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Locus standi of individuals before Community courts under Article 230(4)EC: Illusions and Disillusions after the Jégo-Quéré (T-177/01) and Unión de Pequenos Agricultores (C-50/00 P) judgments

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Although Article 54 of the Schengen Convention has lost its character as a creature purely of international law since it was grouped into the so-called “third pillar” of the European Union by a Council decision, the provision remains subject however to intergovernmental cooperation under international law with the framework of the EU. This has consequences in particular with regard to judicial control, which now falls to the ECJ as provided in the modalities laid out in Title VI of the EU Treaty.

45 See supra note 34.

1. Introduction

As Professor Neuwahl rightly commented, “Judicial review of Community acts at the initiative of individuals is one of the most complex issues of European Community Law”. This question has been the subject of extensive debate among practitioners and in the legal literature. The two commented cases – Jégo-Quéré, delivered by the Court of First Instance of the European Communities (hereinafter CFI) on 3 May 2002, and Unión de Pequeños Agricultores (hereinafter UPA), delivered by the Court of Justice on 25 July 2002 – provide vivid examples of this controversy. The central issue in both is whether it is appropriate to widen locus standi of individuals when they challenge the validity of Community acts before the two Community courts.

Generally speaking, legal systems may adopt three different approaches to the right of individuals to challenge an act. The first and most restrictive alternative is to accord locus standi solely when the concerned act infringes the individual’s legal rights. At the other end of the spectrum is the so-called actio popularis, the most liberal approach, which allows locus standi for every citizen irrespective of a particular interest. The third and middle way is to allow an individual to challenge the validity of an act when he can demonstrate that the act will adversely affect him in some way or another.

Article 230 EC (former Article 173 of the Treaty) admits the right of individuals to request annulment of an act adopted by Community institutions and organs listed in that provision. More precisely, Article 230(4) EC states that “[a]ny natural or legal person may (...) institute proceedings against a decision addressed to that person or against a decision which although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”. On the mere basis of this wording, one could say that Community law appears to fall within the third approach highlighted above. However, it bears severe restrictions as to the nature of the act (“a decision”) and as to the way the concerned act of general application affects the individual, i.e. the necessity to demonstrate “direct and individual concern”. Against this wording, the Court of Justice in earlier days applied indeed a three-fold test in order to determine whether an individual had locus standi. The first and decisive issue was to determine whether a Community regulation was in truth a decision. It is, however, established since the landmark cases of Extramat and Codorniu that even a true regulation, keeping its legislative character, can be challenged under Article 230(4) EC. Since then, the only issue of admissibility of an action for annulment of a Community act by an individual is therefore whether he is “directly and individually concerned” by the act. However, the case law concerning this latter expression has brought locus standi in Community law closer to the first, rigid approach indicated above.

It is precisely the debate of relaxation of locus standi of individuals, and more particularly the interpretation of the notion of “individual concern”, which is at the centre of Jégo-Quéré and UPA. Both cases involved an application by legal persons for annulment of regulations adopted by the Commission (Jégo-Quéré) and by the Council (UPA). In both cases, the defendant institutions raised inadmissibility of the actions for annulment on the grounds that the applicants were
not individually concerned by the disputed regulations. In UPA, the CFI ruled at first instance by an order delivered on 23 November 1999 that the action was indeed inadmissible. On appeal, the Court of Justice confirmed that decision in the commented case. In Jégo-Quéré, the CFI, initiating a new legal reasoning, admitted that the action by the French company involved was admissible and ordered that the case should proceed on the merits.

As will be analysed in this article, in Jégo-Quéré, the CFI decided to give a more open definition of the concept of “individual concern”, as laid down in Article 230(4) EC. By contrast, in UPA, the plenum of the Court of Justice has not endorsed such an approach, instead relying on its traditional case law. The UPA judgment discreetly invalidates the tentative approach adopted by the CFI in Jégo-Quéré. Before dwelling on that question (section 3), it is necessary to analyse and discuss the legal earthquake caused by Jégo-Quéré.

2. Jégo-Quéré and the redefinition of the concept of “individual concern”

In Jégo-Quéré, the extended composition of the first chamber of the CFI decided to reconsider the interpretation of the notion of “individual concern” pursuant to Article 230(4) EC. In doing so, the CFI was strongly inspired by the opinion of the Advocate General Jacobs in UPA, delivered on 21 March 2002. This section begins by briefly recalling the traditional approach concerning the interpretation of the expression “directly and individually concerned” (2.1.) and subsequently with its reconsideration by the CFI (2.2.). It concludes with an examination of the reasons that convinced the CFI to propose a new interpretation of the notion of “individual concern” (2.3.).

