Free Movement of Workers, EU Citizenship and Access to Social Advantages

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ED\u00c9ITORIAL

LISBON AND THE LAWYERS – REFLECTIONS ON WHAT THE EU REFORM TREATY MEANS TO JURISTS

Philipp Kiiver

As soon as it became clear what the new EU Reform Treaty would look like, the Dutch government of Prime-Minister Balkenende announced that a referendum was not necessary in order to ratify the text in the Netherlands. The argument was, and still is, that the new treaty is fundamentally different from the previous Constitutional Treaty (which Dutch voters had rejected in 2005). The new text is supposedly so mundane, so down-graded and non-constitutional in nature that this time a vote of approval in the national parliament would be quite sufficient. At around the same time, Luxembourg's Prime-Minister Juncker gave a different sort of statement before his own parliament. Luxembourg would not need a referendum either – but not because the Reform Treaty is too mundane to merit one, but because Luxembourgish voters had already approved the Constitutional Treaty in a referendum. And since the Reform Treaty contains 90 percent of the Constitutional Treaty, so the argument in Luxembourg goes, calling for a second popular vote on what is essentially the same thing would be superfluous.

Much has been said and written, and much more will still be said and written on the extent to which the Constitutional Treaty and the Reform Treaty, or Lisbon Treaty after the place of signature, look alike. Much will be written on which of the two projects would have been the better alternative. Indeed, the next issue of the Maastricht Journal will include an interesting collection of first reflections on the Lisbon Treaty, on both its form and its content. But what we may do already now is reflect on how Lisbon may affect the way legal practitioners, academics, and teachers at law schools work. How will jurists talk, think, and teach after Lisbon?

Since the way lawyers talk about treaties depends above all on the treaties themselves, a brief overview of the Lisbon reforms and a contrast to the ill-fated Constitutional Treaty would be in order. Let us in that context focus above all on the big picture.

Whereas the Constitutional Treaty would have been chiefly a repeal-and-replace exercise with respect to the accumulated body of European treaty law, consolidating almost everything in a single treaty, Lisbon is an amendment treaty. It does not repeal the existing treaties, but inserts changes to the current Treaty establishing the European
Community (the EC Treaty) and the Treaty on European Union (the EU Treaty) and supplements them with additional texts in its annex. Lisbon is thus, as far as the format is concerned, more or less akin to Amsterdam and Nice. The overhaul of the treaty structure will however be somewhat more far-reaching under Lisbon than it was under Amsterdam and Nice. The idea is to now have an overarching treaty on the institutions, and a second treaty on the details, as it were. Briefly, therefore, provisions regarding the fundamental principles of EC law and regarding the institutions (such as voting rules in the Council and the composition of the European Parliament) will be moved upstairs, from the EC Treaty to the EU Treaty. In return, the Third Pillar on police and judicial cooperation in criminal matters will be moved downstairs from the EU Treaty to the EC Treaty. Thus, the EU Treaty will host the institutional bit of Union law (plus the exceptional area of the common foreign and security policy), whereas the EC Treaty will contain legal bases for specific policy areas and other procedural provisions and will be called the Treaty on the Functioning of the EU. Many supporters of the original Constitutional Treaty lament that Lisbon is messy and unreadable, because it does not create a unified text. In fact, however, the post-Lisbon setup would still correspond to the structure of the Constitutional Treaty. The post-Lisbon EU Treaty, with its institutional provisions, would then mirror Part I of the Constitutional Treaty; and the EC Treaty with its provisions on policy areas would mirror Part III; only Part II of the Constitutional Treaty, the Charter on Fundamental Rights, will not be reproduced in the post-Lisbon treaties but will nevertheless be made binding via a specific reference in the EU Treaty. Not everything is as neat as that, of course. For example, a large number of protocols, declarations, and opt-outs will cut across the new treaty structure. Furthermore, the Maastricht Pillars will not disappear; they remain visible, in particular the basic provisions regarding the Second Pillar on common foreign and security policy, which will be embedded in the EU Treaty rather than in the Treaty on the Functioning of the EU. But the big picture is not as confusing as it sometimes seems, or is suggested, and it cannot be said that it is much more confusing than the Constitutional Treaty.

It is of course not certain that Lisbon will enter into force at all. But if it does, then one may indeed expect that lawyers will for some time to come, for purposes of making an argument, refer not only to the consolidated, post-Lisbon treaties, but also draw a connection with the Constitutional Treaty. If a post-Lisbon provision is simply copy-pasted from the Constitutional Treaty, and certainly if it had been there even before, then such reference would add credibility to an argument that a particular provision was never called into question and represents a fixed element of continuity in EU law. It is also helpful to point out a provision’s history where a provision was newly inserted in the Constitutional Treaty and retained unamended in Lisbon, or inserted and then changed, or inserted and then dropped again. Though it failed to enter into force as such, the Constitutional Treaty will provide soft interpretative guidance for years to come.

Another very practical consequence of Lisbon will be the complications caused by the renumbering of provisions. They may be similar to what lawyers experienced after
the renumbering of Amsterdam. This also means that we may see a period with double
 citations, and we will continue to see double or even triple citations with respect to older
case-law or in new case-law on older facts. But the confusion will subside with time as we
get used to the new numbers and life moves on. Incidentally, one advantage of Lisbon
over the Constitutional Treaty is that not all existing provisions will be reshuffled. Thus,
the familiar Articles 234 or 308 EC, for instance, will stay where they were, albeit in
slightly changed form and with the EC Treaty renamed Functioning Treaty.

On the theme of numbers, since Lisbon means to squeeze an institutional reform
into the framework of existing treaties, some numbering is ugly. To draw a comparison
with American constitutionalism – so popular among Madison enthusiasts drafting
the Constitutional Treaty – the basic provisions regarding the US Congress are found
in Article 1 of the United States Constitution, a prominent place for a system’s federal
legislature indeed. The basic provisions regarding the European Parliament and the
Council, by contrast, will be numbered Articles 9a and 9b of the EU Treaty, respectively.
If the aim of Lisbon was to sound non-constitutional and unpretentiously technical,
then, as far as numbering style is concerned, the aim has certainly been achieved. A
summary of the rights that EU citizens enjoy is to be discovered in Article 17b.

Work for practicing lawyers and academics will definitely become more difficult
because treaty provisions proper may be conditioned or superseded by a vast body of
protocols, all of which enjoy treaty status as well. This without even counting the British
and Irish opt-outs from the Third Pillar and the UK and Poland-specific reservation
regarding the supremacy of domestic law over the Charter on Fundamental Rights. On
the bright side, however, this also means that practicing lawyers and academics will not
be out of work, and actually testing the opt-outs in court should provide work for both
professions as well.

What about scholars of the institutional, or constitutional law of the EU? Now that the
word ‘Constitution’ is banned from the treaties, the discourse on the constitutionalization
of Europe will be a bit more sober than it used to be during the Convention process. In
fact, it mostly remained rather sober in constitutional law circles even at a time when
other commentators were getting excited, positively or negatively, about the prospect
of a continental constitution. For the truth was, and is, that in as far as the European
Union has a constitution, it is already there: it may be found in the body of treaty law
as interpreted with great ambition and determination by the courts; in as far as the EU
did not have a constitution already, the Constitutional Treaty would not have created
one either. After Lisbon, debates on the constitutionalization of the EU will remain as
intriguing as before, but practicing lawyers of, say, competition law, may safely return to
handling treaties and secondary EU law without too much distraction. Thus, the legal
community will get some of its normalcy back.

More practically speaking as regards the ratification of Lisbon, one of the points
of the new treaty is to achieve the desired institutional reform with significantly fewer
referendums than the Constitutional Treaty had to face. At the time of writing, it seems
unlikely that any of the founding fathers will hold referendums on Lisbon, and those
member states that had already secured parliamentary approval for the Constitutional
Treaty will certainly not begin planning for referendums now. Scholars as well as policy-
makers may thus again engage in strategic scenarios of what might happen in case of
a ‘no’ to Lisbon from one of the member states that had previously not had the chance
to express their opinion on the Constitutional Treaty. The two popular rejections of
the Constitutional Treaty from the European heartland in 2005, by France and the
Netherlands, were truly shattering. However, in case of an isolated ‘no’ from Ireland
or Denmark in 2008, sensible contingency plans can be devised based upon historical
precedent.

The most intriguing prospect in this context, however, has to do with the UK. One
could easily imagine many a Europhile secretly longing for a British referendum that
would be negative, simply to bring about a last stand, a once-and-for-all showdown,
possibly precipitating a British withdrawal from the Union. Such thought should even be
appealing to British Eurosceptics who want their country to leave the EU anyway. After
all, how many more opt-outs and special arrangements for one country can the continent
tolerate?

Some of the questions for lawyers are also more technical than political: should it come
to that, how can one, under the international law on treaties, arrange for a withdrawal of
a member state from the EU because of its rejection of Lisbon? Lisbon does contain an
exit clause envisaging a negotiated withdrawal from the Union for individual member
states, but in order for that clause to apply, Lisbon would have to ratified in the first place,
in which case the question of withdrawal would be moot anyway. The current treaties do
not provide for any exit mechanisms, however, unilateral or otherwise. This means that
the withdrawal of one member state would require unanimous approval by all existing
member states as well, which also means that it is not possible to expel a member state
against its will. Thus, expect interesting scenarios to be tabled, some of which have been
around earlier on. For example, we may ponder the idea that the 26 other member states
might collectively leave the EU, leaving behind only a single member state, and going on
to found a new, 26-strong organization that looks exactly like the original EU.

But let us return to the lawyers themselves and their daily work. In most of the
substantive policy areas, the Lisbon changes will not so much affect the legal scope of
EU action as the political decision-making process: more co-decision, more qualified
majority voting. In law schools, classes on the history of the EU treaties will take longer;
in classes on the substantive law, we will have to get used, among other things, to a new
numbering. Some habits we may keep. Now that the straightforward language envisaged
in the Constitutional Treaty is off the table, directives will still be called directives, and
not ‘European Framework Laws’. Some habits are bound to change, though. After de-
pillarization, we are probably supposed to stop using the term ‘European Community’
– everything will be ‘Union’ – although old habits die hard, especially since we will still
be able to tell the original Community bits apart from the rest, namely the continuing residue of the two Union Pillars.

Another question to be addressed is how we should henceforth call the EC Treaty? ‘Treaty on the Functioning of the European Union’ sounds too cumbersome. Can we simply keep calling it ‘the Treaty’ as we do now? After all, the EU Treaty will now become what it was supposed to become already in Maastricht, namely a genuinely overarching ‘parent’ treaty, rather than an awkward supplement introducing additional intergovernmental pillars. Perhaps ‘the Treaty’ will some day refer to the EU Treaty rather than the EC Treaty, and perhaps ‘Rome’ could still be a useful and familiar shorthand version for the Treaty on the Functioning of the EU?

Time will tell. For now, let us follow the ratification process. Let us prepare for the moment that the official consolidated version of the treaties is published. Let us, each starting with our own field of expertise, check what will change and what will stay the same. And let us remain critical and realistic: there remains a chance of course that Lisbon will fail just as the Constitutional Treaty did. And what then? Possible scenarios range from the agonizing to the frustrating to the intriguing or downright frightening. For the short term, it will simply mean that we will use the current, post-Nice version of the treaties. Which is of course what we are doing already now.
FREE MOVEMENT OF WORKERS,
EU CITIZENSHIP AND ACCESS
TO SOCIAL ADVANTAGES

Mel Cousins*

ABSTRACT

This article discusses recent developments in the European Court of Justice’s approach to freedom of movement of workers and how that has been influenced by EU provisions on citizenship. It examines, firstly, the Court’s interpretation of the circumstances in which a worker who has changed his or her residence (without altering the place of work) could rely on Article 39 EC (which concerns the rights of migrant workers). Secondly, it examines how the expansion of rights in this area is creating certain tensions between the legal provisions concerning the right to “social advantages” – which include many social security benefits – and rights under the detailed system of social security co-ordination set out in Regulation 1408/71. In particular, this has created disputes concerning the ‘export’ of social benefits. In conclusion we discuss some of the implications of this case law for the Court’s approach to free movement of citizens and workers.

Keywords: EU Law; Free Movement of Workers; Citizenship; Social Advantage; Social Security

§1. INTRODUCTION

One of the most vibrant areas of EU law is that concerning the concept of EU citizenship. Indeed this concept, once thought to be merely symbolic, has now developed to such an

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1 See R.C.A. White, 'Free movement, equal treatment and citizenship of the Union', 54 I.C.L.Q. 885 (2005); R.C.A. White, 'Citizenship of the Union,
extent that it is influencing the European Court of Justice’s interpretation of the right to free movement of workers. This is a somewhat unexpected development given that, historically, workers were those with the greatest rights under EU law. As we will see, this has given rise to concerns, at least in some legal quarters, that the distinction between workers and citizens is becoming blurred. In this article, a number of recent cases in which the Court considered a number of issues concerning the relationship between citizenship and workers rights are discussed. In part I, we examine the Court’s interpretation of the circumstances in which a worker who has changed his or her residence (without altering the place of work) could rely on Article 39 EC (which concerns the rights of migrant workers). The citizenship-informed rights of workers include the right to ‘social advantages’ under Regulation 1612/68 on free movement of migrant workers.\(^2\)

The expansion of rights in this area is also leading to certain stresses between the legal provisions concerning the right to ‘social advantages’ – which include many social security benefits – and rights under the detailed system of social security co-ordination set out in Regulation 1408/71.\(^3\) In particular, this has created tensions concerning the ‘export’ of benefits, i.e. claims by migrant workers to access to social advantages payable outside the country of employment under Regulation 1612/68 in situations where this is not provided for (or specifically excluded by) Regulation 1408/71. The Court’s approach to this issue in a number of recent cases is discussed in part II (which looks at the relationship between the two legal instruments) and part III (which sets out the detailed analysis of the cases). In conclusion we discuss some of the implications of this case law for the Court’s approach to free movement of citizens and workers.

\section{2. Does A Change of Residence Only Bring the Free Movement of Worker Provisions into Play?}

In a series of recent cases – Hartmann, Geven and Hendrix – the Court of Justice considered whether a person who lived and worked in one Member State and while, continuing to work in that State, moved his or her residence to another Member State could rely on the free movement of worker provisions in EU law.

\begin{thebibliography}{9}
\bibitem{2} Article 7(2) of Regulation 1612/68 provides that a worker who is a national of a Member State ‘shall [in the territory of another Member State] enjoy the same social and tax advantages as national workers’.
\bibitem{3} Regulation 883/2004 is intended to reform and replace the existing Regulation 1408/71. Although ‘in force’, Regulation 883 is not yet ‘applicable’.
\end{thebibliography}
Ms. Hartmann, an Austrian national who was not employed in the paid labour force, was married to a German who worked in Germany.\(^4\) The couple lived in Austria and Ms. Hartmann claimed a child raising allowance (under the BerzGG) from the German authorities in respect of her children. This was refused on the basis that she was not resident in Germany. Normally the Hartmanns would have been entitled to such an allowance under Regulation 1408/71 on the basis of Mr. Hartmann’s employment in Germany. However he was a civil servant and civil servants were not – at the relevant time – within the personal scope of regulation 1408/71.\(^5\)

Ms Geven was a Dutch national who lived in the Netherlands with her husband, who worked in that Member State.\(^6\) After the birth of her son, she worked on a part-time basis in Germany (between 3 and 14 hours per week). Ms. Geven applied for the same child-raising allowance but was refused by the German authorities on the basis that she did not have her permanent or ordinary residence in Germany and was not in a contractual employment relationship of at least 15 hours a week. Moreover, as a person in minor employment the German authorities ruled that she was not an ‘employed person’ within the meaning of Regulation 1408/71.\(^7\)

Mr. Hendrix was also of Dutch nationality. He has a slight mental disability and received a disability allowance (Wajong).\(^8\) Mr. Hendrix was considered to be between 80\% and 100\% incapacitated for work because there are insufficient posts in the labour market suited to his skills and capabilities. He was employed in specially adapted work, in the Netherlands. He was paid for this work but continued to receive the Wajong benefit, reduced to take account of his wages. In 1999, Mr. Hendrix moved to Belgium while continuing to work in the Netherlands. The Netherlands authorities then decided to terminate the benefit under the Wajong on the basis that he had taken up residence outside the Netherlands. The Wajong benefit is specifically designated by the Netherlands as a special non-contributory benefit under Regulation 1408/71 and as such is not exportable.\(^9\)

\(^4\) Case C-212/05 Hartmann [2007] ECR I-000.
\(^5\) See the analysis of this issue by Advocate General Geelhoed in his opinion at paras. 23–27. The Regulation was subsequently extended to civil servants from 1999 (Regulation 1399/1999).
\(^6\) Case C- 213/05 Geven [2007] ECR I-000.
\(^7\) Unlike Regulation 1612/68, which applies an EU definition, the personal scope of Regulation 1408/71 is largely defined by national law. It appears that Ms. Geven’s employment was below the thresholds for insurance under national law and she was not, therefore, entitled to benefits under Regulation 1408/71.
\(^8\) Case C-287/05 Hendrix [2007] ECR I-000.
\(^9\) The refereeing court in Hendrix had asked whether the Wajong was, in fact, a special non contributory benefit but this issue had already been resolved in Case C-154/05 Kersbergen-Lap [2006] ECR I-6249. This is by no means an uncontroversial issue. See M. Cousins, ‘Social security, social assistance, and “special non-contributory benefits”: the never-ending story’, 9 European journal of social security 95 (2007); and Verschueren ‘European (internal) migration law as an instrument for defining the boundaries of national solidarity systems’. 
The Court had previously held – in Werner – that the mere fact that a person lived in a Member State other than that in which he worked was not sufficient to bring into play the free movement of worker provisions. Although that case involved free movement of services (Article 49 EC), it was widely understood to apply also to free movement of employees under Article 39 EC. In that case, Mr. Werner – a German dentist who worked in Germany but lived in the Netherlands with his wife – questioned whether German tax law which treated him less favourably because he lived outside Germany was compatible with Community law. The Court shortly dismissed his claim on the basis that mere residence by a national of a Member State outside that State in which he worked did not raise an issue of EU law. However, in a case involving very similar facts, Ritter-Coulais, the Court subsequently held that a German couple who were employed in Germany but lived in France could rely on Article 39 to preclude German tax law that treated them less favourably than German residents. This decision has been heavily criticised for its form if not its outcome. As Martin pointed out, it appeared that the Court ‘had reversed Werner, but without saying so and without legally motivating that reversal’.

Fortunately the issue has again been raised in the recent Hartmann and Hendrix cases, and clarification of the Court’s position has been assisted by the fact that the two Advocates General – Geelhoed in Hartmann and Kokott in Hendrix – took different views on the issue. Advocate General Geelhoed, supported by the Netherlands and United Kingdom governments as well as the EC Commission, argued for the maintenance of the Werner position, while Advocate General Kokott supported a broader approach.

Advocate General Geelhoed in Hartmann began his analysis by pointing out that the Court has consistently ruled that ‘any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of Article [39] EC’. He emphasised that the Court has described the objective of Article 39 EC as being to allow a worker to move freely within the territory of the other Member States and to stay there for the purpose of employment.

In the light of this description of the scope of Article 39 EC, Geelhoed suggested that one could distinguish two situations covered by the free movement of worker rules:

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11 See, for example, the opinion of Advocate General Léger in Case C-152/03 Ritter-Coulais [2006] ECR I-1711 at paras. 35–60.
12 In fact, one of the couple had dual French nationality but the Court made no reference to this fact.
13 Case C-152/03 Ritter-Coulais [2006] ECR I-1711.
14 D. Martin, ‘Comment on Ritter-Coulais and Ioannidis’, 8 European Journal of Migration and Law 231 (2006), 235. As Advocate General Kokott more tactfully put it, it would have been ‘a welcome step’ if the Court in Ritter-Coulais had expressly stated that it was abandoning the Werner case-law (Hendrix, opinion at para. 23).
15 Opinion, paras. 28–434.
16 As, for example, in Ritter-Coulais, para. 31.
first, the ‘classical’ situation of a person who moves to another Member State to take up employment and, second, that of a frontier worker who goes to work on a regular basis in a Member State other than that of residence. In both cases, Geelhoed argued that the essential factor was that the person moved to another Member State for the purpose of employment. However, Mr. Hartmann did not fall into either category as he has taken up residence in Austria for non-work-related reasons. Advocate General Geelhoed accepted that the recent decision in Ritter-Coulais might appear to call this approach into question and suggest that Mr. Hartmann could indeed be considered as a Community worker. However, he questioned whether such an interpretation was consistent with the system of free movement of workers established by the Treaty which rested, he argued, on a distinction between four categories of free movement based on the reasons for which a Community national wished to go to another Member State. He pointed out that originally a right to free movement has been granted for economic reasons and that distinct legal regimes had been established for persons wishing to move to another Member State to take up employment, to establish themselves or to provide services. Later, with the introduction of the citizenship provisions in the Treaty, a right to free movement and of residence was also recognized for non-economic reasons. Geelhoed argued that the rights linked to each category of free movement are different (even if a certain degree of convergent interpretation has occurred over time in the rules concerning employment, establishment and freedom to provide services). He argued that the citizenship rights, however, remained distinct, and the rights which could be based on these provisions, while evolving, were limited in comparison with those flowing from the economic freedoms. Accordingly, Geelhoed argued that it was essential to establish in an objective manner the reason why the person concerned had exercised his or her right of free movement so as to establish the regime under which his or her rights were based.\(^{17}\)

This approach had been adopted by the Court in Werner\(^{18}\) and Geelhoed suggested that the apparently different outcome in Ritter-Coulais arose from the fact that the free movement of capital and the citizenship provisions were not in force at the relevant time.\(^{19}\) He argued that the effect of Ritter-Coulais would be to blur the distinction between free movement of workers and the free movement rights of citizens and to allow an EU citizen who moved for non-economic reasons to avail of rights reserved for those who were moving for economic reasons.

