consideration of *locus standi* is the question which acts are open to challenge at all. There seem to be only three alternatives in Art. 230(4). The object of the challenge can be: either a decision addressed to the plaintiff; or a decision in the form of a regulation, but of direct and individual concern to the plaintiff; or a decision addressed to another person, but (again) of direct and individual concern to the plaintiff. In every case, what seems to be required, in substance if not in form, is a decision. The term ‘decision’ is to be taken, the ECJ held in an early judgment, in its technical meaning as in Art. 249, fourth subparagraph EC. ‘Decision’ does not encompass any act whatever, simply because it requires the adopting Community institution to make up its mind, and thus arrive a ‘decision’ in everyday parlance.¹⁰

Nevertheless, the Court subsequently abandoned this limitation of the challengeable acts. What is instead required is that the challenged act be binding, *i.e.* capable of granting or denying rights, or imposing obligations.¹¹ This quality, however, accrues to decisions as much as to regulations,¹² and also to directives.¹³

For example, the Court accepted early on that even an act *sui generis*, such as a letter withdrawing provisional immunity from fines under Art. 15(6) of Regulation 17 of 1962, is a suitable object of a challenge under Art. 230(4).¹⁴ This is despite the fact that the Regulation, in paras. 1, 2, and 4 of the same Article, employs the technical term

⁹ Case C-50/00P, *Unión de Pequeños Agricultores v Council*, [2002] ECR I-6677.

¹⁰ Joined Cases 16/62 and 17/62, *Confédération nationale des producteurs de fruit et légumes et al. v Council*, [1962] ECR 471, at p. 478, third paragraph.

¹¹ See, most recently, Joined Cases T-377/00, T-379/00 et al, *Philip Morris International et al. v Commission*, [2003] ECR II-1, paras. 76-82.

¹² Art. 249, second subpara. EC.

¹³ Art. 249, third subpara. EC; Case C-10/95P, *Asocarne (II)*, [1995] ECR I-4149, para. 32. The problem of ‘direct concern’ in connection with Directives will be discussed below at II3.

¹⁴ Joined Cases 8-11/66, *Cimenteries v Commission*, [1967] ECR 75.

‘decision,’ yet does not classify the ‘information’ in para. 6 as a decision. The difference makes good procedural sense in the context of Reg. 17, as it avoids the publicity requirement according to Art. 19 of that Regulation. The difference can, therefore, not be put down to an oversight, or a mere editing fluke. In the same vein, although acts which mark only a (preparatory) step in the adoption of a decision properly so-called cannot be challenged,¹⁵ they are suitable objects of a challenge where they can be separately enforced,¹⁶ or where they prevent the adoption of a decision that could, in its turn, be challenged.¹⁷ Later, the Court went so far as to accept as a challengeable act an oral statement, made at a press conference, that a merger was not subject to assessment under Regulation 4064/89. This has legal repercussions which should not go without scrutiny; hence an action lay under Art. 230.¹⁸ From these examples, it follows that the substance of the act, more specifically the effects it has on the plaintiff, are crucial for determining whether the act can be challenged under Art. 230(4).¹⁹ The Court’s jurisprudence, however, swung wildly throughout the 1970s and 1980s regarding the distinction between regulations and decisions.²⁰

According to the Court, the essential characteristic of a decision is the limitation of the persons to whom it is addressed. A regulation, by contrast, being essentially of a legislative nature, is applicable not to a limited number of persons, but to categories of persons viewed abstractly and in their entirety.²¹ The distinguishing criterion was (and still is) whether the measure at issue is of general application or not.²² In some judgments,²³ the Court looked exclusively at the wording of the provisions in issue, and found it abstract.²⁴ The abstract character of the language alone prevented any further

¹⁵ Case T-212/95, *Officinen v Commission*, [1997] ECR II-1161.

¹⁶ Case 46/87, *Hoechst v Commission*, [1989] ECR 2859.

¹⁷ Case 120/73, *Gebrüder Lorenz*, [1973] ECR 1471.

¹⁸ Case T-3/93, *Air France v Commission*, [1995] ECR II-533.

¹⁹ Case 307/81, *Alusuisse Italia SpA v Council and Commission*, [1982] ECR 3463, para. 7.

²⁰ A useful overview can be found in Trevor Hartley, *The foundations European Community law*, 5th ed. OUP 2003, pp. 362, 364–369, and in Albors-Llorens, *loc. cit.* fn. 2, pp. 103-105.

²¹ This has been the standard formula ever since Joined Cases 16 and 17/62, *Producteurs de Fruits v Council*, [1962] ECR 471, p. 478, last para.

²² Joined Cases 789 and 790/79, *Calpak et al. v Commission*, [1980] ECR 1949, paras. 8, 9; Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, para. 82, with references.

²³ Joined Cases 789 and 790/79, *Calpak et al. v Commission*, [1980] ECR 1949, paras. 9-13.

²⁴ To this day, such ‘abstractness’ is only excluded where the name of the plaintiff appears in the challenged act, Case T-100/94, *Michailidis v Commission*, [1998] ECR II-3115, para. 54. Such

enquiry, especially regarding individual concern. In other judgments, the Court did not spare so much as a thought for the classification of the challenged act, and instead went straight to the question of individual concern. This was then treated in an equally cavalier manner. One can only speculate about the reasons why the Court, in the latter cases, lurched into considering the merits of the action, but would not have any of it in the former group of cases. At any rate, such unpredictability was less than satisfactory.

The Court finally abandoned this lottery in *Codornú*,²⁵ its last judgment before the Court of First Instance was given the competence to hear in first instance all actions brought by individuals. The facts of the case have been sufficiently discussed in earlier literature on Art. 230. Crucially, the Court recognised that a measure can be a ‘true’ Regulation, not merely a decision in disguise, and can still be of individual concern to the plaintiff.²⁶ Hence, what alone counts after *Codornú* is whether a legally binding act, of whatever description, is of individual and direct concern to the individual bringing an action under Art. 230(4) EC.²⁷ Nevertheless, in a ritualistic fashion, the Court still goes through the question of classification in every case, despite the fact that it is no longer of any legal consequence whatsoever.²⁸ Such ‘legal mantras’²⁹ are not necessarily harmful, but they obfuscate the reasoning. Worse, they might provide inroads for exactly the kind of manipulation that was overcome in *Codornú*.

While the jurisprudence now shows the clarity and flexibility one would wish for, the Court has never explained how this tallies with the wording of Art. 230(4), as quoted

mention, moreover, automatically confers individual concern, Case 138/79, *Roquette v Council*, [1980] ECR 3333, paras. 15, 16, and below II2b(ii).

²⁵ C-309/89, *Codornú v Council*, [1994] ECR I-1853; the same solution was earlier suggested by Daig, *loc. cit.* fn. 2, p. 196, fn. 20. The formal classification as a regulation had already been abandoned as the decisive criterion for *locus standi* in Joined Cases 239/82 and 275/82, *Allied Corporation v Commission*, [1984] ECR 1005, para. 11, regarding regulations imposing anti-dumping duties. On this and other ‘special cases,’ see below II2a.

²⁶ Paras. 19-22.

²⁷ Neuwahl, *loc. cit.* fn. 2, p. 23, first para.; Arnall, *loc. cit.* fn. 2, [2001] CMLRev 24, third para.

²⁸ See most recently Case T-177/01, *Jégo-Quéré v Commission*, [2002] ECR II-2365, paras. 23-24, but then 25-36; Case T-13/99 *Pfizer Animal Health SA v Council*, [2002] ECR II-3305, paras. 81-84, and Case C-50/00P, *Unión de Pequeños Agricultores*, [2002] ECR I-6677, para. 35, then paras. 36 ff.; Joined Cases T-94/00, T-110/00, T-159/00, *Rica Foods (Free Zone) et al. v Commission*, [2002] ECR II-4677, para. 47, then para. 48.

²⁹ Arnall, *loc. cit.* fn. 2, [2001] CMLRev 21, third para., speaks of ‘circuitous reasoning.’

above.³⁰ The Court, arguably, reads the three alternatives as mere illustrations of what the first subparagraph of Art. 230 describes, undifferentiated, as ‘acts.’ The fourth subparagraph can relate to the first in two ways.

It can be read as a *lex specialis* stipulating, for non-privileged applicants, not only the additional requirements of individual and direct concern, but also narrowing the range of acts individuals may challenge. This reading, however, appears too narrow for two reasons. Firstly, Arts. 220 and 230(2), as expressions of the rule of law, mandate a comprehensive control of the legality of all acts that can affect individuals’ rights.³¹ To allow control only of decisions would create unnecessary gaps in the legal protection enjoyed by individuals. Secondly, Art. 234(b) EC also speaks, without further qualification, of ‘acts.’ This provision is in some respects (see below at II4b), the mirror image of Art. 230(4) EC. It enables individuals to raise, in proceedings before national courts, arguments against the validity of an act of Community law which they would raise before the ECJ if they had standing to do so.

Another interpretation of Art. 230(4) is therefore preferable. The provision is *lex specialis* (and to this extent supersedes the first subparagraph) only with regard to the requirements of individual and direct concern, not also with respect to the categories of acts that can be challenged. With regard to these categories, the two provisions are complementary. This is confirmed by another consideration. The term ‘acts’ in Art. 230(1) excludes recommendations and opinions,³² and includes acts of the European Parliament only if they are ‘intended to produce legal effects vis-à-vis third parties.’ These two qualifications encapsulate the requirement that the ‘act’ be legally binding.³³ Decisions are, by virtue of their definition in Art. 249, legally binding. In the perspective of the Treaty’s drafters in 1957, other acts were not envisaged to affect the interests of individuals in any other than an indirect way. It only later turned out that this was an oversight, creating gaps in the legal protection of individuals which needed

³⁰ Albors-Llorens, *loc. cit.* fn. 2, p. 105, first para., calls this a ‘re-drafting of the Treaty by the Court.’

³¹ Case 294/83, *Parti écologist ‘Les Verts’ v European Parliament*, [1986] ECR 1339, para. 23, first sentence.

³² According to Art. 249, fifth subpara. EC, they have no binding force.

to be filled.³⁴ Examples are the adoption of the Community's budget (Art. 272(7) EC),³⁵ or the allocation of funds from it to political parties: before the first direct elections to the European Parliament in 1979, political parties fought no European election campaigns anyway.³⁶ In this view, Art. 230(4) merely illustrates, for the sake of clarification, some of the acts individuals might typically want to challenge. It is not meant to rule out challenges to other acts.

2. Individual concern

The first and most important point to emphasise about the notion of 'individual concern' is that it is a term of art. This should come as no surprise, as we have already seen that the Court insists on the technical meaning of the term 'decision.' What is more, the Court held that 'decisions addressed to another *person*' (emphasis added) includes such addressed to Member States.³⁷ This is legal terminology, not common parlance. Likewise, the meaning of 'individual' deviates from the sense in which the word is employed in everyday usage. Taken in this (colloquial) sense, nobody could be more individualised than the one and only economic operator in a given field whose business is ruined by a Community Regulation. Nevertheless, the Court has consistently held that it is immaterial whether or not the number, or even the identity, of those affected were ascertainable, or even known to the Community institution which adopted the challenged act.³⁸

For this reason, any criticism based on the colloquial understanding of 'individual' fails to do justice to the Court's jurisprudence.³⁹ It is misguided to criticise the Court for, as it were, missing the point that there is no natural number smaller than one, or that whole

³³ On this requirement, see most recently Case T-113/00, *Du Pont Teijin Films Luxembourg et al. v Commission*, [2002] ECR II-3681, para. 47, and T-377/00 (above n. 11), para. 77.

³⁴ Arnulf, *loc. cit.* fn. 2, [2001] CMLRev 24, second para., speaks of 'difficulties which the authors of Art. 230 quite understandably failed to foresee.'

³⁵ Case 34/86, *Council v European Parliament*, [1986] ECR 2155, paras. 5, 6.

³⁶ Case 294/83, *Parti écologist 'Les Verts' v European Parliament*, [1986] ECR 1339, paras. 24, 25.

³⁷ Case 25/62, *Plaumann v Commission*, [1963] ECR 95.

³⁸ Case 231/82, *Spijker Kwasten v Commission*, [1983] ECR 2559; extensive references to the case-law can be found in Koen Lenaerts and Dirk Arts (ed. Robert Bray), *Procedural law of the European Union*, London (Sweet & Maxwell) 1999, pts. 2-052 to 2-054 (p. 52 f.).

³⁹ An example of this can be found in Daig, *loc. cit.* fn. 2, p. 210, first para.

factories cannot be built overnight (to take the example of case *Piraiki-Patraiki*⁴⁰). If one wanted to criticise the Court, it would first have to be explained why, of all the terms employed in Art. 230(4), ‘individual’ should *not* be taken in a technical sense. If, however, the appropriateness of a technical understanding were accepted, any proposal for a definition of ‘individual’ is, to begin with, as convincing or unconvincing as the Court’s. With regard, more specifically, to the question whether the Court’s jurisprudence is ‘restrictive,’ it follows that more arguments are needed than simply pleading, in a circular manner, a preconceived understanding based on the non-technical usage of the term.⁴¹

(a) The so-called ‘special cases’ of individual concern

There are three areas in which the Court has always followed a pattern of establishing individual concern akin to the one it now uses universally.⁴² This was in contrast to the Court’s earlier, more erratic ways outside the areas now to be discussed. They are competition law, state aids, and anti-dumping.⁴³ Two reasons, in particular, are discernible for why these areas were treated differently.

Firstly, in the area of competition law, there is no (or no sufficient) redress in the national courts against measures taken by the Community institutions. The enforcement of Community policy in this area is (or rather, since the recent reforms: was) entirely in the hands of the Commission; national authorities became involved only in an auxiliary function.⁴⁴

⁴⁰ Case 11/82, *Piraiki-Patraiki v Commission*, [1985] ECR 207 – in this (misguided) sense, Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases, and Materials*, 3rd ed. OUP 2003, p. 489, third para., call the test ‘economically unrealistic,’ yet it has nothing to do with economics, see below.

⁴¹ Similarly Harding, *loc. cit.* fn. 2, p. 355, second para.: ‘Art. 230, taken together with Art. 249, does not, and was probably never intended to, hold out much hope to private plaintiffs in the case of measures not actually addressed to them.’ In the same sense already Daig, *loc. cit.* fn. 2, p. 194, third para.

⁴² Compare Case 169/84, *COFAZ v Commission*, [1986] ECR 391, para. 23, and Case 26/76, *Metro v Commission* (No. 1), [1977] ECR 1875, para. 13 (second subpara.), with Joined Cases T-32 & 41/98, *Government of the Netherlands Antilles v Commission*, [2000] ECR II-201, para. 51.

⁴³ In the field of anti-dumping, the Community institutions always acted by means of Regulations in the sense of Art. 249(2) EC. This explains why the focus there was always on individual concern, rather than on the (redundant) classification of the act as a regulation or a decision.

⁴⁴ Things are slightly different regarding state aids. There, Member States are ultimately responsible for recovering aid granted in breach of Art. 87 EC. Similarly, in anti-dumping it is for the national customs authorities to collect the anti-dumping duties stipulated by Council and Commission in a

Secondly, in all three areas, there are extensive provisions for the participation of economic operators, in the procedure leading to the adoption of measures, by (typically) the Commission. The reason why the participation of economic operators is so comprehensively regulated in competition law, state aids, and anti-dumping, is the complexity of the required economic assessment in each of these areas. This makes it imperative to draw on the intimate knowledge companies have of the markets they are active in. The Commission could not possibly hope to replicate this knowledge through its own research efforts, nor even through measures of enquiry on site such as under Arts. 20 and 21 of Reg. 1/2003.⁴⁵ Conversely, the companies on whose expertise the Commission has drawn are also the most competent to spot any flaws in the Decision or Regulation ultimately adopted. It is therefore sensible to allow them to challenge the measure directly.⁴⁶

What is more, the possibility of challenging the act allows operators to enforce their right to participate in the procedure for its adoption. This is independent of whether or not they have actually been allowed to exercise their right to participate.⁴⁷ A refusal to hear them (or the termination, without scrutiny, of procedures in the course of which they would have been heard) perverts the rationale for granting rights of participation in the first place. This rationale is, as we have seen, to put as much relevant information as possible at the disposal of the Community institution. A refusal to allow participation, or termination of the procedure before interested operators can participate cannot, therefore, be allowed to deprive them of the right to challenge the act under Art. 230(4), a right they would otherwise have had. The act adopted can be said to be ‘addressed,’ to borrow the words of the first alternative in Art. 230(4), to those who have (or would

regulation, Joined Cases 239 and 275/82, *Allied Corp. v Commission*, [1984] ECR 1005, para. 15; Case 231/82, *Spijker Kwasten v Commission*, [1983] ECR 2559, para. 11. The national implementing measures in these two areas open up a different route for challenging Community acts, discussed below at II4b.

⁴⁵ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1 of 4 January 2003.

⁴⁶ Craig and de Búrca, *loc. cit.* fn. 40, p. 516, fourth para.

