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**Talking with the “pouvoir constituant” in times of constitutional reform:  
The European Court of Justice on Private Applicants’ Access to Justice**

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## Talking with the “*pouvoir constituant*” in times of constitutional reform: The European Court of Justice on Private Applicants’ Access to Justice

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### A. Introduction

European lawyers, at least those dealing predominantly with institutional matters, are living particularly interesting times since the setting-up of the “European Convention on the Future of Europe” in December 2001.<sup>1</sup> As the Convention’s mandate, spelled out in rather broad terms in the European Council’s declaration of Laeken,<sup>2</sup> is potentially unlimited, and as the future constitution of the European Union (EU) will be ultimately adopted by the subsequent Intergovernmental Conference (IGC), there appears to be a great possibility to clarify, to simplify and also to reform many of the more controversial elements in the European legal construction.

The present debate on the future of the European constitution also highlights the relationship between the *pouvoir constituant*<sup>3</sup> and the European Courts, the

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<sup>1</sup> On the Convention’s work so far see e.g. J.-V. Louis, ‘La convention et l’avenir de l’Union européenne’, (2002) *Cahiers de droit européen*, 235 et seq.; “Editorial comments: The sixteen articles: On the way to a European Constitution”, (40) *Common Market Law Review* 247 et seq.; S. Hobe, “Bedingungen, Verfahren und Chancen europäischer Verfassungsgebung: Zur Arbeit des Brüsseler Verfassungskonvent”, (2003) *Europarecht*, 1 et seq. – See also the contributions in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe* (E-Book published by the European University Institute, San Domenico di Fiesole 2003, at <http://www.iue.it/AEL/Ten%20Reflections%20on%20the%20Constitutional%20Treaty%20for%20Europe.shtml> )

<sup>2</sup> See [http://europe.eu.int/futurum/documents/offtext/doc151201\\_en.htm](http://europe.eu.int/futurum/documents/offtext/doc151201_en.htm) .

<sup>3</sup> The term “*pouvoir constituant*” is not (yet) commonly accepted in the context of the EU. On the one hand, this is due to the fact that some still question that the EU has (or can ever) have a

Court of Justice (ECJ) and its Court of First Instance (CFI), who have to interpret the basic rules and principles of the EU.<sup>4</sup>

In that light, the present article will focus on a classic theme of the Court's case law: the relationship between judges and *pouvoir constituant*. In the EU, this relationship has traditionally been marked by the ECJ's role as driving force in the "constitutionalisation" of the EC Treaties – which has, to a large extent, been accepted and even codified by the Member States in subsequent treaty revisions. However, since 1994, the ECJ appears to be more reluctant to act as a "law-maker."<sup>5</sup> The recent judgment in *Unión de Pequeños Agricultores (UPA)*<sup>6</sup> – an important decision by which the ECJ refused to liberalize individuals' access to the Community Courts – is also interesting in this context. *UPA* may be seen as another proof of *judicial restraint* - or even as indicator of the beginning of a new phase in the "constitutional dialogue" between the ECJ and the "Masters of the Treaties."

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constitution – although one cannot seriously deny that the EU Treaties form the constitution of the public power it institute (constitution in the material sense). On the other hand, this constitution takes the form of an international agreement concluded among the EU Member States and ratified by their peoples and/or their representatives in the national parliaments. There is, thus, no "European people" which could be regarded as the *pouvoir constituant* in the classical sense as to be found in nation states. However, the traditional concepts developed for the latter do not fit to the new form of institutionalised public power which has been instituted by the EU Treaties. The classical constitutional concepts have, thus, to be adapted to this new reality. If one accepts this, which does not equate the EU to a traditional state, it is possible to consider the EU Treaties as the the Union's Constitution and the Member States revising these Treaties according to Article 48 EU as the Union's *pouvoir constituant*. – See e.g. J. Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe* (Université Libre de Bruxelles, Brussels 1997); M. Andenas, "Can Europe have a Constitution?", in: D. Melissas/I. Pernice (eds.), *Perspectives of the Nice Treaty and the IGC in 2004* (Nomos, Baden-Baden 2002), 102; J.-C. Piris, "L'Union européenne at-elle une constitution? Lui faut-il une?", (1999) *Revue trimestrielle de droit européen* 599; A. Auer, "L'adoption et la révision des constitutions", in: R. Bieber/P. Widmer (eds.), *L'espace constitutionnel européen* (Schulthess, Zürich 1995), 267; H. J. Boehl, *Verfassungsgebung im Bundesstaat* (Duncker & Humblot, Berlin 1997); M. Duverger, "Le pouvoir constituant dans l'Union européenne", in: European University Institute (ed.), *A Constitution for the European Union?* (Working Paper RSC 95/9, San Domenico di Fiesole 1995).