\(^{17}\) Para. 34.

\(^{18}\) Although, Geelhoed accepted that the actual outcome in Werner would be different today (para. 35).

\(^{19}\) The suggestion appears to be that the Court incorrectly applied Article 39 EC in the Ritter-Coulais case in order to achieve the outcome that would be arrived at today by the application of the free movement of capital and/or citizenship provisions. However, this interpretation seems less likely than that suggested by others, i.e. that the Court simply overruled its previous approach without bothering to say so or explain why.
Advocate General Geelhoed argued that, from an economic perspective, the rules of the common market had been established to liberalize not only the products of the economic cycle (goods and services) but also the factors of the economic cycle (labour and capital). It was, he argued, possible to separate the migrant worker as a person from that which she represented in economic terms. Where a worker moved to another Member State to work, the labour factor was transferred to the State of employment. On the contrary, however, where a person continued to work in one country but moved to live in another, the labour factor remained in situ and there was, therefore, no reason to apply Article 39 EC. Therefore, he argued that Mr. Hartmann could not be considered to be a migrant worker for the purposes of Article 39 EC.

To the contrary, Advocate General Kokott in *Hendrix* argued that movement of residence should engage the free movement of worker rules. She accepted that the freedom of movement rules did not apply to situations which are purely internal to a single Member State. In a situation where discrimination did not directly relate to nationality and a worker sought to rely on the freedom of movement for workers rules against his own Member State, some other cross-border factor was, therefore, required to bring the matter within the scope of that freedom. However, she suggested that the cross-border element in the *Hendrix* case was supplied by the fact that he was resident in Belgium and worked as an employed person in the Netherlands. As a frontier worker he moved, on a daily basis, from one Member State to another to pursue his employment there.

Advocate General Kokott argued for ‘an understanding of the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured as described in Article 14(2) EC’. She pointed out that Article 39 EC implements the fundamental principle contained in Article 3(1)(c) EC, according to which the Community is to abolish obstacles to free movement between Member States. In that context, Kokott argued that it was of no consequence whether those obstacles emanate from the State of origin or the host State. She believed that the more restrictive interpretation of freedom of movement for workers would contradict the principle underpinning the internal market. In an area without internal frontiers, a person who travels from his State of residence to work in the State of which he is a national may not be subject to obstacles any more than a person who commutes from his State of nationality in order to work in another Member State. Kokott argued that it could not be decisive whether the cross-border situation arose from a transfer in the place of residence or in

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20 Para. 41.

21 Para. 41 et seq. Although Advocate General Kokott’s analysis is persuasive, her choice of judgments to support that approach is perhaps less so. For example, she cites Case C-227/03 *Van Pommeren- Bourgondiën* [2005] ECR I-6101, but this involves Regulation 1408/71 on the co-ordination of social security under which movement for *any* purpose has long been accepted as falling within the scope of the Regulation. See F. Pennings, ‘The *Van Pommeren- Bourgondiën* Judgment’, *7 European Journal of Social Security* 167 (2005).
the place of employment. Such an approach would give rise to totally random results and would mean, for example, that Mr. Hendrix, who had worked in the Netherlands and moved his residence to another Member State, would not be able to rely on the freedom of movement for workers. If, however, he were subsequently to lose his job and to take up new employment in the Netherlands, the principle of the freedom of movement for workers would apply, because he would now be moving from Belgium to the Netherlands in order to take up employment.

Kokott addressed the argument of Advocate General Geelhoed in Hartmann that the aim of the free movement provision is solely to permit the factor of labour to move, there being no such movement in the case of a mere transfer of residence. She accepted that in so far as a national rule was ‘directly linked to the transfer of a private residence’ and created obstacles to that move, it might indeed be argued that such measures should be categorised primarily as affecting the freedom of movement for Union citizens (under Article 18 EC). Kokott argued, however, that if the

transfer of the residence has already been effected and the less favourable treatment results from the fact that workplace and residence are now to be found in different locations, freedom of movement for workers takes precedence: from that moment onwards, the factor of labour is impeded in its movement from the (new) State of residence to the State of employment.22

She also rejected the suggestion, advanced by Geelhoed, that the outcome in Ritter-Coulais should be interpreted with regard to the fact that the provisions concerning freedom of movement of capital and for citizens of the Union did not apply _ratione temporis_ to the facts of that case as unconvincing. Kokott argued that it would be legally untenable to adopt a broader or narrower interpretation of freedom of movement for workers depending on whether the facts of the case are also covered by another fundamental freedom.23 She proposed, therefore that a worker could rely on Article 39 EC and Article 7 of Regulation 1612/68 against the Member State of which he is a national, if he has worked solely in that Member State and continues to work there, but is resident in another Member State.

The Court in both cases ruled that the persons concerned could rely on Article 39 EC.24 However, the Court did not enter into the rationale for its approach, relying in Hartmann on its (unmotivated) decision in Ritter-Coulais and in Hendrix. Nonetheless, it is now at least entirely clear that the fact that a person settled in a Member State for reasons not connected with his or her employment does not justify refusing him or her the status of migrant worker, which he or she acquired as from the time when, following the transfer of residence to that Member State, he or she made full use of his right to freedom of movement for workers by going to another Member State to carry on an

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22 Para. 45.
23 Para. 40.
24 _Hartmann_, paras. 17–20; _Hendrix_, para. 46.
occupation there. It may be assumed that the rationale for the Court’s approach is substantially that outlined by Advocate General Kokott (discussed above).

§3. CONFLICTS BETWEEN COMMUNITY REGULATIONS

The fact that the claimants were able to rely on Article 39EC and Regulation 1612/68 then raised the question as to whether they were entitled to the specific benefits claimed and raised a potential conflict between Regulation 1612/68 and Regulation 1408/71. Regulation 1408/71 – established on the basis of Article 42 EC – provides a rather comprehensive (and complicated) system of co-ordination of social security benefits in the EU Member states (and the EEA) with the aim of facilitating the free movement of workers. However, there are always situations where migrant workers feel they should be – but are not – entitled to a particular benefit. This arises for two reasons. Firstly, Member States have understandable concerns about the cost implications for their benefit systems and tend to have particular concerns about exporting non-contributory benefit. Secondly, developments in employment and social patterns, and changes in national benefits systems tend to outpace the ability of the Community legislature to respond to such change. This leads to migrant workers seeking to rely on Article 39 EC and Regulation 1612/68 in order to establish entitlement to benefits that either do not fall within the scope of Regulation 1408/71 or are specifically not exportable under that regulation. This in turn raises the question as to whether one Regulation has priority over the other.

In previous cases, the Court has tended to avoid giving any definitive view on this issue but, in practice, had allowed workers to rely on Regulation 1612/68 to claim benefits where no entitlement arose under Regulations 1408/71. However, in Hartmann, Advocate General Geelhoed agreed with the argument of the German government that where a benefit is not exportable under Regulation 1408/71 (because the person concerned fell outside the personal scope of the Regulation), this situation should not be called into question by allowing the benefit to be obtained under Regulation 1612/68. This he believed was the objective of Article 42(2) of Regulation 1612/68, which provides that ‘This Regulation shall not affect measures taken in accordance with Article 51 [now 42] of the Treaty’, which, of course, includes Regulation 1408/71. Based on this somewhat

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25 Hartmann, para. 18.
26 Although it does not appear that any research has ever been carried out to establish if it has any effect whatsoever in this regard.
27 See, in particular, Case C-57/96 Meints [1997] ECR 6689 (redundancy benefit for agricultural workers not within the material scope of Regulation 1408/71 but exportable under Regulation 1612/68); and Case C-337/97 Meeusen [1999] ECR 3289 (study finance – an issue not addressed by Regulation 1408/71 – exportable under regulation 1612/68).
28 Hartmann opinion, para. 50. The German authorities pointed, in particular, to the absence of any mechanism under Regulation 1612/68 to prevent double payment of social benefits.
slender evidence, Advocate General Geelhoed argued that this created a relative hierarchy between the two Regulations in the sense that Regulation 1408/71, being more specific, must take precedence over Article 7(2) of Regulation 1612/68, where the application of the two Regulations would lead to contradictory outcomes.

In Hendrix, the defendant as well as the Netherlands and UK governments also argued that Regulation 1408/71 was the more specific provision in comparison to Regulation 1612/68, and that, therefore, it applied exclusively (i.e. to the exclusion of Regulation 1612/68) within its scope of application. They argued in particular that Regulation 1612/68 could not result in a situation that benefits whose export is excluded under Article 10a of Regulation 1408/71 might, after all, be payable. However, Advocate General Kokott pointed out that the Court has consistently held that Article 7(2) of Regulation 1612/68 can apply to social advantages which fall within the scope of Regulation 1408/71.29 She argued that both Regulations could be applicable in parallel (i) because of the difference in their personal scope, (ii) because the concept of a social advantage in Regulation 1612/68 is broader than that of a social security benefit under Regulation 1408/71, and (iii) because of the general significance of Regulation 1612/68 for freedom of movement of workers.30 Consequently, she took the view that the fact that a benefit falls wholly or partially outside the scope of Regulation 1408/71 and, accordingly, that that Regulation does not require the benefit to be exported is irrelevant as to whether Regulation 1612/68 provides an entitlement to the benefit. Unsurprisingly, Advocate General Kokott dismissed the relevance of Article 42(2) of Regulation 1612/68. She pointed out that Article 42(2) does not set out any precedence as to measures taken in accordance with Article 42 EC, rather it merely requires that Regulation 1612/68 must not ‘affect’ those measures. She took the view that this wording did not support the argument that Regulation 1612/68 should give precedence to Regulation 1408/71, but rather supported the argument that the Regulations should apply in parallel.31 Nor, she argued, did the fact that Article 7(2) of Regulation 1612/68 is in general terms whereas Regulation 1408/71 contains specific provisions justify the conclusion that Regulation 1408/71, as lex specialis, takes precedence over Regulation 1612/68. The regulatory technique utilised within each of the regulations did not of itself shed any light on the Regulations’ hierarchy.

Above all, Advocate General Kokott argued that the fact that Article 7 of Regulation 1612/68 was a specific formulation of the free movement guarantee set out in Article 39 EC militated against Regulation 1408/71 having general priority over Article 7 of Regulation 1612/68. In contrast, in all cases involving the interpretation and application of Regulation 1408/71, the requirements of the Treaty as a superior source of law must be observed. The fact that a national measure might be consistent with a provision of

30 Hendrix opinion, para. 52.
31 Para. 54.
secondary legislation, in this case Article 10a of Regulation 1408/71, did not remove that measure from the scope of the Treaty’s provisions. The Court most explicitly addressed this issue in *Hendrix* where there was a direct clash between the position in Regulation 1408/71 (benefit specifically not exportable) and the potential exportability under Regulations 1612/68.32 The Court accepted that the benefit in question in that case was a special non-contributory benefit under Regulation 1408/71, receipt of which can lawfully be reserved to persons who are resident in that State, and that Article 42(2) of Regulation 1612/68 provides that it ‘shall not affect measures taken in accordance with Article [42] of the Treaty’. However, it went on to point out that the provisions of Regulation No 1408/71 enacted to give effect to Article 42 EC must be interpreted in the light of the objective of that article, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. Following Advocate General Kokott, the Court pointed out that Article 7(2) of Regulation 1612/68 is the particular expression, in the area of social advantages, of the principle of equal treatment enshrined in Article 39(2) EC, and must, therefore, be given the same interpretation.33 Accordingly it would appear that, in certain cases, Regulation 1408/71 may be overruled by Regulation 1612/68 interpreted ‘as the particular expression of’ Article 39 EC and, as we will see, the Court followed this approach in *Hendrix*.

§4. SOCIAL ADVANTAGES AND MIGRANT WORKERS

Turning now to a detailed analysis of the cases, in the three recent cases considered here, EU citizens relied on Article 39 EC and Regulation 1612/68 to claim benefits that would not have been payable under Regulation 1408/71. All three claimants argued that the benefits in question – a German child-raising allowance in *Hartmann* and *Geven*, and a Dutch disability allowance in *Hendrix* – were social advantages within the meaning of Article 7(2) of Regulation 1612/68. Indeed, the Court had already held – in *Martinez Sala* – that the child-raising allowance in question was a social advantage,34 and the Court did not have any hesitation in holding that the Wajong benefit was also a social advantage.35

The key question was, however, whether EU law required that the claimants, as migrant workers, be entitled to the social advantages claimed. The wording of Article 7(2) itself would suggest that it only applies to discrimination against non-nationals. However, the Court has long ruled that it must be read in conformity with Article 39 EC and so it applies to all discrimination against migrating EU workers (national and non-

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32 The details are discussed in section III.
33 *Hendrix*, paras. 52–3.
34 Despite this Advocate General Geelhoed discussed the issue at some length, paras. 47–60.
35 *Hendrix*, judgement para. 49.
Clearly denying benefits to non-residents – as in all three cases – was more likely to affect migrant workers and the Court accepted this without much argument. Accordingly, the Court ruled that the national laws in question required justification on the basis of objective considerations in the public interest, independent of the nationality of the persons concerned.

In *Hartmann*, the German authorities argued that German child-raising allowance constituted an instrument of national family policy intended to encourage the birth-rate in that country. The primary purpose of the allowance was to allow parents to care for their children themselves by giving up or reducing their employment in order to concentrate on bringing up their children in the first years of the child’s life. The German government claimed that the child-raising allowance was granted in order to benefit persons who, by their choice of residence, have established a real link with German society and argued that, in that context, a residence condition was justified. However, the Court noted that regardless of whether the aims pursued by the German legislation could justify a national rule based exclusively on residence, the information provided by the national court indicated that the German legislature did not in fact confine itself to a strict application of the residence condition for the grant of child-raising allowance but allowed exceptions under which frontier workers could also claim it. In particular, frontier workers who worked in Germany but lived in another Member State could claim German child-raising allowance if they carried on an occupation of a more than minor significance. Consequently, the Court took the view that residence was not regarded as the only connecting link with the Member State concerned, and that a substantial contribution to the national labour market also constituted a valid factor of integration into the society of that Member State. Accordingly, the Court held that, in those circumstances, the allowance could not be refused to a couple such as Mr. and Ms Hartmann who did not live in Germany, but one of whom worked full-time in that State.

*Geven* involved the same benefit and the Court made the same points regarding justification, pointing out that ‘substantial contribution to the national labour market also constituted a valid factor of integration’. However, the Court interpreted the ‘substantial contribution’ requirement to mean that the fact that a non-resident worker does not have a sufficiently substantial occupation in the Member State concerned is capable of constituting a legitimate justification for a refusal to grant the social advantage at issue.
The Court argued that while a person in ‘minor employment’ has the status of worker within the meaning of Article 39 EC, social policy is, in the current state of Community law, a matter for the Member States, who have a wide discretion in exercising their powers in that respect.\(^{43}\) Accordingly, the German legislature could reasonably consider that the exclusion from the childcare allowance of non-resident workers who carry on an occupation that does not exceed the threshold of minor employment (as defined in national law) constitutes a measure that is appropriate and proportionate, having regard to the objective of granting such allowances to persons ‘who have a sufficiently close connection with German society’.\(^{44}\) Therefore, the Court ruled that Article 7(2) of Regulation 1612/68 did not preclude the exclusion of a migrant worker in minor employment (between 3 and 14 hours a week) from receiving a German child-raising allowance on the ground that she did not have her residence in Germany.\(^{45}\)

Finally, the *Hendrix* case raised a series of complex issues about the exportability of special non-contributory benefits. In the *Hartmann* and Geven cases, Regulation 1408/71 had not provided for exportability but neither had it explicitly ruled it out.\(^{46}\) In contrast, article 10a of Regulation 1408/71 specifically provides that

> Notwithstanding the provisions of Article 10 and Title III, persons to whom this regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) *exclusively in the territory of the Member State in which they reside* (my emphasis), in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. …

In a somewhat equivocal opinion, Advocate General Kokott had accepted that as the Wajong benefit was granted only to persons resident in the Netherlands, it disadvantaged workers who worked in the Netherlands but were not resident there. However, that less favorable treatment might be justified by objective considerations in the public interest independent of the nationality of the persons concerned. She argued that the residence requirement in Article 10a of Regulation 1408/71 served to delineate the competences of the Member States in the provision of special non-contributory benefits that are not only connected to social security benefits but which also contain elements of social assistance,

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\(^{43}\) Citing Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741, paras. 18–21, 29. That case had held that Directive 79/7 on equal treatment in social security did not prohibit national provisions under which employment of less than 15 hours a week and attracting remuneration of up to one-seventh of the monthly reference amount was excluded from compulsory social insurance, even where the relevant provisions affect considerably more women than men, since the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve a social policy aim unrelated to any discrimination on grounds of sex.

\(^{44}\) Paras. 28–29.

\(^{45}\) Para. 30. It is arguably unfortunate that the Court should extend its rulings which allowed provisions which had a disproportionate impact on (mainly female) part-time workers in the area of equal treatment into the area of free movement. Previously the Court had not distinguished between full and part-time workers in this area of law once the work involved was ‘effective and genuine’

\(^{46}\) As we have seen the persons concerned fell outside the personal scope of the Regulation.
and pointed out that the Court had already held that the place of residence constitutes an appropriate criterion for that purpose.\(^4^7\) Firstly, the Court had held that Article 10a of Regulation 1408/71 is compatible with the provisions on freedom of movement for workers because special benefits are closely linked to the social environment. Since the centre of gravity of a person’s life is generally to be found at his place of residence, it is primarily for the State of residence, taking into account the social environment there (for example, the cost of living), to determine whether and to what extent a special benefit must be granted to guarantee a minimum means of subsistence. Secondly, the restriction on the exportability of special non-contributory benefits contained in Article 10a of Regulation 1408/71 was based on the consideration that such benefits constitute an expression of solidarity within a Member State. The State to whose ‘community of solidarity’ a person belongs should also bear the responsibility for guaranteeing a minimum means of subsistence. The Advocate General pointed out that in *Tas-Hagen* the Court had recently reaffirmed that entitlement to a social benefit may, as a matter of principle, be determined by reference to the degree of connection to the society of a Member State, expressed by residence in the State concerned.\(^4^8\)

Thirdly, she argued that by linking the award of special benefits (financed through taxes) to the place of residence a connection is achieved between benefit entitlement and funding responsibility similar to that which arises through payment of social security contributions. However, this latter point – which one might observe is more true from the perspective of the State than the claimant – lost much of its significance in the case of Mr. Hendrix and, Kokott suggested, frontier workers in general who normally have close connections to the economic and social environment at their place of work. In fact, Mr. Hendrix lived directly on the frontier with the Netherlands and, in principle, under the Belgium-Netherlands double tax convention was subject to Netherlands income tax on his income earned in the Netherlands. The Advocate General therefore queried whether, as regards frontier workers, place of residence alone constitutes a suitable criterion to establish membership of a community of solidarity. She suggested that recourse might be had to additional criteria which characterise the degree of integration into the economic and social environment such as, for example, place of employment, distance to the frontier from the place of residence, place of consumption, expenditure or primary location for social contacts.\(^4^9\)

Advocate General Kokott went on to consider whether such links existed in the specific case. It is, however, somewhat difficult to detect the rationale behind her analysis

\(^4^7\) Opinion, para. 63 citing Case C-20/96 *Snares* [1997] ECR 6057.
\(^4^8\) Case C-192/05 *Tas-Hagen* [2006] ECR I-10451.
\(^4^9\) While there is much to be said in general for the argument that persons resident outside a Member State may maintain close links with that State, resurrecting the concept of frontier workers in an age of cheap flights and teleworking is surely inadvisable. See O. Glynner, ‘Partial Migration in the EU after the *Baumbast* Case: bringing social and legal perspectives together’, 15 *King’s College Law Journal* 367 (2004).
of a possible link to the labour market. She argued that in cases such as that of Mr. Hendrix, a link to the place of employment should be ruled out 'because the Wajong benefit functions as a job subsidy which permits a disabled worker to be hired in the first place'. Kokott pointed out that that if a Netherlands’ employer hires a disabled worker, it is exempted from paying the statutory minimum wage, while the disabled person receives the difference between his or her actual wage and the minimum wage by way of the Wajong benefit. Without that State benefit, she argued, disabled people who are not fully capable of performing would not have a chance in the labour market at the level of the minimum wage. The fact that a person in receipt of a Wajong benefit is in employment resulted, therefore, from the State’s provision of that solidarity benefit. If employment on the domestic labour market were at the same time to constitute the condition for entitlement to that benefit, Advocate General Kokott argued that there would be a case of circular reasoning. To the contrary, however, one could argue that precisely because the employment is supported by (and perhaps dependent on) payment of the Wajong benefit the link to the Netherlands labour market is even more obvious.