2.1. Traditional interpretation of the expression “direct and individual concern”

Article 230(4) EC does not define the expression of “direct and individual concern”. This has progressively been elaborated by the case law of the Court of Justice.

As regards the criterion of direct concern, it is settled case law that for a person to be directly concerned by a Community measure of general application, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of the measures, which are entrusted with the task of implementing it. Thus, the implementation must be purely automatic and result from Community rules without any intermediate rules. In other words, it must be substantially certain that the contested measure would affect the applicant at the time it was adopted. Gener-

ally speaking, this criterion has caused less difficulty for applicants than the concept of individual concern. In Jégo-Quéré, fulfillment of this criterion was uncontroversial since, to produce its effects vis-à-vis the applicants, the disputed regulation adopted by the Commission did not need any additional measures.

As to the notion of individual concern, the still valid formula dates back from the Court of Justice’s judgment in Plaumann. For natural and legal persons to be regarded as individually concerned by a measure not addressed to them, the measure must affect their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee. This interpretation is rather narrow and situations where a private person can successfully challenge the validity of a Community act of general application are extremely rare. Until Jégo-Quéré, the Community courts never disputed this definition. However, the case-by-case application of that condition has given rise to discrepancies often criticised by the legal doctrine. Furthermore, exceptions to the Plaumann formula have been created, the complexity of which resulted in unpredictable judgments. As will be discussed below (section 2.3.), such criticisms and inconsistencies obviously constituted one of the reasons behind the reconsideration of the definition of “individual concern” by the CFI in Jégo-Quéré.

2.2. Jégo-Quéré: reconsidering the concept of “individual concern”

In Jégo-Quéré, the French fishing company Jégo-Quéré sought annulment of a Commission regulation concerning the ban on the use of nets of less than a stipulated mesh size for fishing hake in the Celtic Sea. The Commission raised an objection of inadmissibility based on the argument that the regulation was of no individual concern to Jégo-Quéré. Conversely, the French fishing company argued that (a) the regulation was not a measure of general application but rather, a “bundle of individual decisions” and that its situation was sufficiently differentiated and (b) finding the company’s action inadmissible would leave it without legal remedy. Indeed, in the applicant’s view, since no national act was adopted to implement the regulation, no action could be indirectly brought against the regulation before national courts. Such a situation would amount to a breach of the “fair trial principle” pursuant to Article 6 of the European Convention of Human Rights (hereinafter ECHR) and could only be resolved by admitting a broader interpretation of Article 230(4) EC.

The CFI’s reasoning is three-fold. First, the CFI rejected the applicant’s argument concerning the legal nature of the Commission regulation. The CFI judged that it was undeniable that the provisions of the regulation are of general appli-


9 See supra note 2.


11 T-177/01 Jégo-Quéré (supra note 3), para. 26. In T-173/98 UPA (supra note 8), the CFI started by concluding that the criterion of individual concern was not fulfilled, and thus, did not examine whether the applicant was directly concerned, cf. para. 65 of the judgment.

cation since they are “addressed in abstract terms to undefined classes of persons and apply to objectively determined situations”.13 Hence, the regulation cannot be considered as a “bunch of individual decisions”. Second, the CFI considered whether, according to the Plaumann formula quoted above, the applicant was individually concerned by the regulation. In this respect the CFI noted that (a) no situation differentiated the applicant from any other economic operator actually or potentially in the same situation and (b) the Commission was under no duty to take the situation of Jégo-Quéré into consideration when issuing its regulation. Invoking the relevant case law, the CFI concluded that the mere fact that the company participated in meetings with the Commission could not distinguish it individually since the applicable Community legislation did not give Jégo-Quéré any procedural guarantees.14 Finally, the CFI noted that (c) the applicant had not produced evidence that the regulation would affect its situation in a similar way as in Extramat and Codorniu.15 In these cases, the applicants had established a set of factors, proving their very peculiar situation, which made them particularly affected by the contested regulations. The CFI therefore concluded that the applicant could not be individually concerned within the meaning of Article 230(4), as interpreted in the case law.

