

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 21 March 2002¹

Introduction

1. In this case an association of farmers appeals against an order of the Court of First Instance² dismissing as manifestly inadmissible its application for the annulment of Regulation No 1638/98,³ which amended substantially the common organisation of the olive oil market, on the ground that the members of the association were not individually concerned by the provisions of the Regulation within the meaning of the fourth paragraph of Article 230 EC.

another person, is of direct and individual concern to the former'. While the focus of that provision is on review of decisions, the Court of Justice has acknowledged, rightly in my view, that regulations can also be challenged in proceedings instigated by individual applicants where they are of individual concern to the applicant, and that the test for establishing individual concern is in substance the same in the case of decisions and regulations. The notion of individual concern has, however, been interpreted strictly in the case-law. Applicants will be regarded as individually concerned by a measure only if it affects their legal position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.⁴ It may be noted that this aspect of the case-law has been much

2. The fourth paragraph of Article 230 EC provides that '[a]ny natural or legal person may... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to

1 — Original language: English.

2 — Case T-173/98 *Unión de Pequeños Agricultores (UPA) v Council* [1999] ECR II-3357.

3 — Council Regulation (EC) No 1638/98 of 20 July 1998 amending Regulation No 136/66/EEC on the establishment of a common organisation of the market in oils and fats, OJ 1998 L 210, p. 32.

4 — See Case 25/62 *Plaumann v Commission* [1963] ECR 95 and, most recently, Case C-451/98 *Annillean Rice Mills*, paragraph 49 of the judgment delivered on 22 November 2001.

criticised both by members of the Court of Justice in their individual capacities⁵ and by commentators⁶ and is often regarded as

creating a serious gap in the system of judicial remedies established by the EC Treaty.

5 — For critical commentary on the case-law by members of the Court of Justice and the Court of First Instance, see F. Schockweiler, 'L'accès à la justice dans l'ordre juridique communautaire', *Journal des tribunaux, Droit européen*, no. 25, 1996, p. 1, at pp. 6 to 8; J. Moitinho de Almeida, 'Le recours en annulation des particuliers (article 173, deuxième alinéa, du traité CE): nouvelles réflexions sur l'expression "la concernant... individuellement"', *Festschrift für Ulrich Everling*, Vol. I, (1995), p. 849, at pp. 857 to 866; G. Mancini, 'The role of the supreme courts at the national and international level: a case study of the Court of Justice of the European Communities', *The Role of the Supreme Courts at the National and International Level*, P. Yessiou-Faltsi (ed.), (1998), p. 421, at pp. 437 to 438; K. Lenaerts, 'The legal protection of private parties under the EC Treaty: a coherent and complete system of judicial review?', *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, (1998), p. 591, at p. 617; A. Saggio, 'Appunti sulla ricevibilità dei ricorsi d'annullamento proposti da persone fisiche o giuridiche in base all'Art. 173, quarto comma, del Trattato CE', *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, (1998), p. 879, at pp. 903 to 904; and my article 'Access to justice as a fundamental right in European Law', *Mélanges en hommage à Fernand Schockweiler* (1999), p. 197. See moreover the support for wider access for individual applicants in Opinions of Advocates General, e.g. the Opinion of Advocate General Slynn in Case 246/81 *Bethell* [1982] ECR 2277, at p. 2299, my Opinions in Case C-358/89 *Extramet Industrie* [1991] ECR I-2501, at paragraphs 71 to 74, and Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, at paragraphs 20 to 23, and the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-142/95 *P Associazione agricoltori della provincia di Rovigo and others* [1996] ECR I-6669, at paragraphs 40 and 41.

6 — For recent criticism by commentators, see among others A. Arnulf, 'Private applicants and the action for annulment under Article 173 of the EC Treaty', *Common Market Law Review* 1995, p. 7 and 'Private applicants and the action for annulment since *Codorniu*', *Common Market Law Review* 2001, p. 7; D. Waelbroeck and A.-M. Verheyden, 'Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: à la lumière du droit comparé et de la Convention des droits de l'homme', *Cahiers de droit européen* 1995, p. 399; G. Vandersanden, 'Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont adressées', *Cahiers de droit européen* 1995, p. 535; L. Allkemper, *Der Rechtsschutz des einzelnen nach dem EG-Vertrag: Möglichkeiten seiner Verbesserung* (1995), pp. 39-40; T. Heukels, 'Collectief actierecht ex artikel 173 lid 4 EG: een beperkte actieradius voor grote belangen', *Nederlands Tijdschrift voor Europees Recht* 1999, p. 16; D. Boni, 'Il ricorso di annullamento delle persone fisiche e giuridiche', in *Il ricorso di annullamento nel Trattato istitutivo della Comunità* (1998), p. 53; M. Ortega, *El acceso de los particulares a la justicia comunitaria* (1999), pp. 225-230; S. Cavallin, 'Direkt ogiltighetstalan inför EG-Domstolen i ljuset av svensk förvaltnings- och konkurrensrätt', *Europarättslig tidskrift* 2000, p. 622, at pp. 635 to 636.

3. The present appeal, which the Court has decided to hear in plenary session with a view to reconsidering its case-law on individual concern, raises an important question of principle: namely whether a natural or legal person ('individual') who is directly but not individually concerned by the provisions of a regulation within the meaning of the fourth paragraph of Article 230 EC as interpreted in the case-law should none the less be granted *locus standi* where that individual would otherwise be denied effective judicial protection owing to the difficulty of challenging the regulation indirectly through proceedings in national courts or whether *locus standi* under the fourth paragraph of Article 230 EC falls to be determined independently of the availability of such an indirect challenge.

4. I will argue that *locus standi* must indeed be determined independently and that moreover the only solution which provides adequate judicial protection is to change the case-law on individual concern.

The contested regulation

5. The legal background is set out in the order under appeal,⁷ and a short summary will therefore suffice for present purposes.

6. The common organisation of the market in oils and fats, which was established by Regulation No 136/66,⁸ laid down, for the market in olive oil, schemes in respect of intervention prices, production aid, consumption aid and storage, as well as imports and exports.

7. Regulation No 1638/98 ('the contested regulation') reforms, in particular, the common organisation of the olive oil market. For that purpose, the previous intervention scheme was abolished and replaced by a system of aid for private storage contracts; consumption aid and the specific allocation of aid to small producers were both discontinued; the stabiliser mechanism for production aid based on a maximum guaranteed quantity for the Community as a whole was amended by being apportioned among the producer Member States in the form of national guaranteed quantities; finally, olive groves

planted after 1 May 1998 were excluded, subject to certain exceptions, from any future aid scheme. The contested regulation also provided that the Commission was to present, in the course of the year 2000, a proposal for a regulation to implement a complete reform of the common organisation of the market in oils and fats.

The facts and the order under appeal

8. Unión de Pequeños Agricultores ('UPA'), the appellant in the present case, is a trade association which represents and acts in the interests of small Spanish agricultural businesses. It has legal personality under Spanish law.

9. On 20 October 1998, UPA lodged an application with the Court of First Instance, pursuant to the fourth paragraph of Article 173 of the EC Treaty (now the fourth paragraph of Article 230 EC), seeking the annulment of the contested regulation, with the exception of the aid scheme for table olives provided for in Article 5(4) of Regulation No 136/66 as amended by the contested regulation. It submitted, in substance, that the contested regulation did not fulfil the requirement to give reasons laid down in Article 190 of the Treaty

7 — At paragraphs 1 to 6.

8 — Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organisation of the market in oils and fats, OJ English Special Edition 1965-1966 (II), p. 221.

(now Article 253 EC), that it did not contribute to the goals of the common agricultural policy set out in Article 39 of the Treaty (now Article 33 EC), and that it violated the principle of equal treatment of producers and consumers set out in the third paragraph of Article 40 of the Treaty (now the third paragraph of Article 34 EC) as well as the principle of proportionality, the right to exercise a profession and the right to property.

10. By reasoned order of 23 November 1999 ('the contested order'), the Court of First Instance dismissed that application as manifestly inadmissible.

11. The Court of First Instance recalled, first, that '[a]ccording to settled case-law... [the fourth paragraph of Article 230 EC] allows individuals to challenge any decision which, although in the form of a regulation, is of direct and individual concern to them. The objective of that provision is in particular to prevent the Community institutions from being able, merely by choosing the form of a regulation, to preclude an individual from bringing an action against a decision which concerns him directly and individually'.⁹

12. The Court of First Instance then considered the nature of the contested regu-

lation. It concluded, after an examination of its provisions and the detailed arguments put forward by UPA, that it was legislative in nature in so far as it applied in a general and abstract manner to objectively determined factual and legal situations.¹⁰ However, acknowledging that 'in certain circumstances, a legislative measure which applies to the operators concerned in general may also be of individual concern to some of them'¹¹ where they are 'able to show that they are affected by the measure in question by reason of certain attributes which are peculiar to them or by reason of factual circumstances in which they are differentiated from all other persons',¹² the Court of First Instance proceeded to examine whether UPA should be granted *locus standi* to challenge the contested regulation.