In relation to other possible criteria, the Advocate General accepted that in contrast to that of the place of residence, the remaining criteria did not ‘permit a definite allocation to an economic and social environment, but rather constitute merely more or less specific features which only within the framework of a global assessment may lead to the relevant economic and social environment being determined’. She argued, however, that coordination of the Member States’ responsibilities with regard to the grant of solidarity benefits must be determined ‘in accordance with clear criteria which in the context of mass administration enable swift assessments with sufficiently unambiguous results to be reached’. She took the view that it would be permissible, therefore, to establish an allocation to the Member States’ social systems by way of abstract criteria, which do not take all the circumstances of an individual case into account, but, using a generalised approach, demonstrate a predominant link to a Member State. In a sentence which has much to be said for it but in no way reflects the Court’s approach in cases such as Watts, she argued that ‘[d]etailed examination of all the factors characterising an individual case does not constitute an appropriate means to determine clearly and at reasonable expense the allocation of competence’. Given the wide margin of appreciation open to Member States in deciding which criteria are to be used when assessing the degree of connection to the society of a Member State, Kokott believed that it was ‘legitimate to rely solely on the criterion of place of residence’, but went on to add that ‘even if in individual cases, for example with regard to frontier workers, other factors might also play a role’. What the qualifying clause was intended to indicate – other than equivocation on her part – is entirely unclear as she went on to propose that it was compatible with Article 39 EC and

50 Para. 70.
52 Para. 71.
53 Para. 73.
Article 7(2) of Regulation No. 1612/68 to restrict the grant of benefits such as those under the Wajong to persons resident in the Netherlands.

The Court, however, took a somewhat different approach. It pointed out that it had previously held that a Member State may not make payment of a social advantage within the meaning of Article 7 of Regulation 1612/68 dependent on the condition that recipients are resident in the national territory of that Member State unless that condition is objectively justified and proportionate to the objective pursued. This remained the case even though the Wajong benefit is a special non-contributory benefit. Following Advocate General Kokott, the Court stated that Article 7(2) of Regulation No. 1612/68 is the particular expression, in the specific area of the granting of social advantages, of the principle of equal treatment enshrined in Article 39(2) EC, and as such it must be accorded the same interpretation as Article 39(2) EC. The Court accepted that the Wajong benefit is closely linked to the socio-economic situation of the Member State concerned, since it is based on the minimum wage and standard of living in the Netherlands. It also had regard to the fact that it is a special non-contributory benefit under Regulation 1408/71, which is to be received exclusively within the territory of the Member State of residence.

On this basis, the Court ruled that the condition of residence was, in general, objectively justified. However, it went on to consider whether the application of the residence condition was proportionate, i.e. whether it entailed an infringement of the rights which Mr. Hendrix derived from the freedom of movement for workers which went beyond what was required to achieve the legitimate objective pursued by the national legislation. The Court observed that the national legislation itself expressly provided that the residence condition might be waived if it led to an ‘unacceptable degree of unfairness’. The Court pointed out that it is the responsibility of national courts to interpret, so far as possible, national law in conformity with the requirements of Community law.

The Court held that the national court must be satisfied, in the circumstances of this particular case, that the residence condition did not lead to such unfairness, taking into account the fact that Mr. Hendrix has exercised his right of freedom of movement as a worker and that he has maintained economic and social links to the Netherlands. In conclusion, the Court ruled that Article 39 EC and Article 7 of Regulation 1612/68 did not preclude national legislation that provided that a special non-contributory benefit may be granted only to persons who are resident in the national territory as long as this did not involve an infringement of the rights of the claimant person which goes beyond


55 It is interesting, if not particularly logical, that the Court having said (paras. 51–4) that the condition of residence must be objectively justified even though the benefit was a special non-contributory benefit, then appears to have gone on to take into account the fact that it was a SNCB as one of the factors constituting objective justification (para. 55).

56 Though, as in Case C-413/99 Baumbast [2002] ECR I-7091, this would surely have been the case whether or not the national legislation contained a specific ‘hardship’ clause.
what is required to achieve the legitimate objective pursued by the national legislation. In what may be interpreted as a strong hint, the Court reiterated that the national court should in particular take account of the fact that Mr. Hendrix had maintained all of his economic and social links to the Member State of origin.

Thus in Hartmann and (perhaps) Hendrix, the Court has further built on the limited existing cases in which it has held that social advantages should be exportable. However, Member States, rather than blaming the Court for its activism in this area, should look at the facts of these cases. The Court has ordered export of a benefit to agricultural workers in Meints – a case in which it appears to have been argued that the residence condition was only included as a side-effect of the application of other qualification conditions – a ‘justification’ unsurprisingly rejected by the Court. In Meeusen, the Court upheld the exportability of a study grant where the national legislation did not impose any residence requirement on the children of national workers but only on the children of the nationals of other Member states. Finally, in Hartmann the Court has upheld the exportability of a benefit where the national law already allowed its export in certain circumstances. Only in Hendrix has the Court (perhaps) allowed the export of a benefit where such export was not (other than exceptionally) allowed under national law. Here it might be argued that the critical point in Hendrix is that the Wajong benefit acted in effect as a wage supplement linked to the employment in the Netherlands.

The extent to which the concept of European citizenship is calling into question national systems of solidarity and the balance which is and should be struck in this regard is clearly a burning question. To date, as, for example, Verscheuren discusses, in the area of social security the Court has struck a somewhat uneasy balance between, on the one hand, ensuring that the concept of European citizenship does have some tangible (financial) content and, on the other, requiring citizens to have certain links with the national state before that state is obliged to provide financial supports. The instant cases arguably do not advance that debate greatly given that, as discussed above, they largely drew on existing national exceptions to territoriality (Hartmann) or will affect only quite limited cases (Hendrix).

There can be little doubt that a major expansion of the exportability of benefits under Regulation 1612/68 is not a desirable outcome. Unlike the situation under Regulation 1408/71, Regulation 1612/68 does not contain any rules as to administrative co-ordination or overlapping provisions. Thus, there are no provisions for ensuring that claims made in one country are passed to the relevant state, for the prevention of double claiming of benefits, and the myriad of other issues which arise. One of the main problems is the

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58 Case C-337/97, Meeusen [1999] ECR 3289, para. 23.
59 One might also point out that had the Member States acted earlier to bring civil servants within the scope of Regulation 1408/71, the issue would have been addressed in that context.
60 Verscheuren ‘European (internal) migration law as an instrument for defining the boundaries of national solidarity systems’.
sclerotic pace of legislation at Community level, which means that the Court is inevitably
driven to provide solutions where the Council (i.e. the Member States) has been unable
or unwilling to do so.

§5. CONCLUSION

The introduction of the concept of EU citizenship raises the issue of the approach which
the Court will take to the rights of citizens and workers respectively. The Court has
already clearly rejected one possible approach, that of prioritising workers rights, leaving
citizenship rights at a mainly rhetorical level. A second option – advocated by Advocate
General Geelhoed, the EC Commission and a number of Member states in the cases
discussed – would be for a separate development of the two concepts. Claims by EU
workers should be considered, firstly, under the free movement of workers provisions as
classically interpreted by the Court and, subsequently, under the citizenship provisions.
The Court appears also to have set its face against such a (somewhat artificial) division
in its recent case law. A third approach would be to accord priority to citizenship and to
consider cases initially under the general citizenship provisions turning only to the more
specific provisions for workers insofar as that was necessary. Although perhaps more
logical, this would be a major change in approach and one for which it might be difficult
to find explicit justification in the wording of the citizenship provisions. Unsurprisingly,
the Court has not adopted this approach and continues to consider claims by EU workers
initially under Article 39 EC.

However, the approach which the Court has adopted is not all that different in effect,
if not in theory, from this option. The Court, while continuing to give priority to the
free movement of workers provisions has interpreted these in the light of the citizenship
articles of the Treaty which it has interpreted to mean that citizenship of the Union is
‘destined to be the fundamental status of nationals of the Member States’.61 Thus in
Hendrix the Court held that

the right of every citizen of the Union to move and reside freely within the territory of the
Member States finds specific expression in Article 39 EC in relation to freedom of movement
for workers.62

As we have seen, this approach is leading to important developments in how the Court
interprets the free movement of worker rules. Thus – in, for example, Hendrix – the

61 For example, in Case C-209/03, Bidar, [2005] ECR I-2119, para. 31: ‘Citizenship of the Union is destined
to be the fundamental status of nationals of the Member States, enabling those who find themselves in
the same situation to receive the same treatment in law irrespective of their nationality, subject to such
exceptions as are expressly provided for’.

62 Citing Case C-100/01 Oteiza Olazabal [2002] ECR I-10981, paragraph 26, and Case C-392/05 Alevizos
Court is able to state that it is not necessary to answer specific questions of citizenship, because it has, in effect, already done so by interpreting Article 39 EC as the ‘specific expression’ of those citizenship provisions and (no longer) simply as a worker-related right.

63 Para. 62
LOCUS STANDI OF PRIVATE APPLICANTS UNDER THE ARTICLE 230EC ACTION FOR ANNULMENT: ANY LESSONS TO BE LEARNT FROM FRANCE?

Anatole Abaquesne de Parfouru*

ABSTRACT

This article examines the rules on locus standi of private applicants under the Article 230 action for annulment of the EC Treaty. It adopts a comparative approach to the question of standing of private parties to challenge a piece of secondary EC legislation under the action for annulment, by contrasting the standing rules in Article 230(4)EC, as interpreted by the ECJ and the CFI, with those, elaborated by the Conseil d'Etat, on locus standi of private applicants to challenge French administrative acts in a Recours pour Excès de Pouvoir (REP). Four major aspects will be considered: the types of acts amenable to review by non-privileged applicants, the two requirements of direct and individual concern and their equivalent in French administrative law (in particular the differences between the notions of 'cercle d’intérêt' and of 'closed class'), as well as the locus standi of associations. The premise of this paper lies in the suggestion that 'a revision of the Treaty which would borrow from the Member States' systems of judicial review should be considered'.

Due consideration will be taken of the limits of comparing a supranational legal order to a national one. This comparison should be considered as a pretext to analyse the standing rules for private applicants under the action for annulment, and suggest possible improvements to these conditions in the light of the constitutional reflection on the role of citizens and of the civil society underlying the liberal standing requirements in French administrative law.

The objective of this paper is therefore to demonstrate the inappropriateness of the strict locus standi rules for private applicants under Article 230(4)EC, and the refusal to abandon

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The need for reform of standing rules for non-privileged applicants is particularly pressing in light of the inadequacy of alternative mechanisms of judicial review and of the principle of effective judicial protection. In this respect, the modifications of the unratified 2004 Constitutional Treaty were clearly insufficient, and the 2007 Treaty of Lisbon, signed in December, reiterates this mistake by adopting an identical formulation of the standing rules for private applicants to that in the 2004 Constitutional Treaty.

**Keywords:** Locus Standi; Standing; Non-Privileged Applicants; Private Applicants; Action for Annulment; Article 230EC; Recours pour Excès de Pouvoir; Intérêt à Agir; Judicial Review; Effective Judicial Protection

§1. **INTRODUCTION: THE DILEMMA OF JUDICIAL REVIEW: EFFECTIVE JUDICIAL PROTECTION VS. MANAGING THE WORKLOAD OF THE COURTS**

The action for annulment, in Article 230 of the EC Treaty, is the main mechanism for judicial review in the Community legal order. It enables Member States, Community institutions and ‘natural or legal persons’ to challenge the legality of Community measures. An action for annulment will be successful and result in the annulment of the contested act if four major conditions are fulfilled. First, the contested act must be reviewable, Article 230(1) indicating the range of reviewable acts. Secondly, the Community measure must be illegal. Article 230(2) establishes four grounds of review under which the legality of an act can be challenged. Thirdly, the proceedings must be instituted within the required time-limit, as provided in Article 230(5). Finally, and most importantly, the applicant must have standing to challenge the Community measure.

Article 230EC distinguishes between three types of applicants. The second paragraph of the Article provides that the Member States, the European Parliament, the Council

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and the Commission, often referred to as ‘privileged applicants’, can always challenge the legality of reviewable Community acts, if the general conditions above are present. The third paragraph of Article 230 allows the Court of Auditors and the European Central Bank, usually referred to as ‘quasi-privileged applicants’, to bring actions ‘for the purpose of protecting their prerogatives’. Lastly, the fourth paragraph of Article 230 concerns ‘natural or legal persons’, or ‘non-privileged applicants’. As we will see below, such private applicants must fulfill strict conditions before being granted standing to challenge Community acts.

Locus standi of non-privileged applicants is an issue of significance in the Community legal order. It relates directly to the principle of effective judicial protection, which, although absent from the original EC Treaty signed in Rome, has been affirmed and reaffirmed by the Community Courts. In its Johnston ruling, the Court held that this ‘requirement of judicial control […] reflects a general principle of law which underlies the constitutional traditions common to the Member States’. It further noted that this general principle of law was ‘also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms’, the principles of which ‘must be taken into consideration in Community law’. This judgment has been referred to in recent cases concerning the standing of private applicants. These cases reaffirmed that ‘individuals are […] entitled to effective judicial protection of the rights they derive from the Community legal order’, referring once again to the constitutional traditions of the Member States and Articles 6 and 13 of the ECHR. Moreover, the ‘right to an effective remedy’ is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, which, although not legally binding, is of importance in the legal order of the European Union.

In its 2005 Bosphorus judgment, the Grand Chamber of the European Court of Human Rights considered the question of effective judicial protection in the EC legal order.

The EP finally became a ‘privileged applicant’ following the Treaty of Nice amendments to the EC Treaty.


Article 47 of the Charter stipulates that ‘everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal’. It was referred to by AG Jacobs in his Opinion in UPA, Case C-50/00P, para. 39, and by the CFI in its judgment in Jégo-Quéré, Case T-177/01, para. 47. The Charter was enshrined in Part II of the 2004 Constitutional Treaty (Article 47 of the Charter would have become Article II-107 of the Constitutional Treaty) and would have become binding, had the latter been ratified. Although not integrated in the revised TEU, the Charter will become binding if the 2007 Treaty of Lisbon, signed in December, is ratified. See new Article 6(1) TEU.
order. After examining the system of remedies in the Community legal order, and despite its observation that individuals’ ‘right to initiate actions under [Article 230] is restricted’, it held that ‘the protection of fundamental rights by EC law can be considered to be […] “equivalent” to that of the Convention system’. However, in his concurring opinion, Judge Ress, referring in particular to Jégo-Quéré and UPA, stressed that the Strasbourg Court did not address ‘the question of whether this limited access is really in accordance with Article 6 §1 of the Convention’ and that ‘one should not infer from […] the judgment […] that the Court accepts that Article 6 §1 does not call for a more extensive interpretation [of Article 230EC]’.

Ideally, effective judicial protection and access to courts would require very liberal standing rules for private applicants to challenge Community acts under the action for annulment. An actio popularis would ensure maximal judicial protection, by allowing every European citizen to bring an action. It is based on the principle that ‘every citizen has an interest in ensuring that public bodies act within their powers’. However, the requirement of effective judicial protection must be balanced with another significant issue, that of managing the work-load of the Community Courts. Although an actio popularis is in any case excluded for practical reasons, Advocate General Jacobs argued in his Opinion in UPA that the case-load problem should not be overestimated, and should not be an obstacle to more liberal standing rules for private applicants in actions for annulment, in particular to the liberalisation of the strict requirement of individual concern. He stressed the importance of the time-limit in Article 230(5)EC and the condition of direct concern in ‘prevent[ing] an insuperable increase of the case-load’, and noted that there were ‘procedural means to deal with a more limited increase of cases’. Furthermore, he argued that the work-load of the Community Courts was less problematic in the light of ‘the establishment of the Court of First Instance, and the progressive transfer to that Court of all actions brought by individuals’. In effect, since 1994, the CFI has jurisdiction to rule on actions for annulment brought by non-privileged applicants. Nevertheless, the case-load which the Community Courts are facing remains an important issue, and prevents any radical liberalisation of the standing rules for non-privileged applicants in annulment proceedings, despite the requirement of effective judicial protection.

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10. Paras. 102(5) & 102(6) respectively of the Opinion in UPA, Case C-50/00P.
12. Moreover, by abolishing the pillar structure, the 2007 ‘Treaty of Lisbon will extend the Courts’ jurisdiction in relation to AFSJ measures (ex-3rd pillar).
The issue of *locus standi* is also significant as it is directly related to the nature of the Community/Union. Appropriate judicial protection and liberal standing rules for private applicants would testify of the supranational, or possibly federal, nature of the Community, and give flesh to the concept of European citizenship in Article 17EC. Delaney argues that ‘an individual’s direct links to a federal-level court which protects [his] rights can inspire federal feeling and encourage the growth of a federal level citizenship’.\(^{13}\) The more restrictive the standing rules for private individuals to challenge Community measures, the clearer the limits to the supranational – not to mention federal – nature of the Union. Ward notes that ‘minimiz[ing] the role which individuals play in checking that EC rules are promulgated within legal limits … makes an awkward bed-mate with the unravelling of a supranational legal model for the enforcement of EC measures, and could indeed undermine the claim that the European Community represents “a new type of legal order”’.\(^{14}\) Limited standing for individuals is traditionally linked to an intergovernmental conception of a legal order, as opposed to a supranational one, and can be considered as a ‘relic of traditional international law thinking’.\(^{15}\)

The comparison made here between the conditions of *locus standi* for private applicants under Community law and under French administrative law, is based on Neuwahl’s suggestion that ‘a revision of the Treaty which would borrow from Member States’ systems of judicial review should be considered’ and that ‘[t]he necessary comparative study should be undertaken’.\(^{16}\) This paper constitutes therefore only one contribution to the debate on reform of standing rules to challenge Community acts, and similar studies should be conducted with the systems of judicial review of other Member States, in order to frame adequate standing rules for non-privileged applicants under the Article 230EC action for annulment. Moreover, this comparative exercise is interesting in that it is, to a certain extent forcing the comparison of the Community/Union to a State-like or federal entity.

This article will begin by considering the inadequacy of alternative remedies to the Article 230EC action for annulment (§2). After noting the object and limits of the comparison between the French and Community standing rules for private applicants (§3), this study will concentrate in turn on the types of acts amenable to review by private applicants (§4), the requirement of direct concern (§5), and that of individual concern (§6).

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\(^{13}\) Delaney, “Right to an Effective Remedy”: Judicial Protection and European Citizenship’, 12.


§2. THE INADEQUACY OF ALTERNATIVE MECHANISMS OF JUDICIAL REVIEW

In addition to the action for annulment in Article 230, the EC Treaty provides three other actions and procedures for judicial review, on which private parties can rely to challenge Community acts, or omissions to act on the part of the EC institutions. The action for failure to act under Article 232EC is also a direct action, yet is concerned with omissions of the Community institutions. On the other hand, like the action for annulment, the plea of illegality and preliminary rulings on validity enable private individuals to challenge the legality of existing Community measures. The plea of illegality in Article 241EC is an indirect action and entitles any party, in proceedings in which a Regulation is at issue, to contest the legality of this act under the grounds of review provided in Article 230(2)EC. The reference for preliminary rulings procedure in Article 234EC can also be used as an ‘indirect challenge to the legality of Community acts’: private individuals may request that a reference be made to the ECJ in the course of national proceedings.

In the light of the principle of effective judicial protection, the Court of Justice has, in the recent cases of UPA and Jégo-Quéré, reiterated the importance of the procedures in Articles 241 and 234EC as mechanisms to challenge the legality of Community acts where private applicants cannot establish standing. However, the plea of illegality in Article 241EC is no adequate alternative to the action for annulment for private individuals. Firstly, only Regulations can be challenged under Article 241EC. Secondly, a private party can only have recourse to Article 241EC if he/she had standing to challenge another measure under Article 230EC, and there is a ‘real connection’ between this latter measure and the Regulation challenged under Article 241EC.

