
Matthew Astley (Law)

Introduction

Few would dissent from the view that in all legal systems there should be in existence at least some means of judicial control over the power wielded by the State. This is certainly the case in English law, where applicants may bring actions for the ‘judicial review’ of administrative action taken by an authority or body, which wields administrative and law making powers – a local authority or government department, for example, or a minister of the Crown. In such cases the applicant will seek to allege that the authority concerned has acted ultra vires – or, in other words, outside the powers conferred on it by Parliament.

Likewise, in European Community law there has always been enshrined in the EC Treaty (which is re-named the Treaty on the Functioning of the European Union [TFEU] by the Treaty of Lisbon) a number of avenues for the judicial review of legally binding EU norms or acts enacted by EU institutions – predominantly the Commission and the Council. Arguably the most important of these avenues is the action for annulment under Article 230 (which becomes Article 263 TFEU post-Lisbon), which sanctions a direct review of the legality of EU activity before the General Court (formerly the Court of First Instance) and/or the Court of Justice of the European Union (hereinafter to be referred to collectively as ‘the Court’, unless specified).

Before being able to bring an action for judicial review in either jurisdiction, an applicant must first show that he has the requisite locus standi, or ‘standing’. The importance of this requirement cannot, therefore, be emphasised too strongly. As Craig states:

A legal system may have very sophisticated tools for substantive judicial review, but if the access or gateways are drawn too narrowly the opportunity for an individual to utilize such tools will perforce be limited (2006, 313).

The rules on standing in English law and EU law differ significantly. This paper will endeavour to critically analyse the law regarding the standing of private parties in EC law in the context of Article 230 proceedings (but does not attempt to deal with the potential impact
of the reforms brought to that Article by the Treaty of Lisbon). It will consider whether the approach of the Court to standing requirements in such proceedings is so restrictive that individuals wishing to challenge the legality of EU activity will find it virtually impossible to do so. As part of this critique, the approach in EU law will be compared with that adopted in English law.

1. The inherently restrictive wording of Article 230

Article 230 of the EC Treaty distinguishes between three groups of potential applicants for the purpose of judicial review proceedings: privileged applicants, semi-privileged applicants and non-privileged applicants. Privileged applicants – Member States (MS), the Council, the Commission and the European Parliament – always have standing to challenge any reviewable act. Their exercise of that right is thus not ‘conditional on proof of an interest in bringing proceedings’ (Case 45/86 Commission v Council). On the other hand, semi-privileged applicants, namely the Court of Auditors and the European Central Bank, may bring proceedings only ‘for the purpose of protecting their prerogatives’ (Article 230(3) EC Treaty) and provided the action ‘is founded…on submissions alleging their infringement’ (Case C-70/88 European Parliament v Council). Private applicants, not falling into either of the aforementioned categories, are dealt with by Article 230(4) EC Treaty – formerly Article 173(4), which states that:

Any 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 another person, is of direct and individual concern to the former.

It is first important to note that the term ‘natural or legal person’ includes, inter alia, individual citizens of any nationality (Lenaerts et al. 2006, 244), non-EU countries (Case C-298/89 Govt. of Gibraltar v Council) and ‘infra-State public entities’ (Arnull 2001, 10, Case T-288/97 Regione Autonoma v Commission). Secondly, even the most cursory glance at the express wording of Article 230(4) reveals that it is inherently restrictive in nature, with review proceedings only being able to be brought in three types of case.

In English law, section 31(3) of the Supreme Court Act 1981 states that ‘the court shall not grant leave [to apply for judicial review] unless it considers that the applicant has a sufficient
interest in the matter to which the application relates [emphasis added].’ Similar wording was
used in some of the case law preceding the Act (see e.g. ex parte Cooke and Stevenson [1970]). Evidently much less restrictive in nature, this test of ‘sufficient interest’ has, in
contrast, been said to be ‘broad’ and to create ‘considerable scope for differing judgments on
the same facts as to whether an applicant has standing’ (De Smith et al. 1999, 31).