Having said this, the CFI considered the second argument of Jégo-Quéré relating to denial of justice. The CFI examined different aspects of the right of individuals to access to the Community courts. In this respect, the CFI recalled that the Court of Justice had itself confirmed that access to courts was an essential element of a Community based on the rule of law. In these circumstances result in an action being considered admissible, without being covered by the conditions of Article 230(4) EC. The CFI is very clear on this point. Consequently, the CFI concluded that the notion of individually concerned must be reconsidered and suggested the following definition: "a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly, if the measure in question affects his legal position, in a manner which is both definite and immediate".16 It is therefore not necessary for that person to demonstrate that his situation differentiates him from all other persons. As the CFI put it: "the number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard".17 The departure from the Plaumann formula is particularly clear.

This new definition was apparently inspired by the opinion of the Advocate General in UPA that was delivered on 21 March 2002. In the very outset of his opinion, Advocate General Jacobs underlined that the central issue at stake in UPA was whether the notion of individual concern laid down in Article 230(4) EC needed to be reconsidered. According to Jacobs’ suggestion, a person should be regarded as individually concerned by a Community measure of general application where, “by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.”18

It is interesting to note that the CFI adopted a slightly narrower interpretation of the criterion of “individual concern”. The CFI used the wording “affects [the individual’s] legal position”, whereas the Advocate General proposed that merely effects, including potential effects, on the individual’s interests should be considered sufficient to accept admissibility of the action.19 In this regard, Jacobs intended to open the possibilities to bring an action under Article 230(4) EC to an even larger number of situations than the CFI has done in Jégo-Quéré. Since words have meaning, Jacobs’ definition strongly echoes the third approach to locus standi highlighted in the introduction to this article. The CFI’s definition, although a clear relaxation and departure from the Plaumann formula, is still rather close to the first alternative. In the CFI’s view, in-

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15 T-177/01 Jégo-Quéré (supra note 3), para. 37, with reference to ECJ Extramat (supra note 6), para. 17 and ECJ Codorniu (supra note 7), paras 21-22.
16 Codorniu was the owner of a registered trademark for a Spanish sparkling wine including the word ‘cramant’, which pursuant to the contested regulation should be reserved for French and Luxembourg producers of sparkling wines. Extramat was the largest importer and end user of calcium metal, which was the subject of the contested anti-dumping measure. Furthermore, its business activities depended to a very large extent on the imports at stake.
17 Article 47 of the Charter enshrines the right for individuals to effective remedies and a fair trial. Although the Charter, proclaimed at the European Council of Nice in December 2000, is legally non-binding, the CFI has made reference to its provisions: see, e.g.: CFI 30 January 2002 – T-54/99 – max mobil Telekommunikation Service GmbH v Commission [2002] ECR II-nyr, para. 48, with reference to Article 41 of the Charter (right to good administration); Conversely the Court of Justice has, so far, refrained from making similar references, preferring to quote the ECHR.
18 As it is well known, according to the case law of the Court of Justice, national courts cannot declare a Community act invalid (cf. ECJ 22 October 1987 – 314/85 – Foto-Frost v Hauptsammel Liefbeck-Ost [1987] ECR 4199, para. 20). National courts are therefore obliged to make a reference for a preliminary ruling to the Court of Justice under Article 234 EC.
19 T-177/01 Jégo-Quéré (supra note 3), para. 51.
20 Ibid., para. 51.
21 Para. 102 subparagraph 4 of the opinion.
22 See also Neuwahl (supra note 1) 31, suggesting that an individual shall be deemed to be individually concerned if prima facie any of his individual rights under Community Law has been infringed, the effective protection of which must be undertaken by the Court of Justice [emphasis added].
individuals must still demonstrate infringement of a “legal position” (but not a “legal right” strictly speaking) in order to have a standing. Unfortunately, as will be discussed in section 3 below, the Court of Justice did not endorse such an effort.

Bearing this in mind, one should, however, make two additional remarks on Jégo-Quéré. The first concerns the practice by Community courts in overruling their case law. It is well known that Community courts rarely overrule previous case law. The wording of Jégo-Quéré obviously indicates that the CFI deliberately took the possibility to reconsider the notion of individual concern in an attempt to widen the possibilities for individuals to challenge Community measures and thereby further increase the legitimacy and credibility of Community law. This was most probably a carefully prepared step. However, interestingly, no official signs were given by the CFI prior to this judgment. Only one example suffices to be taken. In an order delivered on 18 April 2002, that is to say a few days before the delivery of Jégo-Quéré, the CFI still invoked the Plaumann formula as far as the question of admissibility of an action for annulment was concerned. In this case, the CFI concluded that, as judicial protection presently stands in the Community system, the mere fact that a general act may affect the legal position of an individual does not allow the conclusion that the individual is directly and individually concerned by that legal act.