Similarly, national proceedings combined with an Article 234 preliminary reference on the validity of a Community measure cannot be regarded as an adequate substitute to the

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17 See Article 232(3) EC.
18 P. Craig & G. de Búrca, EU Law: Text, Cases, and Materials (OUP, 2008), 528–30. See also Case C-188/92, TWD Textilwerke Deggendorf GmbH v. Germany [1994] ECR I-833, which established that, if a private individual fails to challenge a Community measure within the required time-limit under the Article 230EC action for annulment, although it is clear that he would have been granted standing, he will not be allowed to do so in national proceedings. See Arnall et al., Wyatt & Dashwood’s European Law, 522–3.
20 Regulations in substance, see paras. 40 and 43 of Case 92/78, Simmenthal SpA v. Commission [1979] ECR 777 (where the challenge of notices of invitations to tender was held to be admissible). See also Craig & de Búrca, EU Law: Text, Cases and Materials (2008), 534–5.
21 Para. 41 of Simmenthal, Case 92/78.
action for annulment. Advocate General Jacobs has on several occasions, most notably in his Opinion in UPA, noted the inadequacy of this alternative remedy in allowing private individuals to challenge Community acts.\(^23\)

In terms of the lack of effective judicial protection of national proceedings combined with an Article 234 reference, he notes first that national courts cannot declare a Community act invalid.\(^24\) This point had already been stressed by the Advocate General in his Opinion in Extramet, in which he referred to the ruling of the Court of Justice in Foto-Frost.\(^25\) In this latter case, the Court held that national courts ‘do not have the power to declare acts of the Community institutions invalid’, this power being ‘reserved to the Court of Justice’.\(^26\) Secondly, whereas, under Article 234(3), national courts or tribunals ‘against whose decisions there is no judicial remedy under national law’ are under an obligation to refer questions on validity to the Court of Justice for a preliminary ruling, Article 234(2) provides no such obligation in relation to other courts or tribunals, who have a discretion in assessing whether a preliminary ruling is ‘necessary to enable [them] to give judgment’.\(^27\) Moreover, ‘appeals within the national judicial systems are liable to entail long delays’, which is problematic both in terms of effective judicial protection and of legal certainty.\(^28\) In addition, as Advocate General Jacobs noted in his Opinion in Extramet, national courts may not have the specific expertise required to rule on certain issues, such as anti-dumping, which was in question in this latter case. Even where a reference is made to the ECJ, the Court’s ruling may be limited by the scope of the question referred.\(^29\) Thirdly, and perhaps most importantly, there may be no national measure implementing the contested Community act, and therefore ‘no measure […] capable of forming the basis of an action before national courts’.\(^30\) This is particularly problematic

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\(^{24}\) Their competence being ‘limited to assessing whether the applicant’s arguments raise sufficient doubts about the validity of the impugned measure to justify a request for a preliminary ruling from the Court of Justice’, Paras. 41 & 102(1) of the Opinion in UPA, Case C-50/00P.

\(^{25}\) Para. 72 of the Opinion in Extramet, Case C-358/89.


\(^{27}\) See Arnulf et al., Wyatt & Dashwood’s European Law, 512–27.

\(^{28}\) Para. 42 of the Opinion in UPA, Case C-50/00P. See also para. 102(1).

\(^{29}\) Para. 71 of the Opinion in Extramet, Case C-358/89. In effect, the questions referred to the Court of Justice are formulated by the national referring courts, which ‘might, for example, limit the range of Community measures which an applicant has sought to challenge or the grounds of invalidity on which he has sought to rely’ (para. 42 of the Opinion in UPA, Case C-50/00P). See also para. 73 of the Opinion in Extramet, Case C-358/89: ‘a reference from a national court on the validity of a regulation does not always give the Court as full an opportunity to investigate the matter as a direct action against the adopting institution’ (the Advocate General gave the example of Case C-323/88, Sermes).

\(^{30}\) Par. 3 & 102(1) of the Opinion in UPA, Case C-50/00P. See also para. 44 of the Opinion in Jégo-Quéré, Case C-263/02P (‘real risk that individuals will be denied any satisfactory means of challenging … the validity of a generally applicable and self-implementing Community measure’); and para. 45 of Jégo-Quéré (CFI), Case T-177/01. See also, D. Chalmers et al., European Union Law (CUP, 2006), 432–3; R. Barents, ‘The Court of Justice in the Draft Constitution’, 11 MJ 121 (2004), 131; J.M. Cortès-Martin,
in the case of Regulations, which, according to Article 249EC, are measures of direct applicability, and thus, unlike Directives, ‘penetrate directly into the legal orders of the Member States without the need for domestic measures of incorporation’. Individuals in such a situation would therefore be ‘required to breach the law in order to gain access to justice’, having no national measure to challenge. Another situation where private individuals would be denied a remedy is where there are ‘no national procedures through which the national measure can be challenged’. Finally, the Advocate General stressed the ‘delays and costs’ involved by national proceedings combined to an Article 234 reference, in comparison to annulment proceedings. Moreover, despite the jurisdiction of national courts to grant interim relief or ‘suspend a national measure based on a Community measure’ while referring a question to the Court of Justice, not only is this subject to certain conditions, but such measures are also limited to the Member State of the proceedings. Thus, ‘those affected by an invalid measure within another Member State might be obliged to bring a separate legal action’, which could ‘prejudice uniform application of Community law’, in cases of conflicting decisions by national courts of different Member States.

In terms of the procedural advantages of Article 230 annulment proceedings, in comparison to preliminary ruling references under Article 234, Advocate General Jacobs stressed that an action for annulment provides a ‘full exchange of proceedings’ with the European institution which adopted the contested Community act being ‘a party to the proceedings from beginning to end’. Moreover, in annulment proceedings, interim relief is available at European level under Articles 242 and 243EC, thus ensuring

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32. Para. 43 of the Opinion in UPA, Case C-50/00P.
34. Para. 44 of the Opinion in UPA, Case C-50/00P. See also para. 72 of the Opinion in Extramat, Case C-358/89. This results from the lack of competence of national courts to declare a Community act invalid and the possible appeals within the national proceedings, in order to reach the last resort court, obliged to refer the question to the ECJ (para.42 of the Opinion in UPA, Case C-50/00P). See Ward, Judicial Review and the Rights of Private Parties in EC Law, 258.
36. Para. 44 of the Opinion in UPA, Case C-50/00P. See also para. 72 of the Opinion in Extramat, Case C-358/89.
37. Ward, Judicial Review and the Rights of Private Parties in EC Law, 258, and para. 44 of the Opinion in UPA, Case C-50/00P, respectively. See also para. 72 of the Opinion in Extramat, Case C-358/89.
38. ‘as opposed to a single round of observations followed by oral observations before the Court’ (para. 46 of the Opinion in UPA, Case C-50/00P).
39. Para. 46 of the Opinion in UPA, Case C-50/00P. See paras. 74 & 71 of the Opinion in Extramat, Case C-358/89.
uniform application of Community law.\textsuperscript{40} In addition, an action for annulment facilitates intervention by third parties. The public has knowledge of the action through the Official Journal, and third parties are entitled to intervene if they can establish sufficient interest, whereas under Article 234 references, third parties can submit observations only following prior intervention before the national court.\textsuperscript{41} This ‘may be difficult, for although information about reference proceedings is published in the Official Journal, individuals may not be aware of actions in the national courts at a sufficiently early stage to intervene’.\textsuperscript{42} Finally, and most importantly, annulment proceedings are more in line with requirements of legal certainty, as Article 230(5) establishes a time-limit, whereas there is no such condition for preliminary ruling references on validity.\textsuperscript{43}

\section*{§3. OBJECT AND LIMITS OF THE COMPARISON: THE ARTICLE 230EC ACTION FOR ANNULMENT AND THE RECOURS POUR EXCES DE POUVOIR}

The ‘contentieux de l’excès de pouvoir’, in French administrative law, includes three types of actions: the ‘recours en appreciation de la légalité’, the ‘recours en declaration d’inexistence’, and the ‘recours pour excès de pouvoir’ (REP).\textsuperscript{44} The first type of action can only result in a ‘declaration of illegality’, rather than the annulment of the contested act, and the second type in a ‘declaration of judicial inexistence’.\textsuperscript{45} In contrast, a successful REP has the same effects as a successful action under Article 230EC: the contested measure is declared void, and this declaration takes effect retrospectively.\textsuperscript{46} The EC action for annulment, when brought by natural or legal persons, is therefore comparable to the REP before the French administrative courts.

Arguably, when it is brought by privileged applicants, as provided in Article 230(2), the EC action for annulment also has some characteristics of the French ‘contrôle de constitutionnalité’. As the Conseil Constitutionnel examines the compatibility of legislation with the French Constitution, the Court of Justice may assess the compatibility of EC legislative acts, Regulations and Directives, with the EC Treaty – comparable to

\textsuperscript{40} Para. 46 of the Opinion in \textit{UPA}, Case C-50/00P.
\textsuperscript{41} AG Jacobs refers to Articles 37 and 20 of the Statute of the Court respectively, currently Articles 40 and 23.
\textsuperscript{42} Para. 47 of the Opinion in \textit{UPA}, Case C-50/00P. See also para. 74 of the Opinion in \textit{Extramet}, Case C-358/89.
\textsuperscript{43} Paras. 48 & 102(1) of the Opinion in \textit{UPA}, Case C-50/00P.
\textsuperscript{44} R. Chapus, \textit{Droit du Contentieux Administratif} (Montchrestien, 2006, 12\textsuperscript{th} ed.), 208–11.
\textsuperscript{45} The vices of the measure being so serious that it is considered as having never been adopted, as it is impossible to annul what does not exist. Moreover, few applicants being aware of this third type of action, they traditionally exercise a REP instead. See Chapus, \textit{ibid.}, 211–2.
\textsuperscript{46} See Article 231(1)EC. See Arnell \textit{et al.}, \textit{Wyatt & Dashwood’s European Law}, 452–3; and Chapus, \textit{ibid.}, 219.
a ‘Constitution’ for the EC legal order. However, and firstly, the constitutional review undertaken by the French Conseil Constitutionnel takes place *ex ante*, in other words before the promulgation of the legislative measure, unlike the *ex post* review of legality under the Article 230EC action for annulment. Secondly, the comparison with the French constitutional review is not applicable to actions for annulment brought by private applicants, as provided by Article 230(4). In effect, as we shall see below, in France, private parties are not entitled to refer legislation to the Conseil Constitutionnel. Moreover, and even though the Community Courts have granted standing to private applicants to challenge truly legislative measures, it is clear from the wording of Article 230(4)EC that the intention of the drafters was to allow natural and legal persons to challenge only administrative acts – whether in form or in substance – affecting them. Actions for annulment brought by non-privileged applicants may therefore be compared to the French Recours pour Excès de Pouvoir, which entitles private parties to challenge administrative acts before the administrative judge. We shall consider the respective standing requirements for private applicants under these two actions.

Article 230(4)EC stipulates that a private applicant may bring proceedings ‘against a decision addressed to [him] 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 [applicant]’. Thus, except where the private applicant is challenging the legality of a Decision addressed to him, in the two other situations, the applicant must establish two elements in order to have standing: direct concern and individual concern. Initially, if the act challenged was in the form of a Regulation, the applicant had to prove first that the measure was a Decision in substance. However, since the ruling in *Codorniu*, this is no longer required by the Courts, provided the applicant can establish individual concern.47 We shall therefore examine the two conditions of direct and individual concern. We will first consider their equivalents in the French REP.

French administrative law is mostly ‘jurisprudentiel’, in other words, its rules are dictated by the case-law of the courts, unlike French civil law. The French concept of *locus standi*, the ‘intérêt donnant qualité à agir’, is no exception.48 Some academics identify only two conditions, that the ‘intérêt’ be ‘direct’ and ‘personnel’, whereas

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48 See for example D. Landbeck, *Les Associations et l’intérêt à agir dans le contentieux administratif ou De la difficulté de rédaction des clauses statutaires*, LPA (Petites Affiches) 2003, n°70, 9, 13. The ‘intérêt donnant qualité à agir’ is more simply known as ‘intérêt à agir’.

49 For example, C. Debbasch & J.-C. Ricci, *Contentieux Administratif* (Dalloz, 1985), and M. Hequard-Théron, *De L’inérêt Collectif, AJ* (L’actualité Juridique – Droit administratif) 1986, 65. See however: D. Bailleul, *L’intérêt d’un ‘intérêt à agir’ en matière d’excès de pouvoir*, LPA 2003, n°24, 6, 9 (considering the ‘direct’ and ‘personnel’ conditions as the same requirement); and N. Calderaro, *La recevabilité des recours devant le juge administratif*, LPA 2002, n°138, 4, 8–9 (considering the ‘personnel’, ‘pertinent’ and ‘certain’ conditions as the same requirement that the interest be ‘pertinent’).
others find many more. Chapus, for instance, identifies five such conditions: that the interest of the applicant be ‘personnel’, ‘légitime’, ‘pertinent’, and that the effect of the contested measure on the applicant, the ‘lésion’, be sufficiently direct and certain.\footnote{Chapus, Droit du Contentieux Administratif, 467–77. See also the classification of locus standi conditions by S. Daël, Contentieux Administratif (PUF Thémis, 2006), 107–8.} Recent case-law of the Conseil d’Etat (CE) seems to require only that the applicant’s interest be ‘direct, personnel et certain’.\footnote{For example CE, 29 décembre 1995, Beucher, Rec.480.} We will compare individual concern to the conditions that the interest be ‘personnel’, ‘pertinent’ and that the effect on this interest be sufficiently certain. On the other hand, direct concern, is equivalent to the ‘caractère suffisamment direct de la lésion’.\footnote{Setting aside Chapus’ condition that the interest must be legitimate.}

There are notable limits to the comparison of the standing rules for private applicants under the action for annulment and the REP. The approach of the French administrative judge to the locus standi of private applicants is notoriously very liberal. Yet we should keep in mind that there are numerous administrative courts in France, where the Community judicature is limited to the CFI and the ECJ.\footnote{In addition to the CE, there are currently 38 administrative tribunals and 8 administrative appeal courts in France. See Article R221–3 of the Code de Justice Administrative. Neuwahl, ‘Article 173 Paragraph 4 EC: Past, Present and Possible Future’, 29: ‘the system of administration of justice applicable in any given Member State cannot automatically be transposed to the Community level’. In effect, ‘because there is only one Community judicature …, this system relies heavily on a division of tasks between the [EC], the [CFI], and the national courts’. This is often considered as justifying the strict approach of the Community Courts, and their reliance on the argument that national proceedings combined with an Article 234 reference constitute an alternative remedy to the action for annulment, the Community Courts acting as ‘appellate courts’ (H. Rasmussen, ‘Why is Article 173 Interpreted against Private Plaintiffs?’ 5 E.L. Rev. 112 (1980), 125). However, Neuwahl notes that ‘the democratic structures [of the EC] are not as fully developed as in the Member States’, which would justify more liberal standing rules at EC level.} Nonetheless, French administrative courts also have to face significant case-load problems. However, despite these problems, reform of the liberal standing rules for private applicants was never an issue in French administrative law. This refusal of the Conseil d’Etat to adopt stricter conditions of locus standi for private applicants is based on a specific idea of the principle of effective judicial protection and of the role of the citizen and the civil society in the French legal system. The CE was not prepared to jeopardize these principles, regardless of the case-load problems involved. Similarly, it is submitted that the Community Courts should not subordinate their approach on the standing of non-privileged applicants to considerations of case-load management, as it currently seems to be the case. Finally, a different kind of limit should be stressed: despite the lack of guidance in Article 230(4) as to the meaning of direct and individual concern, there is no such textual limit in

\footnote{Especially in a Union of 27 Member States. However, challenges to EC measures are traditionally made in relation to economic interests, which limits the number of potential applicants at EC level.}
French administrative law. Keeping these limits in mind, this comparison should be considered as pretext to analyse the standing rules of private applicants under the action for annulment, and suggest possible improvements, in the light of a national system of judicial review, if the EC is to prove equal to its supranational nature in guaranteeing effective judicial protection to its citizens.

More specifically, certain characteristics of the French system of judicial review justify a comparison of the standing rules for private applicants at EC level to their equivalent in French administrative law. The French system of judicial review has been established for a long period of time and has demonstrated its efficiency in French administrative law. The *locus standi* rules for private applicants elaborated by the French administrative judge are notoriously very liberal; but it is the rationale behind this generous approach to standing which makes it worthy of interest. *Locus standi* in French administrative law is included in a constitutional reflection on the role of citizens and the civil society vis-à-vis the government. In particular, the standing rules in French administrative law recognise the important function of associations as intermediary powers. The idea is that freedom of association will be impaired if associations lack standing to challenge acts corresponding to the collective interest which they seek to protect. It is submitted that the EC system of judicial review should use this constitutional reflection in the elaboration of its *locus standi* conditions for non-privileged applicants. This is particularly important in the perspective of the construction of a European civil society, and the identification of individuals as ‘European citizens’ rather than merely as citizens of their Member States. Article 8B(2) TEU, to be inserted by the 2007 Treaty of Lisbon, provides that ‘the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society’. Moreover, new Article 6(1) TEU, to be inserted by the same Reform Treaty, gives binding force to the 2000 Charter of Fundamental Rights of the EU, Article 12 of which is devoted to freedom of association. In this context, the debate on reform of the standing rules for private applicants under the action for annulment could and should incorporate the constitutional reflection at the basis of the French system of judicial review.

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35 See also Article 8B(1), which provides that ‘the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action’. 
§4. THE TYPES OF ACTS AMENABLE TO REVIEW BY PRIVATE APPLICANTS

A. ACTS AMENABLE TO REVIEW BY PRIVATE APPLICANTS UNDER THE ARTICLE 230 ACTION FOR ANNULMENT

1. The possibility for private applicants to challenge Decisions in the form of legislative Community acts

Decisions are administrative acts of the Community institutions. Regulations, on the other hand, are acts of general application and thus have a legislative nature. Similarly, since the case of Kloppenburg, Directives have been held by the Community Courts to have general application, and therefore a legislative character, despite the fact that ‘a directive is in principle binding only on the parties to whom it is addressed’.

Article 230(4) EC provides that a non-privileged applicant may challenge not only decisions addressed to him, but also ‘decision[s] which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to [the private applicant]’. Thus, provided the conditions of direct and individual concern are present, private parties may challenge the legality of EC measures in the form of Regulations, in other terms, in the form of legislative acts of the Community institutions. However, according to this formulation, although in the form of a Regulation, the act is ‘in substance a decision’, in other terms a ‘decision in the material sense’. Nevertheless, the possibility of challenging a measure in the form of a legislative act should not be underestimated, and we will see below that this is not possible under the French system of judicial review.

Private applicants can challenge Community acts in the form of Regulations, one of the legislative instruments of the Community institutions. But can they challenge EC measures in the form of Directives? Ward notes the importance of allowing private applicants to bring annulment proceedings against such Community acts, in the light of judgments such as CIA Security and Sapod Audic, which testify that Directives now have ‘a significant impact on the affairs of private sector actors’. Several cases indicate


57 Para. 16 of Gibraltar v. Council, Case C-298/89. See also Salamander AG, Cases T-172 &175–7/98, para. 29.

58 Hartley, The Foundations of European Community Law, 357 (emphasis added).


60 Ward, Judicial Review and the Rights of Private Parties in EC Law, 259.
that private parties can challenge EC measures in the form of Directives, provided that they are of direct and individual concern to them. For instance, in the Gibraltar and Asocarne judgments, the ECJ considered whether a Directive was a Decision in substance, even though it concluded in both cases that it was not. Moreover, in the 2004 SNF case, the CFI noted clearly that ‘the mere fact that the contested measure is a directive is not sufficient to render such an action inadmissible’ and that ‘the Community institutions cannot exclude, merely by the choice of the form of the act in question, the judicial protection afforded to individuals under [Article 230 EC].’

2. The possibility for private applicants to challenge Community acts of a legislative nature in substance? The ‘hybridity theory’ and recent developments in the case-law

The case-law of the Community Courts suggests that a Regulation or a Directive can be brought to review by private applicants, ‘without loosing its [legislative] character’. In Extramet, in the context of anti-dumping duties, the ECJ held that ‘measures imposing anti-dumping duties may, without loosing their character as regulations, be of individual concern in certain circumstances to certain traders who therefore have standing to bring an action for annulment’. Similarly, in the later case of Codorniu, which generalised this principle, the Court ruled that ‘although […] the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to all traders concerned in general, that does not prevent it from being of individual concern to some of them’. These judgments have occasionally been explained by reference to the ‘hybridity theory’, suggested by Advocate General Warner in the Toyo Bearing case, according to which a Regulation may be ‘a legislative act to some but a decision of direct and individual concern to others’. However, Arnulf notes that this theory was expressly rejected by the ECJ, which held in the Moksel case that ‘a single provision [could not] at one and the same time have the character of a measure of general application and of an individual measure’. The effect of Extramet and Codorniu was thus to allow ‘Regulations in the material sense’ to be challenged by individual applicants, provided

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61 Para. 23 of Gibraltar v. Council, Case C-298/89; and para. 32 of Asocarne (ECJ), Case C-10/95P. However, the ruling in Asocarne has been considered as implying that it is only in exceptional circumstances that a Decision in substance will be in the form of a Directive. See also, Hartley, The Foundations of European Community Law, 357.