The first type of case in which review proceedings can be brought under Article 230(4) is
where there is a decision addressed to the applicant. As Hedemann-Robinson acknowledges,
this route to judicial review has ‘been unsurprisingly straightforward to apply and
uncontroversial as an addressee is quite obviously individually concerned with such a
decision’ (1996, 130). The second type of case is where there is a decision ‘in the form of a
regulation’; the third, where there is ‘a decision addressed to another person’. In both cases
the applicant must show that the decision is of ‘direct and individual concern’ to him.
Applicants who satisfy this cumulative requirement may therefore be regarded as de facto
addressees (Case 222/83 Municipality of Differdange v Commission). Furthermore, Article
230(4) distinguishes between form and substance, with applicants only able to challenge an
act, which is a decision in the latter sense. The quiddity of a decision is that it is addressed to
a limited number of persons, ‘whereas a regulation, being essentially of a legislative nature, is
applicable…to categories of persons viewed abstractly and in their entirety’ (Cases 16-17/62
Confédération Nationale v Council).

2. The ‘economy of judicial reasoning’ and the requirement of ‘direct concern’
When dealing with the cumulative requirement of ‘direct and individual concern’, the Court
has applied the axiom économie des moyens (‘the economy of judicial reasoning’), in
accordance with which ‘it is sufficient to establish that one condition is not satisfied and to
dismiss the complaint on this ground without having to deal with the second’ (Barav 1974,
192). It has typically, though not always (see e.g. Case 69/69 Alcan v Commission), chosen to
deal with the requirement of individual concern first. In Plaumann v Commission (Case
25/62), for example, the ECJ held that it must first be examined whether this requirement is
fulfilled because if it is not satisfied ‘it becomes unnecessary to enquire whether [the
claimant] is directly concerned’. In the majority of cases non-privileged applicants have
failed to satisfy the requirement of individual concern (Barav 1974), the corollary of this
being that the requirement of direct concern has ‘traditionally had … a much less decisive
role in the dismissal of actions for annulment brought by private parties’ (Albors-Llorens 2003, 75).

The requirement of direct concern essentially refers to the existence of a direct causal nexus between a Community measure and its effect on the legal position of the private party seeking annulment (Albors-Llorens 2003, Arnul 2001). This requirement has been interpreted to mean that a measure will be of direct concern where it affects the legal situation of the applicant and the addressee is left with no discretion as to the manner of its implementation (see e.g. Cases 41-44/70 International Fruit v Commission, Case 333/85 Mannesmann-Röhrenwerke v Council). This now also appears to be the case where addressees ‘adopt implementation measures on the basis of a competence liée’ (Barav, 1974, 193) – that is, where some element of discretion is conferred on the addressee but the use of that discretion is ‘entirely theoretical’ (Case 11/82 Piraiki-Patraiki v Commission, Case 62/70 Bock v Commission, Case T-435/93 ASPEC v Commission). The rationale for this approach is that ‘The exercise of any real discretion by the addressee … would cause a private applicant to be directly concerned not by the Community measure but by the act of the addressee and therefore it is the act of the addressee that should be challenged instead’ (Albors-Llorens 2003, 75).

3. The requirement of ‘individual concern’

a. Decisions addressed to another person

The seminal decision with regard to decisions addressed to another person is Plaumann, where the ECJ enunciated the test for individual concern, namely that:

Persons ... may only claim to be individually concerned if that Decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed [emphasis added].

Applying this test to the facts, the ECJ held that the fact that the applicant was affected by the impugned decision ‘by reason of a commercial activity [importing clementines] which may at any time be practised by any person’ did not distinguish the applicant vis-à-vis the contested
decision as in the case of an addressee. The upshot of this reasoning is, in essence, that an applicant will only be individually concerned by a measure if he can show that it affected him as a member of a closed category (Hartley 2007). In other words, the applicant must belong to ‘a group of people that could not be enlarged after the measure entered into force’ (Albors-Llorens 2003, 77). The Plaumann ruling is hence explicable on the basis that because the measure would have applied to anyone who may have decided to import clementines in the future – that is, the membership of the group of persons was not fixed when the measure came into force – the applicant was a member of an open, as opposed to a closed, category. It is, however, a test which has been vehemently criticised.

