

The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution?

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judicial review, preliminary rulings, rule of law, European law, fundamental/human rights, legitimacy, Constitution for Europe, law

Abstract

The theme of the article is the ECJ's approach to the standing of private applicants in actions of annulment. The analysis places the emphasis on the Opinions by AG Jacobs and the rulings of the CFI and the ECJ in UPA and Jégo-Quérè and on the limited changes proposed under the Draft Constitution. The argument of the paper is that the critique presenting the preceding line of decisions as a missed opportunity is partly unfounded and partly misplaced for two main reasons. Firstly, the nature of the debate has now changed with the introduction of the right to effective judicial protection and secondly, the existing critique is not reflective of the multidimensional and complex nature of interacting factors that influence the strategic positioning of the ECJ in areas of specific constitutional significance. Therefore, the analysis concentrates on the factors that could provide the exegetical and not necessarily the justifying rationale for the persistently restrictive approach of the ECJ in the area of standing. It is submitted that the recent case law is an integral part of the calculated strategic positioning of the ECJ that was inevitable. The inevitability is founded on three reasons. Firstly, on the nature and significance of effective judicial protection and the central role that it was given by AG Jacobs and the CFI in UPA and Jégo-Quérè respectively. Secondly, the departure from the jurisprudence was driven from below rather than from the ECJ and finally, the chronology was such that coincided with the workings of the Convention on the Future of Europe. These new elements represent an attempted Velvet Revolution rather than a missed opportunity.

Kurzfassung

Thema des Artikels ist der Zugang des EuGHs zum Prozeßführungsrecht (locus standing) privater Kläger in Nichtigkeitsklagen. Die Analyse betont die Anträge des Generalanwalts Jacobs und die Urteile des EuG und des EuGH in den Rechtssachen UPA und Jégo-Quérè und zu den geringfügigen Veränderungen, die durch den Verfassungsentwurf vorgesehen waren. Die Argumentation des Papiers ist, dass die Kritik, welche die vorhergehende Rechtsprechung als verpasste Gelegenheit wertet, zum Teil unbegründet und teilweise auch ungebracht ist. Dies vorwiegend aus folgenden zwei Gründen: Erstens hat sich die Natur der Debatte nunmehr mit der Einführung des Rechts auf effektiven Rechtsschutz verändert, und zweitens reflektiert die bisherige Kritik nicht die multidimensionale und komplexe Natur interagierender Faktoren, welche die strategischen Positionierungen des EuGH in Bereichen spezifischer konstitutioneller Bedeutung beeinflussen. Daher konzentriert sich diese Analyse auf Faktoren, welche die erklärende und nicht notwendigerweise die rechtfertigende Begründung für den anhaltend restriktiven Zugang des EuGH im Bereich des Prozeßführungsrechts liefern könnten. Es wird dargelegt, dass die jüngste Rechtsprechung ein integraler Bestandteil der kalkulierten strategischen Positionierung des EuGH war, die letztlich unvermeidbar gewesen ist. Diese Unvermeidbarkeit ergibt sich aus drei Gründen: Erstens, aufgrund der Natur und Bedeutung effektiven Rechtsschutzes und der zentralen Rolle, welche diesem durch GA Jacobs und durch den EuG in den Rechtssachen UPA und Jégo-Quérè im besonderen gegeben wurde. Zweitens war das Abgehen von der Rechtsprechung vielmehr von unten als durch den EuGH getrieben; und schlussendlich war die Chronologie dergestalt, dass sie mit den Arbeiten des Konvents zur Zukunft Europas zusammenfiel. Diese neuen Elemente stehen somit vielmehr für den Versuch einer samtene Revolution als für eine verpasste Gelegenheit.

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1

Introduction

There is a plethora of critical academic accounts that have eloquently and energetically questioned the approach of the European Court of Justice (ECJ) in relation to Art. 230 (4) EC.⁽¹⁾ There a wide consensus that considers the traditional interpretation of the requirement of 'individual concern' to have been extremely narrow and restrictive. The ECJ's landmark judgment in *Plaumann*⁽²⁾ has formed a formidable hurdle for private applicants challenging Community measures, to the extent that it is virtually impossible or at best an exceptional occurrence, to surmount the 'individual concern' requirement. The academic interest in the area of standing of private parties has intensified following the rulings in *UPA*⁽³⁾ and *Jégo-Quère*⁽⁴⁾ where the compelling Opinion⁽⁵⁾ by Advocate General (AG) Jacobs and the radical departure from precedent by the Court of First Instance (CFI)⁽⁶⁾ created the expectation that the ECJ would re-examine its jurisprudence. The subsequent approach of the ECJ was received as disappointing and as failing to reform an inflexible and unsatisfactory approach.⁽⁷⁾ There were arguments stating that the ECJ has "missed the boat"⁽⁸⁾ and that the *UPA* case represented a missed opportunity in addressing the legal *lacuna* in the system of judicial protection.⁽⁹⁾

The purpose of this paper is twofold: to examine whether there were underlying reasons that could justify the ECJ's approach and whether the critique of the Court's reasoning is reflective of those exegetical factors. The thesis of the paper is that the reasoning of the ECJ must be understood within the context of the introduction of the principle of Effective Judicial Protection (EJP) and in connection with the potential consequences flowing from any reversal of the case law. The criticism characterising the line of cases as a missed opportunity is considering the issue of standing in an incomplete and isolated manner, in terms of the strategic decision-making processes of the ECJ and the influence of a variety of factors that are subsidiary to standing.

Needless to say, this paper is not intending to offer a defence for the ECJ, nor it regards the criticisms in relation to standing as unfounded. Rather, it aims to offer an explanation for the approach of the Court that could create the need for repositioning the associated critique.

In terms of structural method, the argument will be divided in six parts. Those will concentrate on the Opinion by AG Jacobs in *UPA*,⁽¹⁰⁾ the CFI's decision in *Jégo-Quérè*,⁽¹¹⁾ the *UPA* decision by the ECJ,⁽¹²⁾ the Opinion by AG Jacobs in the *Jégo-Quérè* appeal to the ECJ⁽¹³⁾ and the judgment of the ECJ in *Jégo-Quérè*.⁽¹⁴⁾ The final part will examine the provisions of the Draft Constitution on standing.

As a preliminary clarification, it must be noted that the structure of the paper is founded on the chronological development of the case law. This is necessary both in terms of the logical development of the argument but also because it plays an important role in the substance of the argumentation. In chronological order, the first step was the Opinion by AG Jacobs in *UPA* on the 21st March 2002, then the CFI's decision in *Jégo-Quérè* on the 3rd May 2002, followed by the ECJ's judgment in *UPA* on the 25th July 2002. The fourth step was AG Jacobs's Opinion in the appeal of *Jégo-Quérè* on the 10th July 2003, with the concluding part in the ECJ's decision in *Jégo-Quérè* on the 1st April 2004. There are two other relevant dates, namely the 26th of February 2003 when the formula proposed⁽¹⁵⁾ by the President of the CFI for Art. 230 EC was submitted and secondly, the 18th July 2003 when the Draft Constitution for Europe was presented to the President of the European Council in Rome and which contained the new provision on standing in Art. III-365.⁽¹⁶⁾ The starting point should therefore be the Opinion by AG Jacobs in the *UPA* case.

1. The Opinion By AG Jacobs in the *UPA* case

1.1. Factual Background

The underlying facts of the case require a brief description. The plaintiff (*UPA*), a Spanish trade association of agricultural businesses, appealed against an Order by the President of the CFI dismissing their action as inadmissible for lack of individual concern. The Order referred to the action for annulment of Regulation 1638/98,⁽¹⁷⁾ which was amending the established system of guaranteed prices and production aids within the olive oil market. The thrust of the applicants' argument on appeal was that they were effectively deprived any effective judicial protection since there was no national implementing measure in place, hence excluding the possibility of initiating proceedings before a national court in order to make use of Art. 234 EC. Their argument was that in factual situations such as theirs, actions for annulment should not be *ab initio* declared inadmissible for lack of individual concern. Interestingly enough, their claim did not relate to the application of the individual concern criteria since they did not challenge the reasons for the CFI's Order of "manifest inadmissibility".⁽¹⁸⁾ Instead, the essence of their argument was the "fundamental Right of effective judicial protection".⁽¹⁹⁾

1.2. Effective Judicial Protection and Standing: Not a Novel Concept

It will suffice at this stage to mention that this rationale was not entirely new and original, as the ECJ and the CFI had already ruled on similar claims *albeit* in a rather different context. In the case of *Salamander*⁽²⁰⁾ the CFI dismissed an action challenging the Tobacco Advertising Directive that was based on the argument that the Treaties do not offer a complete system of sufficient legal protection of the individual in relation to directives, thus violating the right to an effective remedy.