⁴⁷ *Contra* Moitinho de Almeida, *loc. cit.* fn. 2, p. 851, second para., who requires actual participation as a condition for individual concern. This would, however, lead to the absurd consequence that the adopting Community institution might try to prevent scrutiny of a substantively illegal act by additionally committing procedural irregularities.

have) participated in the procedure. The information and opinions tendered by these operators should, by law, have been on the mind of the institution which adopted the act.⁴⁸

These reflections explain why a complainant according to Art. 3(2)(b) of Reg. 17 can challenge a decision in competition matters,⁴⁹ as can even someone who has merely reacted to a notice according to Art. 19(3) of the same Regulation.⁵⁰ By contrast, a company may not bring a direct challenge after it remained inactive despite its knowledge of ongoing proceedings before the Commission. It will not help if it later protests that the measure adopted by the Commission impairs its economic interests.⁵¹ In the field of state aids, competitors of the recipients of aid, having submitted comments pursuant to Art. 88(2) EC, may challenge the decision provided their position on the market is significantly affected by the aid in question.⁵² Companies may also challenge the Commission's decision not to open a full investigation, if in the course of the procedure under Art. 88(2) EC, they would have been entitled to submit comments.⁵³ Regarding anti-dumping, finally, undertakings may challenge the regulation if they are identified in the regulation imposing anti-dumping duties; if their prices were used in calculating the dumping margin; or if they were heard during the investigation procedure; or finally, if their observations determined the outcome of that procedure.⁵⁴ Two cases from the area of anti-dumping seem to deviate from this pattern, and therefore deserve closer scrutiny.

In its judgment in the first case, *Alusuisse*,⁵⁵ the Court held that 'the distinction between a regulation and a decision may be based only on the nature of the measure itself and

⁴⁸ Daig, *loc. cit.* fn. 2, p. 191, *sub a*).

⁴⁹ Case 26/76, *Metro v Commission* (No. 1), [1977] ECR 1875, para. 13.

⁵⁰ Case 75/84, *Metro v Commission* (No. 2), [1986] ECR 3021, paras. 21-23.

⁵¹ Case T-87/92, *Kruidvat BVBA v Commission*, [1996] ECR II-1931, paras. 63, 67-71.

⁵² Case 169/84, *COFAZ v Commission*, [1986] ECR 391, paras. 24, 25. By contrast, any effect on any competitive relationship whatever will not confer individual concern, *Joined Cases 10 and 18/68, Eridania et al. v Commission*, [1969] ECR 459, para. 7.

⁵³ Case C-198/91, *Wm. Cook v Commission*, [1993] ECR I-2487, para. 23.

⁵⁴ Case 264/82, *Timex v Commission*, [1985] ECR 849, para. 14; Case 169/84, *COFAZ v Commission*, [1986] ECR 391, para. 24. For further examples, see Lenaerts and Arts, *loc. cit.* fn. 38, pts. 7-066 to 7-072 (pp. 170-177).

⁵⁵ Case 307/81, *Alusuisse Italia SpA v Council and Commission*, [1982] ECR 3463.

the legal effects which it produces and *not on the procedures for its adoption*.⁵⁶ This statement, however, has to be read in its context. *Alusuisse*, an importer of a substance on which anti-dumping duties had been imposed – provisionally by the Commission, and definitively by the Council – had *not* participated in the procedure for the adoption of the regulations challenged. Instead, the company pleaded⁵⁷ that since some (other) companies had participated, it – *i.e. Alusuisse* – should be allowed to challenge the measure in the European Court of Justice. The Court’s denying this does not, therefore, establish that as a matter of principle, the procedure for the adoption of a regulations is immaterial.⁵⁸ Instead, the judgment merely says that a measure can be of individual concern to some (those who participated in the procedure for its adoption) but, at the same time, not to others (those who did not so participate). Arguably, the Treaty may be read to consider this disjunction a regular occurrence: there is no indication that actions pending under Art. 230(4) rule out the admissibility of preliminary references being brought under Art. 234(b), and *vice versa*.⁵⁹

The second case deserving special mention is *Extramet*.⁶⁰ Before the judgment in this case, the Court had held that importers do not *per se* have standing against anti-dumping regulations.⁶¹ Rather, they too have to fulfil the above conditions. Where these are not fulfilled, importers can seek redress in the national courts.⁶² The judgment in *Extramet*, however, granted the largest Community importer of calcium metal, who was also a processor, *locus standi* against an anti-dumping regulation.⁶³ The regulation would have made purchases from Extramet’s traditional suppliers outside the Community significantly more expensive. What is more, the sole producer of calcium metal in the Community, Péchiney, had on past occasions refused to supply Extramet

⁵⁶ Para. 13, emphasis added.

⁵⁷ Para. 12.

⁵⁸ This, however, seems to be the interpretation of Advocate-General Jacobs in his opinion in Case C-358/89, *Extramet v Commission*, [1991] ECR I-2501, para. 26. It is respectfully submitted that reading the passage in isolation gives it an unduly wide scope.

⁵⁹ See, *e.g.*, the substantially identical challenges in Case C-376/98, *Germany v European Parliament and Council*, [2000] ECR I-8419 (admissible), and in Joined Cases T-172 etc./98, *Salamander et al. v EP & Council*, [2000] ECR II-2487 (inadmissible).

⁶⁰ Case C-358/89, *Extramet v Commission*, [1991] ECR I-2501.

⁶¹ Case 231/82, *Spijker Kwasten v Commission*, [1983] ECR 2559, paras. 9-11.

⁶² Joined Cases 239/82 and 275/82, *Allied Corporation v Commission*, [1984] ECR 1005, paras. 13-14.

⁶³ Para. 17.

with calcium of the required purity. For this reason, the company had turned to suppliers outside the Community in the first place.⁶⁴ At the same time, P echiney was also a processor. In this capacity, it was Extramet’s principal competitor.⁶⁵

One may read this judgment at face value, as exceptionally granting standing to somebody who was not involved in the administrative procedure, on condition that they are ‘seriously affected.’⁶⁶ The problem with such a criterion is, however, its lack of definition. For any company faced with effective competition, a deterioration in its supply situation can entail serious consequences. If the distortion of competition on a market in the Community is such as to warrant the imposition of anti-dumping duties at all, virtually everybody operating on that market will be seriously affected by the regulation.⁶⁷ The economic approach to the question of why Extramet was ‘seriously affected,’ therefore, needs to be supplemented by another consideration. Arguably, the legal remedies available, or rather, their unavailability, justify a deviation from the established rules of *locus standi*.

It is true that Extramet could have challenged, in the French courts, any attempts by the customs authorities to collect the anti-dumping duties.⁶⁸ We can only presume (the judgment is not explicit, one way or another) that in the meantime, and despite any possible interim measures, Extramet would have become dependent again, or more dependent than before, on supplies by P echiney. This dependence, a consequence of the anti-dumping regulation, could not retroactively be cured by a repayment of the duties paid by Extramet, or by the release of any security furnished instead. Proceedings in the national courts, alleging abuse of a dominant position by P echiney were a course of

⁶⁴ This last piece of information is not contained in the judgment, but in para. 8 of Advocate-General Jacobs’ opinion.

⁶⁵ Para. 6 of the opinion.

⁶⁶ Para. 17 of the judgment.

⁶⁷ Nonetheless, those who benefit from it will lack standing because a finding of nullity by the ECJ would not improve their factual or legal situation. See on this requirement Case T-183/97, *Micheli v Commission*, [2000] ECR II-287, para. 34; Case T-89/00, *Europe Chemi-Con (Deutschland) v Council*, [2002] ECR II-3651, paras. 34, 35, and Case T-398/02, *Linea GIG Srl v Commission*, order of 27 March 2003, ECR II-1139, paras. 45-47. The same considerations apply for the admissibility of an appeal, Case C-50/00P, *Uni n de Peque os Agricultores*, [2002] ECR I-6677, para. 21. Generally on this requirement, see Lenaerts and Arts, *loc. cit.* fn. 38, pts. 7-075 to 7-080 (pp. 178-181).

⁶⁸ Nihoul, *loc. cit.* fn. 2, p. 183, fourth para.

action attempted before by Extramet.⁶⁹ Such proceedings, however, *Péchiney* could easily undermine by supplying just enough to *Extramet* for the latter to stay in business.⁷⁰ Extramet would, therefore, not have had an effective remedy in the national courts against the deterioration in its situation. This justified granting it direct access to the ECJ, in order to tackle the regulation direct, as the root cause of its problems.⁷¹ At any rate, the *Extramet* case shows that the Court is willing to deviate from established rules of standing where effective judicial protection so requires. In all other, ‘normal’ cases, participation in the administrative procedure leading to the adoption of the act challenged will confer standing on the plaintiff.

(b) The ‘mainstream’ case-law: The *Plaumann* formula

The *Plaumann* formula, named after a judgment of 1963, holds that for a measure to be of individual concern, it ‘must concern the applicant by reason of *certain attributes which are peculiar to him*, or by reason of *circumstances in which the applicant is differentiated from all other persons*, and therefore distinguished individually, just as in the case of the person addressed.’⁷² This formula is applicable both in the ‘special’ areas just discussed,⁷³ and within the scope of all other (‘mainstream’) subject-matters of Community law. In the specific areas of competition law, state aids, and anti-dumping, however, it was quickly translated into the much more concrete criterion of involvement in the administrative procedure. It took the ‘mainstream’ case-law somewhat longer to arrive at essentially the same position. Even the exceptional decision in *Extramet* has belatedly found its echo in *Jégo-Quééré*.

In a first step, the Court tried to render the *Plaumann* formula operational only in a negative fashion: there is no individual concern if the applicant is affected merely because he carries on an economic (or other⁷⁴) activity which may at any time be

⁶⁹ Para. 6 of the judgment.

⁷⁰ This follows from Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v Commission*, [1974] ECR 223, para. 25.

⁷¹ The Court had used such an efficiency argument before, see Case 175/84, *Krohn & Co. Import-Export v Commission*, [1986] ECR 753, paras. 27-29.

⁷² Case 25/62, *Plaumann v Commission*, [1963] ECR 95, p. 107, last para. (emphasis added).

⁷³ See, as only one example of many, *Extramet* (fn. 60), para. 16.

⁷⁴ T-219/95R, *Danielson v Council*, [1995] ECR II-3051, para. 71: residence on an island affected by the testing of French nuclear devices.

practised by any person.⁷⁵ For this reason, it is immaterial whether it is possible to determine those concerned by number or even identity, or whether for practical or economic reasons, nobody would take up the same activity in the foreseeable future.⁷⁶

Another attempt by the Court to break down the *Plaumann* formula into easily applicable criteria was to require that the applicant belong to a ‘closed group’ of persons.⁷⁷ The latter can be defined as a finite number of persons, sharing peculiar attributes which nobody can acquire any more after the coming into force of the act in question.⁷⁸

There is, however, a fundamental problem with both definitions of individual concern, based on purely factual circumstances: no two individuals or companies will ever be in exactly the same situation. They will be active on different national or regional markets, subject to different legal regimes, pursuing different activities, or offering different products to different customers, and so on. All of these factors will, in some way or other, determine whether and to what extent individuals or companies are affected by a given piece of secondary Community law. If, therefore, factual circumstances alone were to determine individual concern, everyone would be ‘individually concerned,’ *i.e.* affected in a way in which no-one else is, in every respect, affected.⁷⁹ As a consequence, Art. 230(4) EC could not serve as a filter for the admissibility of direct actions; an *actio*

⁷⁵ This appears already in the first ever judgment under Art. 230(4) (then Art. 173(2) EEC), even pre-dating *Plaumann*: Joined Cases 16/62 and 17/62, *Producteurs de fruit v Council*, [1962] ECR 471, at p. 479, fifth para.; most recently in Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, para. 89.

⁷⁶ 11/82, *Piraiki-Patraiki v Commission*, [1985] ECR 207, paras. 12-14.

⁷⁷ Case 62/70, *Bock v Commission*, [1971] ECR 897, para. 10.

⁷⁸ Hartley, *Foundations* (fn. 20 above), p. 356, 1st para. The requirement of a closed group was later broken down into several requirements, and is in itself no longer decisive, see Case C-152/88, *Sofrimport v Commission*, [1990] ECR I-2477, paras. 11, 12; Case T-298/94, *Roquette Frères v Council*, [1996] ECR II-1531, paras. 41-43; Case T-60/96, *Merck & Co et al. v Commission*, [1997] ECR II-859, paras. 58, 63. Nonetheless, Albors-Llorens, *loc. cit.* fn. 2, p. 53, third para., still treats it as *one* decisive criterion. On p. 219, second para., however, she points out that belonging to a closed group is merely an ‘external indicator’ that the applicant *may* be individually concerned.

⁷⁹ Similarly, Case T-155/02R, *VVG Internationale Handelsgesellschaft et al. v Commission*, [2002] ECR II-3239, para. 31; Case C-312/00P, *Commission v Camar et al.*, [2002] ECR I-11355, paras. 74, 77. Craig and de Búrca, *loc. cit.* fn. 40, p. 490, fourth para., argue that ‘the test in *Plaumann* is based on the assumption that some people have attributes which distinguish them from others and that they possess these attributes at the time the contested decision is made.’ This does not, however, appear to be the current position of the European Court of Justice, and it would not be able to limit the number of those who have standing.

popularis would lie to the Court of First Instance. To rule this out, however, is the very function of the provision. Art. 230(4) is not intended to narrow the categories of acts that may be challenged. Rather, it is meant to stipulate the additional requirements of individual and direct concern. An interpretation that would make it lose its only specific feature, and so render the provision superfluous, is hardly convincing.

It is, arguably, for this reason that the Court looked for legal, rather than factual, criteria. As it turns out, such criteria had already been developed in the ‘special cases.’ It was, therefore, only natural that the Court adopted these criteria for universal application, at least as a starting point. As a result, the current position is that individual concern will be found in three paradigms.

(i) First paradigm: lawful participation in the procedure leading to the adoption of the act

This paradigm comes in two guises: either the Community institution has actively to find out (if only by an invitation to submit the relevant information) who would be affected, and how, by a measure whose adoption it considers; or the institution is under an obligation to receive, in the framework of a procedure governed by Community law and normally by a certain closing date, information about the circumstances or intentions of economic operators. The typical example of this second case is an application procedure for licences to import agricultural products from third countries into the Community. Metaphorically speaking, in the first case, the institution – practically always the Commission – has to ‘ask,’ in the second, it has to ‘listen.’ To put it more technically, the applicant must have a right to participate in the procedure leading to the adoption of the measure it wishes to challenge.⁸⁰

Crucially, in both cases the legal basis of the challenged act must put the adopting institution under a specific duty to avail itself of, and/or to act on, information concerning specifically the applicant(s).⁸¹ It is not sufficient for the institution to be

⁸⁰ Joined Cases T-32 & 41/98, *Government of the Netherlands Antilles v Commission*, [2000] ECR II-201, paras. 51-56.

⁸¹ Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, para. 101.

under a general duty to take into consideration the peculiarities of a given sector of the economy. An example of such a duty can be found in Art. 33(2)(a) EC regarding agriculture.⁸² Individual concern for a plaintiff will, therefore, arise from the combination of specific legal duties on the part of a Community institution regarding the procedure for the adoption of the act, and from the presence of specific factual circumstances on the part of the applicant, to which the duty of the Community institution refers.⁸³ Put more simply, legal duties *and* matching facts are required. Facts alone are insufficient.⁸⁴ This can be illustrated by two pairs of cases based on similar facts. The outcome of each, nonetheless, differed according to the respective legal frameworks.

The first pair are the cases *Sofrimport*⁸⁵ and *Unifruit Hellas*.⁸⁶ In both, the plaintiff companies were fruit importers. Both also had apples in transit from Chile to the Community when Regulations were adopted affecting the importation of the apples.

In the first case, *Sofrimport*, a Commission regulation imposed a temporary import ban. As a result, Sofrimport might as well have dumped its apples in mid-Atlantic: the Community would not have them (nor any other markets, we may presume), and the domestic Chilean market is much too small to absorb the large quantities of fruit grown for export, let alone at a price reflecting the costs of the wasted transport. In view of these foreseeable economic consequences, the Regulation empowering the Commission to impose import bans also stipulated that the Commission find out which importers had apples in transit during the relevant period. For these, special provisions had to be adopted in accordance with the principle of proportionality, to mitigate the impact of the

⁸² Case T-194/95, *Area Cova v Council*, [1999] ECR II-2274, paras. 41-45.

⁸³ Case C-209/94P, *Buralux et al. v Council*, [1996] ECR I-615, paras. 30-34. The passage shows, incidentally, that the judgment is not based on a 'pure *Plaumann* approach,' as Craig and de Búrca, *loc. cit.* fn. 40, p. 497, third para., argue. Such an approach does not exist (if it ever did), as becomes clear also from para. 56 of the judgment in Case T-585/93, *Greenpeace v Council*, [1995] ECR II-2205, reproduced on p. 499 by Craig and de Búrca.

⁸⁴ So is a duty alone to take cognisance of facts not notified in time (*Kruidvat*, above n. 51).

⁸⁵ Case C-152/88, *Sofrimport v Commission*, [1990] ECR I-2477. Ward, *loc. cit.* fn. 2, p. 225, fourth para., gives up too early when she argues that the case was 'confined to its special facts.'

⁸⁶ Case T-489/93, *Unifruit Hellas v Commission*, [1994] ECR II-1201. More recently, see Case T-155/02R, *VVG Internationale Handelsgesellschaft et al. v Commission*, [2002] ECR II-3239, paras. 36, 37.

Regulation. Due to this obligation, *and* because Sofrimport answered the description of operators whose circumstances the Commission was under a duty to ascertain, Sofrimport was deemed to be individually concerned by the Regulation.⁸⁷

In *Unifruit Hellas*, by contrast, the regulation in issue merely imposed an import surcharge. Such a measure does not nearly have the catastrophic impact on imports under way to the Community as does a complete ban. Correspondingly, the basic regulation, vesting in the Commission the power to adopt a regulation stipulating the surcharge, did not provide for an enquiry into the effects of the surcharge on the several operators affected by it. Such an investigation is time-consuming and vulnerable to fraud; proportionality did not require it either. Hence, Unifruit Hellas was held not to be individually concerned.⁸⁸ Instead, the company had to seek redress in the national courts against the national authorities collecting the surcharge.