The second remark relates to the legal consequences of the CFI ruling. Albeit the Court of Justice has been reluctant to follow the CFI’s way of reasoning, it is nevertheless still interesting to continue on the path indicated by CFI. In this respect, one could consider the impact which the reconsidered notion of individual concern could have on the future possibilities for individuals to challenge general measures other than regulations – namely directives under Article 230(4) EC. First of all, it shall be reminded that Article 230(4) EC mentions only decisions and regulations. As recalled above, it took several years for the Courts to develop the principle that even a true regulation of general application could be challenged under Article 230(4) EC. Furthermore, the very nature of a directive must be taken into account. Contrary to regulations and decisions, directives are binding on the Member States only as to the aim to be achieved. However, notwithstanding this, it follows from UEAPME and Salamander that a directive can be challenged under Article 230(4) EC, provided that it is of direct and individual concern to the applicant. It appears that both the Advocate General Jacobs and CFI in Jégo-Quéré have taken onboard this view, as both of them refer to Community measures (emphasis added) in their reinterpretation of “individual concern”. Hence, could the reasoning in Jégo-Quéré be extended to action for annulment of Community directives?

In the authors’ view, the reply to this question is negative. Undisputedly, a private person can be individually concerned by a Community directive. The interpretation given by the CFI to this notion is wide enough to encompass actions for annulment of directives that affect the legal position of individuals. This applies irrespective of the fact that such a person might have judicial remedies at national level – contrary to the situation of the company Jégo-Quéré, since in principle a directive needs to be implemented. The reason lies in the absence of direct concern. The rationale of Jégo-Quéré presupposes that the individual is directly concerned. The definition of “direct concern” laid down in Article 230(4) EC remaining valid, a private person challenging the validity of a Community directive will rarely find himself in a situation whereby the addressee of the directive will have no discretion to adopt implementing acts. The nature of directives is such that they require implementation at national level, even though their provisions might be precise and unconditional. Consequently, it seems improbable that a directive could be challenged along the lines of Jégo-Quéré.

2.3. The reasons for a new definition

In Jégo-Quéré the CFI pointed out one single reason for reconsidering the Plaumann formula on the notion of “individual concern”:

“the need to ensure effective judicial protection of individuals.” This is probably the most fundamental motive for making such reconsideration. Without dwelling on the extent to which fundamental rights are encroached in the case law of the Community courts, it is nevertheless interesting to note the constant emphasis put by the CFI on individual’s procedural guarantees and legal remedies, in particular in the field of Community competition law. Hence, companies being directly and individually concerned by Commission decisions (or refusals to issue a decision) addressed to Members States under Article 86(3) EC (former Article 90(3) of the Treaty) have been granted standing, even if the mentioned provision does not expressly grant procedural rights or legal remedies to complainants. It is also important to remember that, in its contribution to the Intergovernmental Conference which lead to the adoption of the Treaty of Amsterdam, the Court of Justice explicitly addressed the issue whether the right to bring an action for annulment under former Article 173 of the EC Treaty, which individuals enjoy only in regard to acts of direct and individual concern to them, could be considered as suffi-

25 Cf. the similar reasoning by the legal service of the Council of the European Union in a information note (9058/02) dated 22 May 2002 following Jégo-Quéré.

26 Para. 51 of the judgment.


28 See max mobil Telekommunikation Service GmbH supra note 17, paras 49-51. This judgment has been described by one commentator as extending similar guarantees to complainants in procedures under Article 86(3) EC as already recognised under Articles 81, 82, 87 and 88 EC: see Rantala, Complainant’s rights to challenge the Commission’s refusal to take measures under Article 86(3) EC, [4/2002] ELR 139, 144-145.
cient to guarantee effective judicial protection against possible infringements of their fundamental rights arising from the legislatively activity of the Community institutions. Unfortunately, the Member States did not endorse this initiative. Moreover, Jégo-Quéré clearly falls in the tendency of the Community courts to enhance the protection of procedural or substantial fundamental rights, such as in the recent and far-reaching Carpenter case.

Further reasons for reconsidering the criterion of “individual concern” may usefully be found in the excellent and rather exhaustive opinion of Advocate General Jacobs in UPA. The Advocate General listed a number of reasons that shall not be repeated here. However, two of the most important motives are worth mentioning.