Craig contends that the reasons for rejecting the claim can be criticised on both pragmatic and conceptual grounds. As regards the former, he refers to the test as being ‘economically unrealistic’, stating that it is not fortuitous if, say, there are only a limited number of firms pursuing a particular trade; nor, he says, is that number likely to escalate suddenly and unexpectedly (Craig 1994, 2006). On conceptual grounds, he submits that the reasoning of the ECJ in Plaumann ‘renders it literally impossible for an applicant ever to succeed, except in a very limited category of retrospective cases … since it could always be argued that others might engage in the trade at some juncture’ (1994, 509-510). The general unwillingness of the Court to deviate from this inherently restrictive test has produced some lamentable results (Albors-Llorens 2003). For instance, it was held in Glucoseries Réunies v Commission (Case 1/64) that the applicant, a Belgium glucose exporter, was not individually concerned, even though it was highly unlikely that new members would subsequently join this class of people. Furthermore, the ECJ held in Pirai̇ki-Patraiki v Commission (Case 11/82) that those companies which had not entered into contracts to export cotton yarn to France before the date of the impugned decision did not have standing, because it affected them ‘in the same way as any other trader actually or potentially finding himself in the same position [emphasis supplied]’. In this respect, the Pirai̇ki-Patraiki case exemplifies the very restrictive nature of the Plaumann test.

Conversely, Pirai̇ki-Patraiki also serves to illustrate the type of retrospective situation in which applicants may be accorded standing: the ECJ held that those companies which had entered into contracts were individually concerned as they were members of a closed category. In Bock v Commission (Case 62/70) it was held that a Commission decision addressed to the German Government authorising it to prohibit the import of Chinese...
mushrooms was of individual concern to a German importer who had applied for an import licence prior to the date of that decision. It is therefore evident that the only time when the Plaumann test has been satisfied is ‘where an applicant pursued a course of action before the enactment of a measure … and, by reason of that conduct, was specially affected’ (Albors-Llorens 2003, 77; Hedemann-Robinson 1996). In the absence of such circumstances, however, the mere ‘possibility’ of standing for applicants has been described as being ‘like a mirage in a desert, ever receding and never capable of being grasped’ (Craig 1994, 510).

This inherently restrictive approach to individual concern may be contrasted with the ‘individual rights’ approach to standing traditionally adopted by the English courts (see e.g. ex parte Manson (1994), ex parte Whitehouse (1984)). Take, for instance, the Plaumann case. Although the decision had an adverse impact on the Plaumann’s interests, this was not sufficient to render the applicant individually concerned. However, under the ‘individual rights’ approach it is clear that Plaumann, having been adversely affected as an importer of clementines in a way which set it apart from the public at large, would be deemed to have a ‘sufficient interest’ in the matter. Such direct interference with an applicant’s personal rights has been said to be ‘an obvious case in which [an applicant] will have standing’ (De Smith et al. 1999, 35).

A similar contrast can also be made between the respective jurisdictions as regards the standing of associations. Under EC law, the Court has always adopted a restrictive approach (Cases 16-17/62 Confédération Nationale v Council, Case 117/86 UFADE v Council [1986] ECR 3255, Albors-Llorens 1996). It has continued to invoke the Plaumann test, such as in the case of Greenpeace v Commission (Case T-585/93), where the CFI held that the test applied irrespective of the interest affected (see also Case T-219/95 Danielsson v Commission). The CFI further held that the applicant associations did not ‘adduce any special circumstances to demonstrate the individual interests of their members as opposed to any other person’ who was residing, or who might in the future reside, in the areas affected by the impugned decision. Only ‘special circumstances such as the role played by an association in a procedure which led to the adoption of an act’ may justify granting standing to ‘an association whose members are not directly and individually concerned’.