In the *Area Cova*⁽²¹⁾ case, the ECJ this time rejected a claim based on the argument of ineffective judicial protection in relation to requiring individuals to select a domestic remedy and the preliminary reference procedure as the way to challenge a regulation. The appellants argued that Art. 234 EC is of unsatisfactory nature for challenging the validity of a measure and that the decision of the ECJ is in effect in breach of Art. 6 ECHR and Art. 6 (2) TEU. The ECJ stated that "to make a reference for a preliminary ruling... constitutes the very essence of the Community system of judicial protection... the circumstances that one of those remedies would not be effective in the resent situation, even assuming it to be established, *cannot constitute authority for changing, by judicial action, the system of remedies* established by Articles, 230, 234 and 235 of the EC Treaty".⁽²²⁾ In other words, according to Schwarze the Court stated in express terms that "not even for reasons of effective judicial protection it was possible to deviate from the clear wording of Art. 230 (4) EC".⁽²³⁾

In the light of the two preceding cases, decision of AG Jacobs to depart from precedent by relying on EJP is remarkable in two ways. Firstly, the reasoning of both cases was clear in rejecting EJP by placing it below the deference to the text of Art. 230 EC. Secondly, both decisions were relatively recent, while AG Jacobs was the Advocate General in the *Area Cova* case.⁽²⁴⁾ The omens were not good, but AG Jacobs decided to instigate the Velvet Revolution.

1.3. The Structure of AG Jacobs's Opinion: a Revolutionary Blueprint? ↑

AG Jacobs's Opinion did not follow the appellant's suggestion that the ECJ had to create an exception in situations that a preliminary reference was not available. The adopted approach had a broader scope for reform, at the core of which was the principle of EJP. According to Craig, "this right (EJP) framed the entirety of his (AG Jacobs) subsequent analysis".⁽²⁵⁾ Therefore, the Opinion starts by setting out its framework boundaries, namely the adoption of the right of EJP as the yardstick for assessing whether the case law on individual concern needs reconsideration. The Opinion has two main characteristics: it places EJP as the yardstick for assessing whether the case law on individual concern needs reconsideration and it connects the available options with Art. 234 EC.

In relation to EJP, the advantage is that the concept is inherently linked with fundamental rights, thus possessing a special weight for legitimacy of the Court. At the same time, EJP provides a high standard that could not be satisfied by the *Plaumann* approach. In effect, AG Jacobs was asking the ECJ to reorganise its priorities and to depart from both *Plaumann* and *Area Cova*⁽²⁶⁾ and *Salamander*⁽²⁷⁾ by placing deference to the text below the requirement for ensuring EJP. At the same time, the structuring of the Opinion on the basis of EJP has a serious drawback because AG Jacobs was taking a risk in asking for the reversal of two sets of precedent, namely *Plaumann* and *Area Cova/Salamander* in relation to EJP.⁽²⁸⁾

In terms of Art. 234 EC, AG Jacobs positioned the provision at the centre of the options available to the ECJ. Therefore, the Opinion focused on Art. 234 EC as an effective alternative to Art. 230 (4) EC, on the creation of an exception to the requirements of the test for individual concern when Art. 234 EC is not available and thirdly on the obligation of the national legal order to ensure the availability of the preliminary reference procedure.⁽²⁹⁾

In descriptive terms, the Opinion has two organising premises: EJP operates as an external yardstick and Art. 234 EC as the internal organising tool for the various alternatives. Art 234 EC is dependent on and measured for its compliance with reference to the external organising yardstick, namely EJP, because of the higher status of EJP as a fundamental human right. In other words, AG Jacobs took a calculated risk and regarded the EJP's specific weight as exceeding that of the dual set of precedent. According to Schwarze it is in this respect that the Opinion departed from established doctrinal thought, since it is no longer accepting "the traditional view of the restrictions of legal protection for reasons of the requirements of efficiency and functioning of the EU".⁽³⁰⁾

As an interim conclusion, it can be argued that the structuring of the argument was an intentional attempt to undermine the foundation of the ECJ's traditional approach by placing Art. 234 EC at the epicentre of the different options available to the Court. If it proved to be ineffective, then the Court would have to change its approach, since Art. 234 EC was the basis of its traditional reasoning. It is the process of assessing the compliance of the options with EJP that will now be considered.

1.4. From the Three Options to the test of "Substantial Adverse Effect" ↑

The first option available to the ECJ that AG Jacobs focused on was whether Art. 234 EC could offer an effective alternative to Art. 230 (4) EC for protecting the right to EJP.⁽³¹⁾ The conclusion was that Art. 230 EC was manifestly more appropriate for a plethora of reasons:

1. under Art. 230 EC the body that adopted the measure in question will be a party from the start of the proceedings, whereas under Art. 234 EC that would not be guaranteed
2. the national court will often lack the expertise that the ECJ has in specialist areas within the scope of which the contested measure operates
3. the national court will not be able to declare the measure as invalid (*Foto Frost*),⁽³²⁾ nor will it always be able to grant interim relief that is available to the ECJ under Arts. 242 & 243 EC, despite the fact that in challenging a measure it is often imperative that interim relief is available
4. the substantial delays and increased costs related to preliminary references are not present to the same extent in direct actions for annulment
5. the principle of legal certainty is endangered since under Art. 234 EC it is possible to initiate proceedings at any time, whereas under Art. 230 EC there is a strict two-months time limit. Therefore, 'closure' is ensured under the latter procedure
6. under Art. 37 of the Statute of the Court third parties can intervene if they have standing in relation to Art. 230 EC actions, whereas under Art. 234 EC this is not possible unless the party in question participated at the national level
7. the degree of scrutiny is more intense under Art. 230 EC because of the full exchange of pleadings, whereas under Art. 234 EC there is a round of observations and oral arguments before the Court
8. it would be impossible where there are no national implementing measures to use Art. 234 EC

Therefore, AG Jacobs concluded that the traditional justification of the ECJ for its approach to the standing of individual applicants and its main response to arguments for lack of EJP, were antithetical to reality and seriously flawed. As a corollary, the other two options were *prima facie* to be regarded as ineffective given their dependency on the effectiveness of the preliminary reference procedure.

The second option available to the ECJ was to create an exception whereby the standing requirements would be relaxed if a preliminary reference is unavailable. Unsurprisingly, the option was rejected because it would entail a process of construing and applying national rules by the Union's judicial tier that lacked the expertise and was bound to trigger national judicial reaction. Furthermore, the guiding principle of effectiveness of EU law and the constitutional requirement of legal certainty would be weakened as a result of the *ad hoc* and autarchic intervention in the national legal realms by the Community Courts.⁽³³⁾

The third option proposed the creation of an obligation for national courts to ensure the availability of preliminary references when there is a restriction to indirect challenge. Needless to say, this is a weak argument on both substantive and procedural grounds. In terms of substance, the requirement of providing effective judicial protection to the individual as a matter of a fundamental right could not be satisfied in the absence of a specific and concrete remedial mechanism. This option faces certain difficulties at the pragmatic level, because the ECJ would not be in a position to ensure the observance and enforcement by the national courts of the proposed exception. As a corollary, the only way for ensuring enforcement of the proposed exception would be for the ECJ to adopt a highly pro-active approach entailing "far-reaching interference with national procedural autonomy".⁽³⁴⁾ Moreover, the issues of high costs, unnecessary delays and lack of protection in the form of interim measures, which were part of the argumentation employed by AG Jacobs for showing the ineffectiveness of Art. 234 EC, would remain unresolved.

The perimeter of the Opinion by AG Jacobs up to this stage can be drawn on the basis that he placed the right to an EJP at the core of his reasoning by attributing to it a status comparable to a Rule of Recognition⁽³⁵⁾ and by rejecting all three proposed options that are interlinked with Art. 234 EC. The logical conclusion would therefore be the need to adopt a radical reforming approach in relation to the test for individual concern, a paradigm of which was conveniently outlined by AG Jacobs. The test for individual concern proposed by AG Jacobs focuses on substantial adverse effect and states:

"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".⁽³⁶⁾

The first noticeable element of the preceding test is that it places the emphasis on the particular circumstances of the applicant and it examines whether in the light of those his interests are affected. The measuring criterion is 'substantial adverse effect' which is a clearly a stringent requirement, but is much more generous than the *Plaumann* requirement. Moreover, the interesting fact is that 'substantial adverse effect' can be examined in a prospective context, which is a significant alteration of the standing requirements. The merits of this test have been fully outlined in the Opinion, where it was stated that the proposed test is rights oriented and facilitates access to a court empowered to grant the appropriate remedy.⁽³⁷⁾

The test can also be described as removing the pre-existing anomaly of nullifying the chances for standing if the number of affected parties is expanded, by concentrating on individualisation and the particular circumstances of the applicant. The test is also shifting the emphasis from formal admissibility issues to the consideration of the substantive questions, while at the same time the departure from precedent can be justified on the basis of decisions like *Les Verts*(38) and *Chernobyl*(39) that enabled the jurisprudence to remain responsive to altering circumstances within the Union.