The first one relates to the necessity to put an end to the complexity and lack of coherence of the case law developed after Plaumann. In the past years, the Court of Justice and the CFI have indeed developed what may be called exceptions to the rigidity of the Plaumann formula in several situations. However, this is far from being consistent. A classical example may be found in cases involving anti-dumping Community regulations. Those regulations are general measures by nature. However, as anti-dumping regulations concern particular products, a certain number of traders may be affected by such measures and may possibly be individually concerned. This may be the case, in particular, for third country exporting companies, for Community importing companies, but also for the producers of similar products within the Community. As far as locus standi is concerned, these groups of traders do not have similar opportunities. The Community judicature has admitted that regulations imposing anti-dumping duties are of individual concern to producers and exporters of the product in question, who are charged with practising dumping. This applies, in particular, if they are identified by preliminary investigations. Concerning the category of importers, the case law is rather complex. Importers whose resale prices were taken into account for the construction of export prices, importers associated with exporters in third countries on whose products anti-dumping duties are imposed and, in exceptional cases, unrelated importers where the regulation seriously affected their business activities, have all been considered individually concerned by the anti-dumping regulations. However, as the CFI recently ruled, applicants not belonging to these categories – such as, in normal circumstances, unrelated importers, have no standing, despite the fact that they participated actively in the administrative procedure leading to the adoption of anti-dumping measures. Generally speaking, participation in the preparatory phase to the adoption of a legislative act is not sufficient to distinguish a natural or legal person from other economic operators. It is only if Community legislation grants the person certain procedural guarantees that individual concern has been acknowledged.

The sole example of the jurisprudence concerning anti-dumping regulations demonstrates the necessity to render more predictable and easier this body of case law. It is therefore not surprising that, not only legal scholars, but also the members of the Community judicature have, on several occasions, expressed their dissatisfaction, as far as the possibilities for individuals to initiate proceedings according to Article 230(4) EC are concerned. Given these circumstances, the acceptance of the Jégo-Quéré rationale would have been a considerable step forward. Under the new formula suggested in Jégo-Quéré, even unrelated importers would be entitled to challenge anti-dumping regulations, provided that they were directly concerned and their legal position was affected.

The second reason that certainly played a role for reconsidering the interpretation of “individual concern” was that the Court of Justice has not in the past refrained from interpreting broadly other provisions of Article 230 EC. This was particularly the case in respect of the right of the European Parliament to introduce actions for annulment of acts adopted by the other institutions. The fact that the Court of Justice has recognised that regulations and directives, while retaining their legislative character, could also be challenged by private persons, is an additional sign of the progressive approach to the interpretation of Article 230 EC. Hence, it is not impossible to adopt a wider interpretation of the criterion of “individual concern” laid down in Article 230(4) EC.

In this respect, it is not uninteresting to draw the attention on the position taken by the EFTA Court in the Scottish Salmon Growers Association (SSGA) case concerning locus standi of individuals within the ambit of the Agreement on the European Economic Area (EEA). The SSGA lodged with the EFTA Surveillance Authority a complaint in which it alleged

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33 See ECJ 11 July 2002 – C-46/00 – Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-nyr, printed in [2002] Eul.F (E) at 208. Mrs Carpenter was a Philippine national who was married to a British citizen. She had received a deportation order from the Secretary of State, since she had overstayed her original leave. Mr. Carpenter had a business in Britain, which provided cross-border advertisement services in other Member States. The Court held that the deportation of Mrs Carpenter would infringe Mr Carpenter’s right to respect his family life, accorded by the ECHR, which is among the fundamental rights protected in Community law. Thus, the Court concluded that the principle of freedom to provide services laid down in the EC Treaty, read in the light of the fundamental right to respect family life, precluded a Member State to refuse a right to reside in its territory to the spouse of a provider of cross-border services, even if the spouse was a national of a third country.
36 Nashua (supra note 33), para. 15.
that the Norwegian salmon industry had been granted State aid contrary to the EEA Agreement. In a letter to the law firm representing SSGA, the EFTA Surveillance Authority declined competence to assess the matter and announced its decision to close the case. SSGA perceived this letter as a decision and thus brought an action for annulment before the EFTA Court, in accordance with Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.41 Under the second paragraph of Article 36 of the Surveillance and Court Agreement, “a decision may be challenged before the EFTA Court by any natural or legal person if the decision is addressed to that person or, if the decision is addressed to another person, it is of direct and individual concern to the former”. This provision is obviously modelled on the predecessor of Article 230(4) EC.42 Although the EFTA Court is not obliged to follow the case law of the Court of Justice in this respect, the EFTA Court has repeatedly held that the interpretation by the Court of Justice of expressions in Community law is relevant when those expressions are identical in substance to those that the EFTA Court has to interpret.43 In its decision in the case, the EFTA Court consequently stated that relevant Community case law relating to matters such as the nature of a decision, the reviewability of a measure and the extent of locus standi, should be taken into account.44 In the proceedings before the EFTA Court, the EFTA Surveillance Authority claimed, inter alia, that the letter was not a decision, and thus, that the applicant lacked locus standi to bring proceedings for annulment of the measure.