13. In that regard, it noted that actions brought by associations may be admissible in at least three kinds of circumstances:

- when a legal provision expressly grants a series of procedural powers to trade associations;
- when the association represents the interests of undertakings which would, themselves, be entitled to bring proceedings;

10 — Paragraphs 35 to 44.

11 — Paragraph 45.

12 — Paragraph 46.

9 — Paragraph 34.

— when the association is distinguished individually because its own interests as an association are affected, in particular because its negotiating position has been affected by the measure whose annulment is being sought.

interest, and that there is a risk that it will not receive effective judicial protection'.¹⁷

14. However, UPA could not 'rely on any of these three situations in order to establish the admissibility of its action'.¹³ UPA had no rights of a procedural nature under the common organisation of the market in oils and fats;¹⁴ it had not established that its members were affected by the contested regulation by reason of certain attributes which were peculiar to them or by reason of factual circumstances in which they were differentiated from all other persons;¹⁵ and the contested regulation did not affect any specific interests or special protections enjoyed by UPA as an association distinct from the interests of its members.¹⁶

16. The Court was not convinced by those arguments. It held, in response to the first argument, that '[t]he plea alleging possible misuse of powers relates in reality to the substance of the case. To consider that plea at the same time as the admissibility of the action would render the admissibility of an action for annulment brought against a measure of general application dependent solely on the nature of the grounds invoked in relation to the substance of the case in order to challenge the legality of the measure; this would amount to derogating from the conditions for admissibility laid down in [the fourth paragraph of Article 230 EC], as interpreted by the case-law.'¹⁸

17. In reply to the second argument, the Court of First Instance held as follows:

15. Finally, the Court of First Instance noted that UPA had put 'forward two further arguments to prove that it is, none the less, individually concerned by the provisions of the contested regulation, namely that the review of the legality of the contested regulation which it seeks in its action is a matter of Community public

'61 The argument that no effective legal protection is afforded consists of the complaint that there are no legal remedies under national law which make it possible, if necessary, to review the legality of the contested regulation by means of a reference for a preliminary ruling under [Article 234 EC].

13 — Paragraph 48.

14 — Paragraph 49.

15 — Paragraph 50.

16 — Paragraphs 52 to 57.

17 — Paragraph 59.

18 — Paragraph 60.

62 It must be pointed out, in this connection, that the principle of equality for all persons subject to Community law in respect of the conditions for access to the Community judicature by means of the action for annulment requires that those conditions do not depend on the particular circumstances of the judicial system of each Member State. In this regard it should also be observed that, in accordance with the principle of sincere cooperation laid down in [Article 10 EC], the Member States are required to implement the complete system of legal remedies and procedures established by the EC Treaty to permit the Court of Justice to review the legality of measures adopted by the Community institutions (see, on this point, the judgment in [Case 294/83 *Les Verts v Parliament* [1986] ECR 1339], paragraph 23).

the power to review the legality of acts of the institutions. In no case can such an argument enable an action for annulment brought by a natural or legal person which does not satisfy the conditions laid down by [the fourth paragraph of Article 230 EC] to be declared admissible (order of the Court of Justice in Case C-87/95 P *CNPAAAP v Council* [1996] ECR I-2003, paragraph 38).¹⁹

18. The Court of First Instance accordingly concluded that ‘the applicant cannot be regarded as individually concerned by the contested regulation’ and dismissed the application as manifestly inadmissible.¹⁹

63 However, these factors do not provide the Court of First Instance with a reason for departing from the system of remedies established by [the fourth paragraph of Article 230 EC], as interpreted by case-law, and exceeding the limits imposed on its powers by that provision.

The appeal

19. In the present case, UPA asks the Court of Justice to:

64 Moreover, the applicant cannot validly base any argument on the possible length of proceedings under [Article 234 EC]. That circumstance cannot justify a change in the system of remedies and procedures established by Articles [230, 234 and 235 EC] which is designed to give the Court of Justice

— annul the order of the Court of First Instance;

19 — Paragraphs 65 and 66.

- declare the action lodged with the Court of First Instance on 20 October 1998 admissible and refer the substance of the case back to the Court of First Instance for determination.

22. UPA puts forward four pleas in law. The first three pleas allege that the reasoning set out in paragraphs 61 to 64 of the contested order is insufficient and contradictory, and that it rests on a misunderstanding of UPA's arguments.

20. The Commission, which has intervened in support of the Council, asks the Court of Justice to:

- declare the appeal inadmissible;
- in the alternative, reject the appeal as manifestly unfounded;
- order the appellant to bear the costs.

21. The Council did not file a written response, but informed the Court of Justice by letter that in accordance with the Commission's intervention it considered that 'the appeal lodged by UPA is manifestly inadmissible'. At the hearing, relying on substantially similar arguments to those put forward by the Commission, the Council asked the Court to dismiss the appeal as manifestly unfounded.

23. By its fourth plea, UPA contends that the contested order violates its fundamental right to effective judicial protection, which is a recognised principle of Community law and inherent in the system of remedies established by the EC Treaty, and therefore errs in law. In its view, that principle requires the Court of First Instance, when it decides whether to allow an individual to challenge a regulation under the fourth paragraph of Article 230 EC, to examine — in the light of the specific legal and factual circumstances of the case — whether the application of the conditions for *locus standi* laid down in the fourth paragraph of Article 230 EC and interpreted in the case-law would prevent that individual from enjoying effective judicial protection. Without such an examination of the specific circumstances of each case, the right to effective judicial protection would not be effectively upheld. Thus, the Community Courts may, according to UPA, declare an action for annulment inadmissible only where an examination of the relevant provisions of national law reveal that there are procedures under which the applicant may bring the alleged illegality of the impugned measure before the Court of Justice through a request for a preliminary ruling from a national court.

24. The Council and the Commission resist those submissions.

with that preliminary argument on admissibility separately. The Commission's argument goes to the substance of the appeal and must be considered together with the other arguments.

25. The Commission suggests, as a preliminary argument, that the appeal is manifestly inadmissible since UPA lacks an interest in the annulment of the contested order.²⁰ In its view, UPA accepts that it is not individually concerned by the contested regulation within the meaning of the fourth paragraph of Article 230 EC. According to the Commission, the four pleas invoked by UPA seek in substance to show that the contested order violated the principle of effective judicial protection. However, even if the Court of Justice were to annul the contested order on that ground, UPA would not be granted standing by the Court of First Instance — and its substantive allegations would therefore not be examined — since standing is to be determined exclusively on the basis of the criteria laid down in the fourth paragraph of Article 230 EC. In that context, the Commission contends that the reasons given in paragraphs 61 to 64 of the contested order must be regarded as *obiter dicta*, the actual reason for the decision to dismiss UPA's action being that it was not individually concerned.

27. According to the Council and the Commission, the appeal is also unfounded. They maintain, in reply to the three first pleas invoked by UPA, that the reasoning in the contested order is not insufficient or contradictory, and that it rests on a correct understanding of the appellant's arguments.

28. In response to the fourth plea, the Commission states that, while the right to effective judicial protection is a recognised principle of Community law, that principle does not enter into play every time an individual seeks to challenge an act of general application directly before the Community judicature. The Treaty has established a complete system of remedies which enables individuals to challenge acts of general application through proceedings before national courts (which may request preliminary rulings from the Court of Justice) where those acts are implemented by national authorities or the Community institutions. To deny an individual standing to challenge directly a measure of general application under the fourth paragraph of Article 230 EC does not, therefore, in itself violate the principle of effective judicial protection.

26. In my view, for reasons which will become apparent, it is unnecessary to deal

²⁰ — The Commission refers in that regard to Case T-16/96 *Cityflyer Express* [1998] ECR II-757, paragraphs 30 to 35 of the judgment.

29. Moreover, where rules of national law, exceptionally, prevent an individual from challenging a measure of general application before the national courts, or from obtaining a preliminary ruling from the Court of Justice on the alleged illegality of that measure, the solution is not to modify the system of remedies laid down in the Treaty, or to adopt a *contra legem* interpretation of Article 230 EC, but to change those rules of national law in order to ensure that the principle of effective judicial protection is respected and that the Member State in question complies with its duty of cooperation laid down in Article 10 EC. The Commission accordingly concludes that the Court should reaffirm its case-law to the effect that the standing of individuals is to be decided exclusively by reference to the conditions of direct and individual concern laid down in Article 230 EC.

Spanish administration in damages for loss ensuing from the violation of that right.