<sup>4</sup> Art. 220 EC (and Art. 47 EU) confers to the Court of Justice a broad task by stating that it "shall ensure that in the interpretation and application of this Treaty the law is observed". Today the ECJ acts as constitutional court, administrative court, penal/disciplinary court, civil court, arbitration court and – since the establishment of the Court of First Instance – also as appellate court.

<sup>5</sup> This term has been used by V. Constantinesco, "The ECJ as a Law-Maker: *Praeter aut Contra Legem?*", in: D. O'Keefe & A. Bavasso (eds.), *Judicial Review in European Union Law. Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer, The Hague 2000), 73 et seq.

<sup>6</sup> Case C-50/00 P *Unión de Pequeños Agricultores (UPA)*, Judgment of 25 July 2002, nyp in the ECR, the text is available at <http://curia.eu.int/en/jurisp/index.htm> .

## B. “Constitutional Dialogue” in the EU

### I. Treaty Reform as a Form of “Constitutional Dialogue”

Conflicts of interests, powers, and competences are often the main focus of writings on the relationship between the EU and its Member States in general and between the ECJ and national supreme/constitutional courts in particular. This sometimes obscures the fact that conflict resolution is, to a large extent, “daily business” in multi-level (federal) systems which are in constant search and permanent (re-)adjustment of the “federal balance.” Hence, some authors have tried to apply deliberative theories to the EU and to interpret conflicts between center and periphery as “constitutional conversations” or “constitutional dialogues.” According to these theories, such dialogues serve to uncover divergences within the “layered” constitutional system of the EU in order to achieve a greater convergence.<sup>7</sup>

Although adopting a cautious approach towards applying such theories to the EU, the scholar and commentator B. De Witte has recently identified the “semi-permanent treaty revision process” as the “closest thing to a constitutional conversation in Europe.”<sup>8</sup> In fact, the Member States are the sole “Masters of the Treaties” (Article 48 EU). As such they have been negotiating, continuously for more than a decade, in successive Intergovernmental Conferences (IGCs)<sup>9</sup> and trying to develop further the Union’s constitutional order.<sup>10</sup> In contrast to the Member States, the supranational EU institutions, the Commission and European Parliament (EP), do not have formal decision-making powers in the

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<sup>7</sup> N. Walker, “Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe”, in: G. De Búrca & J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart, OUP, Oxford 2000), 9 et seq. (at 21) distinguishes “judicial conversations” between the ECJ and national courts and “political conversations” between Member States in Intergovernmental Conferences and within the EU institutions. Critical on the existence of “judicial conversations” B. De Witte, “The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process”, in: P. Beaumont/C. Lyons/N. Walker (eds.), *Convergence and Divergence in European Public Law* (Hart, OUP, Oxford 2002), 39 et seq. (at 40/41).

<sup>8</sup> De Witte (previous note) at 42.

<sup>9</sup> IGC 1990/91 (Maastricht Treaty), IGC 1996/97 (Amsterdam Treaty), IGC 2000 (Nice Treaty). The next IGC is scheduled for 2004 but may perhaps take place already in 2003.

