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STANDING FOR THE JUDICIAL REVIEW OF COMMUNITY NORMATIVE

ACTS: CLOSING PANDORA’S BOX?

C-50/00 P *Unión de Pequeños Agricultores (UPA)* of 25 July 2002, not yet reported, available at <http://www.curia.eu.int>

By Marie-Pierre Granger*

INTRODUCTION

In *Unión de Pequeños Agricultores (UPA) v. EC Council*, the European Court of Justice, invited to reconsider the conditions of standing of “non privileged applicants”, *i.e.* natural or legal persons,¹ for the purpose of the judicial review of Community measures under Article 230 (4) EC, tried (unsuccessfully?) to place the lid back on the Pandora’s box opened by the Court of First Instance a few months earlier. The reconsideration of these admissibility requirements was still awaiting to be carried out in a solemn fashion by the plenary of the Court in the autumn of this year during the deliberations on the *UPA* case, when the CFI, in the *Jégo-Quéré et Cie* case,² beat the European Court to it, by taking upon itself to reinterpret in a more liberal manner one of the standing criteria, that of the “individual concern” of applicants. Rather unexpectedly, the European Court brought forward the decision in *UPA* to the last session before the judicial summer vacation. Commentators were awaiting the decision with some excitement, expecting some kind of “revolutionary” judgment, but it is disappointment that came out of the ruling. In the judgment, the Court showed an unusual deference to the Treaty-makers and at first sight seemed eager to reaffirm its previous

restrictive approach to the standing of “individuals” (including companies and associations) for judicial review at Community level. However, the judgment is so ambiguous and so restricted in its scope, that it casts doubts as to the real intentions of the European Court and as to the state of the law after that judgment.

“JURISPRUDENCE CONSTANTE”, FACTS AND PROCEDURES

On 20 July 1998, the Council adopted a Regulation,³ which substantially reformed the common organisation of the olive oil market (a system of guaranteed prices and production aids) set up by a 1966 Regulation.⁴ The changes thus brought to the previous schemes forced some small farmers to cease trading. Unión de Pequeños Agricultores (UPA) is a trade association with legal personality which represents and acts in the interest of small Spanish agricultural businesses. On 20 October 1998, UPA brought an action before the CFI under Article 230 EC for the annulment of most of the provisions of the 1998 Regulation, on various substantive grounds, including breaches of some fundamental rights and principles. The Council raised an objection of inadmissibility of the application, which was upheld on 23 November 1999 by a reasoned order of the CFI.⁵ Indeed, under Article 230(4) EC as interpreted by the Community courts, individuals can challenge a Community act which is not addressed to them, that is a decision addressed to others, but also a regulation⁶ or a directive,⁷ only if the act is *de facto* a decision with regard to them and if they can show that they are “directly and individually concerned” by it. The Court established in *Plaumann v. Commission* that applicants are individually concerned by a measure if they can prove that they are affected by the measure in question 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.⁸ This individualisation of

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the applicant' situation is facilitated if the applicant can show that he or she belongs to a closed category,⁹ the interests of which must be taken into account by the institution taking the contested act,¹⁰ or if he or she has some specific rights affected by the act in question.¹¹ This individualisation is difficult to achieve in the case of actions brought by associations, which are admissible only where a legal provision expressly grants associations a series of procedural rights,¹² where the association is distinguished individually because its own interests as an association, especially its negotiating position, are affected by the measure, or where the association represents the interests of companies which would have themselves been entitled to bring proceedings.¹³ The CFI found that UPA did not fall into any of these three categories. With regard to the last one, the CFI noted in particular that

the fact that the regulation may, at the time it was adopted, have affected those of the applicant's members then operating in the olive oil markets and, in some circumstances, caused them to cease trading, cannot differentiate them from all the other operators in the Community, since they are in an objectively determined situation comparable to that of any other trader who may enter those markets now or in the future.

The CFI also rejected UPA's additional plea in favour of a more objective approach to judicial review, which put forward that the review of the legality of the regulation was a "matter of Community public interest". Indeed, in Community law, unlike in English law,¹⁴ issues of admissibility and substance should not be confused. Finally, the CFI also refused to consider the argument that the association may not receive effective judicial protection. The court justified it by the fact that, in any event, it would not be able to depart from the system of remedies provided by Article 230 EC, as it would need to go beyond the limits of the judicial powers conferred by that provision.