Delimitation of the issues

31. It is the fourth plea invoked by UPA which raises the important question of principle which I have set out in paragraph 3 above. At the hearing the parties and the Commission focused on that issue and I consider that it is therefore appropriate to start by examining the fourth plea.

32. In order to determine whether that plea is well founded, it falls to be considered, first, whether there is support in the case-law for the approach suggested by UPA and if so, secondly, whether that approach should be confirmed by the Court of Justice in the present case.

30. Finally, the Commission contests UPA's assertion that it is impossible to challenge the lawfulness of the contested regulation before the Spanish courts. In that context, the Commission asserts that UPA might (i) address to the Spanish administration a request for one of the types of aid which were abolished by the contested regulation with a view to challenging the explicit or implicit refusal of the administration to meet that request; (ii) raise the alleged violation of its fundamental right to effective judicial protection before the Spanish Tribunal Constitucional (Constitutional Court); or (iii) sue the

The judgment in *Greenpeace*

33. The Court's judgment in *Greenpeace*²¹ must, as UPA points out, be the starting point for the analysis of the issue raised by

²¹ — Case 321/95 P [1998] ECR I-1651, at paragraphs 32 to 34.

the present case. In that case a number of individuals and environmental organisations sought to challenge the validity of a Commission decision granting Community funding for the construction of two power plants in the Canary Islands. The Court of First Instance had dismissed that application on the grounds that the applicants were not individually concerned by the impugned decision. On appeal, the Court of Justice held, first, that '[t]he interpretation of [the fourth paragraph of Article 230 EC] that the Court of First Instance applied in concluding that the appellants did not have *locus standi* [was] consonant with the settled case-law of the Court of Justice'.²² It then rejected arguments to the effect that that case-law should not be applied to challenges based essentially on environmental grounds.²³ Finally, it considered an argument — put forward by the applicants — to the effect that the impugned decision could not be challenged in national courts, and that they should therefore be granted standing under the fourth paragraph of Article 230 EC. The Court rejected that argument as follows:²⁴

'As regards the appellants' argument that application of the Court's case-law would mean that, in the present case, the rights which they derive from Directive 85/337 would have no effective judicial protection at all, it must be noted that, as is clear from the file, Greenpeace brought proceedings before the national courts... Although the

subject-matter of those proceedings and of the action brought before the Court of First Instance is different, both actions are based on the same rights afforded to individuals by Directive 85/337, so that in the circumstances of the present case those rights are fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling under Article [234 EC]... The Court of First Instance did not therefore err in law in determining the question of the appellants' *locus standi* in the light of the criteria developed by the Court of Justice in the case-law set out at paragraph 7 of this judgment'.

34. It is, as UPA stresses, possible to read those paragraphs as suggesting that an individual must be granted *locus standi* to challenge a Community measure where an application of the traditional case-law of the Court of Justice would lead to a denial of effective judicial protection owing to the impossibility of challenging the measure in proceedings before national courts. That is however, as the Commission points out, not the only possible reading of the *Greenpeace* judgment. In that context, the Commission draws attention to *Federación de Cofradías de Pescadores de Guipúzcoa and others*,²⁵ where the President of the Court of Justice held:

'In the present case, first of all, as regards the applicants' argument that the validity

22 — Paragraph 27 of the judgment.

23 — Paragraphs 30 and 31 of the judgment.

24 — Paragraphs 32 to 34 of the judgment.

25 — Case C-300/00 P-R [2000] ECR I-8797, at paragraph 37 of the order.

of Regulation No 2742/1999 cannot be submitted to the Court of Justice for assessment otherwise than by means of a direct application for annulment, it must be observed that such a circumstance, even assuming it to be established, cannot constitute authority for changing the system of remedies and procedures established by Articles 230 EC, 234 EC and 235 EC, which is designed to give the Court of Justice the power to review the legality of acts of the institutions. In no case can such a circumstance allow an action for annulment brought by a natural or legal person which does not satisfy the conditions laid down by the fourth paragraph of Article 230 EC to be declared admissible (see the orders in Case C-10/95 P *Asocarne v Council* [1995] ECR I-4149, paragraph 26, and in Case C-87/95 P *CNPAAP v Council* [1996] ECR I-2003, paragraph 38).²⁶

ciple be challenged by individuals through proceedings before national courts,²⁷ and that individual applicants are granted effective judicial protection against unlawful measures because the national courts may request a preliminary ruling on the validity of Community measures from the Court of Justice.²⁸ I will consider first the assumption that the preliminary ruling procedure provides effective judicial protection against general measures. Although I shall suggest that that assumption is for a number of reasons not correct, and that it is therefore desirable to enlarge standing before the Court of First Instance, those reasons are by no means the strongest reasons for reaching that conclusion. I turn to those further arguments below (paragraphs 59 to 99).

35. While it is, in my view, clear that the *Greenpeace* judgment does not exclude the possibility that standing might be granted, in a particular instance, where the application of the fourth paragraph of Article 230 EC as interpreted in the case-law would entail a denial of effective judicial protection, I do not propose to pursue the question whether the Court intended to endorse that possibility. Suffice it to note that the Court's judgment is based on the view that Community measures of general application should in prin-

Is the assumption correct that the preliminary ruling procedure provides full and effective judicial protection against general Community measures?

36. At the hearing, UPA stated that it does not ask the Court of Justice to change its case-law on the interpretation of the fourth paragraph of Article 230 EC. However, implicit in its arguments is a strong criticism of the case-law, since it is alleged that it may lead to a denial of justice unless

26 — See also the Order of the Court of Justice in Case C-301/99 P *Area Cova and Others v Council and Commission* [2001] ECR I-1005, at paragraph 47.

27 — See, to the same effect, Case C-209/94 P *Buralux v Council* [1996] ECR I-615, paragraphs 35 and 36 of the judgment.

28 — See, to the same effect, Case 294/83 *Les Verts* [1986] ECR 1339, paragraph 23 of the judgment.

exceptions are made to it in specific instances.

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

37. I agree with UPA that the case-law on the *locus standi* of individual applicants is problematic. As I shall suggest below, the fact that an individual cannot (in most cases) challenge directly a measure which adversely affects him, if it is a measure of general application, seems unacceptable for, essentially, two reasons. First, the fourth paragraph of Article 230 EC must be interpreted in such a way that it complies with the principle of effective judicial protection. Proceedings before national courts do not, however, always provide effective judicial protection of individual applicants and may, in some cases, provide no legal protection whatsoever. Second, the Court's case-law on the interpretation of the fourth paragraph of Article 230 EC encourages individual applicants to bring issues of validity of Community measures indirectly before the Court of Justice via the national courts. Proceedings brought directly before the Court of First Instance are however more appropriate for determining issues of validity than proceedings before the Court of Justice pursuant to Article 234 EC, and less liable to cause legal uncertainty for individuals and the Community institutions. In addition to those points, it may be argued that the Court's restrictive attitude towards individual applicants is anomalous in the light of its case-law on other aspects of judicial review and recent developments in the administrative laws of the Member States.

38. As is common ground in the present case, the case-law of the Court of Justice acknowledges the principle that an individual who considers himself wronged by a measure which deprives him of a right or advantage under Community law must have access to a remedy against that measure and be able to obtain complete judicial protection.²⁹

39. That principle is, as the Court has repeatedly stated, grounded in the constitutional traditions common to the Member States and in Articles 6 and 13 of the European Convention on Human Rights.³⁰ Moreover, the Charter of fundamental rights of the European Union,³¹ while itself not legally binding, proclaims a generally recognised principle in stating in Article 47 that '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'.

29 — See similarly the Opinion of Advocate General Darmon in Case C-97/91 *Borelli* [1992] ECR I-6313, at paragraph 31.

30 — See, for example, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18 of the judgment.

31 — Done at Nice, 7 December 2000: OJ 2000 C 364, p. 1.

40. In my view, proceedings before national courts are not, however, capable of guaranteeing that individuals seeking to challenge the validity of Community measures are granted fully effective judicial protection.

national courts do not have power to decide what is at issue.