This approach thus makes it ‘almost impossible’ for associations to be accorded standing, and its severity is ‘striking’ when compared with approaches taken under national legal systems.
(Albors-Llorens 2003, 78). There are, for instance, some clear signs of a more liberal public interest or actio popularis (a ‘citizen’s action’) approach being adopted by some English courts, one notable example being ex parte World Development Movement [1995]. It may also be plausible to assert, moreover, that the approach of the ECJ is far more restrictive than even that adopted in ex parte Rose Theatre Trust [1990], where Schiemann J. denied standing, stating that ‘The fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have an interest’.

b. Decisions in the form of a regulation

The next issue pertains to decisions ‘in the form of a regulation’. The raison d’être of this aspect of Article 230(4) is ‘to prevent the Community institutions from being in a position, merely by choosing the form of a regulation, to exclude an application by an individual against a decision which concerns him directly and individually [emphasis supplied]’ (Cases 789-790/79 Calpak v Commission). Two tests can be identified for this type of case: the closed category test and the ‘abstract terminology’ test. This paper will now analyse each of these tests in turn. The latter is stricter than the former, and it is also the one which is more prevalent in the recent jurisprudence of the ECJ (Craig 1994).

In certain circumstances the Court has been willing to adopt a closed category approach. For example, in CAM v Commission (Case 100/74), the impugned regulation concerned a fixed and determinate number of cereal exporters and so the ECJ held that applicants were individually concerned. Similarly, it was found in International Fruit v Commission (Cases 41-44/70) that importers of apples from non-MS who had applied for import licences prior to the adoption of the contested regulation were members of a closed category. As noted above, however, the closed category test is very restrictive in that it will only apply in cases dealing with a ‘completed set of past events’ (Craig and De Búrca 2003, 495).

The test which the Court has more frequently adopted is the ‘abstract terminology’ test. Here the applicant must show that the impugned measure, though a regulation in form, is nonetheless a decision in substance and of direct and individual concern to him. It was held in Calpack that a ‘real’ regulation is a measure which ‘applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner’. Further, even if it is possible to determine the number or
even identity of those affected, the nature of a measure as a regulation will not *ipso facto* be called into question.\(^7\)

So, it is clear from the *Calpack* ruling that the courts must ascertain whether the contested measure is, irrespective of its form, a regulation in substance. The test laid down by the court may, however, be criticised for being unduly restrictive. One reason for this is because, ‘rather than looking behind form to substance, it comes perilously close to looking behind form to form’ (Craig 1994, 515). It has ‘a circular effect in negating the very intention underpinning [Article 230(4)]’, namely to focus on the impact of legislative measures, not their labels (Hedemann-Robinson 1996, 138). In essence, the principal problem with the *Calpack* test is that, even if the task of enactment is essentially administrative in nature, it is always possible to draft norms in the manner prescribed therein and thereby immunize them from attack. This approach is far more restrictive than even the traditional individual rights approach in English law, because even persons whose rights have been affected would not be accorded standing. In sum, it is evident from the restrictive nature of both the *Plaumann* and *Calpack* tests, and their manner of application, that ‘it is *virtually impossible* for an individual to succeed in any case which does not involve some completed set of past events [emphasis supplied]’ (Craig, 1994, 523).

4. Cases where a more liberal approach has been adopted

a. Areas involving acts of a ‘quasi-judicial’ nature

It is discernable that the Court has been willing to adopt a more liberal approach to standing in review proceedings to annul acts of a ‘quasi-judicial’ nature. In contrast to acts in mainstream cases – those concerning the Common Agricultural Policy, for example – these are ‘predominantly decisions of fact and law, rather than discretionary decisions’, and are ‘the culmination of a procedure which has judicial features’ (Hartley 2007, 358). One area falling into this category concerns competition policy (see Articles 81, 82 EC Treaty).\(^8\) In *Metro SB-Großmärkte v Commission* (Case 26/76, Dinnage 1979), for example, the impugned decision ‘was adopted in particular as the result of a complaint submitted by Metro’. It was held that, ‘in the interests of a satisfactory administration of justice’, applicants entitled to complain ‘should be able … to institute proceedings in order to protect their legitimate interests’. However, if the ‘normal’ *Plaumann* test had been applied, ‘Metro would
almost certainly have failed’, as it was affected as a member of an open category (Craig 1994, 518).