As a preliminary observation, it is clear that the test follows the structural organisation of the Opinion, with the emphasis on rights and EJP. In addition, there is no detailed exegesis of the requirements under the test and that vagueness can be attributed to the fact that it would have been more appropriate to set out the skeleton of the test and invite the ECJ to formulate the substantive elements. Finally, the test can be characterised as economically realistic in the sense that it understands the need to distinguish between the number of potential applicants and the practical hurdles inherent in entering into a commercial activity that are pragmatically limiting the number of affected parties. In other words, the primary reasons behind the criticisms of the Plaumann criteria are now addressed and the underlying ideas expressed in the Opinions in *Codorniu*(40) and *Extramet*(41) have been taken into account.

Finally, AG Jacobs offered a more general set of justifications that were directed at possible reactions resulting from his reforming proposals. The argument was that the wording of Art. 230 EC is not restraining any change on the test for individual concern and that the fears of over-loading the CFI were exaggerated.(42) AG Jacobs pointed to the divergence in approach between the ECJ's case law and more liberal developments at the level of the national legal orders.(43) The next step an express reminder that the Court is applying double standards by enforcing EJP on national courts and by narrowing down its scope when it would apply to the Community Courts.(44) A hermeneutic reading of the last argument could regard it as the epigram of what is at stake if there is no change: the legitimacy and authority of the Court will be endangered, as well as its creative use of the concept of EJP in other areas.

1.5. Assessment of the Opinion's analysis ↑

AG Jacobs's Opinion in *UPA* represents the first step in the Velvet Revolution aiming to overturn the legal *status quo* flowing from the requirement of individual concern dating back to *Plaumann*. The 'revolutionary' elements in the Opinion originate from the placement of the right to an EJP as the measuring criterion of the need to reform the test for individual concern. AG Jacobs took the calculated risk of giving to EJP a focal role in his Opinion, thus in effect asking the Court to re-arrange its hierarchy of considerations as expressed in *Salamanca* (45) and *Area Cova*(46). This implied a departure from the established reasoning that placed efficiency and functioning of the Union above legal protection and subsequently a reform of individual concern.(47) The Velvet Revolution started and the CFI had the opportunity in *Jégo-Quére* on the 3rd May 2002 to either join its voice with that of AG Jacobs or support the *status quo*.

2. The ruling by the CFI in *Jégo-Quére* ↑

2.1. Factual Background: Unusual Factors?

On the 3rd of May 2002 the CFI took a remarkable step in directly departing from the established case law and attempting to rewrite the test for individual concern. The ruling was surprising and reinvigorated the interest of the academic community for a number of reasons. Firstly, the CFI was departing from its consistent dismissal of actions for annulment by private parties and also from recent decisions like that in *Rica Foods*(48) delivered on the 17th January 2002. In addition, as Albors-Llorens commented that "was an unprecedented move for a Court normally reluctant to depart from established case law".(49)

The judgment was also interesting in symbolic terms, as the CFI's synthesis for the case gave more gravity to the ruling as it was decided to sit as extended panel (five judges), with the inclusion of the President of the CFI. Furthermore, the CFI intended to reinforce the public impact of the decision and in a press release it was stated that "the CFI, conscious of the need to ensure effective protection of legal rights for European citizens and businesses, redefined the rules governing individual access to Community courts".(50) Such an approach can be explained on the chronological background of the case, with the decision of the ECJ in *UPA* forthcoming and the Opinion of AG Jacobs in the same case issued just weeks before.

At the same time, it must be remembered that the content of the preceding Opinion and the approach adopted was clearly remarkable but nonetheless not a novelty as an action. The reason is that in the past there were Opinions by Advocate Generals that were asking for changes in the jurisprudence, with the classic paradigm of the prolonged criticism of the

case law in relation to the horizontal, or lack of, direct effect of directives.(51)

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What was missing in the past was the adoption of those views by the either of the Courts in a manner analogous to the one adopted by the CFI. In other words, what could have easily been dismissed as a legally valid attempt to trigger concern for the situation in relation to standing, or as just another crusade by an Advocate General, was now forming part of the CFI's reasoning. A reasoning that was well publicised, presented as the necessary step to take, reinforced by the earlier reputation of the CFI as a conservative and precedent bound court and with an ECJ decision pending. The setting could not be more attractive for the second step of the Velvet Revolution.

In terms of the facts of the case, under Regulation (EC) No. 1162/2001(52) the nets used by the claimant were banned for fishing in the waters that the applicants were normally using for fishing. There was no national implementing measure, thus Art. 234 EC was excluded as an alternative; a typical case of a private party bound to fail on grounds of inadmissibility. This can be seen as another reinforcing factor of the importance of the CFI's ruling, as there was nothing distinguishing in the facts that could have justified a departure from precedent on the ground of unavailability of indirect challenge.(53)

In a predictable pattern, the claimants argued that regulation was a measure of specific and not general application and that the lack of a national implementing measure had the effect of depriving them their right to have access to a court. They duly reminded the Court that that the right was guaranteed under Arts. 6 and 13 ECHR and Art. 47 of the EU Charter of Fundamental Rights.

2.2. The Approach of the CFI

The CFI focused first on the nature of the measure and determined that the regulation was not a bundle of decisions and had general application, while the applicant was not individually concerned on the basis of *Plaumann*. Up to this point the CFI followed the classic approach in relation to standing.(54) The CFI concluded that the exceptions established in *Extramet*(55) and *Codorniu* (56) were not applicable in this case, thus exhausting all possible legal arguments that could have been used under the pre-existing state of the law.

The next step for the CFI was to concentrate on the significant part of the applicant's claim, namely the denial of the right to access a court. The CFI cited the seminal decision in *Les Verts*(57) as an express reminder that it was the ECJ itself in that case that confirmed the principle that access to the courts is one of the essential elements of a community based on the Rule of Law and that this is guaranteed in the Community's legal order. In addition, the CFI pointed out that the right has been created and justified by the ECJ in *Johnston*(58) on the basis of the constitutional traditions of the Member States and the ECHR. On this basis, the CFI concluded that it had to examine whether such an important right was to be deprived if the application was dismissed.

At this point the approach of the CFI can be described as an example of reasoning founded on deference to the ECJ's jurisprudence. However, there were two sets of precedent: on standing and on EJP. The CFI applied the precedent on standing (*Plaumann*) and then identified the existence of a second and relevant set of precedent in the form of EJP (*Area Cova/Salamander* and *Les Verts/Johnston*). The key was to justify the hierarchical positioning of the two sets of precedents and the CFI placed the EJP set of cases above the standing precedents. The justification was made through reference to *Les Verts*.(59) a case of paramount constitutional importance, where the ECJ had linked access to a court with the Rule of Law. Moreover, the hierarchical positioning of sets of precedent was supported by the reasoning employed by the ECJ in *Johnston*(60) and the therein emphasis on the origins of the right to judicial protection.

In effect, the CFI considered itself obliged to consider whether the right in question was infringed, which could be interpreted as expressing the willingness to follow the case law of the ECJ in relation to EJP. It is in this respect that the CFI was ingenious in its method. The CFI was about to rewrite the test for individual concern, while approaching the issue as a mere expression of compliance with the ECJ's previous rulings, which were identified as forming two sets of precedent. (61) The essence of the Opinion by AG Jacobs and its revolutionary purpose were now clothed in a cloth of deference to the ECJ's jurisprudence and the logical structuring of the hierarchy between different factors. The Velvet element was now added to AG Jacobs's Revolution.

With that in mind, the CFI concluded that if the action was declared inadmissible then the applicant would be deprived of his rights to an effective remedy.(62) That finding was based on the fact that Art. 234 EC was not available in this case, while the CFI cited(63)

AG Jacobs adopted his view stating that the possibility of violating the law and therefore indirectly instigating proceedings where the preliminary reference could be used does not constitute adequate judicial protection. Furthermore, the CFI stated that the availability of an action for damages under Art. 288 EC was also ineffective, since the removal of the contested measure could not be achieved through the given provision.⁽⁶⁴⁾ Finally, the CFI once more agreed with AG Jacobs that there is no compelling reason for attaching to the requirement of individual concern the *Plaumann* test. Therefore, the CFI was left with no option but to conclude that the established case law had to be reconsidered if the right to EJP was to be guaranteed.

