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Knocking on Heavens Door

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# Contents

<b>1</b>	<b>ABBREVIATIONS</b>	<b>1</b>
<b>2</b>	<b>SUMMARY</b>	<b>2</b>
<b>3</b>	<b>INTRODUCTION</b>	<b>4</b>
3.1	Purpose	6
3.2	Delimitations	6
3.3	Method	7
<b>4</b>	<b>BACKGROUND</b>	<b>8</b>
4.1	Legal background	8
<b>5</b>	<b>EVOLUTION IN CASE LAW</b>	<b>12</b>
5.1	The Plaumann case	12
5.2	The Calpak case	13
5.3	The Codorniu case	14
5.4	The notion of individual concern	15
5.4.1	Pure Plaumann	16
5.4.2	Infringement of rights or breach of duty	16
5.4.3	The degree of factual injury	17
5.4.4	Locus standi in selected areas	18
5.4.5	Direct concern under the notion of individual concern	19
5.5	The Jégo-Quéré case	19
5.6	Opinion of AG Jacobs in the UPA case	21
5.6.1	The substantial adverse impact test	23
5.7	The UPA Case	26
5.8	Conflicting issues between the judgement and the opinion in the UPA case	27
5.9	Summary of case law	30
<b>6</b>	<b>THE EU, A FEDERAL UNION?</b>	<b>31</b>
6.1	Locke	31
6.1.1	Locke's state of nature	31
6.1.2	Locke's social contract	32

6.1.3	Locke's notion of Property	33
6.1.4	Locke's notion of state	33
<b>6.2</b>	<b>Rights and the EU in a Lockean perspective</b>	<b>35</b>
<b>6.3</b>	<b>Rights, do they need to be redefined?</b>	<b>37</b>
<b>6.4</b>	<b>An ever closer Union</b>	<b>39</b>
<b>7</b>	<b>EFFECTIVE JUDICIAL PROTECTION</b>	<b>42</b>
<b>8</b>	<b>THE FUTURE OF LOCUS STANDI</b>	<b>45</b>
<b>9</b>	<b>FINAL CONCLUSIONS</b>	<b>47</b>
<b>10</b>	<b>BIBLIOGRAPHY</b>	<b>48</b>
<b>11</b>	<b>TABLE OF CASES</b>	<b>49</b>
11.1	Cases from the ECJ	49
11.1.1	Opinions	50
11.2	Cases from the CFI	50
11.3	Cases from other courts	50

# 1 Abbreviations

AG	Advocate General
BVerfG	Bundesverfassungsgericht
CFI	Court of First Instance
CFR	Charter of Fundamental Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
TEC	Treaty on the European Community
UPA	Unión de Pequeños Agricultores

## 2 Summary

This thesis will clarify the notion of individual concern and its use by the ECJ, through an analysis of case law and a Lockean analysis of the EU.

The thesis takes its outset in the case law of the ECJ and will show, through a thorough analysis of a selected part of the case law, that this is inconsistent and unstable, leaving individuals with legal uncertainty and little hope of accessing the CFI and the ECJ. What is certain about the case law is that it is restrictive. Even though the case law in recent years has developed to the benefit of the individual, with the abandoning of the abstract terminology test, individuals still have to fulfil the requirements in the Plaumann test, i.e. the test for individual and direct concern.

The notion of rights in the Community is analysed in order to establish certainty about the right to effective judicial protection, and that this right is in fact a fundamental right that requires a substantial protection in the Community legal order. In the process of determining the status of the right to effective judicial protection, the ECHR and CFR are used in connection with legal philosophical perspectives in order to prove the justification of deeming the right fundamental.

Through a Lockean analysis of the Union and the importance of locus standi, the thesis stresses the importance for further protection of the right to effective judicial protection. In a Lockean perspective the right to effective judicial protection and the right to access to an impartial judge, form the corner stones of a political society. Without access to an impartial judge, the society dissolves itself since individuals are left with no way of safeguarding their natural rights, which they have in their capacity of being and existing, rights that also exist in the state of nature, and the key reason why individuals left the state of nature and signed a social contract, to obtain protection of their natural rights and the fundamental norm of human

survival. If individuals are left with no remedy for legal protection, they have no appeal on earth and thus, individuals are left with appeal to heaven, which in the Lockean theory is revolt towards the arbitrary system. In a political society this revolt will usually take place in a democratic way, but if relief cannot be obtained through democratic means, then even brutal revolt can be justified.

It is shown that the current position of locus standi is dissatisfactory, and that individuals for the time being, arguably, may be said to knock on the doors to heaven in order to obtain satisfactory safeguarding of their rights.

### 3 Introduction

The question of locus standi and non privileged private parties access to the ECJ is a long and well debated question, but with the new Draft Constitution<sup>1</sup>, the adoption of the CFR,<sup>2</sup> and the possible accession of the EU, as a distinct legal person<sup>3</sup> to the ECHR<sup>4</sup>, the question calls for new examinations on the application and perhaps even the understanding of the principle. The question of locus standi, or as it is commonly known in classic European law terms, the right to judicial review or effective judicial protection, has frequently been dealt with as a question of the ECJ's lack of will to interpret the treaty broadly, and hence, the blame has been on the ECJ for not expanding individuals right in relation to judicial review. However, with the cementation of the practice by the ECJ in the UPA case<sup>5</sup>, and just recently in the Jégo-Quéré appeal case<sup>6</sup>, the locus standi problem might have to be looked at from a different angle in an attempt to understand the question better.

The ECJ has not been reluctant in granting rights to individuals, in fact, the EU, through the ECJ, has been one of, or perhaps the biggest generator of further individual rights in the history of Europe. Naturally, European Law debaters have struggled to understand the position of the ECJ on locus standi, and have been surprised on several occasions when the ECJ has refused to loosen the strict notion of direct and individual concern as laid down in the Plaumann case<sup>7</sup>, a notion that the ECJ itself could change, according to AGs<sup>8</sup> and the CFI<sup>9</sup>, if it wanted to.

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<sup>1</sup> CONV 850/03

<sup>2</sup> Part II of the Draft Constitution, especially Article 47

<sup>3</sup> Article I-6 of the Draft Constitution

<sup>4</sup> Article I-7,2 of the Draft Constitution

<sup>5</sup> Case C-50/00, 00 P, *Unión de Pequeños Agricultores v Council*, [2002] ECR I-6677.

<sup>6</sup> Case C-263/02 P, *Commission v. Jégo-Quéré*, Judgement of 1 April 2004

<sup>7</sup> Case 25/62 *Plaumann & Co. v. Commission* [1963] ECR 95

<sup>8</sup> Opinion of AG Jacobs in case C-50/00 P, *Unión de Pequeños Agricultores v Council*, [2002] ECR I-6677.

<sup>9</sup> Case T-177/01, *Jégo-Quéré & Cie. v. Commission*, [2002] ECR II-2365

Thus, in an attempt to try and alter the debate, not to turn it away from the ECJ, but at least observe other possible obstacles for individuals right to judicial review and access to the courts, I will try to focus on some of the characteristics of the Union and see if these characteristics correspond with the current application of the Plaumann doctrine. In this regard it will be useful to analyse the status of fundamental rights in the Union and discuss if locus standi can be considered a fundamental right.

Further, the question of access to judicial review is closely related to the status of the Union, as either a union amongst sovereign states or as a quasi-federal<sup>10</sup> union founded on the citizens of Europe. To answer this question, the use of classical philosophical theories on state law, together with case law from the ECJ, will be helpful in diminishing the uncertainty on the role of the Union. If the EU is to be regarded as a quasi-federal union with its own constitution and institutions, corresponding to those of a traditional federal union, and if locus standi is or is not to be considered a fundamental right, then how does the current application of the principle fit in?

Whether or not this thesis will find that the Union has moved on from its traditional outset, i.e. a community of sovereign states to a union of a more federalist nature, the discussion on locus standi will still be of interest. The Union is to a larger and larger degree affecting<sup>11</sup> the Member States domestic sphere,<sup>12</sup> and this way of evolution goes back to some of the early decisions of the ECJ, in its ground braking rulings in amongst others the Van Gend en Loos<sup>13</sup> and Costa Enel<sup>14</sup> cases. The EU, and with it, the legal system of the Union, is, even if one consider EU law a separate system,

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<sup>10</sup> The term quasi-federal is used as opposed to the term federal, due to the fact that there is no corresponding entity of states, sovereign or not, functioning in the same way as the European Union. The ECJs notion of a new legal order in its Van Gend en Loos ruling from 1962 implies that the union is neither a traditional federal union, nor a traditional multilateral relationship between sovereign states, as commonly known in international law. Hence, it would be, if not wrong, then at least doubtful at this time to refer to the Union as a federal Union. Further analysis has to take place, in order to say anything more specific on this. See chapter 6 and 7 below for a deeper analysis of the character of the Union.

<sup>11</sup> The increasing amount of legislative acts, not only affecting governments of the Member States, but also the citizens of the Member States, is a vivid example of this.

<sup>12</sup> Antonsen and Norsk (Eds.) *På vej mod Europas forfatning?* Copenhagen 2003. p. 42

<sup>13</sup> Case 26/62, *Van Gend en Loos v. Administratie der Belastingen*, [1963] ECR 3

<sup>14</sup> Case 6/64, *Costa v. Enel*, [1964] ECR 1141

interlocking with the legal systems of the Member States to a larger degree than ever before, and thus creating challenging situations for both the Union and the Member States in dealing with traditional constitutional questions. The discussion on locus standi will therefore, regardless of the perception of the character of the Union be instrumental in the European debate.

### **3.1 Purpose**

It is the purpose of this thesis to investigate the understanding and perception of the notion on locus standi in the EU. In doing this, the thesis will try to clarify the position of the Union, analyse the legal philosophical perception of the Union, and thus give a suggestion on the current position of the evolving Union and analyse how this correspond to the findings on the right to Judicial review. The right to judicial review will further be analysed in relation to the ECHR and CFR, in order to investigate the notion of locus standi in the light of these eminent rights and the corresponding application by the ECJ.

### **3.2 Delimitations**

A lot of stones will have to be turned in the process of giving reasonable answers to the questions posed, accordingly certain delimitations will have to be done. The case law from the ECJ will to a large degree be mentioned and used in this thesis, but the thesis will not give complete analyses of judgements already dealt with in the literature, except from cases where there should be conflicting perception, or cases that serve to the specific understanding of this topic.

In order to keep the analysis of the Union at a relevant stage for the purpose of this thesis, the thesis will focus on a federal/constitutional perception of polity and how this govern and correspond with the Union. Arguments for a Union of sovereign Member States are consequently not dealt with.