63 A. Arnulf, ‘Private Applicants and the Action for Annulment since Codorniu’ 38 C.M.L. Rev. 7 (2001), 21 (his emphasis).


they were of direct and individual concern to them. Similarly, following the transfer of jurisdiction, the CFI, after having recourse to the hybridity theory in some cases, accepted that a measure could be of direct and individual concern to private applicants without losing its legislative nature. In effect, in *UEAPME, Salamander AG* and the 2004 *SNF* judgment, concerning Directives, the CFI held that in some circumstances ‘even a legislative measure which applies to economic operators generally may be of direct and individual concern to some of them’.70

The fact that Community measures of general application, namely Regulations and Directives, can be challenged by private applicants ‘without losing their legislative character’ has recently been put to doubt. As Hartley points out, in its 2002 *UPA* judgment, the Court of Justice seemed to come back to the ‘hybridity theory’.71 In effect, the Court ruled that ‘a regulation, as a measure of general application, cannot be challenged by natural or legal persons other than the institutions, the European Central Bank and the Member States’. It went further by holding: ‘however, a measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain natural or legal persons and is thus in the nature of a decision in their regard’.72

The latter formula was also used by the CFI in the 2005 *Comafrica* case.73 Thus, in most cases, a true Regulation would not be challengeable by private applicants. In exceptional circumstances, a Regulation in substance could be challenged by private applicants without losing its legislative nature, being however ‘a decision only with regard to those who are individually concerned by it’.74 The ECJ and the CFI therefore appeared to apply the ‘hybridity theory’. However, in its post-*UPA* case-law, the ECJ seems to dispose of the ‘hybridity theory’ and indicates instead that a true legislative measure can be challenged by private applicants without losing its legislative nature. In the 2003 case of *Commission v. Nederlandse Antillen*, after holding that the Regulations at issue were ‘by their nature, of general application and [did] not constitute decisions within the meaning of Article [249EC]’, the Court of Justice, referring to *Codorniu*, held: ‘the fact that a measure is of general application does not mean that it cannot be of direct and individual concern to certain natural or legal persons’.75 Referring to the latter ruling, the ECJ used an almost

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72 Paras. 35 & 36 (emphasis added), respectively, of the judgment in *UPA*, Case C-50/00P.


75 Case C-142/00P, *Commission v. Nederlandse Antillen* [2003] ECR I-3483, paras. 3 & 64 respectively.
identical formulation in its 2004 ruling of Jégo-Quéré.\textsuperscript{76} These judgments indicate, as was already clear from Codorniu, that it is not problematic for private individuals to challenge legislative Community acts of direct and individual concern to them.\textsuperscript{77} Moreover, in these two cases, the Court made no allusion to the exceptional nature of allowing private applicants to challenge truly legislative acts of the Community institutions – the Court did not refer to ‘certain circumstances’, as it had done in UPA.

3. A stricter test of individual concern for applicants challenging truly legislative measures?

In UEAPME and Salamander AG, involving truly legislative Community measures as opposed to ‘disguised’ Decisions, although the CFI considered whether the acts were of direct and individual concern to the applicants, it concluded that they lacked locus standi.\textsuperscript{78} Similarly, in Commission v. Nederlandse Antillen and Jégo-Quéré, in which the Regulations or some provisions of the Regulations at issue were held to be of general application,\textsuperscript{79} the Court of Justice also ruled that the applicants were not individually concerned.\textsuperscript{80} ‘This may suggest that there is a ‘stricter test of direct and individual concern where the contested act is legislative in nature’.\textsuperscript{81} Thus, it may be more difficult in practice for a non-privileged applicant to demonstrate individual concern, where the Community measure at issue is not a Decision in substance. The 2007 Treaty of Lisbon, like the unratified 2004 Constitutional Treaty, goes further in this direction. It facilitates standing against some administrative acts of the Union, ‘regulatory acts which do not entail implementing measures’, by requiring private applicants to demonstrate only direct concern, and not individual concern.\textsuperscript{82}

\textsuperscript{76} Para. 4 of Jégo-Quéré (ECJ), Case C-263/02P.
\textsuperscript{79} Para. 63 of Nederlandse Antillen (ECJ), Case C-142/00P; para. 43 of Jégo-Quéré (ECJ), Case C-263/02P.
\textsuperscript{80} Para. 80 of Nederlandse Antillen (ECJ), Case C-142/00P; para. 48 of Jégo-Quéré (ECJ), Case C-263/02P.
\textsuperscript{81} Arnell, ‘Private Applicants and the Action for Annulment since Codorniu’, 22, concerning the rulings of the CFI in cases such as Salamander AG. He pursues that ‘the language used by the CFI seems calculated to emphasize the exceptional nature of the possibility that a legislative act might be of direct and individual concern to some of those affected’. See also Hartley, The Foundations of European Community Law, 371.
B. A MORE LIBERAL APPROACH THAN THE FRENCH SYSTEM OF JUDICIAL REVIEW

Despite the argument that a stricter test may be applied to truly legislative Community measures, the case-law of the Courts does not only allow private applicants to challenge ‘disguised’ Decisions, in other terms administrative acts in the form of legislative Community acts, it also enables individuals to challenge Regulations and Directives, without these measures loosing their legislative character.83

In France, private individuals are not entitled to challenge laws before the administrative courts in a REP, as such an action can only be brought against administrative acts.84 According to Article 61 of the French Constitution of 1958, laws can only be reviewed by the Conseil Constitutionnel, which controls their conformity with the Constitution, if they are referred by the President of the Republic, the Prime Minister, the President of either Chamber of Parliament, or sixty members of either Chamber of Parliament.85 Moreover, such a control by the Constitutional Court can only occur before the promulgation of the laws: once promulgated, a French law becomes an ‘incontestable’ act.86 Thus, a legislative act which has been promulgated cannot be annulled by any institution apart from the Parliament itself, ‘even though there may be serious doubts as to its conformity with the Constitution’.87

Further, the system established by the French Constitution is even more restrictive, as it allows the Parliament to enact laws in administrative matters, thus preventing

83 We consider Regulations and Directives as legislative acts of the Community. See above §4.A.1. This seems to be confirmed by the terminology adopted in the 2004 Constitutional Treaty, which renamed Regulations and Directives as ‘European laws’ and ‘European framework laws’ respectively (Articles I-33 and I-34), and in the 2007 Treaty of Lisbon which provides that ‘legal acts adopted by legislative procedure shall constitute legislative acts’ (new Article 249A(3) EC/Functioning). However, some of the current Regulations are adopted by the Commission and would therefore qualify as administrative acts (a ‘delegated European regulation’ as provided by Article I-36 of the 2004 Constitutional Treaty or a delegated ‘non-legislative act of general application’ adopted by the Commission as provided by the new Article 249B inserted by the 2007 Treaty of Lisbon). On this point see Koch, ‘Locus Standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ right to an effective remedy’, 524; also Arnulf, ‘Private Applicants and the Action for Annulment under Article 173 of the EC Treaty’, 46 and fn. 145.

84 G. Dupuis & M.-J. Guédon, Droit Administratif (Armand-Colin, 1991), 495; C. Debbasch & J.-C. Ricci, Contentieux Administratif, 717; Chapus, Droit Administratif Général Tome 1 (Montchrestien, 1990), 51, 646.

85 This applies to ‘lois ordinaires’, or acts of Parliament adopted under the traditional legislative procedure. On the other hand, the ‘lois organiques’ (situated between ordinary laws and the Constitution in the French hierarchy of norms and adopted by Parliament under a ‘heavier’ legislative procedure (Chapus, Droit Administratif Général Tome 1, 52)) are automatically transmitted by the Prime Minister to the Conseil Constitutionnel; and the ‘lois référendaires’ (laws adopted by referendum) cannot be controlled by the French constitutional court, being a direct expression of the people. See Chapus, Droit Administratif Général Tome 1, 47; Dupuis & Guédon, Droit Administratif, 79.

86 Expression of the Doyen Vedel, as noted by Chapus, Droit Administratif Général Tome 1, 47.

87 Chapus, ibid., 48, my translation.
them from being challenged by private applicants. In effect, the French Constitution separates legislative matters from administrative ones: Article 34 of the Constitution provides lists of subject-matters which are reserved to the legislator, the ‘domaine de la loi’, whereas Article 37 establishes that administrative matters, the ‘domaine du règlement’, include all areas which have not been reserved to the legislative sphere. We have seen that, provided they have *locus standi*, private applicants can challenge general administrative acts through the REP, whereas legislative acts are not amenable to review. Article 41 of the Constitution allows the government to oppose legislative proposals or amendments which do not belong to the ‘domaine de la loi’. However, as Chapus stresses, the government is under no obligation to do so, and the latter may decide not to use this procedure, in order to prevent the measure from being challenged before administrative courts: once promulgated, a French law has the advantage of being ‘incontestable’. The government is even less likely to use the Article 41 procedure, as the second paragraph of Article 37 allows the government to recover administrative areas lost to the legislator.\(^88\) Legislative acts on administrative matters are not unconstitutional,\(^89\) and operate as unchallengeable legislative acts, unless and until the government uses the ‘delegalisation’ procedure in the second paragraph of Article 37.

Therefore, in comparison to France, EC law is more liberal in relation to the types of acts which a private applicant may seek to annul: legislative measures of the Community can be challenged, at least in theory, by private applicants before the Community Courts, whereas private parties can only challenge administrative acts before the French administrative courts. This may indeed account for the strict requirements which must be fulfilled by an individual to contest an EC act. In effect, we will now see that the conditions of direct and individual concern have proved far more difficult for private applicants to establish than equivalent conditions of *locus standi* in the French system of judicial review.

§5. THE REQUIREMENT OF DIRECT CONCERN

A. A STRICTER TREND IN THE CASE-LAW ON DIRECT CONCERN

The requirement of direct concern, which has to be established by a non-privileged applicant in addition to individual concern for his application to be admissible, is generally

\(^{88}\) Chapus, *ibid.*, 45–6. Article 37, in its second paragraph, provides in effect that the government can amend or replace provisions of legislative measures, after opinion of the CE, if the Conseil Constitutionnel decides that these legislative acts relate to matters within the ‘domaine du règlement’, thus retrograding these acts from the status of ‘lois’ to that of ‘textes de forme legislative’ (administrative acts in a legislative form).

\(^{89}\) The Conseil Constitutionnel, ruling on the constitutionality of such laws before their promulgation, will not find them contrary to the Constitution. See Chapus, *ibid.*, 46.
Locus Standi of Private Applicants under the Article 230EC Action for Annulment

easier to establish than the latter. In the Dreyfus case, the ECJ noted that, in order for an applicant to establish direct concern, the contested Community measure must ‘directly affect the legal situation of the applicant and leave no discretion to the addressees of the measure who are entrusted with the task of implementing it’. Where the measure is not addressed to the applicant and requires implementation by the addressee, the Courts will consider whether the Community measure leaves any discretion to the latter for its implementation, in order to establish whether it is the Community act rather than the implementing measure which is of direct concern to the applicant. Where the addressee of the measure is given truly discretionary powers by the Community act, direct concern will not be established. On the other hand, where no discretion is left to the addressee of the Community measure, the applicant will be directly concerned by the act. Similarly, where, although the act leaves a discretion to the addressee, this power ‘is exercised first and confirmed afterwards’ by the Community measure, the Courts will consider that the applicant is directly concerned. The Court of Justice has also held that a private applicant was directly concerned by a measure where, although it conferred a discretion on its addressee, the latter had informed the applicant, in advance and unequivocally, about the manner in which it would exercise its discretion. Thus, the jurisprudence of the ECJ in relation to direct concern appeared rather liberal. The Court went further in this sense in its ruling in Piraiiki-Patraiki, by finding direct concern where there is

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93 Albors-Llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 75.
97 Case 62/70, Bock v. Commission [1971] ECR 897. Concerning the main differences between this case and Alcan, see Hartley, The Foundations of European Community Law, 379–80. In the Bock case, although in theory the addressee of the Decision could have decided to use their discretion in the opposite way, the German authorities had expressly notified the applicant of the manner in which they would exercise their discretion (rejecting the application). In the Alcan case, however, the Belgian Government had applied to the Commission for a quota, and, although it is arguable that they would have not applied for it, had they not intended to use it, they did not expressly inform the applicant in advance of the way they would use their discretion. Moreover, whereas in Bock the Member State addressee of the measure was ‘acting against the interests’ of the applicant, the national authorities in Alcan were ‘almost … acting on their behalf’, and the Belgian Government would clearly have been granted standing to challenge the Decision.
no doubt as to the manner in which the discretion will be exercised by the addressee. Although the Member State addressee of the measure had not expressed in advance how it would exercise its discretion, the Court held that the applicants were directly concerned, as the possibility that the French Government would not impose a quota on imports of Greek cotton yarn was ‘entirely theoretical’.

However, despite this liberal trend, recent case-law of the CFI, following the transfer of jurisdiction in 1994, indicates a stricter approach to the requirement of direct concern, making it more difficult to establish in some circumstances. For instance, the Nestlé/Perrier and the Vittel cases of 1995 have been described as ‘adding a new layer to the test of direct concern’. These two cases concerned a takeover bid by Nestlé and Demilac SA, Nestlé’s subsidiary, relating to the Source Perrier SA, Nestlé and Demilac having agreed to sell Volvic, one of Perrier’s subsidiaries, to the BSN group if the bid was successful. The manner in which the addressee would exercise its discretion was thus known in advance. The applicants, representatives of the employees and trade unions, challenged the Commission Decision addressed to Perrier, which ‘declared the concentration compatible with the common market […] subject to […] compliance with all conditions and obligations contained in Nestlé’s commitments’. In both cases, although the CFI declared the applications admissible to a certain extent, the applicants were held not to be directly concerned by the Decision. The Court considered first whether the Decision directly prejudiced the ‘own interests’ of the representatives of the employees, and held that it did not, as the status and prerogatives of the representative organizations were not affected by the Commission Decision, and as the organizations had ‘no interest in the maintenance of the […] workforce’ despite the possible ‘reduction in the resources

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98 Case 11/82, Piraiki-Patraiki v. Commission [1985] ECR 207, para. 9. See also Hartley, The Foundations of European Community Law, 380; and para. 44 of Dreyfus (ECJ), Case C-386/96. See, however, the stricter approach of the CFI in Salamander AG, Cases T-172 &T-175–7/98, on the discretion conferred on Member States by Directives (implemented by national authorities) although this discretion is often only theoretical (Arnulf, ‘Private Applicants and the Action for Annulment under Article 173 of the EC Treaty’, 28–30). On this point, see Albers-Llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 76.


101 Para. 46 of the Nestlé/Perrier case, Case T-96/92: ‘although … the decision is not of direct concern to the applicants, they [are] nevertheless … entitled to bring proceedings against that decision for the specific purpose of examining whether the procedural guarantees … during the administrative procedure … have been infringed’. Arnulf, ‘Case Note on Case T-96/92 and Case T-12/93’, 327; and ‘Private Applicants and the Action for Annulment since Codorniu’, 26, finds such an application of the Metro case-law of the ECJ on individual concern (see below) very surprising.

102 The Court held that they were preserved by Article 5 of Directive 77/187/EEC.
of the various applicant councils following job losses.\textsuperscript{103} The Court then turned to the question whether the Decision ‘directly prejudice[d] the interests of the […] employees’, considering the job losses and the loss of collective benefits which it may entail, and similarly held that it did not.\textsuperscript{104} The European and French legislations at issue ensured that the concentration would ‘\textit{not in itself} entail any \textit{direct} consequences for the rights [of the] employees’.\textsuperscript{105} A ‘\textit{direct} causal link’ was missing between the Community measure and the possible effects on the rights of the employees, as ‘such effects are […] produced only if measures which are \textit{independent of the concentration itself} are first adopted by the undertakings in question’.\textsuperscript{106} According to the CFI, the ‘appropriate legal remedy’ for the possible effects on the employees was available in national courts against the ‘measures which are \textit{the immediate origin} of the adverse effects […] alleged’.\textsuperscript{107}

Recent cases suggest that the ECJ is also prepared to adopt a more restrictive approach to the requirement of individual concern. In the 2004 \textit{Front National} case, the Court held that this political party, unlike its individual members, was not directly concerned by a Decision rejecting the possibility for individual MEPs of different political views to form a ‘mixed party’.\textsuperscript{108} ‘The ECJ took the view that the effects on the political party were not ‘directly caused by the contested act’, despite the CFI taking the opposite view in first instance.

\section*{B. \textbf{DIRECT CONCERN AS A STRICTER CONDITION THAN ITS FRENCH EQUIVALENT}}

The case-law on direct concern is very specific, as it concentrates on the existence of a discretion of the addressee of the measure ‘entrusted with the task of implementing it’. However, it is clear from cases such as the \textit{Nestlé/ Perrier} case, that the CFI is not prepared to adopt a liberal reading of the ‘\textit{direct} concern’ requirement and to grant standing to an applicant who is only \textit{indirectly} affected by a Community measure. This contrasts with the French equivalent to this condition. In effect, although the jurisprudence of the Conseil d’Etat requires that the measure affects the private applicant in a sufficiently direct manner,\textsuperscript{109} the liberal approach of the French administrative judge has lead René Chapus to describe this criterion as requiring only that the effect of the act on the interest

\begin{itemize}
\item Para. 38 of the \textit{Nestlé/ Perrier} case, Case T-96/92. Concerning the ‘consultative functions’ of the representative organizations, they were preserved by the Merger Regulation (Regulation No 4064/89): para. 39.
\item Para. 40 of the \textit{Nestlé/ Perrier} case, Case T-96/92 (emphasis added).
\item Para. 45 of the \textit{Nestlé/ Perrier} case, Case T-96/92 (emphasis added). See also paras. 40–4.
\item Paras. 45 & 40 respectively of the \textit{Nestlé/ Perrier} case, Case T-96/92 (emphasis added).
\item Para. 45 of the \textit{Nestlé/ Perrier} case, Case T-96/92 (emphasis added).
\item Conclusions Théry in \textit{Sieur Damasio}, Rec.391, 397.
\end{itemize}

of the applicant should not be ‘exaggeratedly indirect’.\textsuperscript{110} For instance, in its \textit{Damasio} judgment of 1971, the CE has held implicitly that the position of a hotel keeper in a spa was affected in a sufficiently direct manner by an administrative act regulating school holidays, as it reduced from four to three the possible number of water cures a year.\textsuperscript{111} Similarly, in the \textit{Dame David} decision of the CE, a journalist of judicial chronicles was considered to be sufficiently directly affected by an administrative measure integrating new provisions concerning the publicity of judicial debates in the French code of civil procedure.\textsuperscript{112} Another example of the liberal approach of the French case-law can be found in \textit{Ligue nationale contre l’alcoolisme}, in which an association fighting against alcoholism was not too indirectly affected by an act assisting home distillers.\textsuperscript{113} Thus, it is only in extreme cases that the French judge denies standing to private applicants on the ground that they are not directly affected by the contested measure.\textsuperscript{114}

We will now turn to individual concern, and will see that the contrast between this requirement, as interpreted by the Community Courts, and its equivalent in French administrative law, is even more important.

\section*{§6. THE REQUIREMENT OF INDIVIDUAL CONCERN}

\subsection*{A. THE CONSERVATIVE CASE-LAW OF THE COMMUNITY COURTS ON INDIVIDUAL CONCERN}

Of the two conditions in Article 230(4)EC, individual concern is the most difficult for a private applicant to demonstrate. The basic formula was established in \textit{Plaumann}, and remains the authority in terms of individual concern.\textsuperscript{115} The Court of Justice held that ‘persons other than those to whom the decision is addressed’ are individually concerned

\begin{footnotesize}
\begin{enumerate}
\item Chapus, \textit{Droit du Contentieux Administratif}, 473: ‘\textit{exige[nce] … que la lésion ne soit [pas] exagérément indirecte}’. Dupuis & Guédon, \textit{Droit Administratif}, 490, consider that, with \textit{Damasio}, the CE recognised that it is sufficient for an applicant to establish an ‘indirect concern’ (‘\textit{un intérêt indirect à agir}’).
\item By reducing the length of the summer holidays to the benefit of winter holidays. CE, 28 mai 1971, \textit{Sieur Damaso}, Rec.391, implicit judgment, yet expressly considered in the conclusions of the commissaire du gouvernement Théry, 397–400, who advocated that the CE should implicitly consider the application admissible. The conclusions stress the close link in French law between the requirement of a ‘caractère suffisamment direct de la lésion’ (direct concern) and that of an ‘intérêt personnel’ (individual concern).
\item CE, 4 octobre 1974, \textit{Dame David}, Rec.464, implicit, yet once again expressly considered in the conclusions of the commissaire du gouvernement Gentot, 465–7, advocating the implicit admissibility of the application.
\item For example, CE, 7 mars 1962, \textit{Synd. prof. du bâtiment et des travaux publics du Loiret}, Rec.1059.
\end{enumerate}
\end{footnotesize}
by a measure\textsuperscript{116} if it ‘affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed’.