The second pair of cases consists of the judgments in *Weddel*⁸⁹ and *Binderer*.⁹⁰ The first case is one of many examples of a would-be importer of agricultural goods produced in third countries applying for an import licence (*in casu*, for beef). The national authorities charged with implementing the Common Agricultural Policy in the Member States were to collect applications for each importer's desired quantity, and forward them to the Commission. The latter would calculate the overall quantity applied for, compare it to the overall quota set by it, and promulgate in a regulation the reduction coefficient if the sum of the applications exceeded the overall quota. Applying this

⁸⁷ Para. 12. See more recently Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, paras. 102, 104, and Joined Cases T-94/00, T-110/00, T-159/00, *Rica Foods (Free Zone) et al. v Commission*, [2002] ECR II-4677, paras. 56, 57, 75. The same pattern can already be seen in Case 11/82, *Piraiki-Patraiki v Commission*, [1985] ECR 207, paras. 21 and 28: what was decisive there was not the fact that the company had concluded contracts for the delivery of cotton yarn to French customers, but this fact *plus* the duty incumbent on the Commission under Art. 130 of the Act of Accession of Greece to find out which companies had concluded such contracts. The Commission had to make special provisions for these when it adopted a regulation allowing for restrictions of imports of Greek cotton yarn into France, deviating from the principle of free movement of goods. Craig and de Búrca, *loc. cit.* fn. 40, p. 491, last para., argue that Piraiki-Patraiki enjoyed standing because they had entered into contracts before the date of the decision, to be performed while the decision was in force. That this is not the Court's position becomes apparent from paras. 21 and 27 of the judgment, not reproduced by Craig and de Búrca.

⁸⁸ *Unifruit Hellas* (above n. 86), paras. 24-27.

⁸⁹ Case C-354/87, *Weddel*, [1990] ECR I-3847; the same principles are already applied in Case 62/70, *Bock v Commission*, [1971] ECR 897.

coefficient, the national authorities would then grant import licences for reduced quantities. The Court held that the regulation establishing the coefficient was in reality a ‘bundle of decisions’ which affected each applicant for a licence individually.⁹¹

What is striking about the notion of ‘individual’ concern in this and similar cases is how little the Commission learns, in the course of the procedure for the allocation of import licences, about those who apply for a share in the general quota. The applications forwarded to the Commission by the national authorities contain no information about the (would-be) importer. Yet *Weddel* and the other applicants were held to be individually concerned because the Commission was under a duty, in the framework of the procedure for the adoption of this particular measure, as stipulated in secondary Community law, to receive the information, take cognisance of it, and act on it.⁹² This determines the result of each individual application. The quantity each company may import follows from a simple multiplication of the quantity applied for with the coefficient set by the Commission.⁹³

By contrast, the plaintiff will not be individually concerned where there are no specific procedural provisions of secondary Community law stipulating participation by the applicant. The individual will have no standing, no matter how intimate an insight into

⁹⁰ Case 147/83, *Münchener Weinkellerei Herold Binderer v Commission*, [1985] ECR 257.

⁹¹ Paras. 20-23.

⁹² This is the only context in which the ‘closed group’ label may still meaningfully be used, on the understanding that the group is closed for procedural reasons: submission of applications by the plaintiffs, and action taken by the Community institution on these applications, or on licences already granted, as in Joined Cases 106 and 107/63, *Alfred Töpfer and Getreide-Import Gesellschaft v Commission*, [1965] ECR 405, p. 411, fifth and sixth pars; Case 100/74, *Société CAM SA v Commission*, [1975] ECR 1393, para. 15; Case 88/76, *Société pour l’exportation des sucres v Commission*, [1977] ECR 709, paras. 10, 11; Case 264/81, *Savma v Commission*, [1984] ECR 3915, para. 11. *Contra* Albors-Llorens, *loc. cit.* fn. 2, pp. 150-152.

⁹³ By contrast, there is no individual concern where the Commission’s coefficient is not the only factor used by national authorities to establish a reference quantity which, in its turn, serves for the future allocation of quota, Joined Cases T-198/95, T-171/96 et al., *Comafrika et al. v Commission*, [2001] ECR II-1975, para. 106. There is also no individual concern where applications for support payments simply mark those persons who will be affected by a separate measure establishing the factors that go into the calculation of the support payments, Case T-482/93, *Weber v Commission*, [1996] ECR II-609, paras. 65, 66. In both cases, the applicants have participated in a procedure (by submitting the original application), but it is not the procedure leading specifically to the adoption of the measures they wish to challenge in the ECJ. These measures determine the outcome of the application originally submitted, but they are adopted without the participation of the applicants. Similarly already Case 45/81, *Alexander Moxsel Import-Export v Commission*, [1982] ECR 1129, paras. 15-17.

his business practices and legal circumstances a Community institution may have gained. A paradigm case in this respect is that of *Binderer*.⁹⁴

Binderer imported wine from the Balkans into Germany. Because the wines were not made in accordance with Community standards, the company could not use the designations provided for in a Regulation. These designations are meant to protect the consumer against misleading labelling. *Binderer* wished to give consumers some indication as to the quality of the imported wines. For this purpose, the company had devised (German) designations for its wines closely resembling the Community classifications, but not identical to them. To ensure the legality of its labelling, *Binderer* enquired with the Commission whether it could lawfully use the proposed designations. After some deliberation, the Commission replied in the affirmative. Nevertheless, a few months later, it adopted a new regulation on designations for wines. As a consequence, *Binderer* could no longer use its designations. The company challenged the regulation in the ECJ, but was held not to be individually concerned.⁹⁵

It is impossible to say whether *Binderer*'s enquiry, and the information thereby gained, prompted the Commission to adopt the new rules. At any rate, there were no specific rules of secondary Community law which said that the Commission had to take any notice of *Binderer* and its business practices.⁹⁶ Thus, despite the fact that the Commission knew a good deal more about *Binderer* than it ever knew about the thousands of companies which, over the years, applied for import licences, *Binderer* was not individually concerned in the technical sense. The exchange of information between the company and the Commission, however detailed, was nonetheless purely informal.

⁹⁴ Case 147/83, *Münchener Weinkellerei Herold Binderer v Commission*, [1985] ECR 257.

⁹⁵ Paras. 12-15.

⁹⁶ It is a separate question whether, at the level of general principles of Community law, and thus of primary Community law, there exists a rule of good administration, in accordance with which the Commission should acknowledge information, complaints, suggestions, etc., it has received, and inform the person how it handled the intervention. Nevertheless, the Commission may prioritise requests even where there are procedural rights for individuals granted by secondary Community law, see Case T-24/90, *Automec Srl. v Commission* (No. 2), [1992] ECR II-2223, paras. 79-86, and now Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, COM (2002) 141 final, 2002/C 244/03, [2002] OJ C244, p. 5 (10 Oct.).

The CFI has held likewise in the case of companies which, having heard rumours of plans for the adoption of Community measures that would affect their business, intervened repeatedly with the Commission. Where there are no specific provisions governing the participation of such companies in the procedure leading to the adoption of the measure, they will not be individually concerned.⁹⁷ There is, in other words, no way for plaintiffs to confer ‘by force’ individual concern on themselves.

(ii) Second paradigm: the plaintiff’s name is mentioned in the act

The second paradigm of individual concern is that the plaintiff is specifically mentioned in the measure without having participated in the procedure for the adoption of the measure.⁹⁸ These days, this is a rare occurrence. The scope of the Community’s procedural law has been considerably extended over the years, and with it individuals’ rights to participate.

(iii) Third paradigm: certain rights are affected by the act

The bulk of the Court’s case-law falls under the first paradigm (procedural rights).⁹⁹ Cases under the third have some common features. Nonetheless, the Court has, so far, only hinted at criteria for determining which situations will fall within the third paradigm. The well-developed first paradigm can serve as a point of reference. Without any indication to the contrary, it must be presumed that the third is not meant to be less stringent than the first, but merely to cover different situations.

The starting point is the judgment in *Codorníu*. This company, producing bottle-fermented wine in Catalonia, was held to be individually concerned by a Council Regulation reserving the designation ‘grand crémant’ to producers of sparkling wines in Luxembourg and parts of France. This was despite the fact that Codorníu had not participated in the procedure that led to the adoption of the regulation. The provisions of

⁹⁷ T-481 & 484/93, *Vereniging van Exporteurs in Levende Varkens v Commission*, [1995] ECR II-2941, paras. 54-62

⁹⁸ Case 138/79, *Roquette v Council*, [1980] ECR 3333, paras. 15, 16.

the Regulation made it illegal for Codornú to continue to use its trademark which it had registered decades earlier, and which contained the words ‘grand crémant’ now reserved to others.¹⁰⁰

In later judgments, by contrast, the Court refused an extension of this jurisprudence to companies holding quota allocations for a previous marketing year, which were not subsequently re-allocated (in whole or in part).¹⁰¹ There was also no individual concern in the case of purely factual advantages, such as market circumstances conducive to the plaintiff’s business, or of production aid granted for a limited period.¹⁰² Similarly, patent holders were held not to be individually concerned by the Commission’s refusal to allow some Member States’ protective measures against parallel imports of patented drugs.¹⁰³ The Court of First Instance held that the extent of the protection patent holders enjoyed in the common market was determined by the combined effect of Articles 28 and 30 EC. They could not, based on *Codornú*, demand the extension of a temporary derogation from a fundamental principle of the Treaty.¹⁰⁴

If one were to distil an abstract formula from this case-law, one might say that a plaintiff will be individually concerned by a measure impairing an absolute and definitive right granted to him by Community law or by Member State law.¹⁰⁵ An ‘absolute’ right is one which the holder has against everyone, as opposed to rights merely *vis-à-vis* specific persons, *i.e.* contractual rights, or rights resulting from torts. We have seen above from the cases *Sofrimport* and *Piraiki-Patraiki* that contracts entered into, and affected by an act of secondary Community law, are not in themselves enough to render the parties individually concerned. ‘Definitive’ does not imply that the

⁹⁹ Craig and de Búrca, *loc. cit.* fn. 40, p. 496, last para., confound the first and the third paradigm into an ‘infringement of rights [third paradigm] or breach of duty [first paradigm] approach.’ This is understandable on their presumption that mere factual circumstances can confer individual concern.

¹⁰⁰ Case C-309/89, *Codornú v Council*, [1994] ECR I-1853, paras. 19-21.

¹⁰¹ Case T-158/95, *Eridania v Commission*, [1999] ECR II-219, paras. 61, 62.

¹⁰² Case T-482/93, *Weber v Commission*, [1996] ECR II-609, para. 69.

¹⁰³ These drugs had been imported from Spain and Portugal. Price caps in these countries made the drugs much cheaper there than in other Member States. This made parallel trade lucrative. For a while after these two countries’ accession to the Community, however, Member States were authorised to limit imports of pharmaceuticals originating in Spain and Portugal.

¹⁰⁴ Case T-60/96, *Merck & Co et al. v Commission*, [1997] ECR II-859, paras. 45, 50.

¹⁰⁵ Case T-114/96, *Confiserie du Tech v Commission*, [1999] ECR II-913, paras. 33, 34; more recently Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, para. 98.

right must be granted in perpetuity. Instead, it means that the plaintiff cannot be deprived of the right, and any benefits derived from it, at the discretion of a Community or national authority, without being compensated for the value of the right.

In other words, the challenged Community act must affect property rights.¹⁰⁶ These are both absolute, and definitively assigned to their holder. Other rights, even fundamental rights recognised under Community law, are not suitable to confer individual concern.¹⁰⁷ These rights, in particular the right to pursue a trade or professional activity,¹⁰⁸ would not have the capacity to limit direct access to the ECJ in the same way as the first paradigm does. As has been argued above, many if not every business operating on the market affected by a measure in the areas of competition law, state aids, and anti-dumping, will in some way be affected. To accord each of them, in principle, standing for a direct action in the ECJ would render superfluous the limitation established by the first paradigm. This would pervert the wider function of Art. 230(4) EC.

Another limitation can be derived from the judgment in *Codornú*, further aligning the third paradigm with the first. In the first paradigm, participation of the plaintiff in the procedure leading to the adoption of the challenged act means that the adopting Community institution can be deemed to be aware of the specific circumstances of the plaintiff, and to have adopted the act specifically with these circumstances in mind. In this sense, the act can be said to be ‘addressed’ to the plaintiff. This, however, requires publicity, at least for the relevant Community institution, of the information it acts on. This quality of ‘there to be seen by everyone’ does not attach equally to all property rights. It accrues only to those evident from public registers, or in any other way

¹⁰⁶ Similarly Moitinho de Almeida, *loc. cit.* fn. 2, p. 864, second para., who explains *Codornú* as allowing challenges to ‘expropriating’ measures of Community law. Arnall’s objection (*loc. cit.* fn. 2, [2001] CMLRev 42, second para.) that this confuses admissibility and substance is not convincing. For the action to be admissible, it is enough that the plaintiff *might* have the right claimed, and that it *might* be violated. The action is inadmissible where this can obviously be ruled out. It is only for the substantive assessment to ascertain whether this is in fact the case.

¹⁰⁷ *Contra* Albers-Llorens, *loc. cit.* fn. 2, p. 52, second para., who wants to use any individual right under Community law as conferring individual concern. Her examples, however, are drawn from cases in which individual concern derived under the first paradigm, anyway, so that the Court’s jurisprudence cannot be cited in evidence for her submission. Unclear Neuwahl, *loc. cit.* fn. 2, p. 28, fourth para.: ‘hard core of human rights norms and rules relating to proper administration.’

¹⁰⁸ Case 44/79, *Lieselotte Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727, para. 17.

specifically protected by law. This is true of land rights, patents, or, as in *Codorníu*, trademarks, and other intellectual property rights, but not of rights, typically, in chattels. Accordingly, economic operators using generic descriptions also deployed by other operators for their products, and thus not enjoying any proprietary exclusivity,¹⁰⁹ or operators using non-protected designations of geographic origin,¹¹⁰ were found not to be individually concerned.

One might contemplate one last limitation, namely a ‘reduction to zero’ of the property right as a condition for individual concern under the third paradigm. The property right (trade mark) affected in *Codorníu* was, if not cancelled, at least devalued to the point of uselessness. To borrow the language of the Court in the fundamental rights case of *Hauer*, ‘the very substance of the right’ was impaired.¹¹¹ To stay with the case just mentioned, Ms. Hauer remained the owner of her vineyard, but was not allowed to plant new vines on it. One potential use of the land was ruled out, but the property in the land remained intact. The European Court of Justice points out¹¹² that the prohibition on new planting could not be regarded as an act depriving the owner of her property, since she remained free to dispose of it or to put it to other uses which were not prohibited. Seen in this light, *Codorníu* merely marks the upper extreme. Any legal impairment of property rights or their exercise must suffice.¹¹³ Factual impairments, on the other hand, are not enough, such as (to stay with the example of the vineyard) the scrapping or lowering of subsidies for wine, rendering the cultivation of some vineyards economically unviable.¹¹⁴ What is required, instead, is an impairment of the rights themselves, not of the economic advantages of holding them.

¹⁰⁹ Case T-114/96, *Confiserie du Tech et al. v Commission*, [1998] ECR II-913, paras. 32-34; similarly already Case 26/86, *Deutz und Geldermann v Council*, [1987] ECR 941, paras. 10-12: non-protected description of sparkling wine as being made in accordance with the ‘*méthode champénoise*.’

¹¹⁰ Case T-107/97, *Molkerei Großhain et al. v Commission*, [1998] ECR II-3533, paras. 70, 71.

¹¹¹ Case 44/79, *Lieselotte Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727, para. 23.

¹¹² Para. 19.

¹¹³ Paras. 23, 29.

¹¹⁴ The Court emphasised in Joined Cases 133-136/85, *Walter Rau Lebensmittelwerke et al. v BALM*, [1987] ECR 2289, para. 18 that ‘an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from an organisation of the market which existed at a given time.’

To sum up the third paradigm, the holders of property rights evidenced in public registers will be individually concerned by Community measures detracting, in law, from the rights or their exercise.

3. Direct concern

The question behind direct concern has been described as one of the causality of the act's affecting the legal position of the individual.¹¹⁵ More precisely, direct concern will turn on whether the effects of the act of Community law depend on the use of discretion, either by a Community institution (the one adopting the measure, or another), or by a Member State authority applying Community or national law.¹¹⁶ There may be no discretion for two reasons. It may be that there is no discretion from the outset, because the legal basis in Community law of the act adopted leaves the authority no choice. Also, the discretion may have been exercised at an earlier stage already, and the course later taken was determined at that time. This occurs, typically, when a Member State applies, under Art. 134 EC, for authorisation to restrict imports from 3rd countries.¹¹⁷ The Commission decision authorising such protective measures is not an order, but a permission which the Member State may or may not make use of. Nonetheless, Member States are normally already determined to use the authorisation as soon as they have obtained it. They do not normally seek such authorisations 'for a rainy day' (they expire quickly, anyway).

Some uncertainty has recently arisen with regard to the question whether Directives are, or can as a matter of principle, be of direct concern. The question was in principle answered in the negative by the Court of First Instance in its judgment in *Assocarne*.¹¹⁸ The argument was that as Directives by definition¹¹⁹ require implementation by the Member States, they could never be of direct concern to an individual. On appeal, the

¹¹⁵ Hartley, *Foundations* (fn. 20 above), p. 355, 369-373; Albers-Llorens, *loc. cit.* fn. 2, p. 73, second para.