The perception of rights in the Union, and the analysis of these will be brief, considering the ambit of this critical issue. However, to fit a small discussion of rights into this thesis seems more reasonable than not

mentioning them at all, since they are, as will be shown, instrumental in the perceptions of the questions posed by this thesis.

### **3.3 Method**

The basic foundations of this thesis are both analyses of the currently applied law of the EU, the case law of the ECJ and a classic legal philosophical analysis of the EU. It is primarily the Treaty of Nice that will be used to illustrate problems, but as regards the future of locus standi, the Draft Constitution will be used.

Literature has been used in an attempt to get the best possible covering of locus standi in the legal debate of Europe as it stands today. Besides the more traditional legal analytical approach, the case law of the ECJ will be used to illustrate the development in the application of locus standi by the ECJ and the arguments from some of its opponents.

The findings from the different analyses will be compared and used in the conclusions on the current application and possible misapplication of locus standi.

# 4 Background

The core of this thesis is the evolution within three specific areas of the EU; the evolution of locus standi, the evolution of the Union, and to a smaller degree, the evolution and characterization of fundamental rights in the EU. The latter two topics will be discussed in chapter 6. The case law and the evolution of locus standi will be dealt with below in chapter 5. In this chapter the legal rules governing locus standi will be introduced.

## 4.1 Legal background

A general introduction to the legal rules concerning locus standi, will serve to understand both the reasoning of the ECJ and the criticism from its opponents.

The main rule on locus standi for non-privileged applicants are found in article 230(4), which states that:

*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.*

The conditions referred to in the first part of paragraph 4, are the conditions set up in the first, second and fifth paragraph of article 230. According to 230(1) the act must come from an EC institution and must produce legal effects; according to paragraph 2 the applicant must contest the act on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers; finally, according to article 230(5),<sup>15</sup> the

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<sup>15</sup> Article 241 and the plea of illegality is an exception to the time limit set out in article 230(5). But article 241 does not provide its own independent cause for action. Regulations can only be challenged with the plea of illegality if you are subject to a decision, and are in a pending case before the ECJ about this decision, and then claim that a regulation, which has to be connected to the decision, is invalid. Hence, in my opinion, the plea of illegality does not constitute an important part of the system on legal remedies from the view of private non-privileged applicants.

act must be contested within a 2 months deadline.<sup>16</sup> These conditions apply to all applicants. These rules have to be fulfilled by an applicant in order to successfully challenge an act of an EC institution.

The rules are an expression of a desire to restrict access to judicial review to measures, which are of individual and personal concern to the applicants, and not of general concern.<sup>17</sup>

Though not explicitly mentioned in article 230(4), private applicants can challenge directives. The requirement when challenging directives is that the directive is, in reality, a decision.<sup>18</sup> In the *Gibraltar v. Council* case<sup>19</sup> the ECJ stated that the term “decision” in paragraph 230(2) has the technical meaning employed in article 249.<sup>20</sup> The Council later tried to persuade the ECJ to change this interpretation, but the ECJ has been consistent in its perception that directives are covered by article 230(2)<sup>21</sup>. However, it is very difficult for an applicant to successfully challenge a directive.<sup>22</sup>

Another way to directly access the court is through the procedure in article 288(2) TEC. However, this way is only an option when an applicant wants to seek compensation for a loss caused by the EC Institutions. The act applicants seek compensation for does not have to be annulled in order to obtain compensation. But if the compensation is to be granted on the basis of a regulation, infringing the rights of an applicant, the infringement has to be of a special gravity.<sup>23</sup> According to the “Schoepfenstedt formula”<sup>24</sup> there

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<sup>16</sup> That is 2 months from the publication of the act or from the notification of the act to the applicant or from the moment when the act became known to the applicant. According to the Protocol on functioning of the ECJ, the 2 months period is extended according to how far the applicants Member State is placed from Bruxelles.

<sup>17</sup> Ewa Biernat, “The *Locus Standi* of Private Applicants under article 230(4) EC and the Principle of Judicial Protection in the European Community” Jean Monnet Working Paper 12/03, p.5.

<sup>18</sup> Craig and de Búrca, “Text, Cases and Materials” (2003) Oxford, 3<sup>rd</sup> edition p. 483.

<sup>19</sup> Case C-298/89 *Gibraltar v. Council*, [1993] ECR I-3605

<sup>20</sup> *Ibid* para 15.

<sup>21</sup> Case T-135/96 *UEAPME v. Council* [1998] ECR II-2335 and Case T-99/94 *Asociacion Espanola de Empresas de la carne (ASOCARNE) v. Council* [1994] ECR II-871

<sup>22</sup> Biernat, *supra*, note 17, p. 6

<sup>23</sup> Albertina Albors-Llorens, *Private Parties in European Community Law. Challenging Community Measures*, Clarendon Press, Oxford 1996, p. 205

<sup>24</sup> Developed in case 5/71, *Zuckerfabrik Schoepfenstedt v. Council*, [1971] ECR 975

is no liability for the Institutions, “*unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred*”.<sup>25</sup>

In practice only a small number of cases have been able to fulfil the requirements in the Schoppenstedt formula.<sup>26</sup> Further, a right to compensation arguable does not resemble a right to judicial review; nevertheless the ECJ includes the article 288(2) TEC procedure in the complete system of legal remedies and procedures<sup>27</sup>.

Besides the direct way of challenging Community acts, article 234 provides an indirect way of challenge. The preliminary ruling system found in article 234 is a part of the “*complete system of legal remedies for challenging the legality of Community action*”<sup>28</sup>. This way of challenging community acts have become an important way for private applicants, who wants to challenge Community acts, but does not fulfil the requirements for individual and direct concern in article 230(4) TEC. Article 234 TEC challenges are indirect challenges through national courts, who asks the ECJ questions on the validity of community acts. Since the national courts have no jurisdiction to invalidate a Community act themselves, they have to ask the ECJ if they believe an act might be invalid.<sup>29</sup> However, the preliminary ruling system lacks the ability to test certain regulations, which are directly applicable in the Member States<sup>30</sup>. Regulations do not need, and do not allow national measures implementing them<sup>31</sup>, and hence, there is often no national act to challenge in the national courts, as opposed to directives, which have to be implemented by national law. This leaves applicants with the option of breaking the law of a regulation, and then in a criminal proceeding request the national court for a test on the validity of the regulation through a preliminary question, or, as mentioned above, to challenge the regulation through article 230(4) TEC or 288(2) if the

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<sup>25</sup> Ibid para. 11

<sup>26</sup> Biernat, *supra* note 17, p. 29

<sup>27</sup> Case 294/83, *Parti Ecologiste “Les Verts” v. Parliament*, [1986] ECR 1339, para. 23

<sup>28</sup> *UPA case*, *supra* note 5, para. 40

<sup>29</sup> Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*, [1987] ECR 4199, para. 20

<sup>30</sup> Regulations can be challenged according to the Calpak test discussed below in chapter 5.1.2

<sup>31</sup> Molde and Vesterdorf (eds.), *EU-Karnov 2001*, Thomson, p. 17

applicant fulfil the requirements. However, if a regulation calls for supplementary national provisions, applicants might challenge the validity of the national measure and in the same procedure ask the national court to pose a preliminary question to the ECJ, on the validity of the regulation.<sup>32</sup> This sort of procedure should be available in all Member States and supplementary national law, or individual measures issued in connection to the regulation, to those directly and individually concerned by the regulation, should be issued in connection to all regulations, in order to make the indirect challenge procedure available.<sup>33</sup> In fact this procedure has to be available. According to the ECJ, it is an obligation resting on the Member States according to the principles in article 10 TEC.<sup>34</sup>

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<sup>32</sup> Case C-263/02 P, *Commission v. Jégo-Quéré*, Judgement of 1 April 2004

<sup>33</sup> *Ibid.* para 35.

<sup>34</sup> *UPA case*, supra note 5, para. 42.

## 5 Evolution in case law

The problem of locus standi can be differentiated into three different groups of cases; if an addressee of a decision wants to challenge a decision directed to him, if a person wants to challenge a decision addressed to another person and if a person wants to challenge a decision in the form of a regulation.<sup>35</sup> It is only the latter two cases that will be dealt with in this thesis, since the first group of cases does not seem to create problems for the applicant<sup>36</sup>.

The case law on locus standi is numerous, complex and far to immense to be considered as a whole in this thesis. Nevertheless, a brief introduction to the case law is a necessity if one is to understand the problems involved with locus standi.

### 5.1 The Plaumann case

The case to set the stage for the debate on locus standi was the Plaumann case<sup>37</sup> from 1962. The case concerned a German clementine importer who wanted to contest the legality of a decision from the Commission, stating that Germany could not suspend the collection of duties on clementines imported from non-Member State countries. Thus, the Plaumann case concerned a situation where an individual were challenging a decision issued to another “person” i.e. Germany.

Plaumann brought the case to the ECJ who tested whether Plaumann was individually concerned. The ECJ stated that for a person to be individually concerned by a decision addressed to others, this person would have to be affected by the decision by reason of certain attributes peculiar to them, or by reason of circumstances in which they were differentiated from all other persons. If a person by virtue of the mentioned factors was distinguished individually, just as the person addressed by the decision, then that person may claim to be individually concerned<sup>38</sup>. As in many cases following the

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<sup>35</sup> Craig & de Búrca, *supra* note 18, p. 487.

<sup>36</sup> *Ibid.*

<sup>37</sup> Case 25/62, *Plaumann & Co. v. Commission*, [1963] ECR 95

<sup>38</sup> Paul Craig “Standing, Rights, and the Structure of Legal Argument”, (2003) 4 *European public law* p.494

Plaumann case, Plaumann failed to fulfil the requirement, because he was performing a commercial activity that could be performed by any person at any time. The ECJ did not seem to care about the fact, that by excluding an applicant, by virtue of the possibility that anyone might, at any time, pursue the same business, the ECJ made it literally impossible for a non-privileged applicant to succeed in proving individual concern, unless the case might have a retrospective view,<sup>39</sup> thereby excluding the possibility that other persons could pursue the same business at the same conditions. The Plaumann case left applicants with little hope of fulfilling the requirements for locus standi when challenging decisions addressed to another person.

## 5.2 The Calpak case

Challenging regulations that the non-privileged applicants believe in reality are a bundle of, or only a limited and identifiable number of decisions, which is of direct and individual concern to them, form the other part of cases that are problematic in relation to locus standi.