Certain observations must be made at this point. Firstly, it is noticeable that the CFI did not follow AG Jacobs in his detailed questioning of the effectiveness of Arts. 234 and 288 EC as adequate alternatives. Instead, the CFI adopted the peripheral conclusion that the Opinion reached as to the ineffectiveness of the provisions, but without directly and explicitly dismissing the ECJ's traditional reasoning. In effect, the CFI watered down the Opinion's intensity in terms of rhetoric but adopted the conclusion that it could now present in a better light, as a corollary of placing the concept of deference as the underlying theme of the ruling. At the same time, the CFI was confident enough because of its hierarchy-based approach, to directly express the necessity for departing from precedent.

However, there are clearly certain grey areas in the reasoning especially in the failure to explain what changed in the hierarchy of factors and positioned EJP above the *Plaumann* rationale. What was different now that was not present in *Salamander*⁽⁶⁵⁾ or *Rica Foods*⁽⁶⁶⁾ where the CFI did not see a duty in re-organising the hierarchy of deference? Given the fact that the CFI failed to provide an answer to those questions, one can assume that the timing factor and AG Jacobs's Opinion were a possible, or in the view of this paper, a decisive influencing factor. That fact was of course disguised by adopting a lower intensity standard and a different conceptual approach to that of AG Jacobs.

The differences in the two rationales were highlighted in the penultimate part of the judgment concentrating on the CFI's proposed new criterion for individual concern. The Court said that a person is individually concerned by a measure if "... [it] affects his legal position, in a manner which is both definite and immediate, by restricting his rights or imposing obligations on him".⁽⁶⁷⁾ It is evident that this test is narrower than the 'substantial adverse effect' test proposed by AG Jacobs. The claimant under the CFI's test would have to show that there is a definite and immediate element in contrast to the potential substantial adverse effect criterion under AG Jacobs's test. Nevertheless, the CFI's test is much more generous than *Plaumann* and it would address criticisms raised in relation to standing. The watering down of the Opinion's intensity was once again applied by the CFI. However, in the final part of the judgment the CFI was not conservative in its approach and it stated in clear terms that the number of applicants and their position is irrelevant.⁽⁶⁸⁾ In other words, the Court was in line with AG Jacobs's individualisation of the criterion which implies the total rejection of closed class approach

In conclusion, the CFI was influenced by AG Jacobs's Opinion in *UPA*, but the organising theme of the judgment was different. A less intensive approach that was trying to avoid criticising the ECJ's case law was preferred on the basis of the concept of deference to the ECJ's rulings. The process of 'softening' the Opinion was present in the structure of the reasoning where the ECJ was not put in a position where it had to review its case law without being able to avoid concluding that the same jurisprudence was in breach of EJP. Moreover, the test proposed was narrower, while the criticisms of Art. 234 EC as an effective alternative were omitted, but for as a conclusion. The preceding elements, combined with the publicity element employed, the composition of the Court and the reference to the ECJ's creation of EJP made all those points that the Opinion was making but in a more subtle and disguised way. The Revolution was now a Velvet one and the CFI had to wait for the ECJ's reaction in *UPA*, while the legal community was expecting to see whether a revolution would take place with the ECJ reversing the jurisprudence. The outcome was predictable: the ECJ had to respond and it saw the CFI's judgment and the Opinion as a revolution that has taken place.

3. The *UPA* judgment by the ECJ [↑]

The response of the ECJ came on the 25th July 2002 when the Court dismissed an appeal lodged by the UPA against the CFI's Order of inadmissibility. The claim by the appellants was that the denial of standing combined with the lack of alternative remedies amounted to a denial of the right of EJP.

3.1. The Framework of the ECJ's Approach

Before looking at the approach of the ECJ certain background, yet significant, factors must be mentioned. On the one hand, it is submitted that it was necessary and essential for the ECJ to clarify the legal situation and remove all the uncertainty and inconsistency flowing from the CFI's decision in *Jégo-Quéré*. At the same time, the Court had to respond to the highly critical Opinion delivered by AG Jacobs. The authority of the Court and its positioning in the judicial hierarchy of the Union was also in need of reinforcement, since it had been challenged from two different perspectives.

Firstly and in terms of substance, there was a combination of the critical arguments challenging ECJ's jurisprudence and the foundation of those arguments. In other words, the ECJ's rationale supporting its case law that referred to the central role of Art. 234 EC was questioned, while at the same time we have the strengthened reintroduction of the right to an EJP as the yardstick for the area of standing. The issue of protecting fundamental rights in a system that depends on the authority of the ECJ, especially when the Court has been willing to impose obligations on national courts in relation to EJP, was *ab initio* going to create difficulties.

Secondly, the authority of the Court was endangered in terms of hierarchy. The CFI's approach and the open challenge by the AG Jacobs were creating the impression that the ECJ had to be reminded of the need for reform, while any decision by the ECJ to reverse the case law would by implication appear to have been imposed on the ECJ. The fact that the CFI did not refer the *Jégo-Quéré* case to plenary session under Art. 14 of its own Rules of Procedure⁽⁶⁹⁾ was also unhelpful, since it would have meant that the decision by the CFI would be delayed until the ECJ ruled in *UPA*. Alternatively, one can argue that the CFI's approach indicated that there was no need for a plenary session since the need for reform was so obvious that a five judge panel would be able to reverse case law decided by the ECJ as far back as *Plaumann*.

Therefore, the ECJ was in a difficult position and it decided to sit as a full court in order to strengthen the symbolic element of its judgment. It seemed that there were three options available to the ECJ.

The first option was to follow CFI's reasoning or the Opinion by AG Jacobs and their respective tests. This would have been catastrophic in the long term especially because the reasoning of the Opinion was placing the ECJ in an impossible situation of having to admit that the jurisprudence was in breach of the right to EJP. Moreover, the emerging impression would be that the reform was forced from the bottom to the top, thus diverting any praise for the change to the CFI and the Advocate General. Clearly, the ECJ's rejection of this option was in the view of this paper predictable.

The second option was to create a new exception to the case law where EJP was to be ensured when a preliminary reference was not available. This is an interesting option as it would be partly responsive to the claims for denial of the right for EJP, it would maintain the case law and it would safeguard the authority of the ECJ. Nevertheless, the adoption of this approach would disregard the degree of challenge that the ECJ was facing. The Court would have to accept a partial failure in protecting EJP up to that point and it would give the impression of being pressured by the CFI and the Advocate General to adopt a half-way solution that was bound to attract criticisms arguing that the ECJ was not bold enough in its approach. Moreover, the practical enforcement and supervision of that solution would be complex and it would require interference with national procedural rules. Overall, the ECJ was to choose that option if it wanted to apply a damage limitation approach.

The third option open to the Court was to support its case law through responding to all the criticisms. It is submitted that this was the most likely, difficult, appropriate and ingenious option for numerous reasons. On the one hand, the ECJ was going to avoid admitting failure to protect EJP, thus pre-empting the resulting consequences, while at the same time it would support its argument on Art. 234 EC. Moreover, the Court would be enabled to send a strong and clear message as to who is responsible for major changes, while at the same time it could present itself as an agent of change by recognising the problems and asking the political level to intervene. In that way, the Court was merely respecting the text and the intention behind the Treaty provision and was asking everyone to recognise that it had managed to make the problematic provision work while at the same time protecting EJP. The balancing act was a difficult one but the ECJ was able to rise to the task, at least until the provision was amended at the political level.

3.2. The Reasoning of the ECJ: Specific level analysis

The approach of the Court started by looking at *Plaumann* and concluded that the appellant failed to satisfy those conditions. Therefore, the ECJ was confirming and showing its undisputed support to the jurisprudence in a dual way: by applying all the relevant tests and more importantly by making *Plaumann* the starting point in its judgment. That can be compared with AG Jacobs's Opinion and the respective role performed there by the right to EJP. Then next step was to remove any possibility of uncertainty and to indirectly reject the option of creating a new exception where Art. 234 EC was not available. Therefore, the ECJ stated in unequivocal terms that "a natural or legal person does not, *under any circumstances*, have standing"⁽⁷⁰⁾ if the *Plaumann* conditions are not met, thus directly rejecting the option to create an exception.