¹¹⁶ Case 113/77, *NTN Toyo Bearing*, [1979] ECR 1185, para. 11; Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, para. 86.

¹¹⁷ Case 62/70, *Bock v Commission*, [1971] ECR 897, para. 14.

¹¹⁸ Case T-99/94, *Assocarne v Council* (No. 1), [1994] ECR II-871, para. 17.

¹¹⁹ See Art. 249, third subpara. EC.

European Court of Justice, following an earlier judgment,¹²⁰ left the question open whether in principle, Directives were open to challenge.¹²¹ The Directive in issue, at any rate, was not of individual concern to the plaintiffs. They had not participated, as of rights, in its adoption. Also, no specific rights as in *Codorniu* were affected.¹²² The Court of First Instance adopted the same approach in *UEAPME*.¹²³ In the more recent judgment in *Salamander*, however, the Court of First Instance argued again that Directives could not affect a private plaintiff directly because ‘a Directive which requires the Member States to impose obligations on economic operators is not of itself, before the adoption of the national transposition measures and independently of them, such as to affect directly the legal situation of those economic operators.’¹²⁴

This is surprising. It is well established in the Court’s jurisprudence that not all provisions in a Directive leave the Member State *substantive* discretion regarding their implementation.¹²⁵ If such provisions are clear and precise, unconditional, and require no further implementation, individuals can rely on them in the national courts *vis-à-vis* Member States.¹²⁶ In the context of Art. 230(4) EC, however, a private plaintiff will not want to rely on provisions of Community law, on the contrary: he or she will want to see them quashed. The Court of First Instance appears to overlook this difference in para. 54 of *Salamander*.

The crucial point is that provisions whose implementation would work to the disadvantage of the plaintiff might leave Member States no substantive choice either.¹²⁷ This is true of prohibitions not allowing for any exceptions, banning, for instance,

¹²⁰ Case C-298/89, *Government of Gibraltar v Council*, [1993] ECR I-3605, para. 16, 17.

¹²¹ Case C-10/95P, *Assocarne v Council* (No. 2), [1995] ECR I-4149, para. 32.

¹²² Paras. 35-43.

¹²³ Case T-135/96, *UEAPME v Commission*, [1998] ECR II-2335, paras. 63-69.

¹²⁴ Joined Cases T-172 etc./98, *Salamander et al. v EP & Council*, [2000] ECR II-2487, para. 54. In para. 70, the Court added that ‘as a secondary point, the Directive leaves the Member States a power of assessment, such that the applicants cannot be directly concerned by it.’ The action in *Salamander* was the unsuccessful private counterpart to Germany’s successful challenge to the original ‘Tobacco Advertising Directive’ (EC) No. 98/43, Case C-376/98, *Germany v European Parliament and Council*, [2000] ECR I-8419.

¹²⁵ By contrast, Member States always have ‘the choice of form and method,’ Art. 249, third subpara.

¹²⁶ Case 222/84, *Margarite Johnston v Royal Ulster Constabulary*, [1986] ECR 1651, para. 54; Case 8/81, *Ursula Becker*, [1982] ECR 53, para. 25.

¹²⁷ Arnulf, *loc. cit.* fn. 2, [2001] CMLRev 30, second para.

substances or products dangerous to human health, or activities deleterious to the environment. Such prohibitions in a Directive can be translated into national law only by, again, absolute prohibitions. There are no good reasons why the Court should go behind its constant jurisprudence since 1974,¹²⁸ and suddenly treat all provisions in a Directive the same.

4. Alternative remedies in the absence of individual and direct concern

The absence of individual and direct concern does not mean that individuals will have to put up forever more with an act of secondary Community law. This is prevented by a general principle of Community (human rights) law, according to which every measure imposing a burden on individuals must have a (valid) legal basis.¹²⁹ Hence, if individuals cannot challenge an act directly, they can still attack measures to implement it. If the underlying act is void, the implementing measures are illegal for want of a legal base.

Implementation of an act of secondary Community law can take place in two ways. Either the Commission, in its executive function, addresses a decision (or another legally binding measure – ‘the second measure’) based on the act (‘the first measure’) to the individual, or an authority in the Member States does so.¹³⁰ This leads to a bifurcation in the legal protection available to individuals.

(a) ‘Second’ action under Art. 230(4) EC

If the Commission adopts the second measure, the individual can challenge this measure in a second action under Art. 230.¹³¹ If the individual realises that a challenge to the first measure would be futile, the ‘second’ action under Art. 230(4) will, in fact, be the first (and only) action. In the course of this second action, the individual may enter a plea

¹²⁸ Case 41/74, *Yvonne van Duyn v Home Office*, [1974] ECR 1337.

¹²⁹ Case T-199/99, *Sgaravatti Mediterranea v Commission*, [2002] ECR II-3731, para. 126.

¹³⁰ Case C-491/01, *R v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd. et al.*, [2002] ECR I-11453, para. 39.

¹³¹ This action has to be lodged with the Court of First Instance, with an appeal lying to the European Court of Justice, Art. 225(1) EC.

based on Art. 241 EC against the first measure.¹³² It is important to note that Art. 241 provides no independent action against either the first or the second measure.¹³³ The admissibility of the action as a whole remains governed by Art. 230(4).¹³⁴ If the individual prevails with the plea under Art. 241, his success will be limited to the non-application to the instant case of the first measure. The first measure will not be quashed altogether.¹³⁵

This procedural route applies, for instance, in the area of competition law, when the Commission imposes fines on the participants of an illegal cartel.¹³⁶ If a company thought that, say, provisions of Regulation 1/2003¹³⁷ violated its rights, it would have no standing to attack the new regulation. This is because the legal basis for the regulation, Art. 83(1) EC, does not provide for any third parties' participation in the adoption procedure; no-one's name appears in it; and no rights of the type in issue in *Codorniu* (see above at II2b(ii)) are implicated. The company would, therefore, have to wait for the Commission to address a decision to it, e.g., ordering it to cease and desist from participating in an illegal cartel. This decision would fulfil the criteria of individual and direct concern, and could thus be challenged under Art. 230(4). Before the Court of First Instance, the company could argue, as Art. 241 allows, that the underlying

¹³² Joined cases T-94/00, T-110/00 and T-159/00, *Rica Foods (Free Zone) NV, Free Trade Foods NV and Suproco NV v Commission*, [2002] ECR II-4677, paras. 239-241. Contrary to what its wording might imply, Art. 241 also encompasses directives in the sense of Art. 249, third subpara. as suitable first measures, Case 92/78, *Simmenthal v Commission*, [1979] ECR 777, paras. 39-41. This is not the only imperfection in the wording of Art. 241: if the 'first action' would have been admissible, but proceedings have not been instigated within the time limit of Art. 230(5), Art. 241 is, contrary to its opening words, not available, see below on Case C-188/92, *Textilwerke Deggendorf (TWD)*, [1994] ECR I-833. Moreover, contrary to the wording 'any party,' Member States may not invoke Art. 241, Case 52/84, *Commission v Belgium* (Ceramics aids), [1986] ECR 89, paras. 13-14. This mixture of extensive (regarding the categories of acts covered) and restrictive reading is an example of teleological reasoning. The provision, as worded, would not be able to complement Art. 230; this, however, is its function, as the repeated mention of that provision indicates.

¹³³ Joined Cases 31/62 and 33/62, *Wöhrmann and Lütticke v Commission*, [1962] ECR 501, p. 506, last para. f.

¹³⁴ Case C-239/99, *Nachi Europe*, [2001] ECR I-1197, paras. 33-36.

¹³⁵ Case T-82/96, *ARAP v Commission*, [1999] ECR II-1889, paras. 46-49.

¹³⁶ The same procedural mechanism applies with regard to Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community Trade Mark, OJ 1994, No. L11, p. 1. This regulation is implemented not by the Commission, but by the Office for Harmonisation in the Internal Market (trade marks and designs), cf. Arts. 2 and 111 ff. of Reg. 40/94.

¹³⁷ Council Regulation (EEC) No. 17 of 1962 governs, until May 2004, the procedures of the Commission when implementing Arts. 81 and 82 EC. From then on, it will be repealed and replaced

regulation on the basis of which the Commission acted is void, for one of the reasons listed in Art. 230(2) EC. If the Court found this to be the case, the decision addressed to the plaintiff company would be quashed. Other decisions based on the same regulation would, however, remain unaffected (see Art. 231(2) EC), unless they too were challenged within the time limit stipulated in Art. 230(5) EC.

(b) Legal protection in the courts of the Member States, Art. 234(b) EC

If the second measure is taken by a Member State authority, it will be governed by national law. For this reason, the measure has to be challenged in the national courts. Within the framework of the proceedings in these courts, the same mechanism applies as described before. National authorities may, within the scope of Community law, impose obligations on an individual only if there is a legal basis for doing so in Community law.¹³⁸ The individual can, therefore, argue that the first measure is void which the second measure purportedly implements. If this is the case, the second measure is illegal because it lacks a legal base.¹³⁹ The national court can either accept or reject this argument. For reasons of legal certainty, the Court held in *Foto Frost* that finding an act of secondary Community law void is the preserve of the ECJ.¹⁴⁰ For this reason, if a national court contemplates accepting the argument it, must refer under Art. 234(b) EC the question whether the first measure is indeed void. Contrary to the wording of Art. 234, 2nd para., this applies to any national court, not just those of last instance.

There is only one situation in which a national court must not refer a question concerning the validity of an act of secondary Community law. It arose in the case underlying the Court's judgment in *Textilwerke Deggendorf* (TWD).¹⁴¹ The eponymous company had received state aid from the German government. The Commission found

by Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, No. L1, p. 1 of 4 January 2003.

¹³⁸ Case T-199/99 (fn. 129 above), para. 126.

¹³⁹ This is the same general idea as underlies Art. 241 EC, Case C-216/82, *Universität Hamburg v Hauptzollamt Hamburg-Kehrwieder*, [1983] ECR 2771, para. 10.

¹⁴⁰ Case 314/85, *Foto Frost v Hauptzollamt Lübeck-Ost*, [1987] ECR 4199, para. 17.

¹⁴¹ Case C-188/92, *Textilwerke Deggendorf* (TWD), [1994] ECR I-833; critical assessment by Derrick Wyatt, *The relationship between actions for annulment and references on validity after TWD*

that the aid had been granted in contravention of Art. 87 EC, and by a Decision obliged the German government to recover the money paid to TWD. The company could have challenged the decision under Art. 230(4) EC, not least because its name appears in both the grounds, and in the operative part. Instead, TWD waited until the German government did get back to it, reclaiming, by an administrative act, the sums paid. TWD challenged this act in the German administrative court. The company argued that because the Commission's decision misconstrued Art. 87(2)(c) EC and was thus void, the German government's attempt to claw back the payments made to it was also illegal.

The German court referred a question to this effect to the European Court of Justice. The Court, however, refused to entertain the reference in the interest of legal certainty: plaintiffs must use the quickest of several available procedural alternatives to establish the nullity of acts they object to. Hence, national courts must not refer a question regarding the validity of the first measure, but must instead presume its validity, if the plaintiff could have challenged the first measure under Art. 230(4), but has failed to do so in time.¹⁴² If this is the case, the plaintiff's only grounds on which to challenge the second measure can be faults committed by the national authority in the application of national law. This would keep the dispute in the realm of national law. If, however, the plaintiff alleged a misapplication of the Community act, the national court would have to contemplate a reference concerning the act's interpretation to the ECJ. References on questions of interpretation (rather than validity) cannot be time-barred as the concern for legal certainty underlying *Textilwerke Deggendorf* do not apply (at least not to the same extent). They are unaffected by the judgment.

III. The Two Weak Spots of the System: Acts Not Requiring Any Implementation, and Recalcitrant National Courts

Deggendorf, in Julian Lonbay and Andrea Biondi (eds.), *Remedies for breach of EC law*, Chichester (John Wiley & Sons) 1997, p. 55, at pp. 61-63.

¹⁴² Paras. 13-18. Where, however, it is not so clear that the plaintiff in the national court could have challenged the Community act in the European Court of Justice direct, a reference will not be barred:

As we have seen so far, individuals may challenge an act of secondary Community law under Art. 230(4) in the Court of First Instance if they are individually and directly concerned. Failing this, they may challenge the act indirectly, through actions against implementing measures. In the latter case, legal protection will be given either by the Court of First Instance, or by the courts of the Member States, co-operating with the European Court of Justice in the framework of the preliminary reference procedure according to Art. 234(b).¹⁴³

As far as their legal effects are concerned, indirect challenges are not inferior to a direct challenge. From the point of view of the individual plaintiff, there is only an insignificant difference between Art. 231 EC and Art. 241 EC. Under the former, the ‘first’ measure is declared void as the consequence of a successful challenge under Art. 230 as ‘first’ action. Pursuant to the latter, the ‘second’ measure is quashed, and the ‘first’ measure is not applied as a consequence of the successful ‘second’ action.

The same is true regarding Art. 230 as a first action, and Art. 234(b). Strictly speaking, a judgment on a preliminary reference is binding only *inter partes*, *i.e.* on the national court referring the question, and on the parties to the dispute before that court. Nevertheless, the Court has held that a finding of nullity is sufficient reason for any other court not to apply the provisions found void. In practice, this is indistinguishable from effects *erga omnes*, *i.e.* binding effect on everybody. This is reinforced by the Court’s jurisprudence that renewed references after a finding of nullity may only relate to the consequences of nullity (on a similar question, see Art. 231(2) EC), while the finding of nullity itself is definitive.¹⁴⁴

Case C-408/95, *Eurotunnel plc. v Seafrance*, [1997] ECR I-6315, para. 29; Case C-239/99, *Nachi Europe*, [2001] ECR I-1197, paras. 37-40.

¹⁴³ Daig, *loc. cit.* fn. 2, p. 195 *sub* B explains the unwillingness of the Court to grant direct access more generously by the presumption on the part of the Treaty’s drafters that individuals would receive sufficient protection through the indirect means provided for.

¹⁴⁴ Case 66/80, *International Chemical Corporation v Amministrazione delle Finanze dello Stato*, [1981] ECR 1191, paras. 11-14. By contrast, the nullity of an act found valid before may be suggested again in subsequent references, by the same, or by third courts, but with different arguments. This is reflected in the Court’s cautious wording of the operative parts of judgments under Art. 234(b) in the ‘validity’-alternative: ‘consideration of Regulation [1234/5678] has not disclosed any factor of such a kind as to affect its validity,’ see, *e.g.* Case C-491/01 (fn. 130 above), operative part, para. 1.

The situation is different with regard to the conditions for the respective challenges. Normally, the adverse effects of a generally applicable, and hence legislative rather than administrative, act of secondary Community law will only materialise in the act's application to individual cases.¹⁴⁵ Of necessity, this entails a delay until implementing measures are adopted. The problems this may cause can be mitigated by the ECJ's suspending the application of an act under challenge, or granting interim relief, under Arts. 242 and 243 EC respectively. National courts may do so on the basis of similar principles.¹⁴⁶ Nevertheless, national courts may not suspend national measures implementing Community acts which would be deprived of their effects unless implemented immediately (*i.e.*, typically, emergency measures).¹⁴⁷ Although there is no jurisprudence on this point by the European Court of Justice, it may be presumed that the same restriction does not apply to Art. 242 (suspension of Community acts by the European Court of Justice). This is because a suspension ordered by the ECJ has effect for the whole of the Community. This does not to the same extent endanger the uniform application of Community law from Member State to Member State, unlike measures taken by the national courts.

These differences notwithstanding, in Art. 230(4) (as a 'second' action in the sense of above II4a), and in Art. 234(b), the Treaty provides for a complete system for the protection of the rights of individuals against illegal incursions by the Community.¹⁴⁸ This is because implementing measures can only emanate from either a Community institution, or from national authorities; there is no third possibility. Also, the overall number of challenges, brought one way or another, is not reduced by a narrow, nor increased by a wide, interpretation of Art. 230(4). What is affected is merely the way in which they all, ultimately, reach the European Court of Justice.¹⁴⁹ There are,

¹⁴⁵ Similarly Harding, *loc. cit.* fn. 2, p. 358, second para.: 'until that time their interest may be presumed to be insufficient.' In the same sense Daig, *loc. cit.* fn. 2, p. 195, last para.

¹⁴⁶ Case C-465/93, *Atlanta Fruchthandelsgesellschaft mbH* (III), [1995] ECR I-3761, paras. 32, 33. Nihoul, *loc. cit.* fn. 2, p. 188-189, expresses doubts as to whether a reference on validity will necessarily entail more delay than a direct challenge.

¹⁴⁷ Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen et al. v Hauptzollamt Itzehoe et al.*, [1991] ECR I-415, para. 31

¹⁴⁸ Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, [1986] ECR 1339, para. 23. Daig, *loc. cit.* fn. 2, p. 196, second para.