In the Calpak case<sup>40</sup> the applicants, producers of pears, challenged a new regulation, exchanging an older regulation, by which production aid was calculated on an average production during the previous 3 years, as opposed to in the new regulation, where the Commission based the aid granted on the production in a single year, a year production had been atypically low. The applicants claimed that they constituted not merely a closed and definable group but equally a group the members of which were either known to or at least identifiable by the Commission, at the time when it adopted the disputed provisions of the regulation.<sup>41</sup>

The ECJ approached the claim by developing a test applicants had to fulfil in order to challenge the regulation. This test, which is known as the abstract terminology test, requires the applicants to show that the regulation in fact is a decision, or a bundle of decisions that are of individual concern

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<sup>39</sup> Ibid and see cases 106 and 107/63, *Alfred Toepfer and Getreide-Import Gesellschaft v. Commission*, [1965] ECR 553; Case 60/70 *Bock v. Commission* [1971] ECR 897; Case 11/82 *Piraiki-Patraiki* [1985 ] ECR 207.

<sup>40</sup> Cases 789 and 790/79, *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] ECR 1949

to them. The abstract terminology test states that a real regulation is a measure that applies to objectively determined situations and produces legal effects for categories of persons described in a general and abstract way<sup>42</sup>. The fact that the persons affected by the regulation in the Calpak case was identifiable and known, did not persuade the ECJ that the regulation was in fact a bundle of decisions, which might seem a somewhat odd conclusion, considering that the ECJ stated that the objective of article 230(2) TEC, is to prevent the Community Institutions from excluding matters from challenges simply by choosing a certain form and classification.<sup>43</sup> The application of the abstract terminology test gave the Institutions of the Community a chance to formulate regulations in a way that would almost always ensure, that applicants would not be able to persuade the ECJ that a regulation was in fact a decision<sup>44</sup>. The ECJ did not do what it stated it should do. Rather than looking at the substance behind the form of a chosen measure, the ECJ looked at the form of the form of the measure.

Hence, by the early 1980'ies the case for non-privileged applicants did not look good. The Plaumann case left little hope of successfully challenging decisions addressed to other persons, and the application of the abstract terminology test left little hope of applicants luck in persuading the ECJ that a regulation was in fact a decision. The ECJ seemed reluctant to grant non-privileged applicants the same more liberal approach towards locus standi developed in case law in areas concerning state aids, dumping and competition<sup>45</sup>.

### **5.3 The Codorniu case**

The Codorniu judgement<sup>46</sup> from 1991 combined the two forms of cases described above in 5.1 and 5.2. The Case concerned a Spanish producer of sparkling wine who challenged a regulation that stated that only producers

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<sup>41</sup> Ibid para 5.

<sup>42</sup> Ibid para 9.

<sup>43</sup> Ibid para 7.

<sup>44</sup> P.Craig, supra note 38, p. 495

<sup>45</sup> Craig & de Búrca, supra note 18, pp. 503-509

producing wine of a certain quality in France and Luxembourg could use the term *crémant* for their sparkling wines. The applicant had been producing sparkling wine since 1924 with the name *Gran Crémant de Codorniu* and even held a trademark on the name. The applicant challenged the regulation and the Council counter claimed that on the basis of the abstract terminology test, the regulation was a true regulation and could therefore not be challenged. The ECJ stated, in line with the abstract terminology test, that the general application of a measure could not be called into question just because it was possible to determine the number or even identify the persons to whom the measure applied<sup>47</sup>. Until now The ECJ structure and legal argument looked familiar to that used in the Calpak case. Nevertheless, the ECJ went on to state that a regulation may be of individual concern to an applicant<sup>48</sup>, and hence, if the applicant fulfils the requirements<sup>49</sup> of individual concern, the applicant may challenge that regulation<sup>50</sup>.

The fact that a regulation could be both a true regulation, in accordance with the abstract terminology test, and of individual concern to an applicant, connected the Plaumann case and the Calpak case and eased up the difficult way to the courts. All the same, applicants still had to fulfil the test for individual concern.

## 5.4 The notion of individual concern

The notion of individual concern was as mentioned above developed in the Plaumann case. As case law developed, this test has proved to be the main obstacle between non-privileged applicants and the courts of the Union. The case law of interest, when determining the notion of individual concern, is the case law post Codorniu. The application of the test differs slightly and it

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<sup>46</sup> Case C-309/89, *Codorniu v. Counsel*, [1994] ECR I-1853.

<sup>47</sup> *Ibid* para 18.

<sup>48</sup> *Ibid* para 19.

<sup>49</sup> The test developed in the Plaumann case.

<sup>50</sup> *Codorniu case*, *supra* note 46, para 19

seems that individual concern can be differentiated into three different types of cases<sup>51</sup>.

#### **5.4.1 Pure Plaumann<sup>52</sup>**

The starting point when testing for individual concern is the test developed in the Plaumann case. As is clear from the terminology “pure Plaumann”, applicants’ individual concern will be determined on the same conditions as in the Plaumann case itself. Person have to be affected by the decision or regulation by reason of certain attributes peculiar to them, or by reason of circumstances in which they are differentiated from all other persons<sup>53</sup>. This means that applicants will be denied standing if they cannot prove individual concern. Hence, if the applicant performs a business that can be pursued by anyone at any time he will be denied standing; it does not matter if the applicants are definable and actually identified. The fact that the case can cause serious factual injury to the applicant is usually of no relevance, but chances for standing increase if the factual circumstances are all part of completed past events<sup>54</sup>

The “pure Plaumann” situation will be the outset for testing individual concern, and its up to the applicant to show that his case is in fact within one of the following two case scenarios, which both offers easier access to court.

#### **5.4.2 Infringement of rights or breach of duty<sup>55</sup>**

The Codorniu case is an example of the first type of cases where an infringement of the applicants right occurred. Codorniu had individual concern since the company had a trade mark right, which was overruled by the contested regulation.

As for cases concerning breach of duty, the Antellian Rice case<sup>56</sup> provides a vivid example. The applicant challenged a decision concerning minimum import prices for certain goods, and were found to be individual concerned

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<sup>51</sup> Craig & de Búrca, supra note 18, p. 496

<sup>52</sup> Craig & de Búrca, supra note 18, p. 497

<sup>53</sup> *Plaumann case*, supra note 7

<sup>54</sup> Craig & de Búrca, supra note 18, p. 497

<sup>55</sup> Craig & de Búrca, supra note 18, p. 497

even if the measure was of a legislative nature<sup>57</sup>, due to the fact that the Commission had failed in its duty to take into account all the effects of the decision and provide safeguards for the applicants against negative effects<sup>58</sup>.

#### **5.4.3 The degree of factual injury<sup>59</sup>**

The *Extramet* case<sup>60</sup> is important for two reasons. First it is an example of the granting of individual concern due to a severe degree of factual injury and secondly, it is one of the first, if not the first case where inside opposition towards the ECJ's stand on locus standi was expressed. The AG on the case, AG Jacobs, gave an opinion in which he criticised the current standing rules. He claimed that the complete system of judicial review, with particularly the use of article 234 as an important part of this system, was not that complete. His criticism was directed at the ECJ's "excuse" for not easing up the strict rules on locus standi, that the indirect challenge through article 234 TEC provided applicants with a way of access to court if they did not meet the notion for individual concern. AG Jacobs stated that the preliminary ruling system suffered from several different incapacities. First of all, the availability of annulment does not depend on the absence of an alternative means of redress in the national courts, neither does article 230 TEC contain any such suggestions,<sup>61</sup> and it would not be satisfactory with such a result since it would be dependant on national law. Further, Member State's courts are not experts on EU law and challenges against measures would not involve the Commission nor the Council; the proceedings through preliminary rulings are long and expensive; national courts cannot invalidate Community regulations and this might result in interim measures granted in an inappropriate forum and finally, the ECJ do not have the opportunity of investigating thoroughly the matter as opposed to a case of direct challenge<sup>62</sup>.

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<sup>56</sup> Cases T-480 and 483/93, *Antillean Rice Mills NV v. Commission*, [1995] ECR II-2305

<sup>57</sup> *Ibid* para 64.

<sup>58</sup> *Ibid* para 70 and 76.

<sup>59</sup> Craig & de Búrca, *supra* note 18, p. 497

<sup>60</sup> Case 358/89, *Extramet Industrie SA v. Council*, [1991] ECR I-2501

<sup>61</sup> P.Craig, *supra* note 38, p. 496

<sup>62</sup> *Ibid*.

The ECJ concluded that the applicant was individual concerned because of the degree of factual injury he would suffer from the regulation<sup>63</sup>.

#### **5.4.4 Locus standi in selected areas**

As mentioned above in chapter 5.2, there are certain areas where the ECJ has developed a more liberal case law on the right to standing. These specific areas are as follows. Anti dumping cases, as was the situation in the Extramet case where the applicant was granted standing<sup>64</sup>. Competition cases in relation to articles 81 and 82 TEC have easier access to standing<sup>65</sup> due to the complaint procedure in article 3(2) in Regulation no 17/62<sup>66</sup>. State aids cases have as well been treated more favourably by the ECJ, even if they are not treated as favourably as competition cases; the applicant must have been involved in the administrative procedure and must be affected by the granted aid subject to the proceedings<sup>67</sup>. Finally there are cases on the democratic nature of the Union where the ECJ applies a more lenient approach<sup>68</sup>. However, to include this type of cases might not give a true picture on the ECJ's application of the notion of individual concern. The fact that one political party gained standing<sup>69</sup>, does not entirely justify stating that there are cases, which, due to their democratic nature, will make the ECJ ease up the notion of individual concern. This is so, since the ECJ consequently denies standing for private non-privileged applicants. If private applicants, merely in their capacity of being individuals and citizens, are not considered part of the democratic nature of the union, then it is difficult to see what is part of a democratic nature, even if one is to talk about the institutional structure of the Union alone. In Lockean theory the people is the ultimate authority for democratic legitimacy, and thus must be

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<sup>63</sup> *Antillean Rice case*, supra note 56, para. 17

<sup>64</sup> *Extramet case*, supra note 60

<sup>65</sup> Craig & de Búrca, supra note 18, p. 507

<sup>66</sup> Council Regulation 17/62, *on the application of article 85 and 86 TEC*, [1959-62] OJ Series I p.87; see e.g. case 26/76, *Metro-SB-Großmärkte GmbH & Co KG v. Commission*, [1977] ECR 1875

<sup>67</sup> Craig & de Búrca, supra note 18, p. 509

<sup>68</sup> Craig & de Búrca, supra note 18, p. 509

<sup>69</sup> *Les Verts case*, supra note 27

considered part of the democratic nature. I will return to this argument and it will be further discussed below in chapter 7.