Another area falling into the above category is anti-dumping policy. Here the Court is placed in a ‘difficult position’ because anti-dumping duties must be imposed by regulation. (Craig and De Búrca 2003, 504). Nevertheless, it was held in Timex v Council and Commission (Case 264/82) that the contested regulation constituted a decision which was of direct and individual concern to Timex because, *inter alia*, it had initiated the complaint ‘which led to the opening of the investigation procedure’ and the subsequent adoption of the impugned regulation. It is also apparent that producers and exporters will be accorded standing if they are identified in the measure adopted (see e.g. Case 113/77 NTN Toyo Bearing v Council) or involved in the preliminary investigations (see e.g. Cases 239, 275/82 Allied Corporation v Commission). There are also signs of a more liberal approach being taken towards importers, particularly those ‘whose retail prices for the goods in question have been used as a basis for establishing export prices’ (Case C-358/89 Extramat v Council).

b. Cases concerning the institutional structure of the Community

One final area ‘in which there is evidence of a more lenient approach to standing concerns the institutional structure of the Community itself’ (Craig and De Búrca 2003, 509). In Les Verts (Case 294/83), the contested measure concerned the (allegedly unequal) allocation of public funds for the purpose of preparing for elections. Although the applicant was a member of an open category, it was held that to deny standing would ‘give rise to inequality in the protection afforded by the Court to the various groupings competing in the same elections’. The ECJ, in using this *effet utile* technique of Treaty interpretation, thus circumvented the orthodox test of individual concern (Hedemann-Robinson 1996).

In comparison, the English courts have in certain circumstances adopted an approach akin to that in Les Verts, according standing in cases where the applicant alleges a serious illegality of constitutional importance (see e.g. *ex parte Smedley* [1985], *ex parte Rees-Mogg* [1994]). Yet whereas the UK courts are *prima facie* leaning ever closer towards a public interest approach (see notably *ex parte Dixon* [1998] per Sedley J, though compare *ex parte Garnett* [1998]), Les Verts can merely be regarded as ‘a unique case where the public interest in having … decisions reviewed prevailed over the restrictive nature of the Article 230(4) … conditions’ (Albors-Llorens 2003, 79).
5. Recent jurisprudence of the CFI and ECJ

The *Codorniu* case (Case C-309/89) raised hope that the Court was taking a novel and more liberal approach to standing outside of the abovementioned areas (Craig 2006). In one respect this was undoubtedly true, with the ECJ holding that the fact that the impugned measure was a ‘true’ regulation in accordance with the *Calpack* test did not prevent it from being of individual concern to the applicant. This aspect of the ruling was ‘belatedly accepted’ thereafter by the CFI, notwithstanding its initial recourse to the ‘hybridity theory’ – namely that a Community measure can simultaneously be both a true regulation and a true decision – to explain the effects of *Codorniu* (Arnull 2001, 20-22).

Nevertheless, the test for individual concern under *Codorniu* remains the *Plaumann* test. The ECJ held that the contested measure differentiated the applicant from all other traders by precluding it from using its graphic trade mark. This may be construed as meaning that *Codorniu* was individually concerned because of the ‘particularly damaging effects that the measure would have on its situation’, and so the ruling remains part of a special strand of case law limited to exceptional sets of facts (Albors-Llorens 2003, 80-81). Any hope raised by *Codorniu* was therefore ‘dashed by the realization that in most instances the *Plaumann* test…would be interpreted in the same manner as *Plaumann* itself’ (Craig 2006, 333).

Further hope was raised more recently, by the Advocate General’s opinion in *UPA v Council* (Case C-50/00P) and the CFI’s ruling in *Jégo-Quéré v Commission* (Case T-177/01). In both cases, the applicants argued, *inter alia*, that their respective rights to ‘effective judicial protection’ would be denied if they were not accorded standing. This was because the impugned regulations did not provide for any implementing measures by the MS, meaning that it was not possible for the applicants to challenge any such measures directly before their national courts. In consequence they were also unable to challenge the validity of the EU regulations indirectly in the context of those proceedings by requesting that a preliminary reference on the issue be made to the ECJ under Article 234. Where such a request is made in this context, the matter must be referred to the ECJ by the relevant national court, unless the latter plans to uphold the legality of the impugned act (Case 314/85 *Foto-Frost v Hauptzollamt*). Article 234 therefore provides a means of indirect challenge to the legality of Community acts. However, the only way in which the claimants in *UPA* and *Jégo-Quéré*
could have raised the matter indirectly would have been to violate the law and raise the issue of invalidity in defence.