The EFTA Court declared that the contested decision was a decision susceptible to judicial review under Article 36 of the Surveillance and Court Agreement.45 With regard to locus standi, the reasoning of the EFTA Court is, however, ambiguous. Instead of assessing whether the decision by the EFTA Surveillance Authority was addressed to SSGA or not, the EFTA Court directly considered whether SSGA had interest in challenging the decision. In this respect it decided that it was “obvious that the interests represented by the SSGA are centrally concerned by the outcome of the case”.46 The EFTA Court completed its reasoning by stating that the decision concerned the interests of the SSGA to such an extent that the judicial action was to be considered admissible and held it unnecessary to examine whether the applicant was the addressee of the decision of the EFTA Surveillance Authority.47

This last remark is surprising, since before assessing the interest for bringing an action, it is necessary to establish whether an individual is the addressee of the act. If the answer is positive, then it is presupposed that the requirements of direct and individual concern are fulfilled. If not, the individual shall demonstrate direct and individual concern. By not taking position on this issue, the EFTA Court appears to assume that the test both for the addressee of an act and for a third party would be the same. The test would be to demonstrate a “central interest”. Should this be the correct interpretation of the SSGA judgment, it would seem to indicate that the EFTA Court would be ready to admit a more relaxed interpretation of the concept of direct and individual concern than the Community courts, even after Jégo-Quéré.

It is, however, difficult to draw general conclusions from the SSGA case. First, one needs to remember that this case only relates to a decision and not to a legislative measure. Second, no subsequent case has confirmed the approach and the reasoning adopted in SSGA.48 Finally, it shall be emphasised that, despite the EFTA Court’s explicit acknowledgement of the relevance of Community case law, no reference is made to the extensive Community jurisprudence concerning direct and individual concern. It therefore remains to be confirmed whether the EFTA Court endorses a relaxation of the individuals’ right to locus standi. In any event, SSGA demonstrates that a broader interpretation of provisions worded in a similar way than Article 230(4) EC might not be impossible.

Despite the convincing reasons triggering a wider interpretation of the criterion of “individual concern”, the Court of Justice has not been persuaded to follow the path initiated by the CFI and proposed by the Advocate General Jacobs in his opinion in UPA.

3. UPA: an indirect overruling of Jégo-Quéré

The delivery of the UPA case by the Court of Justice49 was expected to set aside the legal uncertainty raised by the co-habitation of the traditional case law of the Court of Justice, on the one hand, and the new definition of “individual concern” initiated by the Court of First Instance in Jégo-Quéré, on the other. Although the judgment by the Court of Justice involves some hesitations in the legal reasoning and may not answer all questions raised by Jégo-Quéré, the full court decided to remain loyal to the Plaumann formula. In UPA, the Court of Justice was requested to annul an order by the Court of First Instance, in which the applicant had not been considered individually concerned, pursuant to the traditional interpretation of Article 230(4) EC. The main argument of the appellant was the following: UPA emphasised that there were no judicial remedies available at national level to dispute the Community regulation at issue. Given these circumstances, the Court of Justice was invited to admit that the two criteria

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41 Generally referred to as the Surveillance and Court Agreement. This denomination will be used in the following.
42 See also Baudenbacher, The Contribution of the EFTA Court to the Homogenous Development of the Law in the European Economic Area (1), [1997] EBLR 245, 246.
44 EFTA Court SSGA (supra note 40), para. 11.
46 Ibid. para. 22 [emphasis added].
47 Ibid. para. 23.
48 Only in one subsequent decision of 12 June 1998 in Case E-4/97 Norwegian Bankers’ Association v EFTA Surveillance Authority did the EFTA Court examine (and admit) locus standi of an association of bankers. Unfortunately, no indication on the reasoning of the EFTA Court was given it that case, since only the operative part of the order was published. The decision is available at www.efta.int/structure/court/efsat/ct.asp.
49 For a recent comment on this case, see Ludewig, A lost opportunity: No new approach to the concept of locus standi under Article 230 EC, [7-8/2002] ELR 258.
laid down by Article 230(4) EC should be disregarded. More precisely, the appellant asked the Court of Justice to go beyond the criteria laid down by the Treaty for *locus standi* of individuals. The reply to this proposal in paragraph 43 of the judgment is straightforward:

(...) it is not acceptable to adopt an interpretation of the system of remedies, such as that favoured by the appellant, to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.