#### **5.4.5 Direct concern under the notion of individual concern**

Proving individual concern alone, will not grant a non-privileged applicant standing, he will still have to prove that the contested measure is of direct concern to him. In the *International Fruit* case<sup>70</sup> the ECJ stated that the applicant was directly concerned by a decision of the Commission since national authorities did not enjoy any discretion in relation to the issuing of the license but merely implemented the decision taken by the Commission. Applicants will henceforth be directly concerned by a measure if it directly affects their legal situation and leaves no discretion of the addressees who are entrusted with its implementation<sup>71</sup>. The implementation must be purely automatic and result from Community rules alone without the application of intermediate rules<sup>72</sup>. The requirement that there can be no intermediate rules is the only part of the test that can cause difficulties, but in the above mentioned case the ECJ found the requirement to be fulfilled.

The test for direct concern has not proven to be a problem for non-privileged applicants; once the requirements for individual concern is fulfilled, standing seem to be the rule more than the exception.

### **5.5 The Jégo-Quééré case**

The recent case law of the ECJ is a brutal evidence on the divided waters that locus standi create. The case to start the debate on locus standi once again was the *Jégo-Quééré* case<sup>73</sup>. The CFI's *Jégo-Quééré* case was changed by the ECJ in the *UPA* case, but a brief introduction to the case will nevertheless be useful on the debate of locus standi.

The case concerned a French fishing company operating primarily in the Celtic sea south of Ireland. The company's vessels used nets with meshes on 80 mm in diameter, a diameter that was banned by Council Regulation No

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<sup>70</sup> Case 41-44/70, *NV International Fruit Company v. Commission*, [1971] ECR 411

<sup>71</sup> Craig & de Búrca, supra note 18 p. 518.

<sup>72</sup> Case T-69/99, *Danish Satellite TV (DSTV) A/S (Eurotica Rendez-vous Television) v. Commission*, [2000] ECR II-4039 para. 24

3760/92<sup>74</sup>. The applicant challenged two provisions of the regulation stating that meshes had to be a certain minimum diameter. The Commission argued that the applicant were not individually concerned, but acknowledged that he was directly concerned by the regulation. The CFI initially took the stand of the Commission and stated that according to the case law up until then, the applicant did not fulfil the requirement for individual concern and neither qualified for standing as established in cases *Extramet* and *Codorniu*<sup>75</sup>.

The applicant did however also argue that if he were not allowed standing, he would be deprived of his right to access to court as enshrined in the ECHR articles 6 and 13 and the CFR article 47. The CFI recalled the judgement of the ECJ in the ‘*les Verts*’ case and stated what the ECJ itself had stated that:

*“access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty, [...] The Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR ”*<sup>76</sup>.

The CFI stated that an applicant challenging provisions of general application and whose legal situation these provisions directly concern, would be deprived of the right to an effective remedy if the challenge was inadmissible. The CFI stated this for three reasons, all in line with AG Jacobs opinion in the *UPA* case. First, the preliminary question procedure in article 234 TEC was not available since there was no implementing measure. Secondly, action for damages under an article 288(2) procedure were not adequate and thirdly, the CFI stated that there were no compelling reason for the notion of individual concern to require that the applicant was differentiated from all others.

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<sup>73</sup> *Jégo-Quéré* case, supra note 9

<sup>74</sup> Council Regulation 3760/92, *Establishing a Community system for fisheries and aquaculture*, OJ 1992 L 389 p.1

<sup>75</sup> *Jégo-Quéré* case, supra note 9.

<sup>76</sup> *Jégo-Quéré* case, supra note 9, para 41

Consequently the CFI found the applicant to be individually concerned on the basis of a new notion for individual concern stating that,

*”a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. 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.”<sup>77</sup>*

The President of the CFI is very much, even in public, in favour of a more liberal locus standi<sup>78</sup>, and the CFI has always put emphasis on individual procedural guarantees and legal remedies<sup>79</sup>. Hence, the judgement of the CFI could be considered a well-planned outburst that the court had been preparing and just waited for the right time to deliver. The right time came with the delivery of the opinion by AG Jacobs in the UPA case.

## **5.6 Opinion of AG Jacobs in the UPA case**

The opinion by AG Jacobs<sup>80</sup> came as a ray of light for those in favour of a more liberal approach on locus standi. Jacobs criticised the notion of individual concern as it had been developed in case law and questioned the statement of the ECJ that there is a complete system of legal remedies for challenging the legality of Community action.

The opinion will be dealt with in detail since it covers many of the aspects complicating the current status of locus standi.

The facts of the case are as follows. The applicant, an association of farmers, *Unión de Pequeños Agricultores*, sought to annul Regulation 1638/98<sup>81</sup> since it altered substantially the organisation of the olive oil market in the Union. The case had been dismissed by the CFI because the applicant did not have individual concern. The applicant argued that it was

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<sup>77</sup> *Jégo-Quéré case*, supra note 9, para 51

<sup>78</sup> President Bo Vesterdorf in speech to the Fédération International pour le Droit Européen.

<sup>79</sup> Kronenberger & Dejmek, *Locus Standi of Individuals before Community Courts under Article 230(4) EC: Illusions and Disillusions after the Jégo-Quéré and Unión de Pequeños Agricultores judgements*, ELF 5/2002

<sup>80</sup> Opinion of AG Jacobs in case C-50/00 P, *Unión de Pequeños Agricultores v Council*, [2002] ECR I-6677.

<sup>81</sup> Council Regulation 1638/98, OJ 1998 L210, p.32

denied effective judicial protection because it could not readily attack the regulation through an article 234 TEC procedure.

AG Jacobs started out by evaluating the arguments of the parties and declared that he would not pursue the possible intention of the ECJ in the Greenpeace case<sup>82</sup>, but stated that the ECJ made it clear that it was of the opinion that general measures should be challenged before national courts and that effective judicial protection was ensured by the possibility of a preliminary question. This statement indicated that previous case law was less important and that new were coming.

The core of AG Jacobs's opinion was the right to effective judicial protection. AG Jacobs made an assessment of effective judicial protection and whether this was adequately protected through an indirect challenge in article 234 TEC. He was of the opinion that the assumption that an applicant has the possibility of testing general measures through a preliminary ruling and thereby being granted effective judicial protection was an assumption open to serious objections<sup>83</sup>. The AG stated this for the following reasons.

First, it is not for the applicant to decide, in the national court, whether or not a preliminary question should be posed<sup>84</sup>. Secondly, if a question is posed the applicant does not decide which measures are referred for review and thirdly, does not decide what grounds of invalidity are raised. Further, the national courts cannot invalidate a Community norm. Fifth, it can be difficult, or impossible to challenge a general measure in a Member State where there are no implementing measures, and sixth, the applicant can be forced to break the law in order to be able to challenge the ensuing measure. Seventh, reflections on legal certainty are in favour of allowing a general measure to be reviewed as soon as possible and not only after implementing measures has been adopted, and finally the AG stated that applicants face procedural disadvantages by indirect challenge, such as the lack of

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<sup>82</sup> Case C-321/95 P, *Greenpeace International v. Commission*, [1998] ECR I-1651

<sup>83</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 102(1)

<sup>84</sup> This argument became evident with the Köbler case, Case C-224/01, *Köbler v. Austria* (judgment of 30 September 2003, not yet published in the ECR), where the applicant Köbler won the right to take action for compensation against Austria for not posing a preliminary question to the ECJ in a case before a national Austrian court involving Köbler.

participation of the institution(s) who adopted the measure, the delays and costs involved, the award of interim measures and the possibility of third party intervention<sup>85</sup>.

The AG considered whether allowing direct action in cases where the particular national legal system made the indirect challenge especially difficult could solve the problem. AG Jacobs rejected this solution and stated that it would have no basis in the Treaty; that it would require the ECJ and the CFI to interpret and apply rules of national law, a job that they were not well prepared or competent to do, and that this solution would create a situation of inequality between applicants from different Member States, with a consequential loss of legal certainty<sup>86</sup>.

The AG made another consideration; perhaps a solution could be found through an obligation for the legal orders of the Member States to ensure that references on the validity of general Community measures are available in their legal systems. But he rejected this solution as well, stating that such an approach would leave unresolved most of the problems of the current situation such as the absence of remedy as a matter of right, unnecessary delays and costs for the applicant or the award of interim measures; be difficult to monitor and enforce; and require far-reaching interference with national procedural autonomy<sup>87</sup>.

For all these reasons, AG Jacobs found that a *denial of justice* would be the consequence if the notion of individual concern were not altered.

### **5.6.1 The substantial adverse impact test**

AG Jacobs's conclusion on the above mentioned was that the only way to secure the right to effective judicial protection of an applicant was by changing the notion of individual concern. An applicant should therefore be individually concerned by a Community measure where the measure had, or

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<sup>85</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 102(1)

<sup>86</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 102(2)

<sup>87</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 102(3)

was liable to have, a substantial adverse effect on his interests<sup>88</sup>. This solution had the following advantages:

*“It resolves the problems set out above: applicants are granted a true right of direct access to a court which can grant a remedy, cases of possible denial of justice are avoided, and judicial protection is improved in various ways; it removes 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 increasingly complex and unpredictable rules on standing are replaced by a much simpler test which would shift the emphasis in cases before the Community Courts from purely formal questions of admissibility to questions of substance; such a re-interpretation is in line with the general tendency of the case-law to extend the scope of judicial protection in response to the growth of powers of the Community institutions (ERTA, Les Verts, Chernobyl)”*<sup>89</sup>

As for the objections against improved locus standi, the AG argued that the wording of article 230(4) TEC does not preclude the substantial adverse impact test. Further, to insulate potentially unlawful measures from judicial scrutiny cannot be justified on grounds of administrative or legislative efficiency; protection of the legislative process must be achieved through appropriate substantive standards of review<sup>90</sup>.

The concern expressed by the ECJ that a flood of cases would make the workload increase dramatically was rejected on the argument that the time limits in article 230(5) TEC and the test for direct concern would keep the load of cases at a manageable level. The possible small increase could be handled by procedural means.<sup>91</sup>

The main objection for a new notion of individual concern is that case law has been the same for many years, but Jacobs rejected this, on the ground that the case law in many cases was not stable and had in recent years been more relaxed with the result of legal uncertainty. The case law is also out of line with the more liberal development in Member States. What makes it even more appropriate to enlarge the notion of locus standi is the establishment of the CFI and the referral of all actions brought by

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<sup>88</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 102(4)

<sup>89</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 102(4)

<sup>90</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 102(5)

<sup>91</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 102(5)

individuals to it. Finally, AG Jacobs stated that the Court's case law on the principle of effective judicial protection in the national courts made it increasingly difficult to justify narrow restrictions on standing before the Community Courts<sup>92</sup>.