After considering potential solutions to the problem in hand, AG Jacobs opined that the only satisfactory solution was to recognise that an applicant is individually concerned where the measure ‘has, or is liable to have, a substantial adverse effect on his interests [emphasis omitted]’. This new test, he said, may be justified on the basis, *inter alia*, that ‘the case-law is increasingly out of line with more liberal developments in … Member States’. No doubt influenced by this opinion, the CFI in *Jégo-Quéré* held that in order to ensure effective judicial protection, individual concern should be satisfied where the impugned measure ‘affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him’. Had either test been adopted by the ECJ, it would doubtless have paved the way for a more liberal approach. Regrettably, however, this was not the case.

In *UPA*, the ECJ held that a true regulation can only be of individual concern to applicants upon satisfaction of the *Plaumann* test; if that condition is not fulfilled, an applicant ‘does not, under any circumstances, have standing’. It is, the ECJ held, for MS to ensure respect for the right to effective judicial protection through a system of legal remedies and procedures which should be interpreted so far as possible to enable applicants to plead the invalidity of a Community measure before national courts. Further, in interpreting individual concern in the light of the principle of effective judicial protection, the Court cannot effectively set aside that express condition without exceeding the jurisdiction conferred on them by the Treaty; rather, the onus is on MS, if necessary, to instigate such reform.

In so far as it suggests that an indirect challenge under Article 234 is an acceptable and effective alternative to a direct challenge before the ECU courts, this reasoning is reprehensible, given that applicants do not have automatic right to a referral under Article 234; this decision is ultimately made by national courts. Even more reprehensible, moreover, is the fact that the inherently restrictive *Plaumann* test remains in place – a position which, as illustrated above, may be contrasted with the *status quo* in English law. All in all, it is fair to say that ‘the decision of the ECJ in *UPA* constitutes an uninviting prospect for natural and legal persons’ (Albors-Llorens 2003, 92).
6. The rationale for the Court’s inherently restrictive approach

Having evidenced the very restrictive nature of the Court’s approach to standing, it is necessary to succinctly consider some of the differing policy arguments advanced to explain it. Rasmussen proffers an ‘appellate court’ thesis, ultimately contending that the ECJ ‘has a long term interest in reshaping the judiciary … to allow itself to act more like a high court of appeals of Community law’, with national courts and the General Court acting as courts of first instance (1980, 122).

Harding explicitly rejects this thesis, asserting instead that Article 230(4) ‘itself … does not, and was probably never intended to hold out much hope to private plaintiffs’, because it would be contrary to good policy to permit challenges to regulations and decisions addressed to MS (1980, 354-355). As Craig observes, however, the ‘crucial issue is … not whether the Treaty imposes limits on standing but whether the interpretation of those limits is … overly restrictive’ (1994, 523-526). The very strict standing requirements in the ‘mainline cases’ are, he says, explicable ‘to a significant degree by the desire of the Court not to become enmeshed in large numbers of cases in which applicants seek to challenge’ the difficult discretionary policy choices made in virtually all such cases. ‘Countless claims … are possible’ because of the ‘plethora’ of decisions and regulations made and the essential nature of these choices, which often means there are winners and losers. In such cases, the Court does not want to be ‘constantly asked to second guess’ the discretionary choices made by EU institutions, which it is reluctant to do.

This reasoning is very convincing, and the author has little doubt that it provides an accurate and logical explanation for the Court’s perennially restrictive approach. But one must question this rationale. As Craig acknowledges, it is possible to challenge a discretionary act in the substantive hearing on the ground, for example, that it constitutes a misuse of power (1994, 526). Although it is difficult to succeed on such grounds, it possible that some cases will. It is surely wrong, therefore, for the Court to adopt an inherently restrictive approach to standing, as illustrated above, on the basis that a more liberal approach would result in an increase in the number of cases brought before it, or because it does not want to second guess discretionary choices. This is especially so where those applicants have a sufficient interest in the impugned act, or where their interests have been adversely affected. Applicants with a chance of succeeding in the substantive hearing may not even gain access to the Court.
7. The potential for reform

Policy considerations aside, it is nonetheless clear that the future for private parties wishing to attain standing in respect of Article 230 proceedings in mainstream cases is bleak. Indeed, the reasoning of the ECJ in *UPA* does not augur well for such parties. Interestingly, however, various proposals for the reform of Article 230 were propounded in the aftermath of that ruling, culminating in the (failed) Constitutional Treaty. As stated previously these proposals are now contained in Article 263 TFEU.