The ECJ's reasoning was now transparent in the sense that *Plaumann* was the priority and EJP the subsidiary consideration. The Court was careful to clarify that the right to EJP was a fundamental right forming an integral part of the Community's legal order that is founded on the Rule of Law, thus implying that in the event of a conflict the possibility of departure from *Plaumann* was hypothetically possible. The Court then reminded everyone that *it was* the creator of the right to EJP that is enshrined in Arts 6 and 13 ECHR and cited *Les Verts*⁽⁷¹⁾, *Johnston*⁽⁷²⁾ and *Commission v Austria*.⁽⁷³⁾ The conclusion was that the Treaty established a complete system of legal remedies for challenging the legality of Community acts. That was reinforced by the existence of alternative routes for protection in the form of Art.241 EC and the preliminary reference procedure as a result of the obligation flowing from *Foto Frost* ⁽⁷⁴⁾.

The use of the Rule of Law argument was also made by the CFI but for the purpose of arguing that the completeness of a legal system in terms of remedies flows from the Rule of Law and is dependent on the criterion of effectiveness. If there is ineffectiveness then the completeness of the system is not present, thus requiring the Community level and the national level to take steps to address the problem. The ECJ adopts the directly opposite view by seeing the Rule of Law as creating a complete system of remedies at the Community level. That enables the delegation to national courts of the obligation to guarantee access to that complete system at the community level, by interpreting national rules in a manner facilitating access to a court. After access to a court is ensured, it follows that because of Art. 234 EC being part of a complete system of remedies, EJP is ensured. In other words, the ECJ equates effectiveness with access to a court, where the CFI sees effectiveness as a parameter that must be constantly ensured at both the national and Community level. Their fundamental difference is that the ECJ delegates the responsibility to the national level, as effectiveness is presumed to be present at the Community level, while the CFI sees effectiveness as an issue that must be monitored at the national and at the Community level.

The next step for the Court was to confirm its reliance on Art. 234 EC and to respond to the argument that its approach was divergent and close to a double standards approach in relation to EJP and national courts.⁽⁷⁵⁾ The argument was reversed and the ECJ placed the burden on the national courts by requiring them to ensure access to EJP through establishing an appropriate system of legal remedies and procedures. The duty under Art. 10 EC required, according to the ECJ, that the national courts should facilitate as far as possible access to a court when there is a claim of invalidity, by construing national rules accordingly. Therefore, the difference in the approach is apparent, with the ECJ explaining that the system of remedies is complete and that the alternatives to Art. 230 EC are effective, with the obligation to ensure access resting with national courts.

However, the Court failed to propose a solution when there is no national implementing measure in place, thus according to Usher "creating a gap in the system of Community judicial remedies".⁽⁷⁶⁾ But the method used for rejecting the creation of an exception was highly sophisticated in that the ECJ agreed with AG Jacobs's argument that such an approach would effectively require the ECJ to examine every case against the background of national procedural law in order to establish whether a reference could have been facilitated at some stage.⁽⁷⁷⁾

Consequently, the ECJ stated that individual concern could be examined in the light of EJP at both national and Community level, with the responsibility delegated to national courts for ensuring access to the Treaty's complete system in the form of enabling access to a court,⁽⁷⁸⁾ thus guaranteeing effectiveness. At the Community level, however, EJP could not be used in order to set aside the individual concern condition that stems from an express and clear textual provision in Art. 230 EC. Accordingly, the ECJ responded to both AG Jacobs's Opinion and to the CFI's ruling that rearranged the hierarchy of factors with deference to EJP given priority over *Plaumann*. The ECJ made it clear that it was the other way around simply because individual concern flows from the Treaty, thus rendering any attempt to change the requirement a judicial amendment of the Treaty. That was for the Member States under Art 48 EC and not for the ECJ as the Court pointed out in clear and certain terms.⁽⁷⁹⁾

The conceptual problem of the argument is that requests for reform referred to *the test* for the textual requirement of individual concern and not to ‘individual concern’ *per se*. In that light, there was no issue of judicial amendment of the Treaty, but rather a change of the test in *Plaumann*. An ECJ predisposed and determined to reform the area would have surely made that point, which was also made by AG Jacobs.⁽⁸⁰⁾ Nevertheless, the ECJ was not intending to change the law for reasons already explained and which had nothing to do with textual constraints. The advantage of the argument is that the ECJ is showing an awareness of the political background and the symbolically significant role of practically illustrating the commitment to the text of the Treaty while refusing to follow an objectively active and creative judicial method. The Court in the past had not shown a similar reluctance,⁽⁸¹⁾ but on this instance certain factors were present: the ECJ was effectively asked in strong terms to follow that approach, the Convention on the Future of Europe was in full working mode at the same time looking at both Art. 230 EC and the future of the judicial architecture.

Therefore, the ECJ’s method and conclusions can be summarised as follows:

- it managed to confirm its commitment to *Plaumann*,
- reminded everyone that EJP was its creation
- made the point that the Union is founded on the Rule of Law and fundamental rights
- acknowledged that the standing requirements are to be interpreted in the light of EJP but only as a subsidiary and not as a paramount consideration
- confirmed that the system of remedies is complete and that it is up to the national level to ensure that the alternatives like preliminary reference are effective by facilitating their use
- equated effectiveness with access to a court
- effectiveness is presumed at the Community level, while at the national level it is up to the domestic courts to ensure access to a court in order to enable use of the alternative procedures
- reform of individual concern at the community level when there is an issue of effectiveness is to be addressed by the Member States through a Treaty amendment and not by the Court

3.3. A Deeper Analysis of the ECJ’s approach in UPA: Micro and Macro Management ↑

The approach and subsequent decision of the Court in *UPA* have been characterised as “a revolution that has not taken place”,⁽⁸²⁾ as a missed opportunity and it was questioned whether the “ECJ has missed the boat”.⁽⁸³⁾ Those criticisms are valid but they are founded on an incomplete assessment of the Court’s reasoning and on isolating the background influencing factors. The Revolution that academics have been asking for *has taken place* but prior to the *UPA* ruling in the form of the CFI’s decision and the Opinion by AG Jacobs. Both were asking the ECJ to reform the area of standing for private applicants, not with the intention of undermining the ECJ’s legitimacy or authority, but with the purpose of forcing much needed change. It is on this basis that the denomination ‘Velvet Revolution’ has been used. This paper is not arguing that a conspiracy was in operation aiming to shift the balance of judicial power, but is rather making the point that the symbolic effect of the attempts of the CFI and AG Jacobs to change the unsatisfactory state of the law and the reasoning they used to that effect, could not be ignored by the ECJ.

Moreover, the approach of the ECJ has to be considered in the broader context of its jurisprudence and on the basis of the decision-making mechanics that direct the strategic positioning of the Court in constitutionally important cases. The approach of the ECJ can be described as having four general parameters:

1. *the approach of the Court is dynamic and non static*: the ECJ changed its approach to different areas in order to ensure that the altering needs of the system were met
2. *the approach of the ECJ is Bi-Focal at all times*: the Court concentrates on a specific area that the ruling relates to but it always considers the implications for its jurisprudence as a whole (Micro and Macro Management)
3. *the approach of the ECJ is influenced by a set of permanent policy goals*: **a.** the *legitimacy and authority* of the Court is to be maintained as it represents an essential component of the system **b.** the degree of *reaction* resulting from the jurisprudence of the Court should be minimised **c.** overall the system must *not be endangered* and the process of *Integration* protected
4. *the ECJ has to offer adequate justification* for its decisions: the authority of the Court depends on elaborate and sufficient reasoning

On the preceding basis, the *UPA* ruling can be explained in a rather different light. Firstly, the Court recognised that the restrictiveness of the standing requirements was not satisfactory and that a change was required, thus responding to the modern needs of the system. At the initial stages of development when *Plaumann* was decided, the issue of private standing could not have been at the top of the priorities of the ECJ.

At that time the Court was trying to establish and develop supremacy and direct effect, which were the fundamental principles needed for the functioning of the Community. Art. 230 EC was not as important provision in terms of development, for various reasons: there was no public pressure to open up standing, the Member States and the Institutions were not directly affected, the ECJ had to ensure that national reaction was as limited as possible because of the radical steps taken in the other areas and there was a clear intention to protect Institutions from judicial review challenges. The Bi-Focal element was therefore a strong consideration at the time.

In addition, it has to be remembered that Art. 234 EC was one of the most significant provisions in the Treaty as far as the ECJ was concerned, since it facilitated co-operation between the national and the Community level and it gave an extremely useful tool to the ECJ for developing the legal system.⁽⁸⁴⁾ The fact that Art. 234 EC could be used as an alternative to Art. 230 EC represented a significant factor for utilizing Art. 234 EC as much as possible at the original stages, because of the advantages related to the procedure. The shift that has gradually taken place, with the greater emphasis being placed on human rights and on the legitimacy of the Court, was apparent to the ECJ. But the Court had a price to pay for reversing the established case law and the CFI's judgment combined with the rhetoric by AG Jacobs was creating a dilemma.