41. It may be recalled, first of all, that the national courts are not competent to declare measures of Community law invalid.³² In a case concerning the validity of a Community measure, the competence of the national court is limited to assessing whether the applicant's arguments raise sufficient doubts about the validity of the impugned measure to justify a request for a preliminary ruling from the Court of Justice. It seems to me, therefore, artificial to argue that the national courts are the correct forum for such cases. The strictly limited competence of national courts in cases concerning the validity of Community measures may be contrasted with the important role which they play in cases concerning the interpretation, application and enforcement of Community law. In such cases, the national courts may, as the Commission stated at the hearing, be described as the ordinary courts of Community law. That description is, however, not appropriate for cases which do not involve questions of interpretation, but raise only issues of the validity of Community measures, since in such cases the

42. Second, the principle of effective judicial protection requires that applicants have access to a court which is competent to grant remedies capable of protecting them against the effects of unlawful measures. Access to the Court of Justice via Article 234 EC is however not a remedy available to individual applicants as a matter of right. National courts may refuse to refer questions, and although courts of last instance are obliged to refer under the third paragraph of Article 234 EC, appeals within the national judicial systems are liable to entail long delays which may themselves be incompatible with the principle of effective judicial protection and with the need for legal certainty.³³ National courts — even at the highest level — might also err in their preliminary assessment of the validity of general Community measures and decline to refer questions of validity to the Court of Justice on that basis. Moreover, where a reference is made, it is in principle for the national court to formulate the questions to be answered by the Court of Justice. Individual applicants might thus find their claims

32 — Case 314/85 *Foto-Frost* [1987] ECR 4199.

33 — Moreover, in relation to Title IV of Part Three of the EC Treaty, only courts of last instance are entitled to refer: see Article 68(1).

redefined by the questions referred. Questions formulated by national courts might, for example, limit the range of Community measures which an applicant has sought to challenge or the grounds of invalidity on which he has sought to rely.

43. Third, it may be difficult, and in some cases perhaps impossible, for individual applicants to challenge Community measures which — as appears to be the case for the contested regulation — do not require any acts of implementation by national authorities. In that situation, there may be no measure which is capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure might, in some instances, be able to bring the validity of a Community measure before the national courts by violating the rules laid down by the measures and rely on the invalidity of those rules as a defence in criminal or civil proceedings directed against him does not offer the individual an adequate means of judicial protection. Individuals clearly cannot be required to breach the law in order to gain access to justice.

44. Finally, compared to a direct action before the Court of First Instance, proceedings before the national courts present serious disadvantages for individual applicants. Proceedings in the national courts, with the additional stage of a reference under Article 234 EC, are likely to involve substantial extra delays and costs. The potential for delay inherent in proceedings brought before domestic courts, with the

possibility of appeals within the national system, makes it likely that interim measures will be necessary in many cases. However, although national courts have jurisdiction to suspend a national measure based on a Community measure or otherwise to grant interim relief pending a ruling from the Court of Justice,³⁴ the exercise of that jurisdiction is subject to a number of conditions and is — despite the Court's attempts to provide guidance as to the application of those conditions — to some extent dependent on the discretion of national courts. In any event, interim measures awarded by a national court would be confined to the Member State in question, and applicants might therefore have to bring proceedings in more than one Member State. That would, given the possibility of conflicting decisions by courts in different Member States, prejudice the uniform application of Community law, and in extreme cases could totally subvert it.

Proceedings before the Court of First Instance under Article 230 EC are generally more appropriate for determining issues of validity than reference proceedings under Article 234 EC

45. I consider, moreover, that proceedings before the Court of First Instance under

34 — See Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415; Case C-465/93 *Atlanta Fruchthandels-gesellschaft* [1995] ECR I-3761.

Article 230 EC are generally more appropriate for determining issues of validity than reference proceedings under Article 234 EC.

46. The procedure is more appropriate because the institution which adopted the impugned measure is a party to the proceedings from beginning to end and because a direct action involves a full exchange of pleadings, as opposed to a single round of observations followed by oral observations before the Court. The availability of interim relief under Articles 242 and 243 EC, effective in all Member States, is also a major advantage for individual applicants and for the uniformity of Community law.

48. Of even greater importance is the point that it is manifestly desirable for reasons of legal certainty that challenges to the validity of Community acts be brought as soon as possible after their adoption. While direct actions must be brought within the time-limit of two months laid down in the fifth paragraph of Article 230 EC, the validity of Community measures may, in principle, be questioned before the national courts at any point in time.³⁵ The strict criteria for standing for individual applicants under the existing case-law on Article 230 EC make it necessary for such applicants to bring issues of validity before the Court via Article 234 EC, and may thus have the effect of reducing legal certainty.

Preliminary conclusion

47. Moreover, where a direct action is brought, the public is informed of the existence of the action by means of a notice published in the Official Journal and third parties may, if they are able to establish a sufficient interest, intervene in accordance with Article 37 of the Statute of the Court. In reference proceedings interested individuals cannot submit observations under Article 20 of the Statute unless they have intervened in the action before the national court. That may be difficult, for although information about reference proceedings is published in the Official Journal, individuals may not be aware of actions in the national courts at a sufficiently early stage to intervene.

49. I consider, for all of those reasons, that the case-law on the *locus standi* of individual applicants as re-considered in the judgment in *Greenpeace*, whichever way that judgment is understood, is incompatible with the principle of effective judicial protection. While review of Community measures through proceedings before national courts may be appropriate *where*

35 — The only exception being where there is no doubt that the individual applicant had standing under the fourth paragraph of Article 230 EC to challenge the measure in question but omitted to do so, see *TWD*, cited in note 5; Case C-178/95 *Wilho* [1997] ECR I-585; Case C-239/99 *Nach Europe* [2001] ECR I-1197.

a case raises mixed issues of interpretation and validity of Community law, proceedings before the Court of First Instance under the fourth paragraph of Article 230 EC are clearly more appropriate *where a case concerns exclusively the validity of a Community measure*. Since such cases will by definition raise questions of law, the possibility of an appeal on points of law provided by Article 225 EC would ensure that the Court of Justice could exercise effective ultimate control over the decisions adopted by the Court of First Instance.

The approach favoured by UPA

50. I do not agree with UPA, however, that it follows from that conclusion that an applicant who is not individually concerned within the meaning of the fourth paragraph of Article 230 EC, as that provision has hitherto been interpreted in the case-law, should be granted standing to challenge a regulation where an examination of the particular case reveals that the applicant would otherwise be denied effective judicial protection.

51. First, there is — as the Commission points out — no support for that suggestion in the wording of the fourth paragraph of Article 230 EC. The conditions for *locus standi* laid down by that provision are objectively defined ('direct and individual

concern') and make no reference to the availability or absence, in particular instances, of alternative remedies in national courts.

52. Second, the Treaty confers upon the Community judicature the task of ruling on the interpretation and validity of Community law; it is — as the Court of Justice has repeatedly stated — not competent to rule on the interpretation and validity of national law. For the Community judicature to examine, on a case-by-case basis, the existence in national law of procedures and remedies enabling individual applicants to challenge Community measures would in my view come perilously close to taking on a role not conferred by the Treaty. Moreover, the Community judicature is not well placed to carry out what may in some cases be a complex and time-consuming inquiry into the details of national procedural law. That point is illustrated by the present case where the parties disagree on the applicant's position in Spanish law and where it is difficult, perhaps impossible, to determine on the basis of the information in the file and the arguments presented at the hearing whether the applicant has an alternative remedy in national law.

53. Third, to accept that *locus standi* under the fourth paragraph of Article 230 EC may depend on national law — which is likely to differ as between Member States

and to develop over time — would inevitably lead to inequality and a loss of legal certainty in an area of law already marked by considerable complexity. It would in my view be unsatisfactory if, for example, an individual in Spain were permitted to challenge a regulation under the fourth paragraph of Article 230 EC whilst an individual in the United Kingdom, affected by the regulation in a similar way, was denied access to the Court of First Instance owing to the different standing rules which apply in the two Member States. Such an outcome would infringe the principle of equal treatment and could result in the lawfulness of the same measure being raised simultaneously in proceedings before the Court of First Instance and the Court of Justice.

The approach favoured by the Council and the Commission

54. The question, then, is how to ensure — within the limitations imposed by the wording and structure of the Treaty — that individual applicants are granted effective judicial protection. The Council and the Commission have suggested, essentially, that the solution is to change rules of national law which render it difficult, or impossible, to challenge Community measures in the national courts.

55. I cannot accept that suggestion either.

56. Access to the Court of Justice via Article 234 EC is — as I have explained above — not a remedy available to individual applicants as a matter of right. Individuals cannot, as a matter of Community law, control whether a reference is made, which measures are referred to the Court of Justice for review or what grounds of invalidity are raised in the questions put by the national court. Those features are inherent in the system of judicial cooperation laid down in Article 234 EC and they cannot be changed by modifications at the level of national procedural law. Nor would the approach favoured by the Council and the Commission resolve the other problems linked to the preliminary rulings procedure identified above: applicants would continue to face serious delays, problems of obtaining interim relief would persist and the advantages — in terms of procedure and legal certainty — of direct actions would not be realised.