UPA appealed to the ECJ against the order, putting forward that the reasoning of the CFI was “inadequate,” “contradictory” and relied on a “misunderstanding” of the association’s argument, and that the order violated its fundamental right to effective judicial protection, a recognised principle of Community law. UPA’s main argument in appeal went as follows. Article 234 EC provides for a mechanism of plea of illegality to be initiated in national court proceedings, which enables national courts to refer questions regarding the legality of Community acts to the Court. However, because the 1998 Regulation did not call for national implementing measures against which an action could be brought before a national court, and because allegedly the association did not have the possibility to infringe the Regulation so as to challenge the validity of possible sanctions imposed as a result of such “illegal” behaviour, it found itself without the means to challenge indirectly the Regulation through the Article 234 EC procedure. Relying on one possible interpretation of *Greenpeace Council and Others v. Commission*,¹⁵ the association claimed that the CFI’s order infringed its fundamental rights to an effective judicial remedy, because it did not examine whether, *in that particular case*, there was an alternative legal remedy for UPA.

THE LEGAL ISSUE

As emphasised by the Court, the issue was whether the appellant, as representative of the interests of its members, could nonetheless have standing, under Article 230(4) EC, to bring an action for annulment of the contested act *on the sole ground* that in the alleged absence of any legal remedy before national courts, the right to effective judicial protection would require it. In other words, the Court had to decide whether the putative lack of alternative remedy at national level can constitute a substitute criterion for granting standing to a legal person, for the purpose of challenging the legality of Community normative acts.

THE ADVOCATE GENERAL'S PLEA FOR A NEW INTERPRETATION OF INDIVIDUAL CONCERN

In his Opinion preceding the judgment, the Advocate General Jacobs carried out a detailed examination of procedures of indirect challenges available against Community acts, which led him to strongly question the assertion that Article 234 EC procedure always provided for an effective alternative remedies. However, he did not consider that the lack of effective alternative remedy should be a criterion for granting standing and he took the view that *locus standi* should be determined independently of the availability of indirect challenges. According to him, the best solution in order to guarantee the adequate judicial protection of individuals is for the Court to adopt a more liberal interpretation of the requirement of individual concern. He suggested that an individual should be regarded as individually concerned where, “by reasons of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.” This understanding of individual concern is inspired by the French concept of an “*acte faisant grief*”, which constitutes the main admissibility requirement for the judicial review of administrative acts in France.

THE ECJ'S AMBIGUOUS APPROACH

While the Advocate General did not hesitate to go over the boundaries of the question asked to the Court and suggested a solution different to the one proposed by the appellant, the Court strictly stuck to its “mandate” and only answered the question asked, refusing the invitation made by the Advocate General and by the CFI in *Jégo-Queré et Cie v. Council*¹⁶ to reconsider the interpretation of individual concern.

The Court started by strongly reasserting that if the condition of individual concern as interpreted in *Plaumann*¹⁷ 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 seems to

be in contradiction with the CFI's decision in *Jégo Quéré et Cie v. Council*¹⁸ and with the Opinion of Advocate General Jacobs which both considered that a more liberal interpretation of the requirement of individual concern than the one adopted in *Plaumann v. Commission*¹⁹ was conceivable and desirable.

The Court nevertheless recalled that the Community is a “community based on the rule of law” and its institutions are subject to the judicial review of the compatibility of their acts with the Treaty and the general principles of Community law, including fundamental rights (*i.e.* the European “constitution”). Individuals are thus entitled to the effective protection of the rights that they derive from Community law, in conformity with the general principles stemming from the constitutional traditions of the Member States and from Articles 6 and 13 of the European Convention of Human Rights and Fundamental Freedoms.²⁰ It is worth noting that the Court made no mention of the EU Charter of Fundamental Rights²¹ proclaimed on 7 December 2000 at the Nice Summit, of which Article 47 recognises the right to an effective remedy and to a fair trial, while the Advocate General and the CFI in *Jégo Quéré et Cie*²² made explicit references to that provision. Perhaps the judges of the Court's plenary felt uncomfortable with the idea of using as a legal basis for their reasoning a document which had not been granted legal force by the Member States, so as to protect themselves against any accusation of judicial activism, while the CFI judges, more daringly, did not hesitate to make such ‘legal’ use of the Charter in *Jégo-Quéré et Cie*²³ and *max.mobile Telekommunikation Service GmbH*.²⁴