The novelty of the new provision is that individual concern *does not* have to be shown for ‘a regulatory act which is of direct concern to [the claimant] and which does not entail implementing measures’. Significantly, the term ‘regulatory act’ is undefined and thus it has been suggested by one author that ‘the seed for new problems concerning the interpretation of [the provision] has been sown’ (Koch 2005, 520). It has also been suggested that there is also nothing to suggest any alteration of the *Plaumann* test in cases not concerning ‘regulatory acts’ (Craig 2006, 345). As stated previously, full coverage of the new Article 263 TFEU lies outside the ambit of this paper, but it is hoped that the Court will use it to justify the adoption of a more liberal approach than that which they have hitherto taken.

**Conclusion**

It is submitted, *ad summam*, that the approach of the ECJ to standing requirements is in fact so restrictive that individuals wishing to challenge the legality of Community activity will find it virtually impossible to do so. The continual application of the *Plaumann* test by the ECJ means that individuals will only succeed in a very limited category of retrospective cases. In contrast, there is now clear evidence of a more liberal public interest approach to standing being taken by some judges in the English courts. However, even the more restrictive individual rights approach traditionally adopted by the English courts is far removed from that consistently taken by the ECJ. And although more liberal approaches have been taken by the ECJ in cases of a quasi-judicial nature, and those raising issues of constitutional importance, it seems unlikely that they will be adopted outside of those specific areas any time soon, save in exceptional circumstances.

**Notes**

2. See also Cases 106-107/63, Toepfer v Commission, Case 100/74 CAM v Commission; Case C-354/87 Weddel v Commission.

3. Standing was accordingly denied, and this decision was upheld on appeal to the ECJ: Case C-321/95 P Greenpeace v Commission.

4. Additionally, see the earlier Fleet Street Casuals case [1982]. Cane (1990: 308) states that ‘It is generally accepted that the main thrust of [this case] was to liberalise the rules of standing … to recognise that public law was concerned with protecting the public interest as well as private interests’. See also ex parte Greenpeace Ltd (No 2) [1994], where Otton J. stated, ‘if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issues before the court’.

5. This sentiment was echoed subsequently in the judgment, when Schiemann J. stated that ‘Since … no individual has the standing to move for judicial review it follows … that the company created by those individuals has no standing’. However, contrast the approach of Schiemann J. in this case with that taken by him in ex parte Beebee [1991]. The view propounded by Cane (1990: 312) is that in the Rose Theatre case ‘Schiemann J. may have reached the right decision but not for the best reasons’.

6. It is important to note, however, that the ECJ did in fact subsequently conclude that the impugned regulation was ‘not a provision of general application … but … a conglomeration of individual Decisions … under the guise of a Regulation’, thus applying the ‘abstract terminology test’. It is therefore evident that there has been some overlap in the approach taken by the Court in respect of both tests.

7. See also Case 41/81 Alexander Moksel v Commission, Case 26/86 Deutz und Geldermann v Council, Cases C-15/91 and C-108/91 Josef Buckl & Söhne v Commission).

8. A liberal approach is also taken in the area of state aid policy. For a comprehensive exploration of the law in this area, see Winter (1999).

10. On this, see Articles 6 and 13 of the European Convention on Human Rights; and Article 47 of the Charter of Fundamental Rights of the European Union. See also Case 222/84 Marguerite Johnston v Chief Constable of the RUC.

11. However, Usher (2003: 585) submits that neither would prima facie have opened the way for public interest litigation such as that previously rejected in the Greenpeace case. A detailed exploration of the similarities and differences between these tests is beyond the scope of this paper. For a discussion, see Albors-Llorens (2003).