57. The suggestion that effective judicial protection would be secured by a ruling to the effect that national laws which render it difficult or impossible to challenge Community measures are contrary to Community law might also underestimate the difficulties of changing the operation of

national legal systems. It would, as UPA points out, be very difficult — both for individuals and for the Commission acting pursuant to Article 226 EC — to monitor and to enforce an obligation to grant individuals the possibility of challenging general Community acts before national courts.

number of persons affected by a measure the less likely it is that judicial review under the fourth paragraph of Article 230 EC will be made available. The fact that a measure adversely affects a large number of individuals, causing wide-spread rather than limited harm, provides however to my mind a positive reason for accepting a direct challenge by one or more of those individuals.

58. In addition to those points, it may be noted that to secure access to justice for individual applicants in all of the Member States, the Court of Justice would have to rule, perhaps repeatedly, on issues which are inherently sensitive and which have hitherto been considered to fall squarely within the realm of national procedural autonomy.

60. In my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.

Suggested solution: a new interpretation of the notion of individual concern

Advantages of the suggested interpretation of the notion of individual concern

59. The key to the problem of judicial protection against unlawful Community acts lies therefore, in my view, in the notion of individual concern laid down in the fourth paragraph of Article 230 EC. There are no compelling reasons to read into that notion a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. On that reading, the greater the

61. A development along those lines of the case-law on the interpretation of Article 230 EC would have several very substantial advantages.

62. First, if one rejects the solutions advanced by UPA and by the Council and Commission — and there are very strong

reasons for doing so — it seems the only way to avoid what may in some cases be a total lack of judicial protection — a *déni de justice*.

what court to take proceedings, or even lead them to take parallel proceedings in the national courts and the Court of First Instance.

63. Second, the suggested interpretation of the notion of individual concern would considerably improve judicial protection. By laying down a more generous test for standing for individual applicants than that adopted by the Court in the existing case-law, it would not only ensure that individual applicants who are directly and adversely affected by Community measures are never left without a judicial remedy; it would also allow issues of validity of general measures to be addressed in the context of the procedure which is best suited to resolving them, and in which effective interim relief is available.

65. Fourth, by ruling that individual applicants are individually concerned by general measures which affect them adversely, the Court of Justice would encourage the use of direct actions to resolve issues of validity, thus limiting the number of challenges raised via Article 234 EC. That would, as explained above, be beneficial for legal certainty and the uniform application of Community law. It may be noted in that regard that the *TWD* case-law³⁷ — according to which an individual cannot challenge a measure via Article 234 EC where, although there was no doubt about his standing under the fourth paragraph of Article 230 EC, he omitted to take action within the time-limit laid down in the fifth paragraph of that Article — would, in my view, not normally extend to general measures. Individuals who were adversely affected by general measures would therefore not be precluded by that case-law from challenging such measures before national courts. None the less, if the notion of individual concern were interpreted in the way I have suggested, and standing for individuals accordingly liberalised, it may be expected that many challenges would be brought by way of direct action before the Court of First Instance.

64. Third, it would also have the great advantage of providing clarity to a body of case-law which has often, and rightly in my view, been criticised for its complexity and lack of coherence,³⁶ and which may make it difficult for practitioners to advise in

36 — See, for example, A. Arnulf, 'Private applicants and the action for annulment since *Codorniu*', cited in note 6, at p. 52, and other articles cited in note 5 above.

37 — See cases cited in note 35.

66. A point of equal, or even greater, importance is that the interpretation of Article 230 EC which I propose would shift the emphasis of judicial review from questions of admissibility to questions of substance. While it may be accepted that the Community legislative process should be protected against undue judicial intervention, such protection can be more properly achieved by the application of substantive standards of judicial review which allow the institutions an appropriate 'margin of appreciation' in the exercise of their powers³⁸ than by the application of strict rules on admissibility which have the effect of 'blindly' excluding applicants without consideration of the merits of the arguments they put forward.

67. Finally, the suggested interpretation of the notion of individual concern would remove a number of anomalies in the Court's case-law on judicial review. The most important anomalies arise from the fact that the Court has adopted different approaches to the notion of individual concern and to other provisions of Article 173 of the EEC Treaty (now, after amendment, Article 230 EC).

68. Thus, the Court has taken a generous view of the types of acts which are suscep-

tible to review. Under the first paragraph of Article 173 of the EEC Treaty, the Court was originally competent to review 'acts of the Council and the Commission other than recommendations and opinions'. Article 189 of the EEC Treaty (now Article 249 EC) defined binding Community acts as regulations, directives and decisions. It might have been thought, on the basis of those provisions, that the Court was only competent to review regulations, directives and decisions adopted by the Council or the Commission. However, in *ERTA*³⁹ the Court was willing to review the legality of Council proceedings regarding the negotiation and conclusion by the Member States of an agreement on the working conditions of the crews of vehicles engaged in international road transport⁴⁰ on the ground, essentially, that the purpose of the procedure for judicial review laid down in Article 173 of the EEC Treaty — which is to ensure observance of the law in the interpretation and application of the Treaty — would not be fulfilled unless it was possible to challenge all measures, whatever their nature or form, which are intended to have legal effects.⁴¹ In *Les Verts*⁴² the Court was asked to review two measures, adopted by the European Parliament, on the reimbursement of expenses incurred by parties taking part in the 1984 elections. In declaring that action admissible, it held that while 'Article 173 refers only to acts of the Council and the Commission... an interpretation of [that provision] which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary to both the spirit of the Treaty as

39 — Case 22/70 *Commission v Council* [1971] ECR 263, paragraphs 39 to 42 of the judgment.

40 — The European Road Transport Agreement.

41 — For an application of that principle to a Commission Communication, see Case C-57/95 *France v Commission* [1997] ECR I-1627.

42 — Cited in note 28, paragraphs 24 and 25 of the judgment.

38 — See in that regard, in particular, Case C-331/88 *Fedesa* [1990] ECR I-4023, paragraph 14 of the judgment.

expressed in Article 164 [now Article 220 EC] and to its system'.⁴³

70. Similarly, when considering on what grounds the validity of Community measures adopted may be challenged, the Court held that although Article 173 of the EEC Treaty provided that the Court had jurisdiction in actions brought on grounds of 'infringement of this Treaty or of any rule of law relating to its application', 'the need for a complete and consistent review of legality require[d] that provision to be construed as not depriving the Court of jurisdiction to consider, in proceedings for the annulment of a measure based on a provision of the EEC Treaty, a submission concerning the infringement of a rule of the EAEC or ECSC Treaties'.⁴⁷

69. When deciding which institutions are entitled to bring proceedings for annulment under the Treaty, the Court has not adopted a strict reading of the Treaty text either. Prior to the entry into force of the Treaty on European Union, the first paragraph of Article 173 of the EEC Treaty provided that the Court had jurisdiction 'in actions brought by a Member State, the Council or the Commission'. The absence of any reference to the European Parliament in that provision did not, however, prevent the Court from holding in *Chernobyl*⁴⁴ that 'an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives',⁴⁵ for while '[t]he absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap,... it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties'.⁴⁶

71. The restrictive attitude towards individual applicants which the Court has adopted in the context of the fourth paragraph of Article 230 EC — and which it has, despite the extension of the powers of the Community by successive Treaty amendments, declined to reconsider — appears difficult to justify in the light of the cases decided under the other paragraphs of Article 173 of the EEC Treaty, where the Court has adopted a generous and dynamic interpretation of the Treaty, or even a position contrary to the text, to ensure that the evolution in the powers of the Community institutions does not undermine the rule of law and the institutional balance.

72. A further anomaly in this area arises from the fact that under Community law

43 — See also Case 2/88 *Zwartveld* [1990] ECR I-3365, paragraphs 23 and 24 of the judgment.

44 — Case C-70/88 *European Parliament v Council* [1990] ECR I-2041.

45 — Paragraph 27.

46 — Paragraph 26.

47 — Case C-62/88 *Greece v Council* [1990] ECR I-1527, paragraph 8 of the judgment.

there are no restrictions on the standing of individuals to bring actions for damages under Articles 235 EC and 288 EC. The class of individuals capable of seeking damages for loss caused by Community measures is thus unlimited. In the context of the strict standing rules applied under the fourth paragraph of Article 230 EC, that seems paradoxical since damages actions will often involve, or effectively involve, challenges to the legality of general Community measures. Thus the Court of First Instance already has jurisdiction to review the legality of general measures in claims for damages (or on a plea of illegality under Article 241 EC) at the suit of an unlimited class of individuals.

Objections to the suggested interpretation of the notion of individual concern

73. What, then, are the objections to the suggestion that an individual applicant is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests? According to the Council and the Commission a broader interpretation of the notion of individual concern than that adopted in the Court's existing case-law would be contrary to the fourth paragraph of

Article 230 EC and result in a flood of additional challenges to Community acts.