<sup>10</sup> Government representatives are the main actors in an IGC. However, also other national instances take part: national parliaments, “regional” parliaments and governments, public opinions and national constitutional courts. Their power stems from the fact that ratification of treaty amendments may require their assent. See for details De Witte (note 7) at 48/49.

treaty revision process and are, hence, limited to various forms of more subtle political persuasion.<sup>11</sup>

## II. “Constitutional Dialogue” Between the ECJ and the Union’s *Pouvoir Constituant*

Thus, one may ask how the ECJ can manage to enter into a “constitutional debate” on Treaty revision and constitution-making which is dominated by the different national - and to some extent also supranational - political “players.”

### 1. *The Traditional Approach: ECJ Acts, Pouvoir Constituant Accepts*

More than the other supranational EU institutions, the ECJ has the power to interpret Treaty provisions – and to give them a meaning which was not intended by the *pouvoir constituant*. This allows the ECJ to enter with the latter into a special form of “constitutional dialogue.”

For many years, this dialogue was characterized by the fact that the judiciary enjoyed a kind of “strategic advantage”: the “Masters of the Treaty” were to accept every step undertaken by the ECJ in further developing the Treaty text into a constitution<sup>12</sup> as long as they did not themselves manage a unanimous Treaty amendment.<sup>13</sup>

This is not to say that the Union’s *pouvoir constituant* always opposed judicial constitutional developments. On the contrary,<sup>14</sup> most of the ECJ’s developments have been accepted by the Member States, some of them have even been formally codified by subsequent Treaty revisions.

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<sup>11</sup> See De Witte (note 7) at 47. The Commission was influential in the IGCs 1985/86 and 1990/91 while the EP did particularly well in the IGC 1996/97.

<sup>12</sup> Direct applicability of treaty provisions, primacy, the doctrines of implicit and parallel external competences, direct applicability of directives, Member State liability for breaches of EC law.

<sup>13</sup> This explains why the UK government tried to reduce considerably the powers of the ECJ during the IGC 1996/97 and why the Member States have been very reserved on extending the ECJ’s powers to fields as internal security and immigration.

<sup>14</sup> During many years, Member States felt no need to oppose themselves to the judge-driven “constitutionalization” of the Treaties since as each single government remained, thanks to the so-called *Luxembourg compromise*, “Master of the decision-making process”. On this see J.H.H. Weiler, ‘The Transformation of Europe’ 100 (1991) *Yale Law Journal* 2403 et seq.

## 2. *First Signs of Change: the Pouvoir Constituant Reacts*

Although the Union's *pouvoir constituant* has accepted some of the ECJ's "proposals" for Treaty reform and even "codified" some of them in different revision treaties, the "Masters of the Treaties" have, during the last decade, also signaled some change regarding their perception of the Court's "law-making" stature.

Recent Treaty revisions also contained provisions, which made clear that the *pouvoir constituant* was not ready to accept all "proposals" made by the ECJ. Two examples serve to illustrate this point. The Single European Act excluded the application of the doctrine of parallel external powers in the field of environmental protection. The Treaty of Maastricht even contains two special provisions limiting the possible effects of one of the ECJ's judgments, which the Member States disliked.<sup>15</sup>

More generally, the Member States have demonstrated their awareness of the Court's powers in the constitutional field by excluding and limiting these powers from some of the new spheres of competence conferred to the Union by the Treaties of Maastricht and Amsterdam.

## 3. *A More Cautious Approach: ECJ and the Limits of EU Powers*

The aforementioned reactions of the Union's *pouvoir constituant* and growing criticisms – expressed by academia but also by the German Federal Constitutional Court – denouncing the ECJ's "judicial activism" led the ECJ to adopt a more cautious approach.

Three landmark decisions issued during the last years may be seen as indicating the judges' turn towards a case law which pays heed to growing national concerns about the ECJ's role as a "law maker."

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<sup>15</sup> See Protocol No. 2 (ad Article 119 EC) intending to limit the effects of *Barber* and Protocol No. 17 limiting those of *Grogan*. See on this M. Fernández-Salas, "De la possibilité de renverser l'arrêt 'Bosman' par une modification du traité", (1996) *Revue du marché unique européen* 155 at 167 et seq.