Secondly, in terms of the permanent policy goals the Court found itself in an extremely difficult position where it was asked by the CFI and by the Advocate General to accept in effect that the right to EJP was not protected by the Court since *Plaumann*. Moreover, the position of the ECJ was one where any otherwise welcomed change would have been credited to the prior ruling of the CFI and the Opinion of AG Jacobs. In addition, the Court had to respond to criticisms for double standards in relation to EJP and to arguments presenting the Court as stubbornly relying on Art. 234 EC when the ineffectiveness of the provision in the given context was axiomatic as the Opinion by AG Jacobs eloquently showed.⁽⁸⁵⁾

Furthermore, the authority of the Court was also endangered by the earlier argumentation employed by the ECJ, whereby the change of the standing requirements has been described by the Court as judicial amendment of the Treaty.⁽⁸⁶⁾ Finally, it must be remembered that at the time the Convention on the Future of Europe was in full operative mode, thus in effect presenting the Court with the ideal exit policy. The ECJ had the opportunity to present itself as a mere enforcer of the Treaty and as respecting the text of the Treaty, while at the same time asking directly and loudly for the much needed change. The ECJ could not ignore this route and it also had to consider the fact that the future powers of the Court were subject to discussion, when the past case law of the Court was in effect about to be reaffirmed through the provisions of the Draft Constitution. A further important factor was that the EU Charter on Fundamental Rights and its justiciability was probably the most heated issue, with the predictable empowering consequences that that would entail for the ECJ. This was not the time for being creative, nor was the time ripe for leaving unchallengeable proposals put forward by the lower judicial hierarchy that could have a serious negative impact on the symbolic authority of the Court.

In relation to the need to justify the decision in the best possible light, the ECJ had a difficult task in responding to the arguments by the CFI and by AG Jacobs. The Court managed to fulfil the task with minor omissions and gaps, the most significant of which was that the calls for reforming the individual concern requirement were asking for *Plaumann* to be reversed and not for modification of the text of Art. 230 (4) EC.

The preceding approach can be labelled as constructive conservatism since by arguing that going round *Plaumann* is possible only through an amendment the Court gains on three levels. Firstly, it presents itself as respecting the Treaty and its text. Secondly, the area of Art. 230 remains low at the hierarchy of potential threats to the legitimacy of the Court, thus rendering the acknowledgement that the Court has been infringing a fundamental human right since 1963 obsolete. Thirdly, the Court knows that an amendment is forthcoming, hence taking the responsibility away from the ECJ. The Velvet Revolution was put to an end and what remained to see was whether there would be any subsequent attempts to reintroduce the issue.

4. The Opinion by AG Jacobs in *Jègo-Quèrè*

On the 10th July 2003 AG Jacobs delivered his Opinion for the appeal against the CFI's ruling in *Jègo-Quèrè*. The *UPA* decision by the ECJ was of course the landmark that buried the proposals of AG Jacobs and the CFI, thus it was clearly interesting to see whether the powerful rhetoric of the Advocate General in *UPA* would change as a result of the *UPA* judgment.

The facts of the case have already been outlined but the claims were now different. In terms of the substance of the appeal, the Commission argued that the failure to refer the case to a plenary session of the CFI under Art. 14 of the Rules of Procedure was a manifest error of appreciation by the CFI. In addition, the Commission argued that the interpretation of individual concern adopted by the CFI was in breach of Community law and that the conclusion reached stating that the traditional interpretation of individual concern failed to guarantee the right to EJP was mistaken.⁽⁸⁷⁾

In terms of structure of the Opinion, the comparison with the Opinion in *UPA* could not be starker. The right to an EJP that provided the backbone of the *UPA* Opinion was now substituted with the reference to the *Plaumann* requirements and the text of Art. 230 EC.⁽⁸⁸⁾ Then the substance of the appeal is examined and the CFI's decision and the *UPA* ruling by the ECJ are analysed, thus leading to the conclusion that in the light of the latter "the CFI erred in law when it departed from the traditional interpretation of individual concern...the CFI acted in breach of the fourth paragraph of Article 230".⁽⁸⁹⁾ Therefore, AG Jacobs up to this point is merely applying the traditional approach and the doctrine of precedent without examining the right to EJP and whether the *UPA* decision offered an effective rebuttal to his Opinion in *UPA*. It is not until paragraph 44 of his Opinion in *Jègo-Quèrè* that a reference to the earlier *UPA* Opinion is made.

AG Jacobs makes a reference to the fact that he finds highly problematic the strict test for standing because it gives rise to a real risk that individuals are denied any satisfactory means for challenging validity.⁽⁹⁰⁾ Furthermore, it "may prove impossible for such individuals to gain access to a national court",⁽⁹¹⁾ while it is unsatisfactory to have to break the law in order to open up the possibility for challenging the validity of a measure. AG Jacobs then briefly refers to the inadequacy to offer an alternative remedy of Arts. 235 and 288(2) EC and concludes the argument by stating that "such an outcome is to my mind unsatisfactory, but an unavoidable consequence of the limitations which the current formulation of the fourth paragraph of Art. 230 is considered by the Court to impose".⁽⁹²⁾ Needless to say, no reference to his proposed test of 'substantial adverse effects' was made.

Certain observations must be made. There is no reference to EJP as a right, which is now substituted by the lack of access to a court and the denial of satisfactory means for challenging validity. Those two points are parallel or maybe constituent parts of EJP but there is no actual reference to the right that provided the yardstick for the Opinion in *UPA*. Secondly, there is no reference to Art. 234 EC and its inadequacy which was clearly an integral part of the eloquent analysis in the *UPA* Opinion. Here the focus is on Art. 235 and 288 (2) EC perhaps because AG Jacobs wanted to make the point that Art. 234 EC was not available because of the absence of a national implementing measure. Therefore, the absence of a reference to Art. 234 EC could be interpreted as a criticism of the effectiveness of the procedure when its utilisation is impossible, as was the case in the given proceedings.

Nevertheless, such a type of criticism is surely less severe and weakly articulated than that employed in the *UPA* Opinion. Alternatively, one could also argue that AG Jacobs did not mention the preliminary reference procedure because the *UPA* judgment clarified that the position of the provision and its effectiveness is beyond doubt. It is submitted that this line of reasoning is unstable simply because the Advocate General found it possible to express his opposition to the current state of the law without feeling constrained by the *UPA* ruling. Whatever view is adopted, the common element is that there is an apparent and self-evident shift in the rhetoric of the Opinion with the Advocate General seeming reluctant to reinforce the critical argumentation employed in *UPA*, while there was a refusal to respond to the *UPA* judgment. The effect of the *UPA* ruling acted as a catalyst that changed approaches, at least in terms of argumentation and intensity.

Finally, there are of course carefully structured criticisms of the *UPA* ruling and a basic support of the earlier *UPA* Opinion. The point is supported where the Advocate General refers to "such an outcome is to my mind unsatisfactory, but an unavoidable consequence of the limitations which the current formulation of the fourth paragraph of Art. 230 is considered by the Court to impose".⁽⁹³⁾ The hidden point is that AG Jacobs disagrees with the argument of the need for amendment because the change of the standing requirement is in his view misplaced, since it is the *Plaumann* test and not the text of the Treaty that must be changed. Once again, the criticism is in effect hidden and nothing resembles the critical theme of his *UPA* Opinion. Finally, there was no reference to the proposed text of Art. III-365 in the Draft Constitution that was presented on the 18th July 2003 and which was not even remotely close to the test proposed by AG Jacobs in *UPA*. That can not be explained but for the influence and authority of the *UPA* judgment.

In conclusion, the main parameters of the AG Jacobs's Opinion in *Jègo-Quèrè* are therefore transformed and they include: the strict application of *UPA* and *Plaumann*, the absence of the right to EJP, the absence of Art. 234 EC, the completely reverse structuring of the Opinion, the careful expression of disagreement, the minimisation of the intensity of criticism and the use of hidden critique points. The ECJ stamped its authority and pushed through its objectives that underpinned the *UPA* decision.