¹⁴⁹ Neuwahl, *loc. cit.* fn. 2, p. 30, fourth para., who does, however, see the advantage of indirect actions that national courts would 'act as a filter for manifestly ill-founded claims.' This might also explain

nonetheless, two situations which are not catered for. In these situations, the presumption of a complete system breaks down, and remedial action has to be considered.¹⁵⁰

The first situation arises if an act requires no implementation at all. This is the case with prohibitions stipulated in a regulation, as opposed to a directive or decision. Such prohibitions occur, with increasing frequency,¹⁵¹ in the context of the Community's Common Fisheries Policy. Whenever the stocks of a particular fish species are in danger of being over-fished, the Commission stipulates, by means of a Regulation, that vessels from designated Member States stop fishing for a certain time. Such prohibitions have immediate effect. They do not require any implementation, *i.e.* measures confirming the prohibition in, or applying it to, individual cases. The only way national authorities become involved at all is by punishing those who breach the prohibition. These regulations can be adopted without the participation of quota holders. This denial of participation is justified in light of the urgency with which the measures need to be adopted. They only circumscribe their addressees by the flag of their vessels, not by name. The quota are not property rights of their holders. Lastly, the boats are not rendered useless. The individuals' only chance, therefore, to challenge such a regulation is first to incur sanctions, penal or administrative, and then to challenge the legality of those sanctions.¹⁵²

The second situation not catered for in the present system occurs where a national court is not willing to consider the plaintiff's argument that the act of Community law underlying a national implementing measure might be void, or to refer a question to that effect to the ECJ.¹⁵³ There can be many reasons for such reluctance. The political significance of the matter, for instance the realisation of a large infrastructure project, may be one consideration. The Community measure can go unchallenged altogether if

why not every action declared inadmissible under Art. 230 bounces back to the Court under Art. 234(b). *Contra* Arnulf, *loc. cit.* fn. 2, [2001] CMLRev p. 51, third para.

¹⁵⁰ Daig, *loc. cit.* fn. 2, p. 196, second para.

¹⁵¹ See, *e.g.*, Regulations (EC) No. 2209/2003, [2003] OJ L330/20; No. 2248/2003, L333/41; No. 2255/2003, L333/48; Nos. 2264–2267, 2282/2003, L336/20–23, 94, all within less than a week.

¹⁵² In the same sense, Waelbroeck and Verheyden, *loc. cit.* fn. 2, p. 434, pt. 55.

¹⁵³ von Danwitz, *loc. cit.* fn. 2, p. 1112, right column, fourth para.; Nihoul, *loc. cit.* fn. 2, p. 192 *sub* C2.

the higher courts in the national judicial hierarchy share the recalcitrance of the lower ones.

Two mechanisms are conceivable for enforcing the obligation to refer. They are the usual mechanisms for policing Member States' obligations under Community law. One is, or rather would be, the one provided for in Art. 226 EC.¹⁵⁴ The notion of the 'Member State' (the defendant in any action under Art. 226) encompasses any body vested with public authority, whether constitutionally independent or not.¹⁵⁵ National courts thus share in the Member States' obligations under Art. 10 EC to fulfil the obligations arising out of the Treaty, and to abstain from any measures that could jeopardise the attainment of its objectives.¹⁵⁶ In practice, however, the Commission (which has unfettered discretion in this regard)¹⁵⁷ has not once brought an action under Art. 226 against a Member State for an alleged failure of its courts to live up to their obligations as Community courts in the Member States.¹⁵⁸ This is despite flagrant breaches of the duty to refer by, for instance, the *Conseil d'Etat*¹⁵⁹ and the *Bundesfinanzhof*.¹⁶⁰ The reason for the Commission's reluctance is not difficult to fathom. The ECJ's sitting in judgment over a national court would not be conducive to the spirit of mutual respect and co-operation between European Court of Justice and national courts which is the very foundation of the preliminary reference system.

¹⁵⁴ Imelda Maher, *National courts as Community courts* (1995) *Legal Studies* 226, p. 230, second para.; Gert Nicolaysen, *Vertragsverletzung durch mitgliedstaatliche Gerichte?* [1985] *Europarecht* 368, *passim*; Lenaerts and Arts, *loc. cit.* fn. 38, pts. 2-052-2-054 (p. 52 f.).

¹⁵⁵ Case 102/79, *Commission v Belgium* ('Tractors'), [1980] ECR 1473, paras. 14, 15; Case 97/81, *Commission v Netherlands* ('Drinking water'), [1982] ECR 1819, paras. 11, 12; Case C-145/97, *Commission v Belgium* ('Furnished accommodation'), [1998] ECR I-2643, paras. 1, 6, 9. For reasons of procedural economy, however, only the central government will (vicariously) be party to the proceedings before the ECJ.

¹⁵⁶ Case 14/83, *von Colson and Kamann v Land Nordrhein-Westfalen*, [1984] ECR 1891, para. 26, more recently, Case C-129/00, *Commission v Italy* ('Overpayments'), judgment of 9 December 2003, n.y.r., paras. 29-35, 41. More generally, see Temple Lang (above n. 2), *passim*.

¹⁵⁷ Case 247/87, *Star Fruit v Commission*, [1989] ECR 291, paras. 11-13; Case 48/65, *Lütticke et al. v Commission*, [1966] ECR 19, p. 27, 5th-8th para.

¹⁵⁸ Case T-219/95R, *Danielson v Council*, [1995] ECR II-3051, para. 77.

¹⁵⁹ *i.e.* the highest French administrative court, in *Ministre de l'Interieur v Cohn Bendit*, English translation in [1980] 1 CMLR 543.

¹⁶⁰ *i.e.* the highest German tax court, in *Kloppenburger*, discussed below.

The second mechanism is the corollary of the first, with enforcement entrusted to individuals in the Member States. Under the *Francovich* line of case-law,¹⁶¹ Member States can be held liable for their courts' failure to refer questions on the validity of a Community act to the ECJ. While this was, for a long time, a rather theoretical possibility,¹⁶² the Court has now expressly recognised this application of its jurisprudence.¹⁶³ It is true that the judgment dealt with the failure to refer a reference for the interpretation of Community law, rather than its validity. The reasoning must, however, be the same for the latter paradigm. What remains is the question which rights are violated by the failure to refer a question on validity. Part of the answer is, the same (property) rights as under the third paradigm for individual concern under Art. 230(4) (the '*Codornú*' paradigm).

These property rights are rather narrowly circumscribed. They would not help those who wanted to challenge, say, a quota allocation. Art. 234 EC, itself, imposes obligations on (some) national courts, but does not give rise to corresponding rights on the part of individuals.¹⁶⁴ These limitations do not, however, determine standing in the national courts. Neither do they bar any Community or national rights individuals may have when it comes to references.¹⁶⁵ Art. 234 may not be the source of these rights, but it may still be the vehicle for their realisation.

IV. Participation by National Courts as a Systemic Weakness? Advocate-General Jacobs' Opinion in *Unión de Pequeños Agricultores*

¹⁶¹ Starting with *Francovich*, and developed in *Brasserie de Pêcheur*, fn. 3 above.

¹⁶² Bernhard Wegener, *Staatshaftung für die Verletzung von Gemeinschaftsrecht durch nationale Gerichte?* [2002] *Europarecht* 785, *passim*.

¹⁶³ Case C-224/01, *Köbler v Austria*, judgment of 30 September 2003, n.y.r., paras. 33-36, 51-59. According to para. 122, breach will not be sufficiently serious, however, if a reply to the question cannot be found in the ECJ's case law, and if the reply was not obvious. The misreading by the national court of a judgment by the ECJ will not suffice. This appears a rather lenient application of the requirements, given that initially, the national court had correctly identified, and referred under Art. 234, an ambiguous point of Community law. Then, however, it withdrew its reference because it thought the answer followed from a judgment rendered by the ECJ in the meantime, yet not exactly on the same point, paras. 107-117.

¹⁶⁴ Joined Cases T-377/00 et al, *Philip Morris International et al. v Commission*, [2003] ECR II-1, para. 105.

¹⁶⁵ See below VI.

The most comprehensive reflection by an Advocate-General concerning the case-law on Art. 230(4) EC was offered by AG Jacobs in his opinion in *Unión de Pequeños Agricultores*. It is appropriate to deal with the opinion first not only because of its thoughtfulness but also because this best reflects the sequence of events: the Court of First Instance was apprised of the opinion when it delivered judgment in *Jégo-Quéré*, and the European Court of Justice could draw on both when deciding *Unión de Pequeños Agricultores*.

While building largely on ideas first put forward in his opinion in *Extramet*,¹⁶⁶ the opinion in UPA significantly develops the argument. In it, the Advocate-General takes issue with the proposition that the preliminary ruling procedure provides full and effective judicial protection against general Community measures. He develops two theses to this effect, which will be considered in turn. The gist of his critique is most poignantly captured in the first thesis, on which the remainder of the opinion rests. His critique is followed by the Advocate-General's own proposal for reform of the case-law, after two alternative proposals have been rejected.

1. 'Proceedings before national courts may not provide effective judicial protection of individual applicants.'

The first of the AG's arguments to underpin the thesis that proceedings before national courts may not provide effective judicial protection of individual applicants¹⁶⁷ is that national courts may not declare measures of Community law invalid. This would conflict with their competences when it comes to the interpretation, application, and enforcement of Community law.¹⁶⁸

This point is uncontroversial. Since *Foto Frost*,¹⁶⁹ the European Court of Justice, for reasons of legal certainty and in the interest of the uniform application of Community law in all Member States, has insisted on its monopoly to declare Community law void. Some Member States' legal systems reserve the right to quash normative acts to

¹⁶⁶ Case C-358/89, *Extramet v Commission*, [1991] ECR I-2501, pp. 2507 ff.

¹⁶⁷ Heading before para. 38 of the opinion.

¹⁶⁸ Para. 41.

¹⁶⁹ Case 314/85, *Foto Frost v Hauptzollamt Lübeck-Ost*, [1987] ECR 4199.

constitutional courts, but limit this increased protection to parliamentary statutes.¹⁷⁰ Any other act of general application can, if illegal, be set aside by any court. In the absence of a hierarchy among the various types of secondary Community law,¹⁷¹ however, this is not a viable option (yet).¹⁷²

Secondly, the AG argued that plaintiffs have no right for national courts to refer a question on the validity of Community law (or, for that matter, any type of question, be it on validity, or on interpretation) to the ECJ.¹⁷³ National legal remedies against such refusal, if they are available at all, take time. Also, even if the national court decides to make a reference, it alone determines the content of the question referred.¹⁷⁴

This, however, is in the nature of the procedure under Art. 234, it is, in the words of the Court, its ‘inherent feature.’¹⁷⁵ The national court retains full responsibility for the resolution of the dispute pending before it.¹⁷⁶ The European Court of Justice is a mere adviser in this, if an authoritative one: more than an *amicus curiae*, but less than a court of higher instance.¹⁷⁷ The responsibility of the national court would be obscured if the

¹⁷⁰ See, e.g., Art. 100(1) of the German constitution: ‘where a court considers that a law on whose validity its ruling depends is unconstitutional, it ... shall seek a ruling ... from the Federal Constitutional Court.’

¹⁷¹ See Case C-136/96, *Scotch Whisky Association*, [1998] ECR I-4571, para. 47: Regulation as *lex specialis* to a Directive.

¹⁷² Declaration No 16 annexed to the Treaty on European Union (1992) on the hierarchy of Community acts provided that ‘The Conference agrees that the Intergovernmental Conference to be convened in 1996 will examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of act.’ This has not been done in subsequent intergovernmental conferences. Art. 35 of the Draft Constitution of July 2003 ([2003] OJ C169/1) does not go beyond the principle that delegated legislation must keep within the limits of the enabling act, already *in nuce* contained in Art. 202 EC, see Case C-159/96, *Portugal v Commission* („Chinese Textiles’), [1998] ECR I-7379, paras. 40-45.

¹⁷³ In the same sense, see T-377/00 (above n. 164), para. 105.

¹⁷⁴ Para. 42.

¹⁷⁵ Case 97/85, *Union Deutsche Lebensmittelwerke et al. v Commission*, [1987] ECR 2265, para. 12.

¹⁷⁶ This is the starting point whenever the Court assesses the objection that a reference is inadmissible because the case in the national court (allegedly) does not involve Community law etc., see Case C-439/01, *Libor Cipra et al. v Bezirkshauptmannschaft Mistelbach*, [2003] ECR I-745, para. 18. This is not to deny that the guidance given by the Court can vary considerably. Even where the guidance given is more a leash than a helping hand, however, the point remains that the judgment enforceable between the parties is rendered by the national court; the point of Community law is only one of several to be considered.

¹⁷⁷ *Contra* Rasmussen, *loc. cit.* fn. 2, p. 114, fourth para., and p. 122, fourth para., who argues that the aim of the European Court of Justice in denying direct access under Art. 230 is to function as a kind of supreme appellate court for the Community, ‘or something very like it’ (Conclusion, p. 126). Some of his arguments for this have been overtaken by time: for example, since the extension of majority

parties to the proceedings could, ‘over the head’ of the national court, engage in whatever sort of dialogue with the ECJ. Consequently, the Court has resisted any attempts at this.¹⁷⁸

The third argument makes a related point. According to the AG, indirect challenges entail significant extra costs and delay. In the meantime, national courts may grant interim relief. To some extent, however, they do so at their discretion. In any case, measures adopted by national courts to grant interim relief are limited in their application to the Member State in question. The plaintiff might seek relief in several Member States simultaneously, but uniform decisions would not be guaranteed.¹⁷⁹

There are indeed practical disadvantages to this indirect method of challenging Community law. Disapplication of an act of Community law in some Member States, but not in others, would distort competition between economic operators in the several states. How one gauges this danger is another matter. On the one hand, and this confirms the AG’s position, Member States’ courts have only limited scope for granting interim relief against national measures implementing an allegedly void act of Community law. Before they do so, they must consider the cumulative effects of such

voting in successive Treaty amendments, Member States have challenged Community acts in increasing numbers. Also, the Court has awarded damages (as representative of the long-running ‘milk-quota saga,’ see Case C-104/89 etc., *Mulder* (no. 2), [1992] ECR I-3061), and has decoupled the action under Art. 235 from national remedies (see, e.g., Joined Cases T-481&484/93, *Vereniging van Exporteurs in Levende Varkens v Commission*, [1995] ECR II-2941, paras. 69-72). On close inspection, the ‘appellate court-hypothesis’ is based on a superficial similarity: appellate courts determine questions of law alone, only lower courts are also charged with establishing the facts of the case (Rasmussen p. 124). Under Art. 234, the Court’s ruling is on an abstract question of law, the factual side of the dispute is for the national court alone (p. 116, fifth para.). Hence, the European Court of Justice seeks to install itself as an appellate court (p. 125, second and third para.). Crucially, however, the Court is in no position ever to quash a judgment by a national court, and either to refer it back, or itself to decide the case.

¹⁷⁸ Case C-261/95, *Palmisani*, [1997] ECR I-4025, para. 31: ‘Article 234 of the Treaty instituted a *system of direct cooperation between the Court of Justice and the national courts* by way of a non-contentious procedure which is *completely independent of any initiative by the parties*, who are merely invited to state their case within the legal limits laid down by the national court’ (emphasis added); Case C-412/96, *Kainuun Liikene*, [1998] ECR I-5141, paras. 21–24; Case C-43/97 *WWF et al. v Autonome Provinz Bozen et al.*, [1999] ECR I-5613, paras. 28–33. The ECJ will, however, be guided by the submissions of the parties where the national court has set out its concerns against the validity of an act of Community only in vague and general terms, see Joined Cases 103 and 145/77, *Royal Scholten Honig*, [1978] ECR 2037, paras. 16, 17.

¹⁷⁹ Para. 44.

disapplication by courts in several Member States.¹⁸⁰ This requirement is intended to caution them against granting interim relief lightly. On the other hand, it is by no means a foregone conclusion that the European Court of Justice will grant interim relief, or that it will at least be readier to do so than national courts.¹⁸¹

The wider question behind this and the second argument is, however, why the Treaty should provide at all for the involvement of national courts in the adjudication of the legality of Community acts. The Advocate-General's critique is so comprehensive that it can be understood to view the participation by national courts in the control of the validity of secondary Community law *in itself* as a weakness of the system. The Court seems to view things differently. Its answer is aptly summarised by a phrase used in an earlier judgment: the national courts are 'the ordinary courts of Community law.'¹⁸² To put it differently, the division of functions between the European Court of Justice and the national courts is rooted in the same considerations that underlie the principle of subsidiarity in Art. 5 EC.¹⁸³ This provision applies specifically to the legislative competence of the Community. It does not, however, exhaust the principle of subsidiarity. A wider reading is found in the last recital of the preamble to the Treaty on European Union. It says that it is in accordance with the principle of subsidiarity if 'decisions are taken as closely as possible to the citizen.' This idea applies in the judicial sphere, too. The involvement of national courts in the adjudication of Community law gives that law a 'local presence,' both institutionally and substantively.

¹⁸⁰ Case C-465/93, *Atlanta Fruchthandelsgesellschaft mbH* (No. 3), [1995] ECR I-3761, para. 44.

¹⁸¹ For a recent denial, see Case T-155/02R, *VVG Internationale Handelsgesellschaft et al. v Commission*, [2002] ECR II-3239, paras. 17-19. In fact, the Court grants interim relief very rarely.

¹⁸² Case T-219/95R, *Danielson v Council*, [1995] ECR II-3051, para. 77; already in Case 283/81, *CILFIT*, [1982] ECR 3415, para. 7, the Court had spoken of 'national courts, in their capacity as courts responsible for the application of Community law.' Similarly Marco Darmon, *Réflexions sur le recours préjudiciel*, [1995] 31 Cahier de Droit Européen 577, at p. 578, fourth para.: 'Le juge national est le recours légal du particulier. Juge communautaire du droit commun, il applique directement la norme communautaire' (emphasis added). Maher, *loc. cit.* fn. 154, *passim*.