Considering the fundamental principles behind the system of judicial review of the Treaty, this statement is neither surprising nor controversial. What the Court does say is only that it has no jurisdiction to examine and interpret national procedural law. Whatever criticisms can be made to the existing Community system of legal remedies, it is clear that the Court of Justice cannot disregard the wording of Article 230(4) EC. As the Court further pointed out, it falls solely within the competence of the Member States, in their treaty-making capacity, to modify that provision. This reasoning is understandable and should be welcomed. For the sake of clarity it must not be forgotten that this point was left unchallenged by the CFI in *Jégo-Quéré* as well as by Advocate General Jacobs in his opinion in *UPA*. Indeed, as analysed above, the CFI did not dispute that individuals should demonstrate, in accordance with Article 230(4) EC, that they are “directly and individually” concerned by a Community regulation in order to have the capacity to challenge its validity. On the contrary, the CFI, like Advocate General Jacobs, questioned the rigidity of the interpretation of the notion of “individual concern”, as developed by the Court of Justice since *Plaumann*. Hence, in *Jégo-Quéré*, the CFI initiated a more flexible interpretation of Article 230(4) EC. However, it did not admit – and rightly so – a possibility to derogate from the criteria that provision lays down, in the way requested by *UPA* in the proceedings before the Court of Justice.

This said, prior to answering the argument of the applicant, the Court of Justice cautiously recalled the principles governing *locus standi* of private persons against Community acts of general application under Article 230(4) EC. The Court of Justice restated its reasoning from *Plaumann*, according to which a natural or legal person can be individually concerned by the measure at issue if it affects him by reason of certain attributes peculiar to him, or by reason of a factual situation which differentiates him from all other persons and distinguishes him individually in the same way as the addressee. The Court then went on in declaring in a two-line paragraph that: “if that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation.”

This assertion appears particularly clear. The narrow definition of the criterion of “individual concern” as established since *Plaumann* should remain valid. Nevertheless, the Court of Justice’s reasoning is a bit weakened by the fact that it continues by considering, “however”, whether effective judicial protection of individuals is ensured. This general passage, introduced by the conjunction “however”, might tend to indicate that derogation to *Plaumann* might be possible if it were demonstrated, in a particular case, that no effective legal remedy existed under Community law. As contended by *UPA*, it should be pointed out that the possibility to grant individuals access to Community courts when there is no other effective judicial remedy was already indicated in *Greenpeace*. In that case, the Court of Justice refused standing to an association for the protection of the environment against a Community directive because of lack of individual concern. This conclusion did not prevent the Court of Justice to consider the applicant’s arguments concerning lack of judicial remedy. This way of reasoning could be interpreted as admitting that, when no effective judicial remedy is available to an individual, an exception to the rigid interpretation of the concept of individual concern could be considered. This possible opening seems nevertheless to be rejected. In an order delivered on 8 August 2002, the President of the CFI appears to interpret the *UPA* judgment and more particularly its paragraph 37 as bearing no exceptions. This order concerned an action for annulment of a Commission regulation and a request for interim measures to which the Commission opposed an argument of inadmissibility of the action. The President of the CFI referred solely to the Court of Justice’s judgment in *UPA* in order to reject the action as inadmissible. While admitting that the Commission regulation affected the economic situation of the applicant, the President of the CFI indicated that such circumstances do not suffice to differentiate the applicant from all other persons. The particular emphasis on paragraph 37 of the *UPA* judgment appears to indicate that *Plaumann* bears no derogation. *Jégo-Quéré* is therefore clearly overruled and, like the Court of Justice in *UPA*, even totally ignored by the President of the CFI. This is so even before the Court of Justice has to decide on the appeal brought by the Commission against that judgment.

In the *UPA* judgment, one reason for rejecting the lack of effective judicial remedies in the Community system is the argument that natural and legal persons have always the possibility to ask the national courts to request a preliminary ruling on the validity of Community measures. The Court of Justice in this respect declared that it falls within the Member States’ competence to “establish a system of legal remedies and procedures which ensures respect for the right to effective judicial protection.” The reference to preliminary ruling proceedings

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50 *UPA* (supra note 4), para. 37 [emphasis added].