1. The existence of a ‘closed class’ of private parties affected by the Community measure: a necessary condition for granting standing to private applicants

A traditional interpretation of the Plaumann formula implies a ‘closed class test’: private applicants will establish individual concern only if they ‘belong to a group of people that could not be enlarged after the measure entered into force’, in other terms, to a ‘closed class ascertainable when the act was adopted’.\textsuperscript{117} Before the ruling in Codorniu, a distinction was made by the ECJ between measures in the form of a Decision and those in the form of a Regulation. Where the contested act was in the form of a Decision, the Court applied the ‘closed class test’.\textsuperscript{118} On the other hand, where the measure was in the form of a Regulation, the case-law alternated between the ‘closed class test’ and the stricter ‘abstract terminology test’.\textsuperscript{119} The objective of this latter test was to identify whether the measure was a ‘true Regulation’ or a Decision in substance. In Calpak, for instance, the Court considered whether ‘the measure applic[d] to objectively determined situation and produce[d] legal effects with regard to categories of persons described in a


\textsuperscript{117} Albors-llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 77; and F. Berrod, ‘Case Note on Case C-321/95P’ 36 C.M.L. Rev. 635 (1999), 641, respectively. See also Craig & de Búrca, EU Law (2008), 513 and the notion of ‘retrospective impact’ of the measure (or ‘completed set of past events’ in the previous edition).


\textsuperscript{119} Craig & de Búrca, EU Law (2008), 515. On the application of the ‘closed class test’ to measures in the form of Regulations, see: Case 100/74, CAM v. Commission [1975] ECR 1393, paras. 15–6, 18–9, distinguishing Case 64/69, Compagnie Française v. Commission [1970] ECR 221, in which the Court had dismissed the application on the ground that the act was a Regulation in substance, although the latter affected only a closed class of persons (paras. 10–13, 17) See also Hartley, The Foundations of European Community Law, 365–6. In Cases 41–4/70, International Fruit Company v. Commission [1971] ECR 411, the closed category test was used to determine whether the measure was a Decision or a Regulation in substance (Arnulf, ‘Private Applicants and the Action for Annulment since Codorniu’, 32, fn. 117; see paras. 17–18, 21). See also Case 88/76, Exportation des Sucres v. Commission [1977] ECR 709, para. 10; Case 123/77, UNICME v. Council [1978] ECR 845, where the Court expressly refused to consider whether the measure was in substance a Regulation (para. 7). For cases adopting an ‘abstract terminology test’, see for instance Cases 103–9/78, Beauport v. Council and Commission [1979] ECR 17; Cases 789 & 790/79, Calpak v. Commission [1980] ECR 1949; Case 26/86, Deutz und Geldermann v. Council [1987] ECR 941. See also Hartley, The Foundations of European Community Law, 367; Rasmussen, ‘Why is Article 173 Interpreted against Private Plaintiffs?’.
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generalized and abstract manner’.\(^\text{120}\) Therefore, the fact that the applicant belonged to a ‘closed category’ affected by the measure would not necessarily imply that the act was in substance a Decision and thus be of individual concern to him. However, the ruling of the ECJ in Codorniu severely restricted the ‘abstract terminology test’, by establishing that a Regulation in substance could be of individual concern to an applicant.\(^\text{121}\) Thus, even if a measure was considered to be a Regulation in substance according to the ‘abstract terminology test’, it could nevertheless be of individual concern to a private applicant, and the latter could be granted standing to challenge this measure.\(^\text{122}\) The ‘closed class test’ is now applied both to measures in the form of Decisions and to those in the form of Regulations. Therefore, when examining the case-law on individual concern, we shall not distinguish according to the form of the contested act.

Although being part of a closed class of individuals affected by the contested measure has to be demonstrated by an applicant in order to establish individual concern, the case-law makes clear that it is not necessarily a sufficient condition.\(^\text{123}\) Two rulings, Piraiki-Patraiki in 1985 and Sofrimport in 1990, concerning respectively measures in the form of a Decision and of a Regulation, appeared to apply the ‘closed class test’ in a liberal manner.\(^\text{124}\) However, later judgments clarified the limits to the ‘apparently liberal approach’ in Piraiki-Patraiki and Sofrimport. For example, in Unifruit Hellas and Antillean Rice Mills, the CFI made clear that a private applicant belonging to a closed class affected by a Community measure will only be individually concerned if the adopting institution was under a legal obligation to consider the interests of members of this class before adopting the measure.\(^\text{125}\) This was the case in both Pitraiki-Patraiki and Sofrimport, in which a provision of the Greek Act of Accession and the provision

\(^{120}\) Cases 789 & 790/79, Calpak v. Commission [1980] ECR 1949, para. 9. The main problem of the ‘abstract terminology test’ was that, although aimed at ‘look[ing] behind the form of the measure’ to determine whether the measure was in substance a Decision, the criterion used made it possible for the legislator to draft the measure in an objective manner, in order for the measure to be considered as a true Regulation, thus ‘immunizing matters from attack by the form of their classification’ (Craig & de Búrca, EU Law (2008), 516).

\(^{121}\) Case C-309/89, Codorniu v. Council [1994] ECR I-1853, para. 19. See also: Walbroeck & Fosselard, ‘Case Note’. Nonetheless, the formula in para. 9 of Calpak is still often used alongside the Plaumann formula and the ‘closed class test’; see for example paras. 107–8 of Comafrika, Case T-139/01; paras. 61–3 of SNF SA, Case T-213/02 (on appeal, para. 37 of Case C-482/04P).

\(^{122}\) Craig & de Búrca, EU Law (2008), 516. See also Hartley, The Foundations of European Community Law, 369.

\(^{123}\) Albors-llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 78.


\(^{125}\) Case T-489/93, Unifruit Hellas v. Commission [1994] ECR II-1201, paras. 24–26; Cases T-480&483/93, Antillean Rice Mills v. Commission [1995] ECR II-2305, para. 67. In this case, the legal obligation to take into account the situation of the applicant was implied from Article 109(2) of the OCT Decision at issue (para.76) (case unsuccessfully appealed to the ECJ). See also Albors-llorens, ibid., 78; and Craig & de Búrca, EU Law (2008), 517 (breach of a ‘duty owed to the applicant’). See also Case C-209/94P, Buralux v. Council [1996] ECR I-615, paras. 33–4. For a further limitation to the Piraiki-Patraiki ruling, see:
of an earlier Regulation respectively required the Commission to take into account the position of the members of the closed category.126 The position was well summarized by the CFI: ‘the mere fact that a trader forms part of a closed group of traders, to which no individual could be added at the time when the [measure] was adopted, is not in itself sufficient […] to be regarded as individually concerned’.127

The liberal ruling in Codorniu was also limited by later case-law. We have seen that in this case the Court held that the ‘legislative nature [of a provision] […] does not prevent it from being of individual concern’ to an applicant, thus generalising the principle in Extramet, which appeared to be restricted to anti-dumping cases.128 Yet another aspect of the Codorniu judgment was important: it appeared to broaden the test of individual concern itself, interpreting the Plaumann formula in a liberal manner.129 In effect, the Court, applying the Plaumann test, concluded that the applicant was individually concerned. Having registered the graphic trade mark ‘Gran Cremant de Codorniu’ in 1924, sixty-five years before the Regulation restricting the use of the term ‘crémant’ was adopted in 1989, the applicant had ‘established the existence of a situation which from the point of view of the contested provision differentiates it from all other traders’.130 Albors-Llorens notes that this ruling ‘could have been interpreted as meaning that the applicant was individually concerned on account of the particularly damaging effects that the measure would have on its situation’.131 However, in Asocarne, the CFI made clear that the applicant in Codorniu was individually concerned only by virtue of the fact that his ‘specific right’, his trademark, had been affected by the measure.132 This restrictive interpretation, based on the ‘exclusive right’ of the applicant, was upheld by the ECJ and confirmed by subsequent rulings of both Courts.133 Thus, the Codorniu ruling was ‘limited to exceptional sets of facts’, and the later case-law preferred an ‘infringement of

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126 Paras. 21 & 28 of Pirika-Patraiki, Case 11/82; and para. 11 of Sofrimport, Case C-152/88. See also Hartley, The Foundations of European Community Law, 365, 368.


129 On this point, see Hartley, The Foundations of European Community Law, 369.

130 Paras. 20–22 of the judgment.

131 Albors-Llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 80 (emphasis added).


rights’ interpretation of the ruling to one based on the substantial adverse effect suffered by the applicant.  

2. The refusal to abandon the ‘closed class test’ and the Plaumann formula: 
UPA and Jégo-Quéré and the rejection of a test based on ‘substantial adverse effect’

The fact that a private applicant belongs to a ‘closed category’ affected by a Community measure is a necessary condition for the Courts to grant locus standi to a private applicant. The case-law shows that, where applicants are ‘members of a theoretically open category’ but are in fact part of a ‘small and easily identifiable group’, in most cases, the Courts dismiss the application as inadmissible. This was the case in Plaumann itself, where the applicant was part of a theoretically open category, importers of clementines, and thus was held not to be individually concerned by the Commission Decision. The post-Plaumann case-law has applied a similar reasoning.

This conception of individual concern was challenged both by Advocate General Jacobs in his Opinion in UPA and by the Court of First Instance in Jégo-Quéré. Noting ‘the anomaly under the current case-law that the greater the number of persons affected the less likely it is that effective judicial review is available’, the Advocate General in UPA suggested a new test of individual concern: ‘an applicant [should be] individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests’. Similarly, following his lead, the CFI in Jégo-Quéré proposed a new approach to individual concern: a private applicant would 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’. The Court stressed that ‘the number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard’.

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134 Albors-Llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 80–1; and Craig & de Búrca, EU Law (2008), 517, respectively.
137 Delivered after AG Jacobs’s Opinion but before the judgment of the Court of Justice in UPA (Case C-50/00P).
thus clearly rejecting the ‘closed class test’ and the *Plaumann* formula. Under the two new tests proposed, the fact that the measure affects an open category of individuals in theory would not be an obstacle to the applicant establishing individual concern.

In both *UPA* and *Jégo-Quéré*, the ECJ rejected the possibility of adopting a new test of individual concern. In *UPA*, it held that, ‘while it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures [...] different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary [...] to reform the system currently in force’. It would thus be beyond its jurisdiction to adopt such a test, which could only result from a formal amendment to the EC Treaty. Albors-Llorens considers this rationale as the true motivation of the Court, despite suggestions that the Court of Justice was ‘react[ing] to the political pressure exerted by the [CFI]’, that it felt ‘unease in departing from established case law’, or that it was concerned by case-load issues, particularly in the light of Advocate General Jacobs’ comments on this matter. This motivation is however questionable, when considering both the lack of any guidance in Article 230(4)EC as to the meaning of individual concern, and the liberal case-law of the Court on other aspects of Community law. Yet the ECJ did not consider that the tests proposed were ‘reformulations’ of

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139 Case T-177/01, *Jégo-Quéré v. Commission* [2002] ECR II-2365, para. 51. See also B. Jack, *Locus Standi and the European Court of Justice: A Faint Light in the Horizon* 6 Environmental Law Review 266 (2004); Albors-Llorens, *The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?*, 84–5, notes that AG Jacobs’s suggested test of individual concern is broader in its scope than that of the CFI: it refers to ‘substantial adverse effect on [the applicant’s] interests’ rather than to adverse effect on his ‘legal position … by restricting his rights or by imposing obligations on him’, and it covers ‘potential effect’ on such interests, whereas the CFI’s test requires the effect to be ‘definite and immediate’. Moreover, the CFI’s test is only applicable to ‘Community measure[s] of general application’. On the differences between the two tests, see also Cortès-Martin, *‘Ubi ius, Ibi Remedium? Locus Standi of Private Applicants under Article 230(4)EC at a European Constitutional Crossroads*’, 242 and 244.

140 Despite the inadequacy of alternative remedies to Article 230EC, both the Advocate General and the CFI rejected the suggestion that an applicant not individually concerned should automatically be granted standing, where no alternative remedy is available (para. 50 of the Opinion in *UPA*, Case C-50/00P, and para. 48 of the CFI’s judgment, Case T-177/01, not surprisingly followed by the ECJ in *UPA*, Case C-50/00P, para. 43, and in *Jégo-Quéré*, Case C-263/02P, *Commission v. Jégo-Quéré & Cie SA* [2004] ECR I-3425, paras. 33–4). For the three major reasons given by AG Jacobs, see paras. 51–3 of the Opinion in *UPA*, Case C-50/00P (namely, the wording of Article 230, which ‘make[s] no reference to the availability or absence … of alternative remedies in national courts’; the lack of competence of EC Courts ‘to rule on the interpretation and validity of national law’; and the inequality which would result of making *locus standi* dependant on national law).


142 Albors-Llorens, *The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?*, 89–90. See, for example, the Court of Justice’s jurisprudence on direct effect, supremacy of Community law, state liability in damages, principles for which ‘no explicit Treaty basis existed’. See also Chalmers et al., *European Union Law*, 433: ‘The *Plaumann* formula is not contained in the text of the Treaties … The *Plaumann* formula is far from being the only plausible interpretation of
the test of individual concern, but rather that they implied 'setting aside the condition in question', and in Jégo-Quéré, it held that 'such an interpretation hа[d] the effect of removing all meaning from the requirement of individual concern'.

It seems in fact that the Court was not prepared to take such a step, without the institutional changes necessary to manage the case-load which would result: such institutional changes could only result from amendments to the EC Treaty. Thus, the Court reaffirmed a 'traditional interpretation of individual concern as laid down in Plaumann'. It refused to abandon the requirement of a 'closed class' affected by the measure, which is a necessary condition to establish individual concern. It remains therefore unlikely that the Court will grant standing to applicants, when they are part of a 'theoretically open category', even when they 'in fact consist of a small and easily identifiable group'.

In Jégo-Quéré, having reaffirmed the Plaumann formula, the ECJ rejected the applicant's argument that it was 'the only operator fishing for whiting in the waters south of Ireland with vessels of over 30 meters in length': it did not distinguish him individually, as the relevant articles of the Regulation at issue were 'of concern to it only in its objective capacity as an entity which fishes for whiting using a certain fishing technique in a specific area, in the same way as any other economic operator actually or potentially in the same situation'.

3. Exceptions to the traditional interpretation of individual concern: participation in the procedure leading to the adoption of measures on anti-dumping, competition, or State aids; absence of alternative remedies in Les Verts

In three specific fields of Community law – anti-dumping, competition, and State aids –, the Court has adopted a more liberal approach to the test of individual concern. It held that private applicants were individually concerned as a result of their participation in

the words contained in the Treaty. The problem is not with the words "direct and individual concern", but with the restrictive interpretation that the Court of Justice has given of those words.

Para. 44 of UPA (ECJ), Case C-50/00P (see also para. 36 of Jégo-Quéré (ECJ), Case C-263/02P); and para. 38 of Jégo-Quéré (ECJ), Case C-263/02P, respectively. See also A. Arnall, 'April Shower for Jégo-Quéré' 29 E.L. Rev. 287 (2004).

Para. 41 of the Opinion of Advocate General Jacobs in Jégo-Quéré, Case C-263/02P. See also paras. 42, 54 of the Opinion in Jégo-Quéré; para. 36 of the judgment in UPA, Case C-50/00P; and para. 45 of the judgment in Jégo-Quéré, Case C-263/02P. For reaffirmation of the Plaumann formula, see also Case C-142/00, Commission v. Nederlandse Antillen [2003] ECR I-3483; Case C-167/02P, Rothley [2004] ECR I-3149. See also Arnall et al., Wyatt & Dashwood’s European Law, 471.


the procedure leading to the adoption of the contested Community act.\textsuperscript{147} In most cases, the applicants would not have been granted standing on a traditional interpretation of the \textit{Plaumann} formula, as the contested measures affected only members of an ‘open category’. The rationale for such an approach can be found in the nature of the procedure leading to the adoption of the Community act. Hartley notes that, unlike other Community acts which are ‘based on policy and discretion’, the measures at issue in these specific areas are taken by the institutions ‘on the basis of objective considerations’ as a result of a quasi-judicial procedure with ‘persons who could be regarded as being, in some sense, parties to the proceedings’\textsuperscript{148}

The ruling of the Court of Justice in \textit{Les Verts} also constitutes a derogation to the traditional interpretation of individual concern, which results from the exceptional set of facts of the case. The contested measure had been adopted by the European Parliament, and concerned the reimbursement of election expenses of those political parties having participated in the 1984 European parliamentary elections. As the parties already represented in Parliament were involved in the procedure of adoption of these measures, the allocation of funds was discriminatory against those parties not yet represented at the time of adoption. The applicant was one such political grouping, presenting candidates for the first time at 1984 election. Without referring to the \textit{Plaumann} formula, the Court held that ‘it [could not] be considered that only groupings which were represented and which were therefore identifiable at the date of the adoption of the contested measure are individually concerned by it’.\textsuperscript{149} Thus, the applicant association was individually concerned and the application admissible, despite the fact that the measure affected the applicant ‘only as members of an open category’.\textsuperscript{150} The rationale for such a departure from the traditional test of individual concern resides in the inequality which would have arisen, had standing not been granted to the plaintiffs, since the political groupings represented in Parliament had participated in the adoption of measures which concerned ‘both […]their own treatment and […]that accorded to rival groupings which were not

\textsuperscript{147} See Cases 239 & 175/82, \textit{Allied Corporation v. Commission} [1984] ECR 1005, para. 12; Case 264/82, \textit{Timex Corporation v. Council & Commission} [1985] ECR 849, paras. 14–15; Case 26/76, \textit{Metro v. Commission} [1977] ECR 1875, para. 2; and Case 169/84, \textit{COFAZ v. Commission} [1986] ECR 391, paras. 24–25. See also Case C-358/89, \textit{Extramet Industrie SA v. Council} [1991] ECR I-2501, paras. 16–17, in which the Court considered that the applicant was individually concerned on the basis of the ‘adverse effect’ on his interest. However, this latter ruling was not only limited to the field of anti-dumping, but, even within this area, later cases such as \textit{Euromin} and \textit{British Shoo} suggested that the ruling \textit{Extramet} was applicable only in ‘exceptional circumstances’ (Case T-597/97, \textit{Euromin v. Council} [2000] ECR II-2419, paras. 45, 49; and Case T-598/97, \textit{British Shoe Corporation v. Council} [2002] ECR II-1155, paras. 48, 50–1). See the long list of specific circumstances affecting the applicant, in para. 17 of \textit{Extramet}. See also Albors-Llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 80–1; and Arnull, ‘Private Applicants and the Action for Annulment since \textit{Codorniu}’, 43.