12. See also Case C-263/02 Commission v Jégo-Quéré.


Bibliography

EC Legislation

European Community Treaty
Articles 80, 81, 230, 234

Charter of Fundamental Rights of the European Union
Article 47

Constitutional Treaty
Article III-365(4)

Reform Treaty of Lisbon
Article 214

UK Legislation

Supreme Court Act 1981: Section 31
European Convention on Human Rights

Articles 6, 13

Cases

Decisions of the Court of First Instance (Numerical Order)


Case T-585/93 Stichting Greenpeace Council (Greenpeace International) and others v Commission of the European Communities [1995] ECR II-2205


Decisions of the European Court of Justice (Numerical Order)


Case 25/62 Plaumann & Co. v Commission of the European Economic Community [1963] ECR 95


Case 1/64 Glucoseries Réunies v Commission of the European Economic Community [1964] ECR 413

Case 38/64 Getreide-Import Gesellschaft v Commission of the EEC [1965] ECR 203

Case 69/69 Alcan Aluminium Raeren and Others v Commission of the European Communities [1970] ECR 385

Cases 41-44/70 NV International Fruit Company and others v Commission of the European Communities [1971] ECR 411

Case 62/70 Werner A. Bock v Commission of the European Communities [1971] ECR 897

Case 100/74 Société CAM SA v Commission of the European Communities [1975] ECR 1393
Case 26/76 Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities [1977] ECR 1875

Case 113/77 NTN Toyo Bearing Company Ltd and others v Council of the European Communities [1979] ECR 1185


Case 11/82 SA Piraiki-Patraiki and others v Commission of the European Communities [1985] ECR 207

Case 231/82 Spijker Kwasten BV v Commission of the European Communities [1983] ECR 2559

Cases 239 and 275/82 Allied Corporation and others v Commission of the European Communities [1984] ECR 1005

Case 264/82 Timex Corporation v Council and Commission of the European Communities [1985] ECR 849

Case 222/83 Municipality of Differdange and Others v Commission of the European Communities [1984] ECR 2889


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


Case 26/86 Deutz und Geldermann, Sektkellerei Breisach (Baden) GmbH v Council of the European Communities [1987] ECR 941

Case 45/86 Commission of the European Communities v Council of the European Communities [1987] ECR 1493

Case 117/86 UFADE v Council and Commission of the European Communities [1986] ECR 3255


Case 205/87 Nuova Ceam Srl v Commission of the European Communities [1987] ECR 4427

17
Case C-354/87 Weddel & Co. BV v Commission of the European Communities [1990] ECR I-3847

Case 34/88 Cevap and Others v Council of the European Communities [1988] ECR 6265


Case C-321/95 P Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities [1998] ECR I-1651

Case C-239/99 Nachi Europe GmbH v Hauptzollamt Krefeld [2001] ECR I-1197

Case C-50/00 P Unión de Pequeños Agricultores v Council of the European Union [2002] ECR I-6677

Case C-263/02 Commission of the European Communities v Jégo-Quéré & Cie SA [2004] ECR I-342

United Kingdom Cases (Alphabetical)

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd. (Fleet Street Casuals) [1982] AC 617

R v Commissioners of Customs and Excise, ex parte Cooke and Stevenson [1970] 1 All ER 1068

R v Dyfed County Council ex parte Manson (18 February 1994, unreported)

R v HM Treasury, ex parte Smedley [1985] 1 All ER 589

R v Independent Broadcasting Authority ex parte Whitehouse (The Times 14 April 1984, CO/920/83)

R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd (No 2) [1994] 4 All ER 329

R v Poole Borough Council, ex parte Beebee and others [1991] 2 PLR 27

R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg [1994] QB 552

R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd [1995] 1 All ER 611

R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co [1990] 1 QB 504

R v Somerset County Council and ARC Southern Limited, ex parte Dixon [1998] Env LR 111

Books


Articles

Albors-Llorens. 2003. ‘The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?’, 62(1) CLJ 72

Arnulf, ‘Private Applicants and the Action for Annulment since Codorniu’ (2001) 38 CMLR 7


Cane. 1990 ‘Statutes, Standing and Representation’ (1990) PL 307