74. I am not convinced by those arguments.

75. First, it may be acknowledged that the wording of Article 230 EC sets certain limits which must be respected. All individual applicants do not have standing to challenge all Community acts. However, I do not accept the proposition that the wording of the fourth paragraph of Article 230 EC excludes the Court from re-considering its case-law on individual concern. It is clear, and cannot be stressed too strongly, that the notion of individual concern is capable of carrying a number of different interpretations, and that when choosing between those interpretations the Court may take account of the purpose of Article 230 EC and the principle of effective judicial protection for individual applicants.⁴⁸ In any event, the Court's case-law in other areas⁴⁹ acknowledges that an evolutionary interpretation of Article 230 EC is needed in order to fill procedural gaps in the system of remedies laid down by the Treaty and ensure that the scope of judicial protection is extended in response to the growth in the powers of the Com-

48 — See F. Schockweiler, 'L'accès à la justice dans l'ordre juridique communautaire', *Journal des tribunaux, Droit européen*, No 25, 1996, p. 1, at p. 7.

49 — See above paragraphs 68 to 70.

munity institutions. While that case-law acknowledges that it may even be necessary to depart from the wording of the Treaty to provide effective judicial protection, the Court is not required to take such a step in the present case, since the interpretation I propose is wholly compatible with the wording of the Treaty.

76. Second, the wording of the second paragraph of Article 173 of the EEC Treaty (now the fourth paragraph of Article 230 EC) differs from, and is more restrictive than, the wording of Article 33 of the ECSC Treaty. It has been argued that that difference reflects the Treaty draftsmen's intention to break away from the liberal case-law on standing which had developed under the ECSC Treaty since its entry into force in 1952,⁵⁰ and to impose strict limits on the scope of *locus standi* under the EEC Treaty,⁵¹ in order to prevent numerous challenges by individual applicants from undermining legislation laboriously adopted by unanimity in the Council of Ministers.⁵²

77. There was, in my view, never much force in that argument.⁵³ To insulate potentially unlawful measures from judicial scrutiny can rarely, if ever, be justified on grounds of administrative or legislative efficiency. That is true in particular where limitations on standing may lead to a complete denial of justice for particular individuals. Arguments drawn from a comparison of the ECSC and the EEC Treaties are, moreover, much less persuasive today than when the Court was first called upon to determine the meaning of individual concern.⁵⁴ The second paragraph of Article 173 of the EEC Treaty has been renumbered but never amended substantively since the Treaty came into force on 1 January 1958. Inferences drawn from the historical background of a provision of that age cannot be allowed to freeze the interpretation of the notion of individual concern. That point is underlined by the fact that the reasons which, allegedly, motivated the Treaty draftsmen to limit individual standing under the EEC Treaty are, in any event, of limited relevance today. On the one hand, the European Community is now firmly established and its legislative process, to a large extent based on the adoption of measures by majority voting in the Council of Ministers and the European Parliament, is sufficiently robust to withstand judicial scrutiny at the instigation of individuals. On the other hand, Community law now affects the

50 — Joined Cases 7/54 and 9/54 *Industries Sidérurgiques Luxembourgeoises v High Authority* [1956] ECR 175; Case 8/55 *Fédération Charbonnière de Belgique v High Authority* [1956] ECR 292.

51 — See, in particular, the Opinion of Advocate General Lagrange in Joined Cases 16/62 and 17/62 *Producteurs de Fruits v Council* [1962] ECR 901, at p. 916; T. Hartley, *The Foundations of European Community Law* (4th ed., 1998), p. 376.

52 — See, in that regard, the concerns expressed by Advocate General Lagrange in *Producteurs de Fruits v Council*, cited in note 51, at p. 916 of the Opinion.

53 — The argument never applied to those Council regulations and directives which were, from the beginning of the EEC, adopted by majority voting, nor to regulations and directives of the Commission.

54 — See A. Arnall, 'The action for annulment: a case of double standards?', *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol. 1, (2000), p. 177, at p. 189.

interests of individuals directly, frequently and deeply; there is therefore a correspondingly greater need for effective judicial protection against unlawful action.

78. It may also be noted that although the European Communities originate in a set of Treaties concluded by the Member States in the context of public international law, the Community legal order has developed in such a way that it would no longer be accurate to describe it as a system of intergovernmental cooperation, nor would it be appropriate to describe the Court of Justice as an international tribunal. The fact that individual applicants have traditionally not, or only exceptionally, been given standing to appear before international judicial bodies is therefore of no relevance for the interpretation to be given to the fourth paragraph of Article 230 EC in the present day.

79. Third, I am not convinced that a relaxation of the requirements for individual concern would result in a deluge of cases which would overwhelm the judicial machinery. There is no record of that having happened in those legal systems, inside and outside the European Union,

which have in recent years progressively relaxed their requirements for standing.⁵⁵ The instigation of proceedings by an individual pursuant to Article 230 EC is moreover subject to a number of conditions. In addition to individual concern, applicants are required to show direct concern, and actions must be brought within a time-limit of two months. While those conditions have played only a limited role in the case-law in the past, their importance would almost certainly increase in response to a relaxation of the requirement of individual concern. It may be thought that a relaxation of the requirements for standing would therefore result in an increase in the number of applications under the fourth paragraph of Article 230 EC which, though appreciable, would not be insuperable.

80. An increase in the case-load need not undermine the Community judiciary's ability to carry out its task and deliver speedy justice. A large proportion of the increase would presumably consist of challenges by different individuals and associations to the same Community measures. Such cases could be dealt with, without any significant additional drain on the resources of the Court of First Instance, by joinder of cases or by selecting test cases. Where challenges were manifestly unfounded in substance, the Court of First Instance could, under Article 111 of its

⁵⁵ — See below paragraph 85.

Rules of Procedure, dismiss them by reasoned order. Given the complexity of the present case-law on standing, and the detailed reasoning contained in the orders of the Court of First Instance in particular on issues of individual concern, it would hardly require considerable extra effort to dismiss such applications on substantive grounds.

marks. Moreover it will remain possible, if necessary, to increase the number of judges and staff at the Court of First Instance.

Is the time ripe for an evolution in the interpretation of the notion of individual concern?

81. Furthermore, the efficiency of the Courts' case-handling could, if necessary, be increased by procedural and jurisdictional reforms. Certain amendments to the Rules of Procedure of the Court of First Instance, aimed at expediting proceedings, have already been introduced.⁵⁶ The Treaty of Nice⁵⁷ lays down a more flexible procedure for amendment of the Rules of Procedure of the Court of First Instance and the Court of Justice.⁵⁸ More importantly, the amendments to the Treaty proposed by the Treaty of Nice also envisage the creation of judicial panels to determine proceedings brought in specific areas⁵⁹ — such as staff complaints and, perhaps, trade

82. At the hearing, the Council stressed that the case-law on individual concern was settled and that it would therefore be inappropriate to depart from it in the present case. It is true that the Court should, for reasons of legal certainty, depart from settled case-law only where there are compelling arguments in favour of, and the time is ripe for, such a step. In the preceding sections, I have argued that the case for reconsidering the case-law on individual concern is indeed compelling. There are four developments which, in my view, show that the time has come for the Court to respond to those arguments.

83. First, the Council's assertion that the case-law on individual concern is entirely consistent and settled is not correct. The Court has, in a number of important judg-

⁵⁶ — Those amendments, which took effect on 1 February 2001, were published in OJ 2000 L 322, p. 1.

⁵⁷ — OJ 2001 C 80, p. 1.

⁵⁸ — Under Article 245 EC amendments proposed by the Court of Justice and the Court of First Instance required the unanimous approval of the Council. The proposed new Articles 224 and 225 EC provide for approval by the Council acting by a qualified majority.

⁵⁹ — Proposed new Article 225a EC.

ments decided over the past 10 years, relaxed the requirements for standing to some extent. In *Extramet*⁶⁰ and *Codorniu*⁶¹ the Court accepted that general measures in the form of regulations may be challenged by individual applicants, since '[t]he fact that an act is of general application does not prevent it from being of direct and individual concern to some of the traders concerned'.⁶² Moreover, the Court has held that an individual will be granted standing to challenge a general measure not only where the measure affects only a closed class of individuals to which the applicant belongs, but also where by reason of a factual situation which differentiates the applicant from all other persons he may be regarded as individually concerned.⁶³ Thus in *Codorniu* a Spanish producer of sparkling wines sought to challenge a provision of a regulation which reserved the use of the designation 'crémant' for wines produced in certain areas of France and Luxembourg. That provision was capable of affecting the position of all producers of sparkling wines in the Community using, or desiring to use, the designation 'crémant'. The Court found none the less that 'Codorniu registered the graphic trade mark "Gran Cremant de Codorniu" in Spain in 1924 and traditionally used that mark both before and after registration. By reserving the right to use the term "crémant" to French and

Luxembourg producers, the contested provision prevents Codorniu from using its graphic trade mark',⁶⁴ and it concluded that Codorniu had therefore 'established the existence of a situation which from the point of view of the contested provision differentiate[d] it from all other traders'.⁶⁵

84. The gradual movement towards wider access for individuals under the fourth paragraph of Article 230 EC suggests a growing acceptance of the view that strict standing requirements for individual applicants are no longer acceptable. The fact that, in *Greenpeace*, the Court apparently left open the possibility that standing might be granted in particular situations where the case-law would otherwise entail a denial of justice⁶⁶ may also be seen as a recognition of the problematic character of that case-law. A more explicit endorsement of that view is to be found in the contribution of the Court of Justice to the intergovernmental conference which led to the adoption of the Treaty of Amsterdam,⁶⁷ where it stated that '[i]t may be asked, however, whether the right to bring an action for annulment under Article 173

60 — Case C-358/89, cited in note 5.