\textsuperscript{150} Hartley, \textit{The Foundations of European Community Law}, 372.
represented’, and since the measure concerned the allegedly unequal allocation of public funds for preparing for the elections.\textsuperscript{151} The Court in effect ruled that a traditional interpretation of individual concern ‘would give rise to inequality in the protection afforded by the Court to the various groupings competing in the same elections’.\textsuperscript{152} Such inequality was accentuated by the fact that, under the traditional test, standing would have been granted to the groupings already represented in Parliament, although they ‘had no need of it’, as they had participated in the adoption of the contested measure.\textsuperscript{153} It should be stressed once again that the judgment in \textit{Les Verts} was a rare case in which ‘the public interest in having the decisions reviewed prevailed over the restrictive nature of the Article 230(4)EC conditions’, as a result of the exceptional set of facts at issue, and the need to ‘reinforce\[e\] the democratic nature of the Community’.\textsuperscript{154} Hartley notes that this ruling can only be explained on the basis of the absence of alternative remedies available to political groupings such as \textit{Les Verts}.\textsuperscript{155} This confirms the exceptional nature of this judgment, as we have seen that both Courts and the Advocate General have recently rejected the possibility for an applicant to be granted automatic standing on the sole basis that no alternative remedies are available to him.\textsuperscript{156}

B. THE FRENCH NOTION OF ‘CERCLE D’INTERET’ AS A BROADER CONCEPT THAN THAT OF ‘CLOSED CLASS’

We have seen that the French equivalent to the requirement of ‘individual concern’ includes several of the conditions identified by Chapus: the requirements of an ‘intérêt personnel’, an ‘intérêt pertinent/adéquat’ and the ‘caractère suffisamment certain de la lésion’. However, the European concept of ‘individual concern’ as interpreted by the Community Courts is far more restrictive than the French conditions. The latter could in effect be described as requiring only that the private applicant be ‘personally concerned’, rather than ‘individually concerned’.\textsuperscript{157} The French jurisprudence is based on the concept of ‘cercle d’intérêt’, which is much wider than the European notion of ‘closed class’ as developed by the Community Courts. The ‘théorie des cercles d’intérêt’ was elaborated

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\textsuperscript{151} Para. 35 of the judgment.
\textsuperscript{152} Para. 36 of the judgment.
\textsuperscript{154} Albors-Llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 79, and Craig & de Búrca, \textit{EU Law} (2008), 517 respectively.
\textsuperscript{156} See para. 50 of the Opinion in \textit{UPA}, Case C-50/00P; and para. 48 of the judgment of the CFI in \textit{Jégo-Quéré}, Case T-177/01P. See also para. 43 of the judgment of the ECJ in \textit{UPA}, Case C-50/00P; para. 58 of \textit{Bactria} (ECJ), Case C-258/02P; and para. 33 of the judgment of the ECJ in \textit{Jégo-Quéré}, Case C-263/02P.
\textsuperscript{157} Distinction elaborated by Berrod, ‘Case Note on Case C-321/95P’, 640, when qualifying the new test for environmental matters suggested by the applicants in the \textit{Stichting Greenpeace} case.
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by the commissaire du gouvernement Chenot in his conclusions under the decision of the Conseil d’Etat in *Gicquel*. Chenot noted that ‘it is not necessary that the interest be special and peculiar to the applicant, but it should be contained in a circle in which the case-law has included ever widening groups of interested parties, without however enlarging it to the entire national community’.\(^{158}\) This notion was specified by the commissaire du gouvernement Mosset in his conclusions to the *Administrateurs Civils* decision of the CE. He stressed that the ‘negative consequences [of the measure] must reach the applicant in a particular quality, by belonging to a defined and limited category’ and that ‘the applicant must be in a particular situation in relation to the act’.\(^{159}\) This reference to a ‘defined and limited category’ is misleading as it reminds us of the ‘closed class test’ of the Community Courts. However, unlike the latter, the ‘cercle d’intérêt’ to which the applicant must belong in fact need not be closed.

As we have seen above, the Community Courts usually deny standing to private applicants who are part of an ‘open category’ even where the number and identity of the persons affected by the contested measure are ascertainable, as confirmed by recent cases such as *Buralux* and *Jégo-Quéré*.\(^{160}\) The Conseil d’Etat, on the other hand, has consistently granted standing to applicants who belonged to ‘open categories’. For instance, the CE has declared admissible the action of a local taxpayer to challenge a decision adopted by his local authority, when such an act generates expenses to the local community.\(^{161}\) Similarly, the resident of a town is entitled to bring an action against a measure changing the name of his town.\(^{162}\) Going even further, the Conseil d’Etat held that any person residing in Corsica had a sufficient interest to challenge a decision approving the ‘development plan’ of the island,\(^{163}\) a ruling in sharp contrast with the decision of the CFI in *Danielsson*.\(^{164}\) Another example of the liberal approach of the French administrative judge can be found in the jurisprudence allowing users of public utilities to challenge measures relating to the organisation and operation of such public utilities. This case-law was inaugurated in 1906 with the decision of the CE in *Croix de*...
Seguey-Tivoli, in relation to the discontinuance of the tramway service to a city district. In this latter case, the public utility at issue had a local character. However, in its more recent case-law, the Conseil d’Etat has held that users of public utilities had standing to seek judicial review of administrative decisions relating to public utilities of national character, despite the fact that such users could be very numerous.

In fact, it appears from the case-law of the Conseil d’Etat that the only element required is that ‘the situation of the applicant [should be] related to the contested act’. Therefore, there are very few limits to the liberal approach of the French administrative judge. The first major limit imposed by the judge is to dismiss applications ‘made in the name of the law, the public interest, or the entire society’, in order to avoid an actio popularis. Thus, applications are dismissed by the CE where the private applicant invokes only his status as a citizen, national taxpayer, or as a consumer, in order to challenge a measure.

Another notable limit established by the case-law is that ‘the type of interest invoked should be in relation with [the contested decision]’, which Chapus qualifies as the requirement that the interest be ‘pertinent’ or ‘adequate’. For instance, and despite its liberal jurisprudence concerning the locus standi of associations which we shall consider below, the CE held in its 1992 UNEF judgment that a student association was not entitled to challenge measures relating to the expulsion of foreigners. Similarly, planning permissions could only be challenged by ‘neighbours’ living in close proximity

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167 Brisson, Le Recours Pour Excès de Pouvoir, 57.
168 Ibid.
170 CE, 29 décembre 1995, Beucher, Rec.480, single ‘considérant’. However, as a proof of the liberal approach of the case-law, an application has been declared admissible when the applicant invoked his interest as consumer of a particular product (in this case petroleum): CE, 14 mars 2003, Migaud, CJEG 2003, 305, cited by Chapus, Droit du Contentieux Administratif, 468. See also Brisson, Le Recours Pour Excès de Pouvoir, 57.
172 Chapus, Droit du Contentieux Administratif, 470. See also Brisson, Le Recours Pour Excès de Pouvoir, 58, and P. Charlot, RFDA 1996, 484.
173 CE, 10 janvier 1992, UNEF, Rec.1196. See also the recent case CE, 23 mars 2005, Institut des Avocats Conseils fiscaux, CJEG 2005, 301; and Chapus, Droit du Contentieux Administratif, 470, on this case.
to its execution,\textsuperscript{174} and not by an undertaking in competition with the business having obtained the planning permission, or by an estate agent, acting in this ‘quality’ rather than that of ‘neighbour’.\textsuperscript{175} However, even in relation to this limit, the French case-law has proved rather liberal, granting standing for instance to parents of children between 16 and 18 years of age to seek the annulment of a measure classifying a film as forbidden to under 16s when it contained pornography and violence and should thus have been forbidden to under 18s.\textsuperscript{176} These rare limits to the standing of private applicants are therefore rather loose. The French case-law ensures only that the applicant is ‘personally’ rather than ‘individually’ concerned by the contested measure, in order to exclude actions by mere busybodies.

The case-law of the Conseil d’Etat also requires that the detrimental effect of the act on the private applicant be sufficiently certain. However, once again, the approach of the CE is very liberal, and the jurisprudence has been rightly described as requiring only that the effect of the measure on the applicant should not be ‘exaggeratedly uncertain’.\textsuperscript{177} An extreme example of this liberal approach can be found in the implicit decision in \textit{Abisset}, in which the CE admitted the application of a camper seeking the annulment of a measure prohibiting camping in a town in which he had never practised this activity. The commissaire du gouvernement, who considered expressly the question of admissibility, accepted that the possibility that the applicant may come to the town in question during an excursion was ‘sufficiently precise, grave and probable’ for the court to declare the application admissible.\textsuperscript{178} Similarly, and expressly this time, the Conseil d’Etat held in \textit{Da Silva} that a worker of Portuguese nationality employed in France could challenge a measure concerning the conditions of establishment in France of foreign workers, even though he was the holder of work and residence permits, which were valid for a number of years. In effect, ‘the contested measures were susceptible of being applied to him at the time of renewal’.\textsuperscript{179} The French administrative judge has also been very liberal in allowing, in various circumstances, a private applicant to challenge the


\textsuperscript{176} CE, 30 juin 2000, \textit{Assoc. Promouvoir}, Rec.265, 1\textsuperscript{st} ‘considérant’. See, however, CE, 30 juin 2000, \textit{Assoc. Choisir la vie}, Rec.248, 1\textsuperscript{st} ‘considérant’.

\textsuperscript{177} Chapus, \textit{Droit du Contentieux Administratif}, 473.

\textsuperscript{178} CE, 14 février 1958, \textit{Abisset}, Rec.98, concl. M. Long, at 101. The commissaire du gouvernement Long considered that this probability became a certitude as a result of the contrariness of the applicant.

\textsuperscript{179} CE, 13 janvier 1975, \textit{Da Silva et CFDT}, Rec.16 (my translation).
nomination of another individual to certain posts to which he may have acceded. The French jurisprudence therefore grants standing to private applicants even when their interest is only affected in an uncertain way – yet not too uncertain by the contested measure: it covers ‘potential effect’ on the applicant. This contrasts with the case-law of the Community Courts, which denies standing to applicants, when the effect of the measure on their interest is a mere possibility. In effect, according to the closed class test, a private applicant will only be individually concerned if he ‘belong[s] to a group of people that could not be enlarged after the measure entered into force’. In other words, the number of ‘addressees’ must be ‘ascertainable when the act was adopted’. Thus, the action will be admissible only if the measure ‘concerns a completed set of past events’, requiring the applicant to ‘pursue […] a course of action before the enactment of [the] measure’. To some extent, the test proposed by Advocate General Jacobs, despite its higher threshold, adopted this aspect of the French case-law: the applicant would have been individually concerned ‘where the measure has, or is liable to have, a substantial adverse effect on his interests’.

C. THE LOCUS STANDI OF ASSOCIATIONS

1. The application of the strict test of individual concern to associations

The position of the Community Courts regarding the standing of associations was summarised by the CFI in Federolio. It held that actions brought by associations were admissible in at least three types of situation. First, where ‘a legal provision expressly

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181 See, for instance, the recent case CE, 23 février 2005, Assoc. transparence et moralité des marchés publics, RFDA 2005, 483. On this case, see Chapus, Droit du Contentieux Administratif, 477.


183 Berro, ‘Case Note on Case C-321/95P’, 641 (emphasis added).

184 Craig & de Búrca, EU Law (2003), 492; and Albors-Llorens, ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 77 respectively (emphasis added).

185 Para. 102(4) of the opinion in UPA, Case C-50/00P (emphasis added), as noted by Albors-Llorens, ibid., 85.


187 Para. 61 (a), (b) and (c) of the judgment.
grants trade associations a series of procedural rights. Secondly, where ‘the association represents the interests of undertakings which would be entitled to bring proceedings in their own right’, in other words, where the persons represented by the association are themselves individually (and directly) concerned by the contested measure. Finally, where ‘the association is differentiated because its own interests as an association are affected’. However, in its summary of the case-law, the CFI reiterated the constant position of both Courts that, for lack of individual concern, associations are not entitled to challenge Community measures merely on the ground that the collective interest that they intend to protect is affected by the contested act. In the words of the Court, ‘an association set up to promote the collective interests of a category of persons cannot be considered to be individually concerned […] by a measure affecting the general interests of that category, and, consequently, may not bring an action for annulment when its members could not do so individually’. This restrictive line of case-law is based on the idea that allowing associations to contest measures affecting only the collective interest they seek to protect would risk opening the floodgates of litigation and significantly increase the workload of the Community Courts.

2. Liberal standing rules for associations in French administrative law: an example to follow?

The French case-law concerning the standing of associations, trade unions and groupings of associations such as confederations is also very liberal. As at European level, associations are granted standing by the French administrative judge to seek judicial review of ‘measures affecting their existence, their heritage, or their mode of operation or

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188 See also para. 66 of the judgment.

189 Emphasis added. For instance, by its ‘role played … in a procedure leading to the adoption of an act’, in particular ‘when its position as negotiator is affected by [the measure]’ (para. 69 of the judgment).


191 We will refer to ‘associations’ as a generic term.
activity’. 192 Yet, most importantly, and unlike at European level, associations have, since the classic decision of the CE in Syndicat des patrons-coiffeurs de Limoges, been entitled to challenge acts affecting the ‘collective interest’ they protect. 193 They are however not allowed to seek the annulment of administrative decisions that only affect the ‘particular interests’ of some of its members, unless authorised to do so by a mandate. 194 Thus, for instance, as a rule, they may not challenge ‘décisions individuelles négatives’, in other words individual decisions having a detrimental effect for the person to whom they are addressed, but may challenge ‘règlements’ – administrative acts of a general nature – and ‘décisions individuelles positives’ – individual decisions granting rights to the person to whom they are addressed. 195 In effect, the latter two types of measures are more likely to affect the ‘collective interest’ protected by the association, 196 unlike the former, which is more likely to affect only the ‘particular interest’ of the addressee. 197

On the one hand, the liberal approach of the French judge, in allowing associations to contest measures contrary to the ‘collective interest’ which they seek to protect, is ideal in terms of effective judicial protection. In effect, any two citizens with a particular concern may create an association to protect it, and thus be entitled to challenge a measure detrimental to this concern, even if neither of them would have been granted standing individually. 198 An example of the liberal standing rules established by the jurisprudence can be found in the decision of the CE which allowed a syndicate of lawyers to challenge a measure on the conditions of detention of illegal immigrants awaiting expulsion. 199 Similarly, an association for environmental protection can establish standing against a planning permission allowing the construction of a nuclear power station, a decision in clear contrast with that of the Community Courts in the Stichting Greenpeace cases. 200

192 Chapus, Droit du Contentieux Administratif, 477 (my translation).
193 CE, 28 décembre 1906, Synd. des patrons-coiffeurs de Limoges, Rec.977. See also Chapus, Droit du Contentieux Administratif, 461. We should note that the French law on the freedom of association was enacted in 1901. On the standing of associations in general, see: G. Peiser, Contentieux Administratif (Dalloz, 2006), 175–178.
194 Ibid. See also Brisson, Le Recours Pour Excès de Pouvoir, 61. Associations are also entitled to intervene to support an action brought by an individual to defend his ‘particular interests’. See also Chapus, ibid., 480.
195 See, for example, CE, 10 juillet 1996, Synd. CFDT Interco des Bouches-du-Rhône, Rec.1074 (‘décision individuelle positive’), and CE, 8 juillet 1989, Burais (‘décision individuelle négative’).
197 The addressee should thus be the one to decide whether or not to bring an action, balancing the advantages and disadvantages of so doing. See Brisson, Le Recours Pour Excès de Pouvoir, 62. In certain situations, however, a negative individual decision may have an impact on the collective interest of the associations, as in the case of ‘salariés protégés’: see CE, 10 avril 1992, Soc. Montalev, Rec.170.
198 Chapus, Droit du Contentieux Administratif, 462, in particular the three examples given.
200 CE, 20 juin 1984, Assoc. Les amis de la Terre, Rec.233 (implicit decision). Concerning the special case of ‘associations agréées’ (having received a special authorisation) which are granted automatic standing, see Chapus, ibid., 473.
Moreover, the French administrative judge does not require that the association be constituted before the adoption of the contested act: individuals who lack standing may constitute an association for the sole purpose of challenging an administrative act.201

On the other hand, such a liberal approach may be problematic in terms of managing the case-load of the courts. However, the French administrative judge has developed certain mechanisms to escape the actio popularis. The most important limit to the admissibility of actions brought by association lies in the requirement that the ‘objet social’ of the association – the ‘collective interest’ that the association is intended to protect – be directly linked with the object of the contested measure.202 If the object of the association is too wide in comparison with the object of the act, the action will be declared inadmissible.203 For instance, an association having as its purpose the fight against all forms of injustice does not have standing to challenge a measure on the procedure used in relation to illegal immigrants.204 Such a limit, applied in a rather liberal manner by the French judge, could be adopted and applied more strictly by the Community Courts, if the strict rules concerning the locus standi of associations at EC level were amended.

§7. CONCLUSION: SUGGESTED IMPROVEMENTS TO THE STANDING RULES FOR NON-PRIVILEGED APPLICANTS IN THE LIGHT OF THE FRENCH CONDITIONS OF LOCUS STANDI FOR PRIVATE APPLICANTS

Keeping in mind the limits of the comparison of a supranational entity with a State, in particular in terms of case-load, what improvements could be made to the standing rules for non-privileged applicants in the light of the liberal approach of the French

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201 See for instance: CE, 21 décembre 1906, Croix de Seguey-Tivoli, Rec.962, above.
203 See in particular the article by Landbeck, LPA avril 2003, n° 70, on the drafting of the statutory clauses of associations, especially 14. See also L.N. Brown & J. Bell, French Administrative Law (OUP, 1998), 167; and Chapus, ibid., 472–3.
204 CE, 10 mars 1995, Assoc. Le droit pour la justice et la démocratie, DA 1995, n°385. See also Chapus, ibid., 472. This limit concerns the scope ratio materiae of the association. Concerning other limits to the liberal standing rules for associations: on the scope ratio loci of the association: see Landbeck, LPA avril 2003, n° 70, 11 and Boré, La Défense des Intérêts Collectifs par les Associations, 212–8; B. Pacteau, Manuel de Contentieux Administratif (PUF, 2006), 119; J. Rivero & J. Waline, Droit Administratif (Dalloz, 2006), 546; recently: CE, 23 février 2004, Cité de Communes du Pays Loudunais, AJDA 2004, 1614. On the rule that groupings of associations are not entitled to challenge measures affecting only one of its associations, and the liberal interpretation of this rule, see de Laubadère et al., Droit Administratif Tome 1, 424–5. On this point, see the very liberal ruling in CE, Ass., 12 décembre 2003, Union des Synd. CGT des personnels des affaires culturelles, AJ 2004, 199; and Chapus, ibid., 484, on this case.
administrative judge to the *locus standi* of private applicants? We have seen that the French administrative courts admit actions brought by applicants who are only indirectly concerned by a measure. Despite a stricter trend in its recent case-law, the approach of the Community Courts to direct concern remains rather liberal, and need not be further liberalized to grant standing to applicants who are merely indirectly concerned by an EC measure. The French administrative jurisprudence also allows private applicants who are merely personally – rather than individually – concerned by an act, to bring an action against it. Without going to this extreme which would be dramatic in terms of workload for the Community Courts, examination of the French approach stresses how strict the interpretation of individual concern by the Courts is, and suggests that there may be a ‘juste milieu’ between these two extremes. The system of judicial review should remain adapted to the judicial architecture of the Union, which excludes a radical liberalization of the standing rules for private applicants. A solution would be to allow private applicants to challenge EC measures when, despite being part of an ‘open category’ of persons affected by the act, they constitute a ‘small and easily identifiable group’.205 This would provide a limited yet essential liberalization of the ‘closed class test’ applied by the Court. Other solutions could also be envisaged. For instance, it has been argued that the closed class test should be adapted to certain areas for which it is particularly difficult for natural persons to establish individual concern, such as the environment.206 Nonetheless, some authors consider that standing should not be thus limited and that ‘it is farcical and inimical to the concepts of democracy and rule of law to hold that, the larger the number of people potentially affected by the act of a Community institution, the less grounds there are to confer standing to challenge that act’.207 This problem could be addressed by liberalizing the standing requirements for associations.208 This would provide an alternative to a radical liberalization of *locus standi* rules, which might put the whole judicial framework of the Union into question.

Associations should be allowed to act as the necessary ‘watchdogs’ of the rule of law in society.209 This is indispensable for the construction of a European civil society, and for the elaboration of the concept of European citizenship in practice. The criterion for holding that associations are individually concerned by an EC measure could be based

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205 This is Hartley’s expression: *The Foundations of European Community Law*, 363.
206 See in particular, Advocate General Cosmas’s criteria for defining a closed class based on ‘geographical proximity’ of the individual to the location of the intervention on the environment, ‘weighted together with … the gravity of the[e] consequences’ on the environment (Opinion in the Stichting Greenpeace case, Case C-321/95P, paras. 104–9).
208 For the opposite view, see Chalmers et al., *European Union Law*, 435, and in particular their point on prior intervention of pressure groups in the law-making process, and their argument that one should ‘not … substitute judicial review for political accountability’.
on the French administrative case-law. It should in effect be required that the collective interest that an association seeks to protect be adequate to the object of the contested act. A similar limitation to that in French administrative law could also be imposed in order to limit the case-load: the collective interest protected by the association should not be too general. In relation to the associations for the protection of the environment, an approach similar to the French one could also be adopted. Despite the requirement that the object of the association should not be too wide, environmental associations are usually granted standing to challenge a measure affecting the environment, unless the impact of the decision is geographically very limited. Advocate General Cosmas notes that ‘within the European Union, the number of legal persons which have as their object the protection and conservation of the environment is today particularly high’. Nevertheless, the particular difficulty for natural persons to establish individual concern in this area and the recent focus of Community law on environmental matters justify the adoption of more liberal approach to associations for the protection of the environment. A further limitation could require that associations be ‘constituted prior to the adoption of the contested measure’, unlike in French administrative law. This would be a necessary limit in order to avoid ‘frivolous’ claims, and avoid opening the floodgates of litigation. Without such a limitation, individuals who lack standing to challenge a particular measure could circumvent this, by constituting an association protecting the appropriate collective interest. Thus, once again, the judicial architecture of the Union should be borne in mind. Moreover, this limitation is not as severe as it appears: if the object of the contested act is sufficiently important for a group of individuals to challenge the act in question, there is a high likelihood that these individuals will have constituted an association prior to its adoption.

Since the ECJ insisted in UPA that a more liberal approach to standing could only result from a Treaty amendment, we suggest that an amended Article 230EC should incorporate the following provisions on standing of non-privileged applicants:

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211 Para. 117 of the Opinion in Stichting Greenpeace, Case C-321/95P.