5. The ECJ's *Jègo-Quèrè* judgment

5.1. Background

On the 1st April 2004 the ECJ delivered its judgment for the *Jègo-Quèrè* case, with the chronology becoming once again crucial. The *UPA* decision clarified things and the Opinion by AG Jacobs in *Jègo-Quèrè* confirmed that the legal situation remained unchanged. At this point it must be remembered that in the *UPA* judgment the ECJ placed considerable, yet implied, emphasis on the Convention on the Future of Europe and the need for amending the individual concern requirement at the political level.⁽⁹⁴⁾ This reasoning formed an important part of the approach of the ECJ for a variety of reasons already analysed. The chronology issue becomes important because on the 18th of July 2003 the Draft Constitution for Europe presented the amended part of Art. 230 (4) EC, which was almost identical to the formula proposed by the president of the CFI on the 26th of February 2003 and favoured by the majority of the members of Working Group II. The latter text read as follows “ Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, and against [an act of general application] [a regulatory act] which is of direct and individual concern to him without entailing implementing measures”.⁽⁹⁵⁾ In the Draft Constitution under Art. III-365, the provision is superficially changed to read “any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct and individual concern to him or her without entailing implementing measures”.⁽⁹⁶⁾ The new provision is not changing the legal situation as dictated by the case law and for present purposes two points must be made.

Firstly, the ECJ's call for reform in *UPA* did not materialise and the Court had extremely clear indications of that by the 26th February 2003 and of course by the Draft Constitution Art. III-365 presented on the 18th July 2003, both of which were prior to the ruling in *Jègo-Quèrè*. The Court therefore could use the judgment to comment on the situation.

Secondly, the proposal by the President of the CFI M. Bo Vesterdorf on the 26th February 2003 does not resemble in any way the proposed test of CFI's *Jègo-Quèrè* ruling. Could the fact that the *UPA* decision by the ECJ implicitly rejected the test by not mentioning it, be seen as directing the CFI's President to follow AG Jacobs in taking a step back? It is submitted that the question has to be answered in the affirmative.

5.2. Approach of the ECJ

In terms of the judgment, the ECJ started by quoting in paragraph 13 the CFI's ruling *per verbatim* from paragraph 44 to 54 of that decision.⁽⁹⁷⁾ It then continued to repeat the main principles of the *UPA* judgment, thus making the following points:

- individuals are entitled to effective judicial protection⁽⁹⁸⁾
- this stems from constitutional traditions of the Member States, Arts. 6 and 13 ECHR and the decisions in *Johnston* and *UPA*⁽⁹⁹⁾
- the Treaty has established a complete system of legal remedies on the basis of Arts. 230, 241 and 234 EC as *UPA* stated⁽¹⁰⁰⁾
- it is for the Member States to establish a system of legal remedies ensuring EJP according to *UPA* again⁽¹⁰¹⁾
- as a result of the obligations flowing from Art. 10 EC the national courts must facilitate challenges to validity at the domestic level by ensuring that national rules are interpreted as far as possible in a way enabling access to a court. *UPA* was cited as the authority once more⁽¹⁰²⁾
- An action for annulment before the Community courts should not on any view be available, if the national rules do not allow challenge and there is no individual concern. In other words, the exceptional by-passing of the standing requirement is not to be applied, again on the basis of *UPA*⁽¹⁰³⁾
- In conclusion, the CFI erred in law.⁽¹⁰⁴⁾

It must be noted that the *UPA* decision has provided the precedent and the most important source of principles for the ECJ in the *Jègo-Quèrè* ruling. The *UPA* judgment has been cited six times by the ECJ and has provided the point of reference and the landmark case in the Court's analysis, whereas the *Plaumann* decision which represented the *locus classicus* in the past, was mentioned only once in paragraph 45. It can be argued that the Court was intending to highlight the significance of the *UPA* decision and project it as the new and complete rationale for the area of standing of private applicants. What was missing from the judgment was a reference to the need for reform at the political level, especially

after the 18th July 2003 proposal for the new test, which was not addressing the concerns expressed prior to the *UPA* judgment.

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That omission could be interpreted as accidental, in which case the Court would have committed an unprecedented oversight. Alternatively, it can be argued that the ECJ was just continuing the theme of respecting the political decisions and the text of the Treaty, thus considering it to be unwise to comment at a time when the Draft Constitution was in the middle of a heated debate as to its nature and with the subsequent uncertainty of adoption pending. It can be reasonably argued that the Court intentionally failed to comment for the latter reason.

6. The Draft Constitution and Standing: Reaffirming the ECJ's Approach [↑]

The workings of the Convention's Circle that examined the area of standing attracted the attention of the academic community as a corollary of the relatively recent debate that was instigated from the case law following the seminal *UPA* decision. Consequently, Art. 230 (4) EC was regarded as a provision that had constitutional significance of an extent that could impact on the legitimacy and the general approach of the Court in performing its constitutional function.

The range of constitutional factors described in the previous sections rendered the approach of the Draft Constitution extremely interesting and with potential for changing the legal *status quo* in a manner that was bound to have an impact on the Court. A rejection of the *UPA* reasoning and a substantive change of direction for standing would have signalled the unsatisfactory state of the law and as a corollary would undermine the authority of the Court. Minimal change could be interpreted as an endorsement of the jurisprudence of the ECJ in a field where the judicial approach was questioned both internally and externally and where the Court reaffirmed its approach chronologically close to the start of the work of the Convention. Therefore, the nature of Art. III-365 needs to be examined in detail.

The new provision in Art. III-365 (4) has failed according to Pech⁽¹⁰⁵⁾ to liberalise the current position and introduced a minor change based on the new distinction between 'legislative' and 'regulatory' acts. For the purpose of assessing the degree of change for standing it is necessary to examine the scope of legislative and regulatory acts respectively.

In textual terms, Art. III-365 (4) represents a continuation of Art. 230 (4) EC and a reflection of the jurisprudence of the ECJ that enables an individual applicant to challenge a legislative act but only if the dual requirement of 'direct and individual concern' is satisfied. The relaxation relates to the dichotomy of the dual requirement in relation to individuals challenging a regulatory act that does not require implementing measures. For such a measure, the requirement is only direct concern.⁽¹⁰⁶⁾ As a general comment, it is clear that the new provision created two different sets of requirements depending on the nature of the contested measure, while the individual concern condition is not altered. The new provision has been criticised mainly on two grounds, namely terminological confusion and incompatibility with 'effective judicial protection' as protected under Art. II-107.

In relation to terminology, Toth⁽¹⁰⁷⁾ characterised the new text as confusing and as a paradigm of unclear drafting that represents a minor improvement not sufficiently broad and effective to resolve the problems associated with the strict approach of the ECJ. The confusion stems from the fact the Art. III-365 (4) refers to 'acts' and 'regulatory acts' with the former intended to apply to acts of a legislative nature. Therefore, there is introduction of the term 'regulatory acts', for which the only alteration in terms of lowering the standard applies, but without being included in Art. I-33 that establishes the range of legal acts. That range includes legislative, non-legislative and non-binding acts but makes no reference to regulatory acts.⁽¹⁰⁸⁾ Therefore, there is no express definition for 'regulatory acts' which are taken to refer to measures that are not legislative, thus leading to a process of defining through exclusion.

Errera stated that the inconsistency between Art. III-365 (4) and Arts. I-33 to I-38 is not ideal for obtaining legal certainty.⁽¹⁰⁹⁾ Errera pointed to the internal inconsistency within Art. III-365 and specifically between subsections one and four, since under the former there is no reference to 'regulatory acts'. An additional complexity is added by the requirement for no implementing measures in relation to regulatory acts. The complication arises because a regulatory act could include administrative rules or secondary legislation that intends to have general application and to facilitate and support legislative acts. Therefore, Art. III-365 (4) would partly apply to what are in effect implementing acts of non-legislative nature, despite the fact that implementing measures are expressly excluded, because those measures do not require further implementation. The terminological confusion is magnified by the lack of a definition for regulatory acts, especially since it seems that under the undefined regulatory acts the implementing measures that are not legislative would not be excluded on the basis of the requirement for no further implementation.

In summary, the terminology is confusing because regulatory acts are not expressly defined, they are indirectly described through a process of comparison with legislative acts and a subsequent exclusion, there is an internal discrepancy between Art. III-365 (1) and (4) and a further difficulty with the implementation requirement.

The second source of criticism relates to what Arnull(110) has termed as possible incompatibility with Art. II-107 and the right to an effective remedy and a fair trial. According to Rochère and Iliopoulou(111) the argument is based on the minimum and insignificant change that is still in breach of the right to access to a court and to an effective judicial remedy as regards the requirement for regulatory acts. The incompatibility with Art. II-107 is, therefore, apparent according to the two preceding views which are reflecting the reasoning of AG Jacobs's in the *UPA* case.