The special thing about the opinion by AG Jacobs is the impact of the right to effective judicial protection. The right was the foundation for the analysis, was part of the reasoning and was central to the conclusion. This was actually the first time the right to effective judicial protection had been the turning point for a case on locus standi<sup>93</sup>. Nevertheless, the opinion can be considered a somewhat classical example of the use of rights and principles as an instrument for changing an existing practise<sup>94</sup>. The use of the right to effective judicial protection as an argument had been used before, but only in context to effectiveness of national remedial protection<sup>95</sup>. It might seem strange that the right to effective judicial protection had not been invoked significantly in cases concerning locus standi before, whether direct or indirect cases<sup>96</sup>, and arguably the conservative evolution in the case law of the ECJ would have been different, had it been invoked earlier<sup>97</sup>. By placing the rights argument at the centre of the opinion, AG Jacobs made strong references to the CFR and thereby laid pressure upon the ECJ to review locus standi in the light of the evolution of the Community. It is clear from the opinion that AG Jacobs considered a right a strong argument.

However, the ECJ was not going to follow the opinion of AG Jacobs.

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<sup>92</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 102(6)

<sup>93</sup> P. Craig supra note 38, p. 499

<sup>94</sup> P. Craig supra note 38, p. 499

<sup>95</sup> Case 309/85, *Barra v. Belgium*, [1988] ECR 355

<sup>96</sup> P. Craig supra note 38, p.499

<sup>97</sup> This might be argued on different reasons. One reason is that there seem to be a tendency for the ECJ to be less activist in its rulings in recent years, and maybe earlier, the ECJ would have opened up for locus standi. Another reason is that at the time when this argument is invoked, the ECJ seem to have put itself in a situation where, even if it might wanted to allow broader locus standi, it has the back against the wall, with its own statement that it is for the Member States to change the Treaty and thereby open for wider locus standi.

## 5.7 The UPA Case

The strong and compelling opinion by AG Jacobs did not have the same impact on the ECJ as it had on the CFI in the *Jégo-Quéré* case. The case would quickly show that the ECJ was of a completely different opinion than its AG. The facts of the case are stated above in chapter 5.6.

AG Jacobs's opinion revolved around the right to effective judicial protection. In the judgement the ECJ had a different focus. The ECJ focused in its reasoning on the fact that the applicant did not fulfil the requirement for locus standi in article 230(4)<sup>98</sup>. The ECJ stressed that if an applicant does not fulfil the notion of individual concern as it is given in the *Plaumann* Case, then this applicant would not have standing to seek the annulment of a regulation under any circumstances<sup>99</sup>. However, the ECJ did introduce the right to effective judicial protection, when it, as AG Jacobs did as well<sup>100</sup>, stated that it had to look into the situation, where an applicant, if in absence of a remedy before the national courts, might be granted locus standi solely on this reason<sup>101</sup>. The ECJ held that even if a national legal order prevented indirect challenge through article 234 TEC, this was not a problem that could justify direct challenge before the courts of the Community. The ECJ did not feel that it was the appropriate interpreter of national procedural law on a case-by-case study, nor that it had the jurisdiction to do this.

The ECJ did state that the right to effective judicial protection was a fundamental right, which was part of the Community legal order based on the rule of law<sup>102</sup>. The ECJ went on to state that the Treaty established a complete system of legal remedies for challenging the legality of Community action<sup>103</sup> and therefore amendments was not necessary. It is, held the ECJ, a task for the Member States to ensure a system of legal remedies that respect the right to effective judicial protection, and national

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<sup>98</sup> *UPA case*, supra note 5 para. 32, 34-36.

<sup>99</sup> *UPA case*, supra note 5 para. 37

<sup>100</sup> *Opinion of AG Jacobs in the UPA case*, supra note 80, para 50-53.

<sup>101</sup> *UPA case*, supra note 5 para. 33

<sup>102</sup> *UPA case*, supra note 5 para. 40

<sup>103</sup> *UPA case*, supra note 5 para. 40

courts should therefore interpret and apply their national rules in order to enable applicants to plead the invalidity of a Community act in domestic actions<sup>104</sup>.

The ECJ concluded on the basis of its starting point that an applicant has to fulfil the requirements for individual concern, as they are set out in the Plaumann case, in order to obtain *locus standi*. However, the notion of individual concern should be read in the light of the right to effective judicial protection, but can never set aside the requirements in the notion of individual concern<sup>105</sup>.

The ECJ thereby made it clear, that it is the notion of individual concern laid down in the Plaumann case that is the important thing, since the ECJ believe that there is a complete system of legal remedies, and that the right to effective judicial protection is a secondary element that the notion of individual concern should be read in conjunction with, but which cannot alter the requirements for individual concern. Hereby, the notion of individual concern remains the same, since the right to effective judicial protection in no way can amend it, unless the applicant might fall within one of the two categories opened by the *Extramet* case and the *Codorniu* case.

The ECJ completely ignored many of the arguments by AG Jacobs.

## **5.8 Conflicting issues between the judgement and the opinion in the UPA case**

The ECJ ignored AG Jacobs's arguments expressed about the difficulties applicants face when challenging measures indirectly through article 234 TEC<sup>106</sup>. The ECJ ignored the arguments by changing focus to national courts and stressing that they have the responsibility according to article 10 TEC to interpret and apply national procedural rules in such a way that applicants can challenge Community norms of general application in domestic courts. However, as the AG stated, this does not solve the procedural problems that indirect challenge implies. For the applicant this

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<sup>104</sup> *UPA case*, supra note 5 para. 41-42.

<sup>105</sup> *UPA case*, supra note 5 para. 44

<sup>106</sup> The arguments by AG Jacobs are mentioned above in chapter 5.6.

means that delays, costs, interim measures, participation of the appropriate institutions and third party intervention are all question marks the applicant will have to try and estimate and include in his considerations whether it makes sense to go to court or not<sup>107</sup>.

The ECJ's reliance on article 10 TEC seems inadequate considering that AG Jacobs clearly stated that to force Member States, and to rely on article 10 TEC would be difficult to supervise and enforce<sup>108</sup>. Further, the procedure requires extensive interference with national procedural autonomy.

Concerning the institutional division of competences between the ECJ and the CFI, the article 234 TEC procedure seem to have complicated more than helped. The CFI was created to ease the workload of the ECJ, and the division of certain assignments therefore seem natural. However, the division has arguably, if not increased the workload of the ECJ, at least not been as effective as it could be, since the ECJ refuses to allow direct challenge, which is exclusively dealt with by the CFI. Would the ECJ allow wider locus standi, they would no longer get as many cases on preliminary questions and would have better time to deal with cases of more importance to the Community<sup>109</sup>. With the Nice Treaty, there seem to have been a slack on the strict division, and the CFI now has a possibility to take preliminary cases in specific areas<sup>110</sup>. This has however not happened yet.

Keeping in mind the fact that the ECJ uses the increased workload, as an argument might seem strange considering the above mentioned. The ECJ seems to put a lot of effort in making sure that the CFI will not have to deal with a flood of cases, but by doing this, the ECJ at the same time ensures a lot of work for itself. This can be explained in two ways.

First, the ECJ thinks of the CFI and itself as one court system that will have to face increased workload together, the older brother protects its younger brother and himself from outside dangers. There might however, also be another explanation. The ECJ is discontent with the division of competences and is afraid of giving up further areas of law that it has commonly dealt

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<sup>107</sup> P. Craig, *supra* note 38 p. 503

<sup>108</sup> *Opinion of AG Jacobs in the UPA case*, *supra* note 80, para 102(3)

<sup>109</sup> P. Craig, *supra* note 38 p. 504

with itself, the older brother is so to say jealous of the younger brother and does not want to share the attention.

If reason number one is true this might explain why the ECJ keeps referring to the complete system of legal remedies, and this would mean that by keeping the current notion of individual concern the workload would remain the same. But that means that a lot of cases that would otherwise go to the ECJ and the CFI are stopped in the national courts or even before they reach national courts, since there might not be a national implementation measure. Then the national courts are not part of the workload argument but they are a substantial part of the complete system of legal remedies. The argumentation reveals that there is not true consistency in the workload argument if the ECJ considers itself and the CFI as 'one court'. The ECJ might actually implicitly state that it is all right that the national courts stop cases that would otherwise go to the CFI and ECJ. It seems hard to argue that that can be considered effective judicial protection and certainly, it is not a thing that a Community, based on the rule of law, would or should embrace.

If reason number two is true, then the ECJ does not think of itself and the CFI as one court and arguably there is no real reason why the ECJ should make sure that the CFI does not get a flood of cases, especially not considering that the CFI at the time for the judgement in the UPA case had given its judgement in the Jégo-Quéré case, thereby indicating that it was prepared to meet the new workload, if such a workload would come. Of course it might be argued that there is a possibility of further cases on appeal from the CFI to the ECJ, but with the decrease of article 234 TEC procedure cases, the ECJ would certainly be liberated from some cases.

The conclusion on the above discussed is that the ECJ's workload argument, besides the factors mentioned by AG Jacobs, does not seem to be consistent. Nevertheless, the judgement of the ECJ cannot be misinterpreted and it leaves little hope of changes for non-privileged applicants in the near future.

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<sup>110</sup> Article 225(3) TEC

A future consisting of 25, soon to be 27 Member States in a union based on the rule of law.

## **5.9 Summary of case law**

It is clear from the case law of the ECJ that even if regulations are true regulations, non-privileged applicants with individual concern might still challenge them. Thus, the test for applicants to fulfil, is the test found in the Plaumann case. The test demands that the applicant has certain attributes or characteristics, which distinguishes him from all other person and make him subject to the measure in the same manner as an addressee. If the applicant operates a business that potentially could be operated by others, the applicant will be denied standing. The Plaumann test can occasionally be interpreted more favourable to the applicant, if the applicant can prove that he had a right infringed by the measure, if the Institution was in breach of its duties towards the applicant or if the applicant suffers a certain degree of factual injury by the measure. In situations where the Plaumann test can be interpreted more favourable, this might be done in light of the right to effective judicial protection.

## 6 The EU, a federal union?

As late as 1239 Henry of Bracton declared "*...for there is no King where the will and not the law has dominion*"<sup>111</sup>.