Furthermore, the European Court followed its traditional view exposed in *Les Verts v. European Parliament*,²⁵ according to which the Treaty provides for a *complete* system of remedies and procedures for the judicial review of Community acts, which is entrusted to the Community courts, but which can be initiated at both national (Article 234 EC) and Community level (Articles 230 and 241 EC). Consequently, the Court considered that, in

conformity with the principle of sincere co-operation (Article 10 EC), it fell on to the Member States to make sure that no failure occurs at national level, by ensuring that national courts refer questions of validity to the ECJ. The Court seemed to have missed the point here, as the issue is not that national legal systems did not provide the necessary procedures, but that the nature of the EC act in question might not create the adequate opportunities for indirect actions initiated at national level. Besides, as pointed out by the Advocate General, such passing on of responsibility does not resolve the problem of “the absence of remedy as a matter of right,” additional delays and costs or the award of interim relief, undermines monitoring difficulties and interferes with national procedural autonomy. The Court nonetheless refused to reconsider the adequacy and comprehensiveness of the system of remedies provided by the Treaty, in spite of the fact that it had been strongly challenged by many academics,²⁶ Advocates General²⁷ and the CFI itself in *Jégo-Quéré et Cie*.²⁸

Following its Advocate General on this point, the Court rejected the interpretation of the system of remedies suggested by UPA:

(...) it is not acceptable to adopt an interpretation of the system of remedies (...) 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.

According to the Court, such interpretation cannot be accepted as it would require an examination of national procedural law, which falls outside the Community courts' jurisdiction. This judicial restraint comes as a bit of a surprise if one recalls that the ECJ has not hesitated in the past to get into the intricacies of national procedural law so as to assess whether national remedies available for the enforcement of Community rights fulfilled the

Rewe proviso of equivalence and effectiveness.²⁹ However, it is true that to make standing dependent on a formal examination of national legal systems would constitute an even further breach in the principle of national procedural autonomy and lead the Court into an area clearly outside its jurisdiction. Besides, as pointed out by the Advocate General, such solution cannot find textual support in the Treaty and would lead to inequalities of treatment between applicants in the various Member States, which goes against the principles of legal certainty and uniformity.

At this stage of the Court's reasoning, it nevertheless sounded like that there was not much that the Court could do, or rather was willing to do, in order to improve individuals' access to the Community courts for challenging the legality of Community acts. However, the European Court's later explanation regarding the interpretation of the requirement of individual concern may restore some hope to those who support the relaxing of standing conditions for "individuals" seeking judicial review of Community acts, although it creates some confusion as to the intentions of the ECJ. The Court emphasised indeed that individual concern must be "interpreted *in the light of the principle of effective judicial protection* by taking account of the various circumstances that may distinguish an applicant individually" while stressing that "such an interpretation cannot have the effect of setting aside the condition in question."

This interpretative statement raises various questions. One of them is whether one could conclude that the fact that an applicant lacks alternative remedies could be a feature capable of "individualising" an applicant's situation and should thus be one factor to take into account in the assessment of individual concern. Another question is whether this interpretative approach could cover the liberal reading of individual concern proposed by the CFI in *Jégo Quéré et Cie*, according to which a 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, *by restricting his rights or by imposing obligations on him*³⁰ or that suggested by the Advocate General.³¹ The Court, quite surprisingly, did not make any explicit reference to either of these interpretative suggestions. On one hand, if one considers that the CFI's or the Advocate General's definitions empty the requirement of individual concern of its substance, then the European Court's decision seems to "invalidate" them. On the other hand, if they are simply seen as more liberal interpretations of individual concern, "in the light of the principle of effective judicial protection," which nonetheless retains enough substantial elements, then they may be acceptable. However, such an understanding of this part of the judgment cannot be reconciled easily with the Court's earlier confirmation of the *Plaumann* interpretation of individual concern.