¹⁸³ Stephen Weatherill, *Law and Integration in the European Union*, OUP 1995, p. 109, 1st para.: '[Art. 234] displays the best aspects of subsidiarity.' Further examples in Weatherill & Beaumont, *European Union Law*, 3rd. ed. London (Penguin) 1999, p. 559. In the same sense Nihoul, *loc. cit.* fn. 2, p. 194. By contrast, Waelbroeck and Verheyden, *loc. cit.* fn. 2, p. 435, pt. 58, argue that subsidiarity would require the ECJ to allow direct actions to remedy the shortcomings of challenges under Art. 234; similarly Vandersanden, *loc. cit.* fn. 2, p. 549, pt. 32.

Institutionally, it allows citizens to turn to courts in their proximity, where their language is understood by everyone on the bench, without the help of interpreters. In substantive terms, the participation of national courts in assessing the validity of secondary Community law is the flipside of the principles of supremacy and direct effect of Community law. Those courts routinely apply Community law. They use it as a guide to the interpretation of national law. This helps avoid clashes between the legal orders. Incompatibilities would otherwise have to be resolved by Community law asserting its supremacy. This outcome, if at all avoidable, is in nobody's interest; it is preferable to interpret national law in a way that renders it compatible with Community law. Apart from this, national courts apply Community law without the medium of national law, as a consequence of either the direct applicability, or direct effect, of Community law. Community law is, thus, as much part of the law of the land as is the law created by national legislatures and courts. Member States' courts are called upon to measure national law by the yardstick of Community law which is, in all its binding varieties, higher-ranking than national law of any description.¹⁸⁴

In the same way, national courts should be the first ports of call for any queries regarding the compatibility of secondary Community law with higher-ranking (typically primary) Community law. This not only acknowledges, in a way conducive to their willingness to co-operate, their central role in the judicial edifice of the Treaty's judicial system. It also makes them the one-stop-shop for the legal protection of the individual, thus bringing decisions in matters vital to the individual 'closer to the citizen.' Seen in this way, the system as set up in Arts. 230 and 234 is not defective. Rather, it embodies a balance between efficiency and integration. This balance may be struck differently. Quite a separate question is, however, whether any 'correction' of this balance can be brought about by jurisprudential means, as the Advocate-General argued, or whether this requires a Treaty amendment, as the Court held.

Quite apart from this, counsel to the plaintiff will always try to cast the net of possible grounds of annulment as wide as possible, including irregularities purely under national

¹⁸⁴ Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Futtermittel*, [1970] ECR 1125, para. 3.

law. Pleadings based on national law, however, will always be for the national courts alone. No-one currently suggests transferring them to the European Court of Justice, and the Court has always been adamant that questions of national law are for the national courts alone.¹⁸⁵ As soon as the parties, therefore, allege faults under national law, the bifurcation in the legal protection returns. To make matters even more complicated, the national court thus seized might want to refer a question on interpretation under Art. 234(a) to the ECJ. The question, for instance, whether the national authorities have correctly exercised their discretion depends on the leeway the underlying Community act grants them in the matter. The ECJ would not want to give judgment on the question before the validity of the act is ascertained. This is advisable not least because the Community act might have to be interpreted restrictively in order to be legal in the first place.¹⁸⁶ As a consequence, however, the national proceedings would be yoked with the necessity to await the outcome of the Court's finding on validity in exactly the same way as is currently the case with a reference on validity under Art. 234(b).

The Advocate-General's third argument was that where no implementation of the act of Community law is required, individuals would have to break the law in order to gain access to justice. This is, in the eyes of the AG, not a reasonable proposition (para. 43). This justified criticism is the very idea underlying the Court of First Instance's judgment in *Jégo-Quéré*.¹⁸⁷

2. 'Proceedings before the Court of First Instance under Art. 230 are generally more appropriate for determining issues of validity than references under Art. 234.'

To underpin the thesis that proceedings before the Court of First Instance under Art. 230 are generally more appropriate for determining issues of validity than references under Art. 234, the Advocate-General argues firstly that the adopting institution is party

¹⁸⁵ See the text below with footnotes 236 and 237.

¹⁸⁶ For an example, see Case 29/69, *Erich Stauder v Stadt Ulm, Sozialamt*, [1969] ECR 419 where the Court avoids annulling a Community regulation by interpreting it restrictively in the light of the plaintiff's human rights, or Case 15/81, *Schul*, [1982] ECR 1409, paras. 42-43: interpretation of a Directive on VAT in the light of Art. 90 EC.

to the proceedings throughout. Also, preliminary references are more widely publicised, and the possibility to intervene is readily available.¹⁸⁸ Secondly, the problems of interim relief mentioned before do not occur.¹⁸⁹ Thirdly, direct actions can only be brought within two months, thus speeding legal certainty. By contrast, preliminary references concerning substantially the same question can be brought before the Court long after this.¹⁹⁰

The first point is correct, if more of a technical nature. Art. 15 of Reg. 1/2003, for instance, provides for a method of creating transparency in the application of Arts. 81 and 82 EC by Member States' courts. It allows the Commission to make, where necessary, representations in national proceedings. This might serve as a model for Art. 230. Problems of interim relief have been discussed above. The problem of legal certainty, addressed by the third argument, arises also in proceedings before the European Court of Justice. It can be dealt with, more or less satisfactorily, by limiting to the future (*ex nunc*) the temporal effects of judgments;¹⁹¹ Art. 231(2) EC envisages this possibility for direct actions.

3. Reform proposals by the parties to *Unión de Pequeños Agricultores*

Before advancing his own solution, the Advocate-General rebutted the suggestions of, respectively, the plaintiffs and the defendants. UPA had suggested that, in the absence of sufficient remedies under national law, an individual should be allowed to bring an action in the ECJ. Against this, the Advocate-General argued that the interpretation of national law was not the task of the ECJ. Also, standing might, as a consequence of this approach, differ from Member State to Member State.¹⁹² This is undeniable, and it tallies with the long-standing view of the Court that it is not called on to interpret national law. This argument became decisive in the judgment in *Unión de Pequeños Agricultores* to deny standing.¹⁹³

¹⁸⁷ Cf. V below.

¹⁸⁸ Paras. 46, 47.

¹⁸⁹ Para. 46.

¹⁹⁰ Para. 48.

¹⁹¹ Joined Cases C-177/99 and C-181/99, *Ampafrance*, [2000] ECR I-7013, paras. 64-69.

¹⁹² Paras. 50-53.

¹⁹³ Para. 43 of the judgment.

Council and Commission, by contrast, had argued that the solution should be sought in an amendment of the rules of national procedural law if those rules made it difficult or impossible for individuals to obtain legal protection. Against this, the Advocate-General highlighted the fact that, as a matter of Community law (Art. 234 EC), there would still be no right for individuals to have national courts refer questions to the European Court of Justice. An obligation under national law, however, would be difficult to enforce. Also, the suggestion would entail a far-reaching incursion into the Member States' procedural autonomy.¹⁹⁴

One might wonder whether Art. 234 must indeed be read in the way suggested by the Advocate-General. In *Foto Frost*,¹⁹⁵ the European Court of Justice already substituted 'shall' (as in Art. 234, third para.) for 'may' in Art. 234, second para. The ECJ has, arguably, not yet exhausted the potential of this judgment. Also, an obligation under national law to refer need not be more difficult to enforce than other procedural provisions. At any rate, Member States' procedural autonomy is not absolute. It is limited by the requirements of equivalence and effectiveness,¹⁹⁶ flowing from Art. 10 EC. This provision belongs to the 'Principles' of the Community, as indicated by the Treaty's chapter heading. It is the legal basis for national courts' obligation to interpret national law – public or civil, and whenever adopted – so far as possible in a way that ensures its compatibility with Community law.¹⁹⁷ Hence, if a national court fails to do so, this is a failure to construe Member State law correctly. Like other such failures, it is reviewable under national law. Considered this way, it is more a matter of taste whether an express stipulation that failure to refer questions on the validity of Community law must also be reviewable, is really such a far-reaching incursion at all. A similar principle is already recognised, as a matter of national law, in at least one Member State. Arguably, Community law can be interpreted in this way, too, cf. below VI.

¹⁹⁴ Paras. 54-58.

¹⁹⁵ Case 314/85, *Foto Frost v Hauptzollamt Lübeck-Ost*, [1987] ECR 4199.

¹⁹⁶ cf. text and references in fn. 237.

4. The Advocate-General's own reform proposal

The Advocate-General's own solution is 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* (para. 60).¹⁹⁸ He identified several advantages of this proposal: no-one who was directly affected would ever be without legal protection (para. 63). The disadvantages of indirect challenges would be avoided (para. 65). A simple criterion would replace ever more opaque and questionable distinctions in the case-law on Art. 230 (paras. 64, 66 – 71). These advantages are undeniable, yet they might appear less enticing if one were not to subscribe to all aspects of the Advocate-General's critique on which they build.

The Advocate-General also argued that the proposal would harmonise the interpretation of Art. 230 with that of Arts. 235 and 288(2) EC (action against Community institutions for non-contractual damages). Under this procedure, comparable limitations as under Art. 230 do not apply, despite the fact that the substantive questions are related (para. 72).

It is true that the substantive questions are similar under both proceedings. This is, however, where the similarities end. According to the jurisprudence of the Court, the two actions are, with few exceptions, independent of each other.¹⁹⁹ What is more, a longer time limit applies to actions under Art. 235 (five years according to Art. 46 of Protocol No. 6 on the Statute of the Court of Justice, annexed to the Treaty) something the Advocate-General had highlighted as a shortcoming of indirect challenges as compared to direct ones. An assimilation of Arts. 230 and 235 does, therefore, not appear the most obvious solution to the problems besetting the present system of challenging the validity of secondary Community law.

¹⁹⁷ Cases 14/83, *von Colson*, [1984] ECR 1891; 79/83, *Harz*, [1984] ECR 1921; C-106/89, *Marleasing*, [1991] ECR I-4135; C-443/98, *Unilever Italia v Central Food*, [2000] ECR I-7535; Case C-287/98, *Linster*, [2000] ECR I-6917.

¹⁹⁸ In a similar sense earlier Vandersanden, *loc. cit.* fn. 2, p. 548, pt. 29, with a proposal for a reworded Art. 230 on p. 551, pt. 35.

A further advantage of the proposed solution is, according to the Advocate-General, that it would bring Community law up to date with developments in the laws of the Member States. The latter are all more generous in granting standing (paras. 85, 86).

The argument derived from the admissibility of actions in national courts does not, however, seem to be based on a comparison of like with like. Community regulations, at least basic regulations,²⁰⁰ are the equivalent of parliamentary statutes in a national setting. It is by no means clear that in all Member States, or even in a majority of them, it is possible to challenge such legislation in the courts.²⁰¹

The Advocate-General acknowledges that it may be true that access to judicial review of legislation is generally subject to stricter conditions than review of administrative measures. Nevertheless, the laws of the Member States do not in general *exclude* individuals from challenging legislation (allegedly) violating constitutionally enshrined rights or fundamental principles of law (para. 89).

The point would, however, have to be made that it is *as easy* to challenge legislation as any other legally binding measure. It might be precisely because of the two tiers of courts, Community and national, involved in the review of Community law, that direct access to the European Court of Justice need not be granted as generously as access to the national courts.²⁰² In the same way, access to constitutional courts in the national

¹⁹⁹ Case T-186/98, *Inpesca v Commission*, [2001] ECR II-557; most recently in Case T-180/00, *Astipescas SL v Commission*, [2002] ECR II-3985, paras. 139-141, 145, 146. Albers-Llorens, *loc. cit.* fn. 2, p. 208 also emphasises the different purposes of the two actions.

²⁰⁰ 'Basic' regulations are those which lay down the broad outlines of policy in a given field. They are typically adopted by the Council, alone or jointly with the European Parliament under the co-operation procedure, and authorise the Commission to adopt more specific implementing provisions. The distinction in Art. 202, third indent, EC (mentioned by the Advocate-General in para. 90 of his opinion) does not establish a lesser status, with regard to the possibility of judicial review, of such implementing measures, as least not as the Treaty currently stands, see Moitinho de Almeida, *loc. cit.* fn. 2, p. 870, second para.

²⁰¹ See Harlow, *loc. cit.* fn. 2, p. 228, third para.; Harding, *loc. cit.* fn. 2, p. 356, second para.; Moitinho de Almeida, *loc. cit.* fn. 2, p. 869, second para. Like the Advocate-General, however, Waelbroeck and Verheyden, *loc. cit.* fn. 2, pp. 404-425, and more guarded pp. 436-439: the first passage refers to acts that would have to be characterised as 'bye-laws,' whereas the second, more to the point made in the text, is about statutes properly so-called.

²⁰² Waelbroeck and Verheyden, *loc. cit.* fn. 2, p. 440, pt. 68 (similarly Ward, *loc. cit.* fn. 2, p. 203, third para.) see a contradiction in the Court's insistence that Member States provide effective remedies for rights derived from Community law (see fn. 237), when the Court itself is not willing to grant such

setting is sometimes made dependent on prior exhaustion of all remedies in the ordinary courts.²⁰³

Finally, the suggested interpretation of Art. 230(4) would, the Advocate-General argued, adequately transpose the Court's jurisprudence on the principle of effective judicial protection in national courts of rights derived from Community law (paras. 97, 98).

To the extent that there would be no (reasonable) access to national courts at all, this idea has been taken up by the Court of First Instance in *Jégo-Quééré*. With regard to situations where there is access to those courts, the Advocate-General's argument seems, once again, to view indirect review under Art. 234(b) as merely an inefficient detour to the ECJ, without any intrinsic value. It is not a foregone conclusion that this is the most plausible, let alone the only possible interpretation (see above IV1a).

In all, therefore, the reform proposal is fully convincing only on the basis of the Advocate-General's criticism of the existing system – which one may or may not share.

V. The First Weakness and the Development in the Court's Case-Law: *Jégo-Quééré*

1. The Court of First Instance's judgment of 3 May 2002

In June 2001, the Commission adopted a Regulation for the immediate reduction in the fishing of hake. The Regulation applied to specific fishing areas, and prescribed a minimum mesh size for fishing nets in order to protect juvenile hake. Also, the Regulation only applied to boats over a certain length, fishing for longer than a defined time. *Jégo-Quééré*'s boats and fishing effort answered this description, and hake accounted for about two thirds of the company's catches. The company challenged the Regulation before the Court of First Instance; the Commission raised the objection of

remedies regarding challenges to Community acts. This criticism is, however, not based on a comparison of like with like: with respect to challenges to Community measures, the functions of national courts and European Court of Justice are complementary, whereas in the national realm, national courts are alone responsible.

²⁰³ For an example, see §90(2) of the *BVerfGG* (Law on the Federal Constitutional Court).

inadmissibility. The Court ran through the test of admissibility in the way described above:

The CFI first established that the provisions of the Regulation addressed, in abstract terms, an indefinite category of persons and objectively defined situations.²⁰⁴ The general scope of its provisions did not, however, mean that the Regulation could not be of direct and individual concern to Jégo-Quééré.²⁰⁵ The Court had no problem establishing direct concern, as the regulation did not require the application of other rules, and left no discretion in its application.²⁰⁶ For the assessment of individual concern, the Court took the *Plaumann* formula as its starting point. The mere fact, however, that Jégo-Quééré was the only company whose boats were affected, and that its catches were drastically reduced, was not decisive.²⁰⁷ There was also no specific provision of Community law which obliged the Commission to ascertain, or to take notice of, the circumstances of Jégo-Quééré before adopting the Regulation.²⁰⁸ Art. 33 EC, or any informal contacts between the Commission and Jégo-Quééré, were equally insufficient to establish individual concern.²⁰⁹ Nor were there circumstances which singled the company out as did those in *Codorníu* or *Extramet*.²¹⁰

The judgment thus merely confirms what has been developed above. So far, there is nothing novel about it. Nonetheless, Jégo-Quééré would, for want of an action under Art. 230(4) EC, have had no legal recourse whatsoever. This was because the regulation required no implementation by national authorities against which the company could turn (para. 39). Access to a judge, the Court pointed out, is a fundamental requirement of the rule of law on which the Community is based. Such access is moreover recognised and protected in the European Convention for the Protection of Human

²⁰⁴ Paras. 23, 24.

²⁰⁵ Para. 25 with reference to, *i.a.*, *Extramet* and *Codorníu*.

²⁰⁶ Para. 26.

²⁰⁷ Paras. 29, 30.

²⁰⁸ Paras. 32, 36.

²⁰⁹ Paras. 33-35.

²¹⁰ Para. 37.

Rights, and in the Charter of Fundamental Rights of the European Union proclaimed at the Nice summit in December 2000.²¹¹

There was no alternative redress for Jégo-Quéré commensurate with these standards: none under Art. 234 EC, as the company would first have to break the law before it could challenge the validity of the Regulation underlying that law; and none under Art. 235/288 EC, either, because damages would not remove the allegedly illegal act, but merely mend, retroactively, its consequences. Also, under the latter procedure, review by the Court is limited to assess whether a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.²¹² Simple illegality is not enough.

As a consequence, whilst the CFI pointed out that these circumstances did not allow it to declare admissible an action which did not meet the requirements of Art. 230(4),²¹³ under the prevailing circumstances, there was no need to limit standing to those who are singled out in a way similar to the addressee of the measure, as required by the *Plaumann* formula.²¹⁴ Rather, in order to provide a complete system for the control of the legality of all Community acts, a person will be considered as individually concerned if a measure of general scope affects the person directly, and if the person's rights are affected in a manner which is both definite and immediate. This would be the case if the person's rights were restricted, or obligations imposed on him. The number and the situation of others who are equally affected is immaterial in this regard.²¹⁵ The action was, therefore, declared admissible, and judgment on the substance was reserved.