The concept of a state has since developed, and sown the seed for one of the biggest disputes in classical and modern legal philosophy. To give a complete analysis on the notion of state in a legal philosophical light, does not only go beyond the limits of this thesis, but is probably a task that cannot be accomplished in a single work.

However, when considering the evolution of the EU some ideas on the notion of state seem to fit better than others.

### 6.1 Locke

John Locke is one of those with a notion of state that is interesting when discussing locus standi, the evolution of the EU and the relationship between the two.

#### 6.1.1 Locke's state of nature

The state of nature in Locke's perception is a situation without a common legislator and without a common impartial judge<sup>112</sup>, but this situation is not necessarily a stateless situation. In the state of nature man is ruled by his own reason. However, there is a fundamental norm, which is the preservation of mankind. This fundamental norm is the prerequisite for a number of natural laws, laws that man might interpret differently and thereby judge each other different, which can create disputes and violence. Locke's state of nature is not, as in Hobbes view<sup>113</sup>, a state of war, but a situation with a system of natural laws instituted by God<sup>114</sup> with the fundamental norm as the basic foundation. A natural law is defined by, in its nature, not being dependent on a state<sup>115</sup>. A consequence of natural laws is that men, not in their capacity of citizens, but in their capacity of persons,

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<sup>111</sup> Lord Chancellor Henry of Bracton, *De Legibus Et Consuetudinibus Angliae*, 1239.

<sup>112</sup> Ola Zetterquist, *A Europe of the Member States or of the Citizens?*, Lund 2002, p. 98.

<sup>113</sup> Thomas Hobbes defines the state of nature as a state of war.

<sup>114</sup> Zetterquist, supra note 112, p. 99

their mere existence, have rights independent from the state<sup>116</sup>. Men are equal and therefore man has no right to harm another mans life, possessions or freedom. The right to freedom and life cannot be renounced, since it, strictly speaking, has never belonged to man. Locke explains this by the fact that man is the creation of God and hence man is obliged to preserve himself. Nobody can give up his freedom unless all has assigned to preserve the natural laws of God in a social contract.

### **6.1.2 Locke's social contract**

The binding point between man and the state is the social contract. Locke uses the social contract to bring men from the state of nature in to a society. Man will so to say sign the contract due to his ability to reason, and thereby help preserving mankind.

*“...the end and measure of [political] Power, when in every Man's hands in the state of Nature, being the preservation of all of his Society, that is all Mankind in general...”; and “when any number of men have, by the consent of every Individual, made a Community, they have thereby made that Community one Body, with a Power to Act as one Body...”<sup>117</sup>*

Signing the contract means that man will give up his right to interpret the natural law and the right to implement it, especially the right to implement it in the form of punishing those who break it. But man will only become a member of society on the basis of his own consent<sup>118</sup>, which means that man will always hold the right to revolt if the society cannot, or does not, safeguard the rights it was established to protect<sup>119</sup>. Revolt is of course the final solution; normally changes in society will take place through democratic control<sup>120</sup>. The supreme power thereby rests with the people.

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<sup>115</sup> Zetterquist, supra note 112, p. 99

<sup>116</sup> Zetterquist, supra note 112, p. 99

<sup>117</sup> John Locke, *Two Treaties II*, quoted in Zetterquist, *A Europe of the Member States or of the Citizens?*, p. 101 supra note 112.

<sup>118</sup> Zetterquist, supra note 112, p. 100

<sup>119</sup> Zetterquist, supra note 112, p. 117

<sup>120</sup> Zetterquist, supra note 112, p. 117

### 6.1.3 Locke's notion of Property

In the Lockean theory, the concept of property is essential. The natural laws does not, in Locke's theory allow man to hurt another mans possession or property, where property is to be understood as anything that man has invested work in<sup>121</sup>. Locke's notion of property entails that rights are not part of the political society, which means that men by their own work can protect themselves against contact with other men in the state of nature, and rights thereby provide man with security.

### 6.1.4 Locke's notion of state

According to Locke, the legislators in a society are obliged to provide a legal order with access to impartial judges that judge according to stable and common laws. These laws shall be expressions of the natural laws from the state of nature, and shall not be commands of a sovereign but rather serve as common rules. Thereby law serves as a safeguard of the natural rights between the members of society and between the members of society and those governing. For the laws to be valid and binding, they must therefore correspond to the natural laws, which are then principals to the positive law<sup>122</sup>.

Locke's view on access to an impartial judge is essential. Locke was of the belief that if there was no legal remedy for appal in the judicial system, there was no appal on earth, and consequently individuals were left with appeal to heaven, which is undefined revolt. The appeal to heaven is a consequence of

*“no Body being secure, that his Will, who has such a Command [of 100000 Men], is better than that of other Men, though his Force be 100000. times stronger.”*<sup>123</sup>

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<sup>121</sup> Zetterquist, supra note 112, p. 101

<sup>122</sup> Linda Franzén, *Artikel 230(4) i EG-fördraget – talerätt för enskilda fysiska och juridiska personer ur en rättsfilosofisk synvinkel*, Lund Universitet 2003, p. 18

<sup>123</sup> John Locke, *Two Treaties II*, quoted in Zetterquist, *A Europe of the Member States or of the Citizens?*, p. 111 supra note 112.

Men are thereby left with no verification that government is in fact more capable of interpreting and implementing the natural laws than they are themselves<sup>124</sup>. The basic function of a government is therefore to fulfil the trust given to it by the governed and ensure the rights of the governed. To have trust, the ones governing must therefore protect and implement the existing moral rights of the governed in order to secure society, and rights and trust are therefore each other's counterweight within the state<sup>125</sup>. Thus in a Lockean state "[...] *political obligation is a moral relation based on consent and embraces mutual rights and obligations.*"<sup>126</sup> To sum up, trust is the interplay between the governing and the governed, founded on the goals of society, goals that allows the governing to exercise power and some degree of judgement<sup>127</sup>. Trust is a one-way mechanism that the governing does not control; it is for the governed to decide when the trust is violated and when the commission of the governing is revoked<sup>128</sup>. To secure the trust relation between the governed and the governing Locke believed in a separation of powers because of mans weakness to let himself, i.e. the governing, be exempted from his own laws<sup>129</sup>.

As mentioned above, Locke believes that man has certain rights that are separate from the state. These rights are mans purely in his capacity of existing and not as a part of society. Consequently rights make the state rather than the opposite<sup>130</sup>. If the state violates the natural rights, then citizens have, not only a right to, but also a duty to oppose the state that violates these rights, just as man would have had the right and duty to in the state of nature. Locke reaches this end by stating that if the state is violating the natural laws and rights of man, then the state de facto dissolves the social contract with the citizens and thereby we are back to the state of nature.

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<sup>124</sup> Zetterquist, supra note 112, p. 111.

<sup>125</sup> Zetterquist, supra note 112, p. 292.

<sup>126</sup> Zetterquist, supra note 112, p. 292

<sup>127</sup> Zetterquist, supra note 112, p. 295

<sup>128</sup> Zetterquist, supra note 112, p. 295

<sup>129</sup> Zetterquist, supra note 112, p. 114

<sup>130</sup> Franzén, supra note 122. p. 17.

*“He being in a much worse condition who is exposed to the Arbitrary Power of one Man, who has the Command of 100000. than he that is expos’d to the Arbitrary Power of 100000. single Men.”<sup>131</sup>*

According to Locke, the only way to ensure the rights of man, is to make the government subordinate to the laws of society<sup>132</sup>

Thus, the protection of rights lies in what we today know as a constitution, setting legal limits. Constitutionalism thereby reflects a political society of a certain limited scope. That implies that the constitution must stem from the people, and thus that the people or citizens of society are the ultimate power of society and consequently the source of authority for all constitutional institutions.

## **6.2 Rights and the EU in a Lockean perspective**

The starting point for individual rights in the EU is the Van Gend en Loos case and the Costa Enel Case, stating that Community acts can have direct effect, and that Community acts are supreme to Member States national laws.

The EU is probably the most, or at least one of the most important players in the field of further individual rights. However, when faced with the question on Community accession to the ECHR, the ECJ stated that it would go beyond the competences of the Community to adhere to the convention<sup>133</sup>. However, the Treaty clearly express that the Union respects the fundamental rights as these are expressed in the ECHR and the ECJ has on several occasions referred to the ECHR. Now, with the adoption of the CFR in the Draft Constitution, the question whether the EU truly is a human rights organisation seems to call for an answer<sup>134</sup>.

Weiler has stated that, *“the constitutional discipline which Europe demands of its constitutional actors (the EU itself, the Member States and the*

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<sup>131</sup> John Locke, *Two Treaties II*, quoted in Zetterquist, *A Europe of the Member States or of the Citizens?*, p. 108 supra note 112.

<sup>132</sup> Zetterquist, supra note 112, p. 108

<sup>133</sup> ECJ Opinion 2/94, [1996] ECR I-1759

<sup>134</sup> The question goes beyond the focus of this thesis but is dealt with in Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, Common Market Law Review, 2002

*European citizens) is in most respects indistinguishable from that which you would find in an advanced federal State.”<sup>135</sup>*

However, in the advanced federal state, one usually finds a bill of rights and an accession to the ECHR. With the adoption of the CFR in the Draft Constitution, one might argue that the EU has its own bill of rights. In the CFR article 47 the right to an effective remedy and a fair trial is explicitly mentioned, similar but not identical to the wording found in article 6 and 13 ECHR.

The EU is a union based on the rule of law and in that sense the EU should fulfil at least three basic requirements: a legal order based on the rule of law excludes arbitrary law and even discretionary authority; it includes the equality of all before the law and it means that constitutional law is the consequence of man’s rights.<sup>136</sup> Besides from the direct expression in article 6 TEU The ECJ has on several occasions stressed that the EU is a Union based on the rule of law<sup>137</sup> respecting the rights in the ECHR and other fundamental rights and principles. In the EctHR *Matthews* case<sup>138</sup> the EctHR stated that the TEC is to be deemed constitutional.

In the Lockean perspective, citizens in the EU have rights against the Union just as they have rights against their own Member States, which means that neither one of those can limit the rights of individuals except from the limitations already found in their respective legal orders. If the Institutions and the Member States do not safeguard the individual’s right, then the impartial judge shall ensure these rights if the alleged violation cannot be adequately justified in the necessity for which the society was created.<sup>139</sup>

With the continued granting of individual rights, the EU citizenship, a Draft Constitution and several cases which all indicates that the Union is more than a classic agreement under public international law, the EU seem to be

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<sup>135</sup> Joseph Weiler, ‘Federalism and Constitutionalism: Europe’s Sonderweg’ Jean Monnet Working Paper no. 10/00.