53 Para. 30 of the order.

54 The appeal by the Commission was registered by the Court of Justice under the number C-263/02.

55 *UPA* (supra note 4), para. 41.
under Article 234 EC, as seemingly an appropriate alternative to direct actions under Article 230 EC, is not entirely convincing. As the Advocate General Jacobs pointed out in his opinion, there are no guarantees that the national courts will indeed make such reference. In addition, as the Court of Justice indicated in CILFIT, Article 177 (now Article 234 EC) “does not constitute a means of redress available to the parties in a case pending before a national court or tribunal”. Admittedly, the Court of Justice has subsequently ruled that national courts cannot declare a Community act invalid and are, in such circumstances, compelled to make a reference to the Court of Justice. But national courts are not precluded from declaring a Community act valid. The reference to the principle of sincere cooperation under Article 5 of the Treaty (now Article 10 EC), as UPA further makes, may contribute to solve this problem. However, an individual faced with a refusal by a national court to refer a preliminary ruling to the Court of Justice, or with a Community act, wrongly declared valid, may indeed have no effective judicial remedy. Proceedings under Article 230(4) EC will be unavailable, since the time limit stated therein will have irremediably elapsed before the national court will have delivered any judgment on the issue. The only alternative left under Community law would be to complain to the European Commission against the refusal by a national court to refer a preliminary ruling on the alleged invalidity of a Community act or the wrong declaration that a Community act is valid. As complainants have no legal rights, they may not use all arguments it possibly can to avoid any criticisms concerning the lack of effective judicial protection, it cannot be entirely excluded that a private person be denied justice at national level.

The attempt to widen the interpretation of the concept of “individual concern” made by the CFI in Jégo-Quéré was a bold attempt – maybe too bold an attempt. From a pure strategic point of view – if strategy exists in such matters - the CFI might have chosen a path whereby it would have presented its reasoning not as a complete reconsideration of the definition laid down by Plaumann, but a mere relaxation of that definition in the particular case at hand. Of course, the case would have been reasoned in a totally different way and would probably not have clarified the already complex body of case law on the application of “individual concern”. But the CFI might have succeeded and convinced the Court of Justice.

In UPA, the Court of Justice’s refusal to endorse a wider interpretation of the notion of “individual concern” was not explained. Admittedly, the Court of Justice was not compelled to do so, since none of the arguments of the applicant invited the Court of Justice to adopt a broader definition of that concept. Although it appears clear that the Court of Justice will annul Jégo-Quéré when it will decide on the appeal brought by the Commission, that decision will remain of interest for the legal motives which will be given by the Court of Justice. For the time being, one can only imagine that some of the reasons lie in the objections highlighted by the Advocate General in his opinion, which Mr Jacobs himself found unconvincing. This concerns, in particular, the alleged flood of applications for annulment of Community acts before the Community judicature. Another explanation is possibly related to the fact that the time was not ripe. In a period of time where the Community judicial system is faced with tremendous challenges linked to the enlargement of the European Union and to the extension of the Community courts’ competences, the Court of Justice may prefer preserving a certain order on matters within its grasp. In the meantime, lawyers and the legal doctrine will continue to struggle with the complexity of the cases relating to locus standi of individuals in Community law, while criticisms as to problems of access of individuals to the Community judicature will remain.

4. Conclusion

Jégo-Quéré was valid case law for less than three months. The attempt by the CFI to broaden the interpretation of the criterion of “individual concern” laid down in Article 230(4) EC was not endorsed by the Court of Justice in UPA. Admittedly, the CFI’s approach would have probably opened the Community judicature to an increased number of actions by individuals alleging the invalidity of Community regulations. Conversely, it would have also brought individuals better standing in Community courts. In UPA the Court of Justice indirectly called on the Member States to amend Treaty provisions. Locus standi of individuals may therefore be at the centre of the Intergovernmental Conference to be concluded in 2004. Although already overruled, Jégo-Quéré had at least the merit to re-open the debate. It remains to be seen whether the last word has been said.

ECJ 25 July 2002 – C-50/00 P – Unión de Pequeños Agricultores
Appeal – Regulation (EC) No 1638/98 – Common organisation of the market in oils and fats – Action for annulment – Person individually concerned – Effective judicial protection – Admissibility

According to the system for judicial review of legality established by the EC Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually.

Para 42 of the opinion.


Cl. Foto-Frost (supra note 18).

UPA supra note 4, para. 42.