61 — Case C-309/89 [1994] ECR I-1853.

62 — *Antillean Rice Mills*, cited in note 4, paragraph 46 of the judgment.

63 — *Ibid.*, paragraph 49 of the judgment.

64 — Paragraph 21 of the judgment.

65 — Paragraph 22 of the judgment.

66 — See above paragraph 35.

67 — *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union*, Luxembourg, May 1995.

of the EC Treaty (and the corresponding provisions of the other Treaties), which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions'.⁶⁸

85. Second, the case-law on standing for individual applicants is, as several commentators have pointed out, increasingly out of line with the administrative laws of the Member States.⁶⁹ Thus French law, and systems based on it, have used the notion of an 'acte faisant grief', so that practically any person adversely affected by a measure has standing to challenge it; and the notion of 'intérêt pour agir' has been construed broadly.⁷⁰ In English law, the jurisdictional requirement of a 'sufficient interest' for an applicant to apply for judicial review will rarely be an obstacle to access to the court.⁷¹

86. In other areas, the basic principles of judicial review have been modelled on the laws of the Member States. Thus Community law effectively protects fundamental principles derived from the national laws — principles such as proportionality, equality, legitimate expectations, legal certainty and fundamental human rights. In relation to standing, however, the position of the individual is far more restricted than in many, if not all, national legal systems. This is a paradoxical situation, especially given the continuing concern about the lack of full democratic legitimacy of Community legislation, which exposes the Community to a risk of resistance by national courts which, it should not be forgotten, have repeatedly emphasised their resolve to ensure that developments in Community law do not undermine the judicial protection of individuals.⁷²

87. It might be objected that some systems of national law draw a distinction between legislation and administrative measures and allow only for judicial review of administrative measures at the initiative of individ-

68 — Paragraph 20.

69 — See, in particular, A. Arnulf, 'Private applicants and the action for annulment under Article 173 of the EC Treaty', cited in note 6, at pp. 7 to 9; D. Waelbroeck and A.-M. Verheyden, 'Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: à la lumière du droit comparé et de la Convention des droits de l'homme', cited in note 6, at pp. 403 to 425; A. Albers-Llorens, *Private Parties in EC Law* (1996), pp. 30 to 40; C. Harlow, 'Access to justice as a human right', in *The EU and Human Rights*, P. Alston (ed.) (1999), p. 187, at p. 193.

70 — See R. Chapus, *Droit du contentieux administratif* (9th ed., 2001), pp. 419 to 457.

71 — See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (1995), pp. 106 to 127.

72 — See, in particular, the judgments of the Danish Højesteret in *Hanne Norup Carlsen v Statsminister Poul Nyrup Rasmussen* (UFR 1999 H 800); the German Bundesverfassungsgericht in *Brunner v The European Union Treaty* (2 BvR 2134/92 and 2 BvR 2159/92, BVerfGE 89, p. 155) and the Italian Corte Costituzionale in *Fragd SpA v Amministrazione delle Finanze* (decision 232 of 21 April 1989, (1989) 72 RIDL).

uals. Since general Community measures are analogous in their effects to legislation, review at the instigation of individuals is not required.

Member States, such as Denmark, Greece, Ireland,⁷⁵ Portugal and Sweden, challenges to the lawfulness of legislation may be raised before, and upheld by, the ordinary courts.

88. I do not accept that objection.

89. While it may be true that access to judicial review of legislation is generally subject to stricter conditions than review of administrative measures, the laws of the Member States do not in general *exclude* individuals from challenging legislation which violates constitutionally enshrined rights or fundamental principles of law.⁷³ In certain Member States such as Austria, Belgium, Germany and Spain (and some of the States currently applying for membership of the European Union⁷⁴) legislation may be challenged by individuals directly before constitutional courts. In other

90. The restrictions on access to judicial review of legislation which exist in the Member States are, moreover, based on two essential premisses: national laws generally establish a clear distinction between legislation and administrative measures and legislation is systematically adopted by more democratically legitimate procedures than administrative measures. By contrast, the Community treaties do not establish a clear 'hierarchy of norms',⁷⁶ and while the EC Treaty draws a distinction between basic Community measures and implementing measures,⁷⁷ the former are not systematically adopted by more democratically legitimate procedures than the latter. For example, a basic regulation adopted by the Council and the European Parliament may confer the task of adopting imple-

73 — See L. Favoreu and J. Jolowicz (eds.), *Le contrôle juridictionnel des lois* (1986); A. Brewer-Carias, *Judicial Review in Comparative Law* (1989).

74 — G. Brunner, 'Development of a constitutional judiciary in Eastern Europe', *Review of Central and East European Law* 1992, p. 535; H. Schwartz, 'The new East European constitutional courts', *Michigan Journal of International Law* 1992, p. 741; M. Verdussen (ed.), *La justice constitutionnelle en Europe centrale* (1997).

75 — Under Article 34 of the Irish Constitution, the jurisdiction to review the constitutionality of legislation is vested in the High Court, with an appeal to the Supreme Court.

76 — The absence of a hierarchy of norms in Community law was noted, when the Treaty on European Union was adopted, in a declaration annexed to the Final Act. Declaration No 16 on the hierarchy of Community Acts states that '... the Intergovernmental Conference to be convened in 1996 will examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of act'.

77 — Article 202 EC.

menting measures upon the Council or the Commission. The choice of implementing authority may affect the procedures by which the implementing measures will be adopted and their democratic legitimacy. Moreover, while the European Parliament plays an increasingly important role in the Community legislative process, its powers vary with the area of the Treaty concerned.

order, to enable the Court [of Justice] to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law',⁷⁹ and that the task of the Court of First Instance was to 'improve the judicial protection of individual interests'.⁸⁰ It appears from those statements that the Community legislature envisaged a division of competence between the Court of First Instance and the Court of Justice: where the former would concentrate on reviewing the legality of Community measures at the suit of individuals, the latter would concentrate on ruling on issues of interpretation through the preliminary rulings procedure and on reviewing the legality of the judgments of the Court of First Instance, thus providing the ultimate control over the lawfulness of Community measures.

91. Nor can it be argued, by analogy with the position in certain Member States where review of legislation is limited to the constitutional court, that review of general measures should be confined to the Court of Justice, to the exclusion of the Court of First Instance. The Court of First Instance already has jurisdiction to review general measures, both in actions for damages and on a plea of illegality.

93. While the Court of Justice may have felt that the Decision establishing the Court of First Instance did not provide the means necessary to implement that vision fully, since it originally gave that Court jurisdiction in actions brought by individuals pursuant to the fourth paragraph of Article 230 EC only in matters related to competition law, the Community legislature has since then transferred competence from the Court of Justice to the Court

92. Moreover, in the preamble to the Decision establishing the Court of First Instance,⁷⁸ the Community legislature stated that 'it is necessary, in order to maintain the quality and effectiveness of judicial review in the Community legal

78 — Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, OJ 1988 L 319, p. 1.

79 — Fifth recital of the preamble.

80 — Fourth recital of the preamble.

of First Instance over all actions brought by individuals pursuant to the fourth paragraph of Article 230 EC.⁸¹ Moreover, the amendments proposed by the Treaty of Nice⁸² to the wording of Article 220 EC recognise the Court of First Instance as being not merely 'attached to the Court of Justice' (Article 225 EC), but as being responsible together with the Court of Justice for the observance of the law in the interpretation and application of the Treaty.

94. The Treaty of Nice envisages, in the new Article 225 EC, that the Court of First Instance shall have jurisdiction to hear and determine at first instance all cases referred to in Articles 230, 232, 235, 236 and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice. Thus in principle the Court of First Instance will have jurisdiction for all actions for annulment, whether introduced by individuals, Member States or Community institutions. The role of the Court of First Instance as the primary court for review of legality, subject to the appellate jurisdiction of the Court of Justice, will thereby be significantly enhanced.

81 — See Council Decision 93/350 Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, OJ 1993 L 144, p. 21; Council Decision of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, OJ 1994 L 66, p. 29.