In *Keck*,<sup>16</sup> the ECJ tried to limit somewhat the wide scope it had previously given to Article 28 EC which grants the free movement of goods within the EU. In *Opinion 1/94*,<sup>17</sup> the Court refused to extend the scope of the common commercial policy – and, hence of the EC competences - to trade in services, although such a “dynamic” and functional interpretation of Article 133 EC would have been both possible and, it is suggested, perfectly consistent with the *ratio legis* of the EC Treaty.

In *Ban of Tobacco Advertising*,<sup>18</sup> the ECJ decided to apply strictly the conditions contained in Article 95 EC, which is the main EU power allowing for the harmonization of Member State regulations which hamper the establishment and/or the functioning of the internal market.

In each of these cases the ECJ reduced - or refrained from fully exploiting - the potential scope of important Treaty provisions. They appear, thus, to provide – at least partially - an answer to the criticisms formulated by some scholars, national courts, and even the Union’s *pouvoir constituant*. The ECJ indicated with these decisions that it is capable of and ready to refrain from a more dynamic interpretation of EU primary law - which has much helped to stabilize the “European project” during its first decades of existence - and instead to adopt a stricter, more text-oriented approach.<sup>19</sup>

### C. *The UPA Judgment: A New Example of Judicial Self-restraint ?*

The *UPA* judgment issued on July 25, 2002 - which became, somewhat unexpectedly, one of the most important cases decided by the ECJ during the last year - may be read as a new step in the ECJ’s move away from its previous “law maker”-stature.

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<sup>16</sup> Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR 6097.

<sup>17</sup> *Opinion 1/94 WTO* [1994] ECR I-5267.

<sup>18</sup> Case C-376/98 *Germany/Parliament and Council* [2000] ECR I-8419.

<sup>19</sup> This does not preclude that the Court has abandoned at all to foster “negative integration” e.g. in national social security systems (see, among others, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5773 and the article of E. Steyger, “National Health Care Systems Under Fire (but not too heavily)”, 29/1 (2002) *Legal Issues of Economic Integration* 97 et seq.

In order to analyze the extent to which the *UPA* judgment may be a new example of *judicial self-restraint* (the theme discussed in section V. below), I will briefly outline the facts of the case (section I.) and the main legal problem raised by the case (section II.), describe the reform proposals and the position adopted by the ECJ (section III.) and assess the Court's solution of the problem (section IV.).

## I. Facts

An association of Spanish farmers (*UPA*) sought the annulment of an EC regulation which discontinued an agricultural aid scheme and which did not require a national application measure. As the CFI rejected the action on grounds of standing, *UPA* appealed to the ECJ.<sup>20</sup> The Court's Advocate General (AG Jacobs)<sup>21</sup> took the opportunity to renew his earlier proposal and to invite the ECJ to review its relatively restrictive – and much criticized – interpretation of Article 230 (4) EC in order to facilitate individuals' standing before the European Courts.<sup>22</sup>

The Court's *UPA* judgment in the case was eagerly awaited for two reasons. First, AG Jacobs had advocated for a revision of the Court's traditional case law on the sensible matter of individual standing. Second, and more important, the CFI had backed AG Jacobs's reform proposals by itself relaxing the traditional standing requirements in its judgment *Jégo-Quéré*.<sup>23</sup> One could, thus, wonder how the ECJ would react.<sup>24</sup>

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<sup>20</sup> See Art. 225 (1) EC: "A Court of First Instance shall be attached to the Court of Justice with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only ..."

<sup>21</sup> See Art. 222 (2) EC: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court ..."

<sup>22</sup> Article 230(4) EC reads as follows: "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." On the narrow interpretation see *infra* subsection II.1.