The judgment might give rise to two misconceptions. The first is that it is of universal application, thus revolutionising the interpretation of Art. 230(4).²¹⁶ The second might be that it is of no significance at all beyond the narrow confines of the case. In order to

²¹¹ Paras. 41, 42.

²¹² Paras. 45-47.

²¹³ Para. 48.

²¹⁴ Para. 49.

²¹⁵ Paras. 50, 51.

²¹⁶ This was the first reaction of some lawyers to the judgment, quoted in *Financial Times* of 4/5 May 2002, and Ragolle (above n. 2), at p. 90.

understand *Jégo-Quéré*'s proper place and contribution to the Court's jurisprudence, these misconceptions have to be addressed in turn.

(a) Revolution?

The first misconception of the judgment could be that it throws overboard the Court's entire jurisprudence on individual concern. In this view, the judgment would replace the essentially procedural notion of individual concern with a substantive one. It is true that the regulation in issue in *Jégo-Quéré* was not of individual concern, in the technical sense, to the company. This alone, however, is not decisive. Crucially, the regulation did not require any implementing measures. There was, therefore, no way to the Court of First Instance, nor to a national court, other than following a breach of the prohibition stipulated in the regulation. First incurring prosecution (or being subjected to any other procedure with a view to the imposition of sanctions) is, however, no longer regarded as reasonable by the Court. This would force the plaintiff to seek his or her rights, as it were, fighting 'with the back against the wall.' In this, the Court takes up, somewhat belatedly,²¹⁷ a suggestion made by Advocate General Verloren van Themaat in his opinion in *Binderer*.²¹⁸ The Advocate General had argued that the Court should grant immediate access to a plaintiff in cases where a preliminary reference could only arise out of criminal proceedings in a national court.

In this situation, *Jégo-Quéré* will still not allow just anyone, by means of an *actio popularis*, to challenge a regulation (or other measures not requiring implementation). The judgment expressly retains a test of individual concern: the measure must '[affect the plaintiff's] position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.' This formula contains two elements. It talks, firstly, about the manner in which the plaintiff must be affected, and secondly, about rights restricted and obligations imposed. On close inspection however, the Court

²¹⁷ In the order in Case 55/86R, *Arposol v Commission*, [1986] ECR 1331, para. 19, the President of the Court held that '... any penalties imposed by the courts of that Member State will be imposed in accordance with the procedure in force in that state, so that procedural safeguards, rights of appeal, and the *possibility of requesting the European Court of Justice for a preliminary ruling* will be available' (emphasis added). In the actual judgment, however, the Court held that the regulation in issue was not of direct concern anyway ([1988] ECR 13, paras. 11-13).

²¹⁸ Case 147/83, *Binderer* (above n. 94), at p. 262.

translates the first element into the second. The preposition ‘by’ indicates that a restriction of rights or an imposition of obligations brings about the required definite and immediate change in the plaintiff’s legal position.²¹⁹ The restriction or imposition will do so in a situation where the regulation does not require any implementing measures.

Seen in this light, the test for individual concern looks very similar to the definition for when a measure is legally binding (cf. above at III). The difference is, however, that for an act of secondary Community law to be legally binding, it is enough that it restricts the rights of (or imposes obligations on) anyone at all, not necessarily the plaintiff. This is because the requirement of a binding act applies to actions brought by any applicant, even to those brought by the so-called privileged applicants listed in Art. 230(2) EC. These may challenge a measure in order to defend their own rights, or someone else’s, or purely in the interest of the legality of Community law. Private (or ‘non-privileged’) applicants, by contrast, may only pursue their own interest under Art. 230. In other words, they must, under the *Jégo-Quéré* test for individual concern, argue that they come within the personal scope of the measure in issue. That is, they must make the case that it is they (alone, or among others) on whom the regulation imposes obligations, or from whom it takes rights away.

This substantive test of individual concern is, in effect, not so different from the procedural one. The reason why certain parties are granted the right to participate in the procedure is, on the one hand, that they have first-hand knowledge of the market affected, which is valuable to the Community institution adopting the act. On the other hand, and this is often the corollary of the first aspect, these parties will be affected in their legal position by the measure eventually adopted. To put it differently, those who would have to be heard will mostly be the same as those whose legal position is materially affected. *Jégo-Quéré* does not, therefore, in substance deviate much from the

²¹⁹ This is confirmed by other language versions of the judgment. The French original says ‘... si la disposition en question *affecte, d’une manière certaine et actuelle*, sa situation juridique *en restreignant ses droits ou en lui imposant des obligations*’ (emphasis added). The German version reads ‘... wenn diese Bestimmung ihre Rechtsposition *unzweifelhaft und gegenwärtig beeinträchtigt, indem sie ihre Rechte einschränkt oder ihr Pflichten auferlegt*’ (emphasis added).

existing case-law. Rather, it adapts this case-law to the situation of an act which is of direct concern to the plaintiff, and which does not require any implementing measures at all, but which is, at the same time, not of individual concern in the usual, technical sense. For such acts, too, *Jégo-Quéré* establishes a filter against attempts to use Art. 230(4) as an *actio popularis*.

(b) Nothing happened?

The second misconception might be that *Jégo-Quéré* was, to use a well-worn phrase, ‘decided on the facts.’ That is to say, it has no wider implications, and will not again come to be applied, except in strictly identical factual circumstances (allowing, of course, for different parties, and maybe a different regulation under challenge). Quite apart from the fact that this assertion can always be made, to argue in this way would ignore the systematic context of the judgment. As we have seen, there was, previously, a gap in the legal protection of those affected by measures of the type in issue in *Jégo-Quéré*. The gap might have appeared tolerable to the Court some twenty years ago in *Arposol*, but this was not good enough any more.

The Court was finally swayed in the other direction by three factors. There is, first, a heightened awareness of fundamental rights. This has found expression recently in the Charter of Fundamental Rights of the European Union, alluded to in *Jégo-Quéré*.²²⁰ This is true despite the fact that the said document is, at present, not legally binding. Secondly, it is more clearly understood that there is no point in having rights if they cannot be enforced. For this reason, Article 47 of the Charter grants a right to an ‘effective’ remedy. Thirdly, Community law has, since the 1990s, come under increased scrutiny, both in the legal, and possibly even more in the political sphere. It could not be seen to cover policy areas previously reserved for the Member States, without correspondingly extending adequate legal protection to individuals.

²²⁰ Paras. 41 and 47.

As it turns out, therefore, *Jégo-Quéré* is only a reading of Art. 230(4) EC in the light of the plaintiff's human rights.²²¹ This is hardly a novel approach. We find this technique already in 1969, in the *Stauder* case.²²² This judgment started the Court's jurisprudence on human rights as guaranteed under Community law. In *Stauder*, a regulation was read in the light of the human rights of those affected by it. Human rights were, henceforth, recognised as 'rules of law relating to [the] application [of the Treaty]' in the sense of Art. 230(2) EC. The situation in *Jégo-Quéré* is different in that a provision of the Treaty itself, Art. 230(4), is read in the light of human rights. Here is not the place to embark on a discussion whether the Treaty contains rules of different rank, and what rank unwritten rules should be accorded. Rather, *Jégo-Quéré* fits an established interpretative pattern: that of the teleological interpretation of norms of Community law. The purpose of Art. 230(4) is to help individuals assert their rights under Community law. The interpretation of the provision must be guided by this purpose. The technical (procedural) interpretation of the provision, combined with the remedies available for those lacking *locus standi* under Art. 230 as a 'first action' (cf. above II4a), is capable of ensuring sufficient legal protection for individuals in most cases. Where the traditional interpretation fails to achieve this, it must be replaced with another, suitable one. No more and no less is done in *Jégo-Quéré*. It would, therefore, be too simple to dismiss the judgment as an isolated incident. *Jégo-Quéré* does contain a principle of wider importance.

2. The European Court of Justice' judgment in Unión de Pequeños Agricultores – revocation of Jégo-Quéré?

Only a few months after the Court of First Instance's judgment in *Jégo-Quéré*, the ECJ had the opportunity again to consider the requirement of effective judicial protection under Community law, in its judgment in the case of *Unión de Pequeños Agricultores* (UPA).²²³

²²¹ Similarly, the ECJ explained in Case C-312/00P, *Commission v Camar et al.*, [2002] ECR I-11355, para. 78, that its judgment in *UPA* is motivated by the principle of effective legal protection.

²²² Case 29/69, *Erich Stauder v Stadt Ulm, Sozialamt*, [1969] ECR 419. Another prominent example is the Court's jurisprudence on the duty of Member States' courts to interpret national law in the light of Community law, see fn. 197 above.

UPA was a trade association representing small Spanish agricultural businesses. It had, in the Court of First Instance, challenged a regulation which discontinued an aid scheme for olive oil.²²⁴ The CFI held the action inadmissible because the association did not fulfil the usual conditions (see above III-3) for individual concern. The Court of First Instance also rejected UPA's argument that it should be held individually concerned, and thus granted access to the Court, because the route through the Spanish courts would not grant it effective legal protection. UPA appealed against the order of the President of the Court of First Instance to the European Court of Justice. In both instances, the association proffered essentially the same arguments why its fundamental right to effective judicial protection was infringed.

Firstly, the regulation did not require any national implementing measures against which those affected could turn. Unión de Pequeños Agricultores' members could not even breach a prohibition and then challenge the validity of any sanctions imposed on them.²²⁵ Secondly, even if they could, the regulation was only valid for three years; proceedings in the national court, including a reference to the European Court of Justice, would take longer than that.²²⁶ UPA also contended²²⁷ that the Spanish government had refused a request by the region of Andalucía to challenge the regulation, as a privileged applicant under Art. 230(2). The Commission retorted in the appeals proceedings that UPA or its members could apply to the Spanish authorities for payment of the aids received before, and then challenge a refusal or a failure to comply on the part of those authorities.²²⁸

In response, the European Court of Justice first set out the traditional definition of individual concern.²²⁹ Next, it stressed individuals' entitlement to effective judicial protection, as required by the rule of law.²³⁰ To this end, the Treaty had established a system of judicial protection, providing both for direct, and indirect means of

²²³ Case C-50/00P, *Unión de Pequeños Agricultores v Council*, [2002] ECR I-6677.

²²⁴ Case T-173/98, *Unión de Pequeños Agricultores v Council*, [1999] ECR II-3357.

²²⁵ Para. 25 of the CFI's order; repeated, as a ground of appeal, in para. 26 of the ECJ's judgment.

²²⁶ Para. 30 of the order, not repeated in the proceedings before the ECJ.

²²⁷ Para. 28 of the order.

²²⁸ Para. 31 of the judgment.

²²⁹ Paras. 35-37.

protection.²³¹ The ECJ went on to say that Member States must enable individuals to obtain protection under Community law in the national courts. This obligation follows from Art. 10 EC.²³² It was not, however, the Court's task, when reviewing the legality of Community measures, to examine in each case whether indeed, national law enabled individuals to be so protected. It would go beyond the jurisdiction of the ECJ to grant access to the Court directly if national law failed to grant adequate protection.²³³ This would, effectively, abolish the requirement of individual concern. It could, therefore, not be done by jurisprudential means. Instead, a formal Treaty amendment would be required (paras. 44, 45).²³⁴

The question whether this overrules *Jégo-Quéré*, if implicit, can be answered in two ways. Firstly, it can be seen as an overruling.²³⁵ On the face of the judgment in *UPA*, the Court is unwilling to attempt any interpretation of its own of national (procedural) law. It will also not be drawn into controversies between the parties on the interpretation of national law.²³⁶ This is in keeping with the ECJ's jurisprudence on Art. 234. The Court has consistently held that the interpretation of national law is exclusively for the courts of the Member States,²³⁷ a task they must carry out before referring questions to the ECJ.²³⁸ Seen in this light, any arguments about the deficiencies of national procedures

²³⁰ Paras. 38, 39.

²³¹ Para. 40; see above II4.

²³² Paras. 41, 42.

²³³ Para. 43. The President of the Court of First Instance in a later judgment emphasised that this applies even more where the plaintiffs did not deny that there was recourse to the national courts which allowed the Community act to be called into question, Case T-155/02R, *VVG Internationale Handelsgesellschaft et al. v Commission*, [2002] ECR II-3239, para. 39.

²³⁴ The same argument was, before *Jégo-Quéré*, used by the Court of First Instance in Joined Cases T-172 etc./98, *Salamander et al. v EP & Council*, [2000] ECR II-2487, paras. 74, 75.

²³⁵ Ragolle (above n. 2), at p. 97 f.

²³⁶ See, most recently, Case C-153/00, *Paul der Weduwe*, [2002] ECR I-11319, paras. 35-39, and Daig, *loc. cit.* fn. 2, p. 197, second para.

²³⁷ See the summary, with references, in Case C-107/98, *Teckal v Comune di Viano*, [1999] ECR I-8121, para. 33. This should not be confused with the Court's respect for the 'procedural autonomy of the Member States,' limited, however, by the principles of equivalence (or non-discrimination) and effectiveness, cf. most recently Case C-255/00, *Grundig Italiana v Ministro delle Finanze* (No. 2), [2002] ECR I-8003, paras. 33-41, and Case C-336/00, *Republik Österreich v Martin Huber*, [2002] ECR I-7699, paras. 55-58, 61. The last mentioned jurisprudence only applies once the meaning of national provisions has been established by the referring national court. The European Court of Justice will treat this interpretation as a given, Case C-261/95, *Rosalba Palmisani*, [1997] ECR I-4025. Similarly, the Court will not be drawn into any controversies about the factual basis of the dispute in the national court, *Teckal*, para. 30.

²³⁸ Case C-83/91, *Wienand Meilicke v ADV-Orga AG*, [1992] ECR I-4871, para. 29

are reserved for proceedings under Art. 226. They have no place in the context of Art. 230. To entertain them in this context would ‘go beyond [the Court’s] jurisdiction when reviewing the legality of *Community* measures.’²³⁹

Secondly, however, the European Court of Justice’s response has to be understood against the backdrop of the underlying dispute, and of the parties’ arguments. There is a crucial difference between the regulations in issue in, respectively, *Jégo-Quééré*, and *Unión de Pequeños Agricultores*. The fishing regulation in issue in *Jégo-Quééré* stipulated an absolute prohibition. Member States have lost all residual competences in the area covered by the Common Fisheries Policy.²⁴⁰ They cannot grant any quota over and above those provided for at the Community level.²⁴¹ For this reason, there could not even be a procedure in which the authorities’ future course of action would be in issue.²⁴² Any interference with the system established by the regulation would be impermissible.²⁴³ As a consequence, there would be no other context but criminal proceedings (or some other procedure resulting in sanctions) in which arguments against the regulation’s validity could be raised at national level. This remains true even if national law offered some procedure for seeking, beforehand, a declaration from the authorities that they would not prosecute violations of the regulation.²⁴⁴ It is established in the Court’s jurisprudence that the exercise of rights under Community law can never, as such, be against public policy and give rise to criminal sanctions.²⁴⁵ In the same vein, individuals must not be compelled to assert their rights in criminal proceedings, or *vis-à-vis* prosecuting authorities.

²³⁹ Para. 43 of *UPA*, emphasis added.

²⁴⁰ Case 804/79, *Commission v UK* (‘Fish resources’), [1981] ECR 1045, paras. 29, 30.

²⁴¹ This is the backdrop to the long-running *Factortame* saga, beginning with Case C-246/89, *Commission v United Kingdom*, [1991] ECR I-4585.

²⁴² For an example of such a procedure, see Case C-491/01, *R v Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd. et al.*, [2002] ECR I-11453: judicial review of ‘the intention and/or obligation’ of the United Kingdom Government to transpose Directive 2001/37/EC (manufacture, presentation, and sale of tobacco products) into national law.

²⁴³ See, for the pre-emptive effect of a common organisation of the market in an agricultural product, Case 16/83, *Criminal proceedings against Karl Prantl*, [1984] ECR 1299, para. 13.

²⁴⁴ This is why Temple Lang’s (above n. 2) trust in actions for declarations as a panacea for the problems of Art. 230(4) might not be entirely justified.

²⁴⁵ Case 48/75, *Royer*, [1976] ECR 497, paras. 32, 39, 48.

The regulation in issue in *Unión de Pequeños Agricultores*, by contrast, abolished subsidies paid by the Community. State aids paid by Member States are, in principle, prohibited by Art. 87(1) EC. This prohibition, however, is subject to the statutory exceptions in the second paragraph, and to the discretionary ones listed in the third. The Commission has laid down guidelines for state aid in the agriculture sector.²⁴⁶ The discontinuation of the scheme of Community aid, therefore, did not mean that any national replacement would under any circumstances be illegal. In fact, of the whole Treaty section on state aids, only Art. 88(3) EC stipulates an unconditional prohibition,²⁴⁷ and it only addresses Member States, anyway. The worst private recipients of illegal aid might have to fear is civil liability towards their competitors.²⁴⁸ The *economic* consequences for UPA's members of the reduced income may have been grave. Nonetheless, the companies would never have to defend themselves against these consequences 'with their backs against the wall' from a *legal* point of view.