82 — Cited in note 57.

95. With a view to the implementation of those provisions the Court of Justice has proposed, in a recent working paper, that, of actions for annulment brought by a Member State, a Community institution, or the European Central Bank, only those brought against the Parliament or the Council, or against the Parliament and the Council jointly, should be reserved to the Court of Justice under the Statute. Those cases are to be reserved to the Court of Justice, under the Court's proposal, so as to preserve its 'quasi-constitutional role' of reviewing the Community's 'basic legislative activities' ('l'activité normative de base'). However, 'in order to avoid reversing the previous transfer to the Court of First Instance of actions brought by individuals and undertakings, the proposal is limited to actions brought by Member States, Community institutions and the European Central Bank'.

96. In my view, whatever arrangements are made for the allocation between the Court of Justice and the Court of First Instance of actions brought by a Member State, a Community institution, or the European Central Bank, those arrangements cannot be allowed to affect the separate and overriding requirement that the individual should have the right to challenge all Community measures by which he is prejudiced. If, as seems to me appropriate, such challenges should be brought in the Court

of First Instance, the 'quasi-constitutional' role of the Court of Justice will be preserved by its appellate jurisdiction. Indeed that role will increase if individuals are allowed to challenge general measures before the Court of First Instance, with a right of appeal before the Court of Justice.

98. Some commentators have contrasted the high standards which the Court's case-law thus imposes on national legal systems with the limited access for individuals to the Community Courts.⁸⁷ While it may be too harsh to speak of 'double standards' in that respect, it cannot be denied that the strict rules on standing under the fourth paragraph of Article 230 EC as currently interpreted by the Court, and the textual and historical arguments invoked by the Council and the Commission in order to justify them, seem increasingly untenable in the light of the Court's case-law on the principle of effective judicial protection.⁸⁸

97. A final development which, in my view, suggests the need to reconsider the case-law on individual concern is the Court's evolving case-law on the principle of effective protection of rights derived from Community law in national courts. While that principle was enunciated in 1986, in the case of *Johnston*,⁸³ its implications have only gradually been spelt out in the Court's case-law in the subsequent period.⁸⁴ It is now clear from the judgments in *Factor-tame*⁸⁵ and *Verholen*⁸⁶ that the principle of effective judicial protection may require national courts to review all national legislative measures, to grant interim relief and to grant individuals standing to bring proceedings, even where they would be unable to do so under national law.

99. Thus, the time is now ripe to reconsider the strict interpretation of the fourth paragraph of Article 230 EC which — by encouraging individual applicants to bring issues of validity before the Court of Justice via Article 234 EC — has the effect of removing cases from the court which was created for the purpose of dealing with them, and to improve the judicial protection of individual interests.

83 — Case 222/84, cited in note 30.

84 — See, in particular, Case 222/86 *UNETEF v Heylens* [1987] ECR 4097; Case C-97/91 *Borelli* [1992] ECR I-6313; Case C-1/99 *Kofisa Italia* [2001] ECR I-207; and Case C-226/99 *Siples* [2001] ECR I-277.

85 — Case C-213/89 [1990] ECR I-2433, paragraphs 19 to 22 of the judgment.

86 — Joined Cases C-87/90, C-88/90 and C-89/90 [1991] ECR I-3757, paragraphs 23 to 24 of the judgment.

87 — See R. Caranta, 'Judicial protection against Member States: a new *ius commune* takes shape', *Common Market Law Review* 1995, p. 703, at pp. 724 to 725. See similarly C. Harlow, 'Towards a theory of access for the European Court of Justice', *Yearbook of European Law* 1992, p. 213, at pp. 228 to 229; C. Kilpatrick, 'The future of remedies in Europe', *The Future of Remedies in Europe*, C. Kilpatrick, T. Novitz and P. Skidmore (eds.) (2000), p. 9; A. Ward, *Judicial Review and the Rights of Private Parties in EC Law* (2000), p. 242; A. Arnall, article cited in note 54.

88 — In that regard, it may be noted that the Court of Justice explicitly rejected the possibility of double standards in the context of interim measures: see *Zuckerfabrik Süderdithmarschen*, cited in note 34, paragraph 20 of the judgment.

Conclusion

100. The case-law on the standing of individuals to bring proceedings before the Court of Justice (now before the Court of First Instance) has, over the years, given rise to a large volume of discussion, much of it very critical. It cannot be denied that the limited admissibility of actions by individuals is widely regarded as one of the least satisfactory aspects of the Community legal system.⁸⁹ It is not merely the restriction on access which is criticised; it is also the complexity and apparent inconsistency which have resulted from attempts by the Court to allow access where the traditional approach would lead to a manifest 'denial of justice'. Thus, one of the fullest and most authoritative recent studies refers to 'the blot on the landscape of Community law which the case-law on admissibility has become'.⁹⁰ While there may be doubts about the degree of criticism that can be levelled at the case-law, it is surely indisputable that access to the Court is one area above all where it is essential that the law itself should be clear, coherent and readily understandable.

101. In this Opinion I have argued that the Court should — rather than envisage, on the basis of *Greenpeace*, a further limited exception to its restrictive case-law on standing — instead re-consider that case-law and adopt a more satisfactory interpretation of the concept of individual concern.

⁸⁹ — See above note 5.

⁹⁰ — A. Arnall, 'Private applicants and the action for annulment since *Codorniu*', cited in note 6, at p. 52.

102. It may be helpful to summarise the reasons for that view, as follows:

(1) The Court's fundamental assumption that the possibility for an individual applicant to trigger a reference for a preliminary ruling provides full and effective judicial protection against general measures is open to serious objections:

- under the preliminary ruling procedure the applicant has no right to decide whether a reference is made, which measures are referred for review or what grounds of invalidity are raised and thus no right of access to the Court of Justice; on the other hand, the national court cannot itself grant the desired remedy to declare the general measure in issue invalid;
- there may be a denial of justice in cases where it is difficult or impossible for an applicant to challenge a general measure indirectly (e.g. where there are no challengeable implementing measures or where the applicant would have to break the law in order to be able to challenge ensuing sanctions);
- legal certainty pleads in favour of allowing a general measure to be reviewed as soon as possible and not only after implementing measures have been adopted;

- indirect challenges to general measures through references on validity under Article 234 EC present a number of procedural disadvantages in comparison to direct challenges under Article 230 EC before the Court of First Instance as regards for example the participation of the institution(s) which adopted the measure, the delays and costs involved, the award of interim measures or the possibility of third party intervention.

(2) Those objections cannot be overcome by granting standing by way of exception in those cases where an applicant has under national law no way of triggering a reference for a preliminary ruling on the validity of the contested measure. Such an approach

- has no basis in the wording of the Treaty;

- would inevitably oblige the Community Courts to interpret and apply rules of national law, a task for which they are neither well prepared nor even competent;

- would lead to inequality between operators from different Member States and to a further loss of legal certainty.

(3) Nor can those objections be overcome by postulating 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. 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.

(4) The only satisfactory solution is therefore to recognise that an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests. That solution has the following advantages:

- it resolves all 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 also 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*);

(5) The objections to enlarging standing are unconvincing. In particular:

- the wording of Article 230 EC does not preclude it;
- 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;

- the fears of over-loading the Court of First Instance seem exaggerated since the time-limit in Article 230(5) EC and the requirement of direct concern will prevent an insuperable increase of the case-load; there are procedural means to deal with a more limited increase of cases.

(6) The chief objection may be that the case-law has stood for many years. There are however a number of reasons why the time is now ripe for change. In particular:

- the case-law in many borderline cases is not stable, and has been in any event relaxed in recent years, with the result that decisions on admissibility have become increasingly complex and unpredictable;
- the case-law is increasingly out of line with more liberal developments in the laws of the Member States;
- the establishment of the Court of First Instance, and the progressive transfer to that Court of all actions brought by individuals, make it increasingly appropriate to enlarge the standing of individuals to challenge general measures;
- the Court's case-law on the principle of effective judicial protection in the national courts makes it increasingly difficult to justify narrow restrictions on standing before the Community Courts.

103. For all of those reasons I conclude that an individual should be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.

104. Since the contested order of the Court of First Instance is based on a more restrictive interpretation of the notion of individual concern, I consider that it should be annulled. Whether UPA's action is admissible falls, however, to be decided — in accordance with the Court's judgment in the present case — by the Court of First Instance.

105. In the light of that conclusion, it is not necessary to examine UPA's other pleas alleging that the reasoning set out in paragraphs 61 to 64 of the contested order is insufficient and contradictory, and rests on a misunderstanding of UPA's arguments.

106. UPA states that it does not ask for costs, and I am thus of the opinion that the Court of Justice should:

(1) annul the contested order;

(2) order UPA, the Council and the Commission to bear their own costs.