THE STATE OF THE LAW AFTER *UPA*

So what is the state of the law regarding individuals' standing for the judicial review of Community acts after *UPA*? The situation is far from clear. Perhaps the lid has not been completely placed back on top of the Pandora's box, and the CFI's liberal interpretation of individual concern could be the new 'state of the law' of *locus standi* in the Community. By neither explicitly confirming nor condemning the interpretation of individual concern provided by the CFI in *Jégo Quéré et Cie* and by hurrying to release a decision which contains ambiguity and inconsistency, the Court did not help in clarifying the Community case law on standing of non-privileged applicants for judicial review of Community legislative and administrative measures.

The Court appeared to favour the status quo. The justification put forward by the ECJ judges dealt with their own understanding of the limits of their powers, as conferred by the Masters of the Treaty. Indeed, at the end of the judgment, the Court stressed that only the

Treaty-makers have the power to modify the standing conditions of the action for annulment by Treaty revision under Article 48 EU, which could have been realised during the 2000 Intergovernmental Conference leading to adoption of the Treaty of Nice. However, although the judicial system of the Community has been substantially reformed in 2000, Article 230(4) EC has noticeably been left untouched, which testifies of the unwillingness of the Member States to operate any change in the standing conditions for judicial review at Community level, or at least the absence of consensus among them necessary to go ahead with the reform. In the face of this implicit refusal by the negotiating Member States to improve access to the Community courts for individuals seeking to challenge the validity of Community acts, it is delicate for the ECJ to take the matter into its own hands. This deference of the ECJ towards the Member States and its strict respect for the wording of the Treaty, re-emphasised by its insistence on the fact that applicants must show that a Community act of legislative nature is “in the nature of a *decision* in their regard”, may nevertheless surprise on the part of a Court which in the past has not shown so much reluctance to go beyond the wordings of some Treaty provisions or to defy the Member States.

Should we conclude that the ECJ has now entered into a phase of judicial restraint, and that the daring and activist court is now the CFI, engaged in various attempts to push the boundaries of the law? One should not rush into such conclusions. First, the ECJ may have had some concerns regarding the possible rise in judicial review litigation that could arise from a relaxation of the standing requirement and its impact on the already significant workload of the Community courts. Secondly, the European Court may have felt that, although the time was ripe for a change in the conditions of access to the Community courts for the judicial review of Community acts, this change should not be realised lightly and deserved more reflection than the CFI gave it. Thirdly, the Court may also have considered that such a change should or could only be operated via the Community political decision-

making process, for reasons of legitimacy, democracy and effectiveness. Fourthly, the Court's apparent "attachment" to the status quo, the lack of consistency and the ambiguity of the ruling may simply be the results of the difficulties encountered by the Court in deciding the case by consensus among all the members of its plenary. Disagreements have probably arisen not so much on the opportunity of improving access of individuals to the Community courts for "direct" actions but rather on the modalities of a new interpretation of the requirement of individual concern. Finally, it should be reminded that the question asked to the ECJ was whether the lack of alternative remedies could constitute an alternative criterion, and not whether one should provide a new interpretation of individual concern. By sticking to providing an answer to the question asked, and by ignoring its Advocate General's proposal for an interpretative change, the ECJ only delayed taking position on the issue while leaving the door open for alternative interpretations of individual concern.

The main drawback of such "wait-and-see" attitude is that it increases even more legal uncertainty with regard to the law of standing for judicial review of Community acts, which is a rather unwelcome development, in particular considering the already complex and sometimes inconsistent nature of the case law on the issue.