The incompatibility of the standing provision with Art. II-107 argument has been challenged on two grounds, namely that it is inaccurate and misplaced. The inaccuracy is founded on the view that there is no incompatibility of Art. III-365 (4) with Art. II-107, since according to Papier(112) there is a mere delay and no denial of legal protection. This conclusion is drawn from the principle that certain types of measures can be challenged before courts only exceptionally, thus resulting to incidental review of the legal norm. Papier concludes that this principle is applicable in German constitutional law and in the ECHR, hence there is no reason why it should be excluded from the sphere of EU law. The issue is, therefore, that delay is not denial, thus leading Papier to conclude that there is no incompatibility with Art. II-107.

Besselink(113) elaborates on the point by stating that there is no conflict with Arts. 6 and 13 ECHR and Art. II-107 as the provisions are not granting unlimited access to a court for all types of complaints and are not absolute in equating judicial protection with the access to a court. There is also European common ground on this approach as there are standing requirements of similar nature in all the Member States, while at the same time Besselink sees Art. III-365 (4) as limiting access only for legislative acts. For the latter point there is a democratic balance and separation of powers issue because courts should not be the only forum for balancing competing interests related to legal norms of general application.

The preceding approaches can be interpreted as stating that the focus is misplaced as it is taken for granted that the individual should be able to challenge all types of acts in the most expedient way. The misconception is supported by reference to comparative constitutional analysis which indicates that the individual can challenge specific types of norms, exceptionally, and by using indirect procedures that would result in incidental review. The situations where a preliminary reference would not be available could be classified as coming within the scope of those measures that are not challengeable, as challenge is exceptional as a legal principle. Moreover, there is a concern about the appropriateness of using courts as a dispute resolution mechanism in situations where there are complex special interests and considerations involved and where there would be general application.

However, the preceding rationale must be questioned since there is a new constitutional setting for the debate on standing which is not fully taken into consideration by the described argument. The nature of the arguments in *UPA*, the use of human rights as a ground justifying change combined with the fact that the reform initiative was driven from the lower parts of the judicial hierarchy, have created a new constitutional environment. The ECJ offered a reminder that placed responsibility for reform on the process of amendment, which was at the time forthcoming in the form of the Draft Constitution. Insistence on denying the existence of an issue for the right to effective judicial protection in the given context is undeniably an intelligent legalistic method, alas incomplete and routed in the past.

The incompatibility of the standing provision with Art. II-107 argument is also challenged on the ground that it is misplaced, with misplacement referring to the simplistic and selective concentration only on Art. III-365 (4). The consensus expressed by Besselink(114) and Pernice(115) points to the existence of supporting structures that are routinely ignored in the debate, thus leading to a selective isolation of Art. III-365 (4) from interlinked provisions. The interesting point is that the preceding point is not made in relation to the preliminary reference procedure as such, but in terms of Art. I-29 (1) and Art. II-111 (1). The argument states that the standing requirements were supplemented by supporting provisions that are establishing a decentralised judicial system that the critics omit to mention. Art. I-29 (1) is creating an obligation for national courts "to provide rights of appeal sufficient to ensure effective legal protection", while Art. II-111 (1) imposes a duty on national courts to apply the EU Charter in order to ensure judicial protection based on the principle of subsidiarity. Therefore, the combined effect of those two provisions is to create a duty for national courts to ensure effective judicial protection based on subsidiarity, thus in effect imposing decentralization and delegation for judicial protection. It can, therefore, be argued that compliance with Art. II-107 is ensured through the combined operation of Art. III-365 (4) and Art. I-29 (1) and Art. II-111 (1). Pernice argues that Art. III-365 (4) per se could be in breach of Art. II-107 but the combined effect of the aforementioned provisions pre-empts any breach.(116)

A point must be made about Art. I-29 (1). It is conceded that the provision mirrors the idea of decentralisation of judicial protection through the delegation of the responsibility to ensure the adequate protection of that right. There is an inherent link with the principle of subsidiarity to that effect and the provision supplements the reasoning of the ECJ in the *UPA* case. As such, the provision offers affirmation for the Court's approach in the post-*UPA* period and is indirectly rejecting the claims for reform of standing. The otherwise criticised approach of the ECJ has been introduced into the Draft Constitution and it can be argued that Art. I-29 (1) is more important than Art. III-365 (4) and it is in this way that is supplementing the latter. Not in terms of completing the system of remedies but by codifying the approach of the ECJ in *UPA*. Therefore, the arguments that insist on focusing on the complementary character of Art. I-29 (1) are distorting the picture through the repetition of the justifying rationale of the Court which misdirects them from commenting on the substantive importance of the provision: the unqualified and holistic support of the Court's approach that is now codified.

In conclusion, Art. III-365 (4) has to be seen in the context of the constitutional crisis that preceded its adoption as that was expressed in the case law. The nature of the debate and its constitutional significance have changed dramatically and it would be unhelpful to ignore those factors. The arguments that consider delay as not amounting to a denial of effective judicial protection and which regard the criticisms as misplaced due to the adoption of a wrong starting point, reflect the reasoning of the ECJ *prior* to the *UPA* case. Furthermore, the idea that there is a supplementing system of remedies that supports and completes the justifiably limited scope of standing is failing to adapt to the new constitutional status of the standing requirements. The view that sees Art. I-29 (1) as the supplementing provision is presenting the justification rationale used by the Court in *UPA* but it fails to present the central importance of the provision as reaffirming through codification the approach of the ECJ.

Consequently, it will be concluded that Art. III-365 (4) offers limited liberalisation of the standing requirements that is unsatisfactory and it introduces a terminological distinction that is *ab initio* blurred due to the lack of clear definitions. The views that concentrate on Art. I-29 (1) offer an incomplete description of the importance of the provision but a useful stepping stone for concluding that the constitutional role of the Court is strengthened partly due to the reflection of its reasoning in Art. I-29 (1) and partly because of the minimal change in Art. III-365 (4). Therefore, in an area where there were constitutional issues raised that doubted the ECJ's methodology, the Draft Constitution has unreservedly confirmed and supported the Court despite the fact that the arguments against were and remain valid and justified.

7. Conclusion

It is submitted that the Court's approach in the area of standing of private applicants has been rightly criticised as too restrictive and narrow. However, there should be a distinction between the general critique on the overall approach to standing and the critique that views the decision in *UPA* as a missed opportunity and as a revolution that has not taken place. The objection to the latter line of reasoning relates to its partial reflection of the dramatic changes of the nature of the legal arguments used in the recent case law (EJP) and to the interpretation of the judgments in isolation from each other and in detachment from important political developments (Draft Constitution).

Consequently, the careful consideration of the recent jurisprudence on standing must take place on the basis of a methodology that approaches the case law as forming a unit rather than as independent entities. The chronology of the decisions, certain procedural details in the composition of the Courts and the fact that AG Jacobs delivered two diametrically different Opinions in *UPA* and *Jègo-Quèrè* are significant factors. More important is the structuring of the Opinion in *UPA* and the contrast with the CFI's ruling in *Jègo-Quèrè*, which provide the background to ECJ's judgment in *UPA*. It is equally important to assess the aftermath of *UPA* and the approaches of AG Jacobs and the ECJ in *Jègo-Quèrè*, as well as the proposal of the President of the CFI on standing submitted to the Convention on the Future of Europe.

The critique that followed *UPA* in effect argued that the 'Revolution' had not taken place and the ECJ failed to reform a problematic area of its jurisprudence. The 'Revolution' took place *prior* to the *UPA* judgment, but was not identified due to the misplacement of the critique. In other words, the 'Revolution' was expected to take place in *UPA*, thus disorienting the analysts from identifying the correct originating direction. The Velvet Revolution as manifested in AG Jacobs's Opinion and the CFI's *Jègo-Quèrè* decision was not given the appropriate attention, despite the fact that it was the nexus that explained subsequent case law. In that light, the impact of the *UPA* decision is that it terminated the Velvet Revolution in the most emphatic way, as the Opinion of AG Jacobs in *Jègo-Quèrè* and the ECJ's judgment in the same case illustrate. What remains to be seen is whether the ECJ could in the future find a way to reverse *de lege lata*, given the minimal change introduced under Art. III-365. At the same time, the supplementing provisions (Art. I-29 (1)) of the Draft Constitution reaffirmed the approach of the ECJ in *UPA* and the idea that the responsibility for effective protection is delegated to the national courts.

One thing is certain. Any possible change will be driven by the ECJ and on the basis of its broader multidimensional decision-making strategy. Reversals of established precedent come within the action framework of the ECJ and are not imposed from below or in detachment from important political initiatives. The reason is that the Court's function is dependent on its authority and that would be endangered if there is any impression of judicial deficit or lack of authority. If the priorities in general and in terms of the area of standing change in the future, it remains to be seen how the ECJ would depart from its interpretation of individual concern. The description of a potential transformation of the Velvet Revolution will await another occasion.

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