<sup>136</sup> Zetterquist, *supra* note 112, p. 121

<sup>137</sup> For example Case 294/83, ‘*Les Verts*’, *Supra* note 27

<sup>138</sup> EctHR, *Case of Matthews v. The UK*, (application 24833/94) judgement of 18 february 1999.

an organisation of individuals rather than of Member States. An illustrative example of this is the Defrenne case<sup>140</sup> where a single person against all the Member States won a case on the direct effect of article 141 TEC. Ms. Defrenne would have, had the EU been an agreement under public international law, lost the case, since it would have been the Member States that would dictate the legal order. In a constitutional legal order, the Defrenne case is a pure example of an individual relying on the constitution in front of an impartial judge against those governing, a classical Lockean illustration of an effective society.

However, the Defrenne case serves to illustrate another important point by Locke. Had she not had the right to bring her case to court, she would have been denied effective judicial protection. Therefore, it is of the utmost importance, that the individual in a Lockean society has the right to take his case to an impartial judge to safeguard his individual rights.

### **6.3 Rights, do they need to be redefined?**

We know, that the ability to safeguard ones rights in a Lockean society is one of, or perhaps even the corner stone in such a society, but are all rights equal and do they all need the same kind of protection? Clearly the answer is no, but what rights are then more worthy of protection than others?

Hohfeld's notion of rights are interesting since they seem to fit the Lockean notion of state well and are all found in Locke's theory as well.

According to Hohfeld's doctrine of rights, a statement of rights contains four basic types of rights: right, privilege, power and immunity, where right is a right to claim, privilege is privilege for freedom, power is power for competence and immunity simply is immunity<sup>141</sup>.

As in Locke's rights, it is the circumstance that man have moral rights, that are of the nature of claims protected by immunity from the state against the core of their rights, which brings us to Locke's purpose of society. Individual's immunity safeguards the prerequisite that the power of those

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<sup>139</sup> Zetterquist, supra note 112, p. 377

<sup>140</sup> Case 43/75, *Defrenne v. Sabena*, [1976] ECR 455

<sup>141</sup> Zetterquist, supra note 112, p. 359

governing society must be limited in character. Thus there must be a right for individuals to effective legal remedies, which we know from above, is a necessary requirement for society, which would otherwise dissolve, and society must provide institutions appropriate for judicial hearing and power to make happen such hearing. Individuals hold this right as a right against society.<sup>142</sup> *“The effectiveness of all other rights rests on the prerequisite of access to effective legal remedy.”*<sup>143</sup>

It is clear that the ECJ has developed a body of fundamental rights and general principles that have slowly been incorporated into the Treaties through treaty amendments. The ECJ has also stated that the sources of these rights stem from the constitutional traditions of the Member States<sup>144</sup> and international treaties to which all the Member States have collaborated or are signatories<sup>145</sup>. Further the ECJ has gone to extreme lengths to stress that these rights are upheld because they are part of EU law and not because they are part of public international law nor the national law of the Member States. Consequently it seems clear that with the clear expression by the ECJ that the right to effective judicial protection is a fundamental right, the right should be safeguarded just as eagerly as other rights. However, in an interview with Sir David Edward former Judge of the ECJ, he stated that rights would probably have to be redefined. In a direct question on whether the ECJ protects rights adequately he replied:

*“[...] I think there has to be a much more sophisticated analysis of rights. There is a difference between the right not to be tortured, which must be absolute, and the right to an effective remedy and a fair trial, which includes the provision of legal aid and which will depend on the workings of the legal system in question. One must be realistic about what a modern legal system can achieve with the resources available to it. So the whole rights discourse needs to be much more sophisticated than it is at the moment.”*<sup>146</sup>

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<sup>142</sup> Zetterquist, supra note 112, p. 377

<sup>143</sup> Zetterquist, supra note 112, p. 377

<sup>144</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125

<sup>145</sup> Case 4/73, *Nold KG v. Commission*, [1974] ECR 491

<sup>146</sup> Interview with former ECJ Judge Sir David Edwards

<http://www.eupolitix.com/EN/Interviews/200402/376866e1-6c73-4e1b-99d7-34d2a5eff96a.htm> 7/4 2004 12.24.

This statement seems strange in the light of the ECJ's reasoning in cases concerning locus standi. The ECJ has consistently held that the right to effective judicial protection is a fundamental right in the EU. Perhaps Sir Edwards is drawing a line between fundamental rights and human rights, but the right to effective judicial protection is enshrined in the ECHR art. 6 and 13, so that would not make sense. Another solution is that he draws a line between fundamental/human rights and absolute rights. However, this would not be a positive evolution in the rights evolution of the Union. However, no conclusions can be made on a single statement.

What can be concluded is that at the moment, the CFR is not legally binding; this will however change if the Draft Constitution enters into force. The ECJ uses the ECHR when interpreting the legality of Community actions and it is taken into consideration when judging on rights; with the ambit of the Draft Constitution, the EU is moving towards an accession to the ECHR. The notion of rights as it is given above is disputable, but from a Lockean point of view, and with the Hohfeld notion of rights as well, there is no doubt that effective judicial protection rank as a right of the utmost importance in the EU, and it is deemed fundamental by the ECJ.

## **6.4 An ever closer Union**

The Union as it stands today is a result of nearly 50 years of development. The Union has changed from a purely economic community to a union, with its own legal personality<sup>147</sup>. There is no doubt that the face and the structure of the Union is of a remarkably different kind today, than it was at its outset. However, the perception of the union varies from different views that struggle to find the right way to perceive the Union; basically the question can be boiled down to if it is a Union of Member States or if it is a Union of citizens?

Some of the strongest arguments against the perception of the Union as a Union of citizens can be found in the German Constitutional Court's case,

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<sup>147</sup> At least according to the Commission and surely if the Draft Constitution is adopted.

Brunner<sup>148</sup> from 1994. In this case the German BVerfG argued that there is no such thing as a common demos of the Union. However, the argumentation have met severe criticism, especially by Frederico Mancini, who have argued that the strong demos such as the BVerfG argues, is not a prerequisite for a legitimate democracy<sup>149</sup> nor for the sake of having a constitution. His argumentation is based on a comparison with states such as India, Belgium, South Africa and Canada, which are all states with no or only little common spiritual, social and political homogeneity of their people, but who are all states that certainly are democratic. Thus, the strong demos theory applied by the BVerfG in the Brunner case might not hold true; according to the strong demos theory people are born into a society and cannot become members of other societies unless they fully absorb the cultural and social history of that society. But according to Locke, the individual is born free and thus cannot be born into a society since it takes the consent of each individual to become a part of a given society<sup>150</sup>.

Reading the treaty, one observes that the language of the treaty implies that the union, or community as it was named previously, has as its ambit “*to lay the foundations of an ever closer union among the peoples of Europe*”. This sentence has caused much debate, since some have argued that the express use of the word ‘*people*’ instead of ‘*citizens*’ implies that the Union was never to evolve into a federal union of member states, whereas others of a more federalist view has taken great notice of the idiom ‘*an ever closer union*’. At this point, a discussion of the intentions of the text found in the preamble is too excessive. Regardless of what view one is, the preamble can be read to fulfil the purpose of both sides of the struggle, and perhaps this is exactly how it should be read, as a political compromise. I’m of the opinion that to argue on the foundations of a compromise will not provide strong conclusions. Thus, I will take a different view and look at the characteristics of the Union in order to elaborate on its status.

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<sup>148</sup> BvG 2BvR 2134/92 & 2159/92., *Brunner v. European Union Treaty*, 1 Common Market Law Reports [1994] p. 57.

<sup>149</sup> Frederico Mancini, *Europe: The case for Statehood*, European Law Journal 1998, p. 29-42

The Union has most of the characteristics that are usually found in a state. The Institutions are in place, the union citizenship, though still complementary to the national citizenship, is becoming more and more important, changing its status from a market citizenship to a citizenship where the individual becomes part of a political society; the massive case law of the ECJ stating supremacy, direct effect and the creation of a new legal order are also all expressions of a union with its own agenda.

Locke held that, “*Those who are united into one Body and have a common establish’d Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, are in Civil Society one with another.*”<sup>151</sup> Individuals in such a society were according to Locke part of a Commonwealth<sup>152</sup> The EU has legislative, executive and judicial powers, which directly affect individuals in the Member States. From a federal point of view, the Community can therefore be considered an organisation exercising state power in relation to individuals.

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<sup>150</sup> Zetterquist, supra note 112, p. 306

<sup>151</sup> John Locke, *Two Treatises II*, quoted in Zetterquist, *A Europe of the Member States or of the Citizens?*, p. 31 supra note 112.

<sup>152</sup> Zetterquist, supra note 112, p. 31

## 7 Effective judicial protection

The Union is based on the rule of law. In a system based on the rule of law, it is essential with an effective judicial protection. Such protection is, according to the ECJ, provided through the complete system of legal remedies. However, as has been argued, the system might not be as complete as the ECJ holds it to be. The preliminary ruling system provided for is not as effective as could be preferred, in fact it can be argued that the preliminary ruling system, even if applied by national courts as the ECJ dictates, leaves the individual with an inadequate protection as against a case in front of the CFI, which holds jurisdiction on cases concerning direct action according to article 230(4) TEC. As we know that the right to effective judicial protection as enshrined in the ECHR constitutes one of the general legal principles of the Union,<sup>153</sup> and as the Union in the CFR, which arguably can be deemed the Union's bill of rights, in article 47 promulgates the right to an effective remedy and to fair trial, then the mere doubt that protection is inadequate should make the ECJ abandon its position on *locus standi*. It has been argued that the argumentation by the ECJ for not reconsidering its position is flawed, especially considering the fact that one of the most prominent AGs has consistently held that the current position of the ECJ is needless, and when the CFI has ruled for a wider notion of individual concern.