Seen in this light, *Unión de Pequeños Agricultores* does not overrule *Jégo-Quéré*.²⁴⁹ The more recent judgment establishes that as long as secondary Community law does not stipulate an absolute prohibition, the Court will not enquire further, under Art. 230 EC, as to what procedures are available under national law. Such an enquiry is, if anything, for proceedings under Art. 226. The earlier judgment concerned precisely such an absolute prohibition. The two judgments can, therefore, exist alongside one another.²⁵⁰

VI. The Second Weakness, and the Non-Development in the Court's Case-Law

1. The obligation to refer questions on validity

We have seen above (at II4b) that national courts can be under an obligation to refer to the ECJ questions regarding the validity of secondary Community law. This extends to

²⁴⁶ [2000] OJ C28/2 of 1.2.2000, with corrigendum in C232/17 of 12.8.2000.

²⁴⁷ Case C-332/98, *France v Commission*, [2000] ECR I-4833, paras. 31, 32; Case C-39/94, *SFEI et al v La Poste et al.*, [1996] ECR I-3547, para. 39.

²⁴⁸ Case C-39/94, *SFEI et al v La Poste et al.*, [1996] ECR I-3547, paras. 72-75

²⁴⁹ Waelbroeck, *loc. cit.* fn. 2, [2002] CDE 5, last three paras., and p. 6, last para., highlights that the judgment is by no means clear, and does not pre-empt the future interpretation of the notion of individual concern.

any piece of secondary Community law of whose illegality a national court is convinced (*Foto Frost*)²⁵¹ provided, of course, the question is relevant to the outcome of the case before that court.²⁵² Conversely, it is always open to the national court to refer a question to the ECJ if it wants to reject the allegation of nullity of the first measure.²⁵³

A reference may also be appropriate where the plaintiff's arguments are not obviously unfounded, and there is no previous jurisprudence by the European Court of Justice on the question. One might go further, however, and ask whether a reference would be compulsory in these circumstances. An early answer (in the negative) to this question was that to require a reference of a court convinced of the legality of an act of Community law would amount to exaggerated formalism, and would serve no purpose; courts of last instance were under a duty to refer, anyway.²⁵⁴ Short of a Treaty revision, however, reconsidering the interpretation of Art. 234(b) offers the best hope of remedying the second weakness in the system of legal protection for individuals under Community law.

The purpose of the procedure under Art. 234 is to safeguard the uniform interpretation and application of Community law in the Member States.²⁵⁵ In the situation where a national court wants to uphold the validity of an act of secondary Community law, there is not the same danger to the uniformity and coherence of Community law as when a national court wanted to 'go it alone' in matters of interpretation, let alone of validity. Thus, if a national court upholds the validity of an act of Community law, the integrity of the Community legal order remains intact. Material justice, however, would suffer if an illegal act were not expunged. This consideration might yet sway the national court to refer the matter, despite its conviction that the Community act is legal, and despite

²⁵⁰ For this reason, it appears that A-G Jacobs in his opinion in Case C-263/02P, *Commission v Jégo-Quéré*, 10 July 2003, n.y.r. (judgment pending at the time of writing), paras. 46, 47, gave up the case for a re-interpretation of Art. 230(4) too early.

²⁵¹ Case 314/85, *Foto Frost v Hauptzollamt Lübeck-Ost*, [1987] ECR 4199.

²⁵² Most recently Case C-318/00, *Bacardi-Martini v Newcastle United FC*, [2003] ECR I-905, paras. 44-51.

²⁵³ Case C-321/95P, *Greenpeace v Commission*, [1998] ECR I-1651, para. 33.

²⁵⁴ *Bebr*, *Examen en validité au titre de l'art. 177 du traité CEE et cohésion juridique de la communauté*, [1975] 11 Cahiers de droit européen 379, at p. 385, 2nd para.

²⁵⁵ Case 283/81, *CILFIT*, [1982] ECR 3415, para. 7, Case 314/85, *Foto Frost v Hauptzollamt Lübeck-Ost*, [1987] ECR 4199, para. 15.

the absence of much of a threat of sanctions if it does not refer.²⁵⁶ It is a different matter, however, whether considerations of material justice are enough to impose an *obligation* to refer, even if the national court is convinced of the legality of the Community act.

This obligation could flow from two sources. Firstly from national law, interpreted in the light of the requirement, under Community law, to provide effective legal remedies. In this context, Member States are not obliged to create entirely new remedies.²⁵⁷ They must, however, make any existing remedies available for the protection of rights derived under Community law, even if such remedies would not be applicable to comparable actions based purely on domestic law.²⁵⁸ Secondly, the obligation could flow directly from Community law, like the obligation under the *Francovich* jurisprudence to make good damage caused as a consequence of breaches of Community law by Member States.

Upholding material justice is one aspect (besides the creation of legal certainty) of the ‘observance of the law’ which Art. 220(1) EC sets the ECJ as its task. Art. 234 is but one, concrete emanation of this overarching mission. This provision, therefore, has to be read in the light of Art. 220. As a consequence, there is not a choice, or a trade-off, between legal certainty and material justice. As soon as one of them becomes relevant, a reference is mandatory. Hence, whenever arguments are raised regarding the illegality of an act of secondary Community law, and these arguments are not obviously spurious or have already been rejected by the European Court of Justice, every national court is under an obligation to refer a question regarding the validity of the act to the ECJ.

Confirmation for this interpretation can be seen in the Court’s judgment in *Foto Frost*. In para. 17 of the judgment, the Court held that ‘since Art. 230 gives the Court the exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that *where the validity of a Community act is challenged before a national court*, the power to declare the act invalid must also be reserved the Court of

²⁵⁶ This is despite the fact that the ECJ has accepted that Member States can be held liable for their courts’ failure to refer. On Case C-224/01, see text above in and by n. 163.

²⁵⁷ Case 158/80, *Rewe v Hauptzollamt Kiel*, [1981] ECR 1805, para. 44.

²⁵⁸ Case C-97/91, *Oleifici Borelli v Commission*, [1992] ECR I-6313, paras. 13-15.

Justice' (emphasis added).²⁵⁹ The referring German court in *Foto Frost* was convinced of the illegality of the Community regulation whose applicability or otherwise was crucial to the outcome of the action pending before it (para. 11). Nonetheless, the ECJ does not make this conviction a condition for the obligation to refer. Instead, the obligation to refer follows from the 'necessary coherence of the system of legal protection established by the Treaty' (para. 16). This is in keeping with the Court's jurisprudence that the right to an effective remedy before a court of competent jurisdiction is guaranteed in Community law.²⁶⁰ 'Effective' legal protection requires that no arguments go unheard by a court that could draw legal consequences from them, and help the party raising them to their right. Such protection cannot, however, be achieved if there is no guarantee that the only court which can entertain arguments regarding the invalidity of secondary Community law would become involved in the proceedings at some stage.

It is true that in para. 14 of the judgment in *Foto Frost*, the Court held that '[national] courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the Community measure.'²⁶¹ This, however, would preclude plaintiffs from having even serious arguments tested in the European Court of Justice, simply because the national court, for whatever reasons, will not endorse them. The deficiencies highlighted by Advocate-General Jacobs in his opinion in *Unión de Pequeños Agricultores* would thus be compounded. By contrast, the advantages, from the point of view of the integration of Community law in the Member States' legal systems, of plaintiffs having to go through the national courts

²⁵⁹ Similarly, in Case C-209/94P, *Buralux et al. v Council*, [1996] ECR I-615, para. 36, the Court held that 'it is therefore possible for the appellants to argue, in support of an action challenging a refusal given under the contented provision ... that that provision is unlawful, thereby obliging the national court to rule on all of the claims made in that respect, after a preliminary reference to the European Court of Justice for an assessment of its validity.'

²⁶⁰ Case T-177/01, *Jégo-Quéré v Commission*, [2002] ECR II-2365, para. 41, with further references.

²⁶¹ Reiterated, e.g., in Case C-27/95, *Woodspring District Council v Bakers of Nailsee*, [1997] ECR I-1847, para. 19.

would not fully accrue. Community law would be applied in the Member State, even when it should not.²⁶²

The letter of Community law would be observed, but its spirit would not. To paraphrase the last sentence of para. 14 of *Foto Frost*, not to call the existence of a Community measure into questions can be as wrong (if for different reasons) as to do so. National courts would not act as gateways, but as traps for actions that would be heard by the ECJ, were it not for the absence of individual and direct concern on the part of the plaintiff. *Foto Frost* can, therefore, be read to relieve national courts of the duty to refer only where the allegation of illegality is manifestly unfounded, or has already been rebutted by the European Court of Justice.

The Court's judgment in *CILFIT* leads to the same conclusion, but from a different angle. It establishes a quasi-objective test for when, under Art. 234, a national court of last instance²⁶³ may or may not assume that there is a 'question' of Community law for which it should seek clarification from the European Court of Justice. What counts in this respect is not what the court hearing the case subjectively deems so clear that there is no 'question' about it (hence the test is not purely subjective). Rather, it must, in the absence of jurisprudence by the ECJ on the point, imagine itself in the shoes of every other national court, and of the European Court of Justice (this makes the test quasi-objective). It must also heed the peculiarities of Community law, and must be fully aware of the nuances each of the individual official language versions (all of which are equally authentic) may add to the interpretation.²⁶⁴ At the very least, these daunting requirements should make national courts very suspicious of their own certainties. In

²⁶² Ward, *loc. cit.* fn. 2, p. 268, second para. (similarly Olivier Dubos, *Les juridictions nationales, juges communautaire*, Paris (Dalloz) 2001, p. 104, first and second para.), concurs that a declaration of validity can be as problematic as one of invalidity; this is because uncertainty would arise from conflicting findings, in this respect, by several national courts. In other words, the first national court before which serious doubts regarding the legality of an act of Community law are raised might as well refer the question, even if it tends towards a finding of validity, because some plaintiff will sooner or later convince another court of the act's invalidity. In these circumstances, referring the question to the ECJ gets it 'out of the system' in the interest of everybody.

²⁶³ According to Case C-99/00, *Criminal proceedings against K.R. Lyckeskog*, [2002] ECR I-4839, paras. 14-19, the duty to refer pertains to the highest courts and those lower courts against whose judgments no further appeal is *possible*, regardless of whether or not a higher court actually accepts the appeal.

²⁶⁴ Case 283/81, *CILFIT*, [1982] ECR 3415, paras. 17-20.

reality, they reduce the Court's endorsement of the *acte claire* doctrine to mere lip-service. While *CILFIT* applies only to courts of last instance, the method prescribed therein of approaching questions of Community law is not limited to specific courts, or to questions of interpretation rather than validity. As under *CILFIT*, so under *Foto Frost*, certainty is hard to come by in the absence of previous jurisprudence by the ECJ.

2. An individual right to have questions on validity referred

The position of individuals with regards to references has recently been bolstered, if cautiously, by the ECJ's judgment in *Köbler*.²⁶⁵ It would be further enhanced if, as a matter of Community law, there were a right for individuals to have national courts' refusals to refer questions of validity reviewed by higher-ranking national courts.

An example of such a right can be seen in the Bundesverfassungsgericht's (German Federal Constitutional Court) judgment in *Kloppenburg*.²⁶⁶ The Bundesfinanzhof (German Federal Tax Court), in its judgment in an action brought by Ms. Kloppenburg, denied the direct effect of certain Community tax provisions. It did so despite the fact that direct effect of the Directive in question had been established by the European Court of Justice.²⁶⁷ What is more, the court refused to refer its contrary reading of the Community provisions (and indeed its disapproval of the entire doctrine of direct effect) to the ECJ. This judgment was quashed, on a constitutional complaint by Ms. Kloppenburg, by the Federal Constitutional Court.

A constitutional complaint is not an appeals procedure. The Federal Constitutional Court will not check judgments for any misapplications or misinterpretations of statutory law. Within the remit of the Federal Constitutional Court come only violations

²⁶⁵ Case C-224/01, *Köbler v Austria*, judgment of 30 September 2003, n.y.r.

²⁶⁶ (1987) 75 BVerfGE 223 – *Kloppenburg*, English translation in [1988] 3 CMLR 1. More recently, and with a summary of the case law on this question, see Bundesverfassungsgericht, 1 BvR 1036/99, *R v Germany*, judgment of 9 January 2001, para. 18 (the judgment can be found at <http://www.bverfg.de/>). In this case, the Bundesverwaltungsgericht (Federal Administrative Court) had sought to deal of its own with an allegation that provisions in a Community Directive (86/457/EEC) amounted to indirect sex discrimination in breach of Directive 76/207/EEC. The question how to solve such conflicts had not yet been discussed by the ECJ, so that the Federal Constitutional Court found that the Federal Administrative Court, by trying to solve the problem applying national methodology alone, had breached its obligation to refer.

²⁶⁷ Case 8/81, *Ursula Becker v Finanzamt Münster Innenstadt*, [1982] ECR 53, para. 49.

of human rights granted by the German constitution. In the case of the Federal Tax Court's judgment, the court found a violation of Ms. Kloppenburg's right under Art. 101(1), second sentence, GG: 'Nobody may be removed from their lawful judge.' The European Court of Justice is the lawful judge, in the sense of this provision, for all questions where serious doubts are raised regarding the interpretation or validity of Community law.

It is established in the jurisprudence of the Federal Constitutional Court that only arbitrary conduct in this respect will violate the human right. 'Arbitrariness' will be present where the national court either does not even see the possibility of referring a question; where it openly goes against the relevant jurisprudence of the European Court of Justice; or where an answer different from the one given by the national court clearly emerges from Community law as interpreted by the ECJ.²⁶⁸ This qualification has two advantages: firstly, it renders the test of arbitrariness purely objective and legal; nothing turns on the subjective motivations of the judges when they (allegedly) acted arbitrarily, and the facts underlying the dispute need not be re-examined. Secondly, the test merely establishes an outer limit to the discretion of judges as to whether there are serious doubts about the answer from the point of view of Community law. National procedural autonomy remains otherwise unaffected.

To transfer this model to the Community plane seems preferable to a wholesale reform of Art 230(4) EC.²⁶⁹ It is only a variant on the right to legal protection, recognised in the legal systems of all Member States. It would seek a solution to the problem of recalcitrant national courts (or rather, courts over-confident of their interpretive capacities) where it originates, namely in the framework of the judicial system of the Member States. It does not add obligations which national courts do not already have, but rather brings out in sharper relief their existing obligations under Art. 234. Finally, properly qualified by the requirement of arbitrariness, it will not lead to a flood of

²⁶⁸ Order of the Federal Constitutional Court of 9 Nov. 1987 in Case 2 BvR 808/82, [1988] *Europarecht* 190 – *Denkavit*, under 2(b)(bb) and 3(b). See also *R v Germany*, above n. 266, paras. 21-24.

²⁶⁹ *Contra* Usher (above n. 2), at p. 599 f., who is in favour of legislative reform (as in the draft constitution).

spurious appeals, but merely help correct the relatively few lapses occurring in an otherwise workable system.

VII. Conclusion

The Community system for the protection of individual rights, as interpreted by the European Court of Justice, is better than the criticism of the jurisprudence on Art. 230(4) EC may lead one to believe. What is more, the Court has recently, in its judgment in *Jégo-Quéré*, closed one of the remaining gaps. At the same time, its judgment in *Unión de Pequeños Agricultores* leaves open the way to solutions for the second weakness in the system. The elements of such a solution are already present, partly in Community law, partly in national law. To draw them together would take the Community one step closer to the realisation of the rule of law, as envisaged in Art. 220 EC.

Epilogue

The European Court of Justice has lately quashed the Court of First Instance's judgment in *Jégo-Quéré*.²⁷⁰ The ECJ gave two reasons. Firstly, it was possible for national law to allow individuals to seek from national authorities a measure open to challenge, where a challenge would otherwise require a breach of the provision to which the individual takes exception. It was possible for the laws of the Member States to do likewise in case the individual wanted to challenge a Regulation of direct concern to them.²⁷¹ Secondly, the interpretation of Article 234(4) as proposed by the CFI would remove all meaning from the requirement of individual concern as set out in that provision.²⁷²

As far as the first argument is concerned, it follows from the Court's preceding quotations from *Union de Pequeños Agricultores*, viz. that it was for the Member States to establish a suitable system of legal remedies. The Community courts would not

²⁷⁰ Case C-263/02P *Commission v Jégo-Quéré*, judgment of 1 April 2004, n.y.r.

²⁷¹ Para. 35.

²⁷² Para. 38.

become involved, even where it was obvious that the Member States had failed to establish such a system.²⁷³ This begs the question what remedies are left to the individual in this case, Articles 230 and 234 being out of the picture. The answer, presumably, is to be found in the judgments in *Francovich* and its progeny, and especially, as far as national courts are concerned, in *Köbler*. Nevertheless, it would be flattering to describe the Court's curt (and above all, hypothetical) assertion as a reasoned engagement with the arguments exchanged on four occasions in Luxembourg, not to mention in the numerous articles on the topic. The second reason is not much more convincing. The CFI did give *a* meaning to the requirement. To hold that this is *no* meaning is only understandable on the assumption that the traditional interpretation is all there is to say about 'individual concern.' Why? The two lines of para. 38 contain, in effect, nothing beyond the Court's asserting its authority.

Finally, lest the perfect be the enemy of the good, it should be said that after two years, Article 230(4) is back where it was²⁷⁴ – but that the system as a whole is workable. Short of a Treaty amendment,²⁷⁵ or legislative action by the Member States, the obligation on national courts as proposed above might offer an alternative way of catching the few paradigms that still slip through the net.

²⁷³ Paras. 29-34 of the judgment in Case C-263/02P.

²⁷⁴ Note also the Court's dealing with individual concern based on procedural rights in paras. 44-47.

²⁷⁵ Or rather, adoption of the constitution with Art. III-270(4) which drops the requirement of 'individual concern.' On this, see Usher, loc. cit. above n. 1.