<sup>23</sup> Case T-177/01 *Jégo-Quéré et Cie/Commission* of 3 May 2002 (available at <http://curia.eu.int/en/cp/aff/cp0241en.htm>). This case has already been commented by several authors (partly together with the *UPA* judgment), see e.g. F. Berrod/F. Mariate, "Le pourvoi dans l'affaire Unión de Pequeños Agricultores c./ Conseil: le retour de la procession d'Echternach",



The ECJ decided to reject the reform proposals and to maintain its traditional interpretation of the standing requirements in Article 230 (4) EC.

## II. The Problem of Individuals' Access to the European Courts

Private applicants' *locus standi* before the ECJ has been, for many years now, a hotly debated issue, in particular as the Court's case law is widely considered as being too restrictive.<sup>25</sup>

### 1. No Standing When Challenging the Legality of EC Regulations and Directives

(2002) 10 *Europe* 7 et seq.; D. Hanf, "Facilitating Private Applicants' Access to the European Courts ? On the Possible Impact of the CFI's Ruling in Jégo-Quééré", 3 (2002) *German Law Journal* 7; id., 'Kicking the ball into the Member States' field: the Court's response to Jégo-Quééré', 3 (2002) *German Law Journal* 8; T. Lübig, "Anmerkung Jégo-Quééré", (2002) *Europäische Zeitschrift für Wirtschaftsrecht* 532 et seq.; J.-P. Jacquet, "La protection juridictionnelle des droits fondamentaux dans l'Union européenne", (2002) *Actualité juridique – droit administrative* 476 et seq.; F. Malvasio, "Débat sur l'accès des particuliers au prétoire communautaire", (2002) *Actualité juridique – droit administrative* 867 et seq.; M. Nettesheim, "Effektive Rechtsschutzgewährleistung im arbeitsteiligen System europäischen Rechtsschutzes", (2002) *Juristenzeitung* 928 et seq.; H.-P. Schneider, "Es gibt noch Richter in Luxemburg", (2002) *Neue Juristische Wochenschrift* 2927 et seq.; D. Slater, "Chronique. Contentieux. Arrêt Jégo-Quééré" in (2002) *Revue du droit de l'Union européenne* 391 et seq.; D. Waelbroeck, "Le droit au recours juridictionnel effectif du particulier. Trois pas en avant, deux en arrière", (2002) 1/2 *Cahiers de droit européen* 3 et seq.; J.-D. Braun/M. Kettner, "Die Absage des EuGH an eine richterrechtliche Reform des EG-Rechtsschutzsystems - "Plaumann" auf immer und ewig?", (2003) *Die öffentliche Verwaltung* 58 et seq.; N. van den Broek, "A Long Hot Summer for Individual Concern? The European Court's Recent Case Law on Direct Actions by Private Parties ... and a Plea for a Foreign Affairs Exception" 30 (2003) *Legal Issues of Economic Integration*, 61 et seq.

<sup>24</sup> On the "dialogue" between the CFI and the ECJ see e.g. A. Arnull, "Interpretation and Precedent in European Community Law", in: A. Barav/D.A. Wyatt (eds.), 14 (1994) *Yearbook of European Law* (Clarendon, Oxford 1995), 115 et seq. (at 125 et seq.).

<sup>25</sup> See e.g. A. Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court', 11 (1974) *Common Market Law Review* 191 et seq.; H. Rasmussen, 'Why is Article 173 Interpreted against Private Plaintiffs?', 5 (1980) *European Law Review* 112 et seq.; A. Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty', 32 (1995) *Common Market Law Review* 7 et seq.; D. Waelbroeck/A.-M. Verheyden, 'Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires à la lumière du droit compare et de la Convention des droits de l'homme', (1995) *Cahiers de droit européen*, 399 et seq.; F. Schockweiler, "L'accès à la justice dans l'ordre juridique communautaire", (1996) *Journal des Tribunaux – droit européen* 1 et seq.; P. Craig/G. De Búrca, *EU Law. Text, Cases and Materials* (3<sup>rd</sup> Ed., OUP, Oxford 2002), 482 et seq.; C. Harlow, 'Access to Justice as a Human Right: The European Convention and the European Union', in: P. Alston (ed.), *The EU and Human Rights* (OUP, Oxford 1999), 187 et seq.; B. De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in: P. Alston (ed.), *The EU and Human Rights* (OUP, Oxford 1999), 859 et seq. – The Court's restrictive approach is defended by P. Nihoul, 'La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale', 30 (1994) *Revue trimestrielle de droit européen* 171 et seq.