213 A limitation suggested by AG Cosmas, even though he rejects extending the locus standi of associations (para. 117 of the Opinion in Stichting Greenpeace, Case C-321/95P). There is no such limit in French administrative law. In the Seguey-Tivoli case (CE, 21 décembre 1906), for instance, the association was constituted in order to challenge the administrative act (at the initiative of Léon Duguit).

214 Para. 117 of the Opinion in Stichting Greenpeace, Case C-321/95P.

215 Para. 45 of the judgment of the ECJ in UPA, Case C-50/00P.

216 The current Article 230(4)EC reads: ‘Any natural or legal person may, under the same conditions, 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’.
Any natural or legal person may (under the same conditions) institute proceedings against a decision addressed to him or her, or against a regulation, a directive, or a decision addressed to another person, which is of direct and individual concern to him or her.

A private applicant will establish individual concern where he or she is part of a closed class of persons affected by the contested measure, or where he or she is part of an open category but the persons affected by the contested measure constitute a small and identifiable group.\textsuperscript{217}

An association will establish individual concern where it has been constituted prior to the adoption of the contested measure,\textsuperscript{218} and where the collective interest that it seeks to protect corresponds to the object of the contested measure, and provided the collective interest protected is not too general.

By way of derogation, associations having as their collective interest the protection of the environment in general will be individually concerned by a measure having an impact on the environment, unless the impact of the measure is geographically limited.\textsuperscript{219}

Advocate General Jacobs has stressed certain mechanisms preventing a dramatic increase of the case load. A certain increase in the Community Courts’ case-load will nevertheless inevitably result from the liberalisation of the standing rules for private applicants in the action for annulment – even if the extent of such liberalisation is limited. However, this is the price to pay for democracy, when we consider the ‘increasingly pervasive role Community legislation plays in the lives of individuals in the Community’.\textsuperscript{220} It seems however that, although they have adopted very liberal approaches in the past on some issues, such as direct effect, the Community Courts are not prepared to make such a step alone, and consider that the standing rules should only be modified by amending the EC Treaty.\textsuperscript{221} The 2004 Constitutional Treaty, had it been ratified, would have only modified the rules of \textit{locus standi} for non-privileged applicants to a limited extent. Article III-365(4), the equivalent to current Article 230(4)EC, would have introduced a distinction between ‘self-executing’ administrative acts, on the one hand, and ‘legislative and administrative acts entailing implementing measures’, on the other hand.\textsuperscript{222} For ‘regulatory acts […] [which do] not entail implementing measures’, in other terms ‘self-executing’ administrative Community acts, standing would be made simpler, as the

\textsuperscript{217} This formulation is based on T.C. Hartley’s terminology.
\textsuperscript{218} See AG Cosmas’s Opinion in \textit{Stichting Greenpeace}, Case C-321/95P, para. 117.
\textsuperscript{219} In which case only an association with a more specific collective interest will establish individual concern.
\textsuperscript{220} Torrens, \textit{Locus Standi} for Environmental Associations under EC Law–\textit{Greenpeace}–A Missed Opportunity for the ECJ’, 336.
\textsuperscript{221} Para. 45 of the UPA ruling, Case C-50/00P. See also, \textit{Report of the Court of Justice} of May 1995, para. 20, referred to by Ward, \textit{Judicial Review and the Rights of Private Parties in EC Law}, 260.
\textsuperscript{222} C. Brown & J. Morijn, ‘Case Note on Case C-263/02P’ \textit{41 C.M.L. Rev.} 1639 (2004), 1655–6.
applicant would only have to establish direct concern. However, for legislative and administrative acts requiring implementing measures, applicants would still be required to establish both direct and individual concern, and the meaning of these conditions would be left in the hands of the Courts. The lack of substantial changes to the standing rules for private applicants in the 2004 Constitutional Treaty should have attracted more attention during the ratification period, instead of the rather sterile debates that took place in some Member States, as it was the case in France. The 2007 Treaty of Lisbon, signed by the Heads of State and Government on 13th December 2007, to be ratified by January 2009, reiterates the mistakes of the 2004 Constitutional Treaty in this regard. The 2007 Lisbon Treaty proposes an identical wording to that in Article III-365(4) of the Constitutional Treaty: ‘regulatory acts … which do not entail implementing measures’

223 The expression ‘regulatory act’ is nowhere defined in the 2004 Constitutional Treaty (O.J. C310/1, 16–12–2004). See however, Article I-35 on ‘non-legislative acts’, and Article I-33 on the four types of non-legislative acts (‘European regulations’ – which are administrative acts, unlike the current Regulations as defined in Article 299EC –, ‘European decisions’, which both have binding force, and ‘recommendations’ and ‘opinions’, which both have no binding force). See also Article I-36 on non-legislative/ administrative ‘delegated European regulations’ (‘European laws and framework laws [legislative acts] may delegate to the Commission the power to adopt delegated European regulations to supplement or amend certain non-essential elements of the law or framework law’) and Article I-37 on non-legislative/ administrative ‘European implementing regulations’ and ‘European implementing decisions’. It should be noted that ‘European regulations’ can either be ‘binding in [their] entirety’ or be ‘binding only as to the result to be achieved’, and thus require implementing measures. The present author agrees with Koch’s argument that ‘regulatory acts’ include all ‘binding non-legislative acts of the Union’ (Koch, ‘Locus Standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ right to an effective remedy’, 520): ‘European regulations’ (including ‘delegated’ and ‘implementing’ ones) and ‘European decisions’ (including ‘implementing’ ones). Thus, applicants would only have to establish direct concern for ‘European regulations which are binding in their entirety’, and for ‘European decisions not addressed to the applicant or any person’ if they do ‘not entail implementing measures’ (Koch, 524). See also Koch’s argument that, although the applicants in UPA would have had to demonstrate individual concern and thus not have been granted standing, the applicants in Jégo-Quéré would have had standing under these new rules, as the Regulation at issue was adopted by the Commission, and thus would have potentially been adopted as a ‘European delegated regulation’, and therefore required the applicants to demonstrate only direct concern. For the same view, see Cortsé-Martin, ‘Ubi ius, Ibi Remedium? Locus Standi of Private Applicants under Article 230(4)EC at a European Constitutional Crossroads’, 250–1; and Arnulf, The EU and its Court of Justice, 89–90. The rules in Article III-365(4) of the 2004 Constitutional Treaty were thus potentially wider than those of Article 230(4)EC. See also J.A. Usher, ‘Direct and individual concern – an effective remedy or a conventional solution?’ 28 E.L. Rev. 575 (2003); and Barents, ‘The Court of Justice in the Draft Constitution’, 130–134, especially 134 (on the absurdity of distinguishing according to ‘the form of the act’).

224 Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, CIG 14/07, Brussels, 3 December 2007, available at http://consilium.europa.eu. Article 230 of the Treaty on the Functioning of the European Union (ex-EC Treaty, renamed), as amended by Article 2. B. 214(c) of the 2007 Treaty of Lisbon, provides: ‘Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person, or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures’. See also the new provisions on ‘acts setting up bodies, offices or agencies of the Union intended to have legal effects vis-à-vis third
would only require the private applicant to demonstrate direct concern;\(^{225}\) otherwise, the requirements of direct and individual concern are to be retained for measures not addressed to the applicant, and with this the strict case-law of the Community Courts on individual concern. The drafting of the 2007 Treaty of Lisbon should have been the occasion for reconsidering the standing rules for private applicants under the action for annulment, rather than merely rubber-stamping the inadequate provisions of the 2004 Constitutional Treaty on the subject.

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\(^{225}\) Although the Treaty of Lisbon is to ‘drop… the denominations “law” and “framework law”’, it is to ‘maintain… the distinction between what is legislative and what is not’ (Brussels European Council 21/22 June 2007 Presidency Conclusions, Annex I (Draft IGC Mandate), III. Amendments to the EC Treaty, paragraph 19(v)), available at http://europa.eu). Thus, the expression ‘regulatory act’ in the 2007 Treaty of Lisbon is to be given the same meaning as in the 2004 Constitutional Treaty. See Articles 249A to 249D of the Treaty on the Functioning of the EU (ex-EC Treaty), as amended by Article 2. B. 236) of the 2007 Treaty of Lisbon. Article 249B envisages a situation similar to the ‘delegated European regulation’ of Article 1-36, by providing that ‘a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act’ (emphasis added). Koch’s argument as to the respective outcomes of UPA and Jégo-Quéré is therefore applicable to the 2007 Treaty of Lisbon.
BOOK REVIEWS


The present book is a Ph.D. dissertation written under the supervision of prof. dr. L. Waddington and prof. dr. A.W. Heringa and defended in 2006 at Maastricht University before the distinguished jury of prof. dr. H. Schneider, prof. dr. J. Gerards, prof. dr. I. Boerefijn, prof. dr. C. McCrudden and dr. M. Bell.

The book concerns one of the fastest developing and most fascinating fields in the legal framework of the European Union – anti-discrimination law. In her book, the author deals with selected issues on anti-discrimination law ranging from the concepts of indirect discrimination (chapter 3), harassment (chapter 4) and positive action (chapter 5) to in-depth analysis of the specific discrimination grounds of religion and belief (chapter 6), sexual orientation (chapter 7), disability (chapter 8) and age (chapter 9). All the issues are presented in a multi-layered context of European Union law, the national legal frameworks of two EU Member States - the United Kingdom and the Netherlands, selected due to the advanced nature of their legal frameworks in this field – and to some extent international law, particularly the case law of the Strasbourg Court.

The added value of this book is equally multi-levelled. First of all, it is remarkably rich. Although at the outset the wealth of presented information may seem a bit overwhelming to a person not familiar with the subject matter and the selection of the research topics may seem somewhat accidental, the reader easily gets into the swing of the text, which presents numerous recent legal developments in the anti-discrimination law field. This quality renders M. Gijzen’s book noteworthy not only for academics working in the anti-discrimination field but also for law students who wish to understand the more confusing concepts that populate the sphere of anti-discrimination law. M. Gijzen explains them in a straightforward manner, providing an extraordinary number of examples based on the case law of the European Court of Justice as well as British and Dutch judicial authorities. Thus, not only is the reader presented with rich theoretical background of equality and non-discrimination law but also with living examples and real problems that arise at the so-called grass-root level.

Secondly, the reference to British and Dutch legislation and case law before and after the implementation of the acquis communautaire in the field fills a gap in the discrimination-related literature. The European legal framework, including in particular Article 13 EC
Treaty and the Race and Framework Directives of 2000, has already been thoroughly examined in the literature. Currently, following the deadline for implementation of the directives (the end of 2003, although for the exceptional cases of age and disability discrimination grounds, the end of 2006), the most important task is to understand how the law actually functions in the EU Member States. This is why the detailed information on current laws, the values underpinning the adopted anti-discrimination legislation and, most importantly, on the interpretation and application thereof by the national courts and other judicial bodies is very much appreciated. Despite the fact that the presented Dutch and English laws suffer from certain shortcomings as pointed out by the author (e.g. the medical approach to disability in the UK or exceptions to the age discrimination ban in Dutch law), they can act as a yardstick, both in the positive and the negative sense, for legislators and the judiciary in other countries, notably those where European law has not been fully or correctly implemented. Moreover, these examples can serve as a source of inspiration for further European-level developments in the field.

Finally, this 550-page-long account confirms the existence of correlations between various areas of anti-discrimination law, which have important legal and paralegal implications. As defined by M. Gijzen herself, the aim of this book was to determine the impact of:

1) European law on national laws of the EU Member States (the so-called ‘top-down’ impact),
2) EU Member States’ laws on European law (the so-called ‘bottom-up’ impact), and
3) international law on European and national laws,
and to compare
4) various discriminatory grounds (the so-called ‘cross ground’ fertilisation) in the context of their underpinning values, and
5) national regulatory frameworks against the background of supranational equality standards (the so-called ‘cross country’ comparison).

The identification of the ‘top down’ impact demonstrates that the European anti-discrimination law is a necessary backbone for activities at the national level, even where some anti-discrimination regulation is already in place, since it revives interest in the problem, helps in standard setting and thus, in most cases, boosts the protection of individual citizens. However, European legislation must be of the highest quality as otherwise it may have, as demonstrated by the author, a corrosive effect on more practical national regulations in the area. The influence of international law on national case law, in turn, has been demonstrated not to be considerable because the respective national and supranational authorities have different judicial mandates and operate in different socio-cultural contexts. It is for this reason that national judicial bodies are not particularly interested in drawing inspiration from rulings given, for example, by the Strasbourg court.
The comparison of various discriminatory grounds results in the conclusion that their incorporation within the body of anti-discrimination law was inspired by divergent underpinning values, as reflected in different regulatory approaches to equality and anti-discrimination, depending on the ground at stake. Although Ms Gijzen supports equal protection against discrimination, she agrees with a need for tailored-made approaches and interpretations for different grounds of discrimination. The comparison of Dutch and English regulatory frameworks proves that even after the implementation of EC law, national approaches to discrimination are likely to differ from one another, resulting in unequal protection against discrimination across the EU member states.

To sum up, this is an excellent book that contributes extensively to the discussion on discrimination law at the European and national levels. For all those interested in this fascinating and rapidly developing legal field, it must be obligatory reading.

Małgorzata Marta Zajac


Climate change will likely be the most complex and expensive environmental problem humanity has ever had to address. According to the Stern Review commissioned by the UK government, the cost of business-as-usual, by not taking immediate action to mitigate climate change, will likely be equivalent to between five to ten percent of world GDP each year.\(^1\) Although the transition to a low carbon economy is a responsibility of all countries, the Kyoto Protocol of 1997 expects rich nations to take primary responsibility. Acknowledging the states’ ‘common but differentiated responsibilities’,\(^2\) the Protocol obliges developed nations to take the lead role. So far, only the member states of the European Union (EU) have shown international leadership on climate policy.

Therefore, this excellent edited collection assembled by Peeters and Deketelaere on the achievements of EU climate change policy is a very timely publication. They have brought together nineteen distinguished, mostly European scholars, on climate law and policy to provide an informative account of the flurry of initiatives. Professor Marjan Peeters is a member of the Department of Law at the University of Maastricht, and Professor Kurt Deketelaere is the Director of the Institute of Environmental and Energy Law, University of Leuven. With the other contributors, they examine the relationships between EU climate law and international law (part 1), greenhouse gas (GHG) emissions

\(^1\) N. Stern, Stern Review on the Economics of Climate Change (HM Treasury, 2007).
trading in the EU (part 2), energy regulation in relation to climate policy (part 3), and instrument policy mixes for better governance of climate policy (part 4).

Over at least the past decade, one can argue that the EU has generally led the world in environmental law reform. In the area of climate policy, the EU is also widely recognised as a front-runner, or a ‘global green leader’ (3) in the words of Deketelaere and Peeters. Not surprisingly, therefore, EU climate policy and law has already generated a significant body of literature. The EU’s achievements are all the most noteworthy given that the European Community Treaty does not explicitly refer to ‘climate change’ or similar notion.

Even the EU, however, faces formidable challenges to achieve a low carbon economy. The International Panel on Climate Change has called for cuts in GHG emissions by at least 60 percent by 2050 to avoid dangerous climate change, while for many scientists and activists such as George Monbiot, even steeper cuts of up to 90 percent are necessary. These targets are well in excess of even the EU’s relatively ambitious goals.

The significant feature of this book is its focus on legal instruments, with emissions trading as the principal policy tool, accompanied by directives on energy taxation, energy efficiency and renewable energy. They authors provide both a theoretical and practical legal perspective on the regulatory issues involved. A seminal observation that flows through the book is that ‘the current approach like emissions trading and energy taxation is not yet meaningful enough because of the fact that they, thus far, do not lead to impressive reductions’ (4).

This suggests that even with the right policy tools, the underlying fundamental goals must be sufficiently ambitious. Those goals, however, require a political consensus for determined action. For instance, it was not long before the EU carbon trade regime launched in 2005 began to unravel, as an excess of emission allowances caused the price of allowances to crash and become virtually worthless. The first phase of this scheme – which covered around 40 percent of the EU’s emissions – fell short of its promises because the carbon dioxide limits were not strict enough. Moreover, the large polluters were given credits free of charge.

But carbon trading is new ground for environmental law reform, and some trial and error can be expected. These limitations are acknowledged in this book, as the

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5 For example, A. Michaelowa and S. Butzengeiger and M. Grubbs (eds), The EU Emissions Trading Scheme (Earthscan, 2005); L. Jaggard, Climate Change Politics in Europe: Germany and the International Relations of the Environment (Tauris Academic Studies, 2007); J. Gupta and M.R. Grubb, Climate Change and European Leadership: A Sustainable Role for Europe? (Springer, 2000).
7 Directive 2003/87/EC.
contributors provide a balanced and fair review of the successes and limitations of climate policy and regulation in the EU.

Among the valuable individual chapters, Wybe Th. Douma’s paper (chapter 3) provides fascinating insights into the special relationship between the EU and Russia regarding its ratification of the Kyoto Protocol, and the influence the EU was able to exert to facilitate Russia’s ratification, which was crucial to keeping the Protocol alive. On emissions trading in the EU, Javier de Cendra de Larragán’s chapter (6) addresses the complicated topic of the linkage between the Kyoto Protocol’s project mechanisms (Clean Development Mechanism and Joint Implementation) and the EU emissions trading scheme. British lawyers Karen MacDonald and Zen Makuch (chapter 7) provide an incisive account of how the emissions trading scheme interacts with the participatory and transparency objectives of the Aarhus Convention. They note, for instance, the potential contradictions here, given that the ‘concept of emissions trading relies on the privatization of formerly publicly held rights’ (127). Peeters herself examines problems of enforcing the emissions trading scheme (chapter 9), noting the challenges that have plagued the scheme such as a ‘credible verification process’ and ‘monitoring requirements’ (179). Also noteworthy is the chapter on EU energy policy, by Véronique Bruggeman and Bram Delvaux (chapter 12). They canvass the ‘pressures’ that Kyoto is placing on a host of EU directives to perform, including directives on promotion of renewable energy power, use of biofuels, combined heat and power generation, among many other examples carefully reviewed. They observe that even with the plethora of directives, the EU appears unlikely to meet its own targets for greening its energy sector.

Not all aspects of climate policy are covered in these chapters, however. Climate ethics is largely ignored, although other commentators have suggested that we need a shift in ethics to address global warming. In his polemic, American Heat, Donald Brown argues that we need to reflect on the ethical issues raised by climate change in order to reach an urgently needed international consensus for action. Likewise, ethical issues have hardly featured in EU climate policy to date, so perhaps it is not surprising that the contributors to this book had little to say on this topic.

The final part of the book has some of the strongest analysis. Ludwig Krämer, a renowned EU environmental lawyer, reflects on the EU’s constitutional and institutional barriers for acting on climate policy. Despite having no specific mandate in its Treaty on climate policy, Krämer describes the Community’s achievements in this domain as ‘very

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9 Directive 2001/77/EC.
10 Directive 2003/30/EC.
11 Directive 2004/8/EC.
considerable’ (290). Krämer nonetheless conveys concern that further policy advances may be hindered without more explicit jurisdictional competencies in the climate and energy policy fields. Krämer also astutely considers the value of having the right combination of policy instruments to address global warming – no one single tool will suffice.

What is somewhat unclear from this book is whether the lessons of the EU experience can be transferred to other jurisdictions such as Australia, Canada or developing countries such as China. For instance, to what extent does the EU’s experience with emissions trading and energy taxation hinge upon unique political and legal traditions within Europe? The authors of course did not set out to write a book about comparative environmental law, but it is a question that non-EU readers will ponder as they hope for their own countries to emulate the EU’s successes and to avoid its mistakes.

Only two chapters explicitly address such comparative perspectives. George Pring’s essay helpfully examines the US experience with acid rain allowance trading (chapter 10). He points out that regulating GHG emissions is vastly more complicated than regulating sulphur dioxide given the pervasive use of fossil fuels in the economy. In the final chapter, Joyeeta Gupta considers the thorny North-South dimension of international climate politics, and notes policy challenges here that are even greater than the current trans-Atlantic divide. Gupta astutely deciphers the enormous challenges, that, in her own words, ‘unless the climate change regime is redefined in terms of liability, the South cannot force the North to take action. In the meantime, they can only hope for a series of technological breakthroughs’ (299).

With preparations commencing for the negotiation of a post-Kyoto agreement after 2012, readers will find this collection of essays on the strengths and weaknesses of climate law in Europe very useful. Peeters and Deketelaere have assembled a good account of the policy achievements, limitations and future challenges for the EU on climate policy. This scholarship is not just for legal academics and practitioners. It should be read by policymakers, students, environmental activists and indeed anyone interested in how climate governance can succeed. But as an exceptionally dynamic area of environmental law, it will not be long before the editors will need to write another book to keep abreast of the rapid legal changes on climate change.

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