In the Union as it stands today, individuals only have one common judge that provides effective judicial protection since only the ECJ can annul legal acts of the Institutions<sup>154</sup>. This means that even within the Union as we know it today, the right to effective judicial protection is inadequate since the preliminary ruling system only provides a feeling of comfort, but does not place the individual in a situation where he can adequately protect his interests and rights. This is because of the explicit use by the ECJ of article 234 TEC as a part of the complete system of legal remedies. When article

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<sup>153</sup> TEU article 6 and case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, [1979] 3727 and case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] 1651

234 TEC does not provide adequate protection, the general legal principles in article 6.2. TEU are broken together with the principle in article 47 in the CFR.<sup>155</sup>

Applying the findings of the Lockean theory on the Union provides interesting questions to the debate. Europe is arguably the individuals Europe, which correspond to the Lockean theory. According to the Lockean theory, a polity only exist due to the individuals. And it is the individuals that form the corner stone and legitimacy for the political society. The EU arguable started as an international organisation, but has evolved into a Union with powers corresponding to those of a traditional state. For the Union to be a new legal system, Locke require that the political society has a legislator, legislating corresponding to the natural laws and that there is an impartial judge. These two bodies are found in the Council and the CFI and the ECJ. Further, individuals must be able to, directly or indirectly, influence the legislative work. It can be held that individuals do have indirect influence, since Member States act according to their national parliaments, which represents the citizens. However, the lack of power to hire and fire is a substantial imperfection in the Lockean society. This together with the indirect representation is often referred to as the democratic deficit. Nevertheless, it can, arguably, be held that the Union is a political society based on the rule of law with its own constitution in the form of a social contract that the citizens have 'signed'. Accordingly, the EU is from a Lockean perspective a society established to protect the rights of the citizens and this is regardless of the interest of the many as opposed to the single individual. Whenever the EU is affecting the legal sphere of an individual, it is therefore of the utmost importance that the individuals rights are protected.<sup>156</sup> In accordance with Lockean theory, it is up to the ECJ to interpret the law of the Union, but also never to interpret the law against the natural laws. It is therefore in conflict with the Lockean theory not being

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<sup>154</sup> Zetterquist, *supra* note 112, p. 380

<sup>155</sup> However, the status of and the principle in article 47 CFR is still in a legal vacuum until the Draft Constitution is adopted.

<sup>156</sup> Franzén, *Supra* note 122. p. 20.

able to have your case in front of the courts.<sup>157</sup> Further, to have your case in front of a national court does not suffice in the protection of individual rights, since the national court is another legal system independent from the system of the EU. Consequently, when the ECJ states that the Treaties have created a new legal order independent of the Member States, then this legal order cannot be considered complete nor independent, when the system is dependant on Member States national systems in order to provide effective judicial protection.

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<sup>157</sup> Individuals might be denied access to court according to Locke if the individual has his rights protected by a group, e.g. through the Member State pleading the case, but if the Member State is the one violating the rights of the individual, then it is fundamental that the individual has access to court to protect his rights.

## 8 The future of locus standi

As we stand now, the only thing that can change the notion of individual concern as applied by the ECJ is a political amendment of the Treaty. But what might initiate political will for amendment? Had it been difficult before, certainly now it will be even more difficult to reach an agreement on the amendment of the notion of individual concern. However, the Draft Constitution might come at a time were the Member States are more ripe for amendments than ever before.

The Draft Constitution in its build up resembles, if one disregard the massive size of the work, more than ever a classic constitution; the pillars of the old Treaty are gone; the Treaty on the EU is incorporated and the CFR as well. Again, as in chapter 6.4, I am of the believe that the mere name of the Draft Constitution should rather be regarded a political compromise than an actual statement on the legal status of the document.

The new formulation of article 230(4) TEC is found in article III 270 (4) in the Draft Constitution. The formulation reads as follows:

*“Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.”<sup>158</sup>*

As is clear from the formulation, the Draft Constitution draws a clear line between legislative and regulatory acts. Thus, the situation will not change for legislative measures; here the notion of individual concern remains the same. As regards regulatory measures that do not requires or have implementing measures, it will suffice to show that the measure is of direct concern to the applicant. This will mean that regulatory acts which does not allow, or does not require implementing measures will be allowed standing in order to avoid that the individual will have to break the law and thereby contest the measure through a preliminary question in a criminal proceeding

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<sup>158</sup> *Draft Treaty Establishing a Constitution for Europe*, OJ 2003, C 169 p.1

in front of a national court. This implies that in the future, a return to a test somewhat close to the abstract terminology test will be a reality.<sup>159</sup> Nevertheless, the step is an improvement as opposed to the current situation, but does not leave much hope that the ECJ will find it within its competence to change the notion of individual concern. Maybe though, the ECJ will find itself in a situation where it no longer will wait for political amendments. The ECJ did, when the Nice Treaty was under preparation, clearly state that it required political amendment to the Treaty in order to change the notion for individual concern. Perhaps now, 2 treaties later, the patience of the ECJ will have run out and the Court will perhaps at a given chance change the notion for individual concern. It is however clear speculations and the clear expression from the former case law stands as a wall in front of the ECJ. It will require highly legal technical skills not to come out as a court that has clearly gone beyond its competences. This has nevertheless happened before, as for instance in the *Keck* case<sup>160</sup>.

The CFR is as mentioned, adopted into the Draft Constitution, but it cannot be expected to alter the position of the ECJ on the notion of individual concern, since it has already taken the CFR into account in its case law.

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<sup>159</sup> Marton Varju, *The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention*, 2004 *European Public Law* p. 43-56 at p. 55.

<sup>160</sup> Case 267 & 268/91, *Keck & Mithouard*, [1993] ECR I-6097

## 9 Final conclusions

It appears from the findings of this thesis, that the notion of individual concern is unchanged throughout the history of the ECJ case law, with only small corrections. The Plaumann test is still the starting point when challenging acts of the Institutions. The arguments by the ECJ for this situation have been shown to be less convincing and the case law is not stable, but does not appear to change in the near future.

The right to effective judicial protection has been proven a fundamental right of the Union, regardless of the perception of the Union.

With Lockean theory applied on the EU it becomes even more obvious that the current situation is flawed. The lack of appeal to an impartial judge within the legal system of the EU is a fundamental breach in a Lockean perspective. This does however not mean that the Union cannot be perceived as a Union of Citizens. I am of the belief that at the current place of time, the Union does have a constitution, but this constitution might be regarded imperfect due to the lack of access to an impartial judge. Taken to the extreme, the citizens of the EU are left with no appeal on earth and have therefore only appeal to heaven left. Citizens denied access to effective judicial protection might accordingly be knocking on the doors to heaven. The respond is yet to be seen, but with the Draft Constitution, arguable the citizens might glimpse down to earth again.

# 10 Bibliography

Albertina Albors-Llorens, *Private Parties in European Community Law. Challenging Community Measures*, Clarendon Press, Oxford 1996

Antonsen and Norsk (Eds.), *På vej mod Europas forfatning?*, 2003 Copenhagen.

Ewa Biernat, *The Locus Standi of Private Applicants under article 230(4) EC and the Principle of Judicial Protection in the European Community*, Jean Monnet Working Paper 12/03

Lord Chancellor Henry of Bracton, *De Legibus Et Consuetudinibus Angliae*, 1239.

Paul Craig and Gráinne de Búrca, *Text, Cases and Materials*, 2003 Oxford, 3<sup>rd</sup> edition

Paul Craig, *Standing, Rights, and the Structure of Legal Argument*, 2003, European public law

Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, Common Market Law Review, 2002

Linda Franzén, *Artikel 230(4) i EG-fördraget – talerätt för enskilda fysiska och juridiska personer ur en rättsfilosofisk synvinkel*, Lund Universitet 2003

Federico Mancini, *Europe: The case for Statehood*, European Law Journal 1998

Molde and Vesterdorf (eds.), *EU-Karnov 2001*, 2001 Thomson Copenhagen

Kronenberger & Dejmek, *Locus Standi of Individuals before Community Courts under Article 230(4) EC: Illusions and Disillusions after the Jégo-Quéré and Union de Pequeños Agricultores judgements*, 2002 ELF

Marton Varju, *The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention*, 2004 European Public Law

Joseph Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, Jean Monnet Working Paper no. 10/00.

Ola Zetterquist, *A Europe of the Member States or of the Citizens?*, Lund 2002

# 11 Table of Cases

## 11.1 Cases from the ECJ

Case 25/62 *Plaumann & Co. v. Commission* [1963] ECR 95

Case 26/62, *Van Gend en Loos v. Administratie der Belastingen*, [1963] ECR 3

Cases 106 and 107/63, *Alfred Toepfer and Getreide-Import Gesellschaft v. Commission*, [1965] ECR 553

Case 6/64, *Costa v. Enel*, [1964] ECR 1141

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

Case 41-44/70, *NV International Fruit Company v. Commission*, [1971] ECR 411

Case 60/70 *Bock v. Commission* [1971] ECR 897

Case 5/71, *Zuckerfabrik Schoepfenstedt v. Council*, [1971] ECR 975

Case 4/73, *Nold KG v. Commission*, [1974] ECR 491

Case 43/75, *Defrenne v. Sabena*, [1976] ECR 455

Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, [1979] 3727

Cases 789 and 790/79, *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] ECR 1949

Case 11/82 *Piraiki-Patraiki* [1985 ] ECR 207.

Case 294/83, *Parti Ecologiste "Les Verts" v. Parliament*, [1986] ECR 1339

Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] 1651

Case 309/85, *Barra v. Belgium*, [1988] ECR 355

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

Case C-298/89 *Gibraltar v. Council*, [1993] ECR I-3605

Case C-309/89, *Codorniu v. Counsel*, [1994] ECR I-1853.

Case C-358/89, *Extramet Industrie SA v. Council*, [1991] ECR I-2501

Case C-267 & 268/91, *Keck & Mithouard*, [1993] ECR I-6097

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

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

Case C-224/01, *Köbler v. Austria* (judgment of 30 September 2003

Case C-263/02 P, *Commission v. Jégo-Quéré*, Judgement of 1 April 2004

### **11.1.1 Opinions**

Opinion of AG Jacobs in case C-50/00 P, *Unión de Pequeños Agricultores v Council*, [2002] ECR I-6677.

## **11.2 Cases from the CFI**

Cases T-480 and 483/93, *Antillean Rice Mills NV v. Commission*, [1995] ECR II-2305

Case T-99/94 *Asociacion Espanalo de Empresas de la carne (ASOCARNE) v. Council* [1994] ECR II-871

Case T-135/96 *UEAPME v. Council* [1998] ECR II-2335

Case T-69/99, *Danish Satellite TV (DSTV) A/S (Eurotica Rendez-vous Television) v. Commission*, [2000] ECR II-4039

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

## **11.3 Cases from other courts**

EctHR , *Case of Matthews v. The UK*, (application 24833/94) judgement of 18 february 1999.

BvG 2BvR 2134/92 & 2159/92., *Brunner v. European Union Treaty*, 1  
Common Market Law Reports [1994] p. 57