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- ¹ The “privileged applicants”, which have systematic standing, are the main Community institutions (the EC Council, the EC Commission and when the Treaty of Nice will be ratified, the European Parliament) and the Member States. Other Community institutions such as the Court of Auditors and the European Central Bank are “semi-privileged applicants”, which have standing to defend their prerogatives. See Article 230(2) and (3) EC.
- ² T-177/01 *Jégo-Quéré et Cie* of 3 May 2002, not yet reported.
- ³ Regulation No 1638/98, O.J. 1998 L 210, p.32.
- ⁴ Regulation No 136/66, O.J. English Special Edition, 1965-1966, p.221.
- ⁵ T-173/98 *Unión de Pequeños Agricultores v. Council* [1999] E.C.R. II-3357.
- ⁶ C-358/89 *Extramet Industrie v. Council* [1991] E.C.R. I-2501; C-309/89 *Codorniu v. Council* [1994] E.C.R. I-1853.
- ⁷ T-171 and 175-177/98 *Salamander and Others v. Parliament and Council* [2000] E.C.R. II-2487.
- ⁸ C-25/62 [1963] E.C.R. 95, p.107.
- ⁹ C-106/63 *Alfred AG Toepfer .v. Commission* [1965] ECR 405.
- ¹⁰ C-11/82 *Piraiiki-Patraiki v. Commission* [1985] ECR 207.
- ¹¹ T-480 and 483/93 *Antillean Rice Mill e.a. v. Commission* [1995] ECR II-2305.
- ¹² T-122/96 *Federazione Nazionale del Commercio Oleario (Federolio) v. Commission* [1997] E.C.R. II-1559.
- ¹³ T-481/93 and T-484/93 *Exporteurs in Levende v. Commission* [1995] E.C.R. II-2941.
- ¹⁴ *R. v. Inland Revenue Cmrs ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617.
- ¹⁵ C-321/95 P [1998] E.C.R. I-1651.
- ¹⁶ *op.cit.*
- ¹⁷ *op.cit.*
- ¹⁸ *op.cit.*
- ¹⁹ *op.cit.*
- ²⁰ C-222/84 *Johnston* [1986] E.C.R. 1651.
- ²¹ O.J. 2000 C 364, p.1.
- ²² *op.cit.*
- ²³ *op.cit.*
- ²⁴ T-54/99, 31 December 2001, not yet reported.
- ²⁵ in C-294/83 [1986] E.C.R. 1339,

²⁶ See *inter alia*, A. Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) 11 C.M.L.Rev. 191; A. Arnall, 'Private applicants and the action for annulment under Article 173 of the EC Treaty' (1995) C.M.L.Rev. 7; 'Private applicants and the action for annulment since Codornú' (2001) 38 C.M.L.Rev. 7 and *The European Union and its Court of Justice* (Oxford University Press, 1999), 40-49; D. Walbroeck and A.-M. Verheyden, 'Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: à la lumière du droit comparé et de la Convention des droits de l'homme' (1995) C.D.E. 399; G. Vandersanden, 'Pour un élargissement du droit des particuliers d'agir en annulation contre les actes autres que les décisions qui leur sont adressées' (1995) 5-6 C.D.E. 535; C. Harding, 'The Private Interest in Challenging Community Action (1980) 5 E.L.Rev. 354; C. Harlow, 'Towards a Theory of Access for the European Court of Justice' (1992) 12 Y.E.L. 213; N. Neuwahl, 'Article 173 paragraph 4 EC: Past, Present and Possible Future' (1996) 21 E.L.Rev. 17; M. Nettesheim, 'Article 173 of the EC Treaty and Regulation: Towards the Development of Uniform Standing Requirements' in H.W. Micklitz and N. Reich (eds) *Public Interest Litigation before the European Courts* (Nomos Verlagsgesellschaft, 1996).

²⁷ Opinions of Advocate General Roemer in case C-6/68 *Zuckerfabrik Watenstedt* [1968] ECR 595; Advocate General Gand in case C-64/69 *SA Alcan Aluminium v. Commission* [1970] ECR 385, Advocate General Slynn in case C-246/81 *Lord Bethell v. Commission* [1982] ECR 2277; Advocate General Jacobs in cases C-358/89 *Extramet Industrie v. Council* [1991] ECR I-2501; C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 20 to 23 and C-50/00 *Unión de Pequeños Agricultores (UPA) v Council* of 21 March 2002; Advocate Général Ruiz-Jarabo Colomer in case C-142/95 P *Associazione agricoltori della provincia di Rovigo and others* [1996] ECR I-669; and Advocate General Cosmas in case C-321/95 *Stichting Greepeace Council (Greenpeace International) and Others v. Commission* [1998] ECR I-165.

²⁸ *op.cit.*

²⁹ C-33/76 *Rewe v. Landwirtschaftskammer Saarland* [1976] ECR 1989; C-431/93 *van Schijndel and van Veen v. SPF* [1995] ECR I-4705.

³⁰ *op.cit.* paragraph 51.

³¹ *op.cit.*