At the price of some oversimplification, one can summarise the Court's case law as follows. Private applicants are allowed to challenge individual or administrative measures of the Community which concern them *directly* and *individually*.<sup>26</sup> However, the Court does not normally recognise such a direct and individual concern when applicants seek to challenge general normative (“legislative”) EC acts.<sup>27</sup>

The ECJ has allowed individuals to challenge only some very specific categories of general normative acts, e.g. when the applicant has been named in a regulation or when the legislative act has been adopted with regard to particular individuals, as frequently happens in anti-dumping measures.<sup>28</sup> Thus, the applicant challenging a general legislative measure has standing only when that person or firm can successfully establish that the contested act “disguises” what is, in fact, an individual measure.

In spite of some judgments adopting a slightly more liberal stance on an individual's standing,<sup>29</sup> the ECJ has maintained its restrictive approach with regard to the interpretation of the notion of “*individual concern*” of Article 230 (4) EC, which it developed in the early 1960s.<sup>30</sup> When the incriminated measure “applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner” the Court does not recognise an individual concern – regardless of “the

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<sup>26</sup> See Article 230 (4) EC quoted *supra* note 22.

<sup>27</sup> The leading case is Case 25/62 *Plaumann* [1963] ECR 197 but see also Case 16/62 *Confédération nationale des producteurs de fruits et légumes* [1962] ECR 901 and Case 307/81 *Aluisisse* [1982] ECR 3463.

<sup>28</sup> For an overview on this case law see e.g. P. Nihoul, ‘La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale’, 30 (1994) RTD eur. 171 et seq. and T.C. Hartley, *The Foundations of European Community Law* (4th ed., OUP, Oxford 1998) at 355 et seq.

<sup>29</sup> see Case G-309/89 *Codorniu* [1994] ECR I-1853, but also the Anti-dumping Case C-358/89 *Extramet* [1991] ECR I-2501 is often cited in this context.

<sup>30</sup> P. Craig/G. De Búrca, *EU Law. Text, Cases and Materials* (3<sup>rd</sup> Ed., OUP, Oxford 2002), 496 et seq. differentiate between three approaches: ‘infringement of rights or breach of a duty’ approach (ex.: Case G-309/89 *Codorniu* [1994] ECR I-1853 and Cases T-480 and 483/93 *Antillean Rice* [1995] ECR II-2305), ‘degree of factual injury’ approach (ex.: Case C-358/89 *Extramet* [1991] ECR I-2501) and ‘pure Plaumann’ approach (ex.: C-209/94 P *Buralux* [1996] ECR I-615), the latter being the ‘default position’ (at 500).

mere fact that it is possible to determine the number or even the identity of the producers” concerned by the general measure.<sup>31</sup>

Historically, the ECJ’s approach can be explained by the fact that the drafters of the EEC Treaty decided, under German influence, to endorse a more restrictive standard on *locus standi* than they had done in the preceding ECSC Treaty.<sup>32</sup> One has also to understand that the ECJ showed little enthusiasm for allowing – at least in the founding phase of the Community - individuals to challenge legislation that was the result of difficult political compromises reached within the Council under the rule of unanimity.<sup>33</sup> Furthermore, a restrictive approach on standing allowed not only the ECJ to avoid having to exercise control over norms of a discretionary nature - in particular in the sensible field of common agricultural policy – but also to filter incoming actions.<sup>34</sup>

## 2. *The Dogmatic Foundation of the Court's Approach: A Complete System of Remedies Granted by the Cooperation Between the ECJ and National Courts*

The Court has continuously justified its restrictive approach to the standing of individuals by reference to what the Court refers to as the complete system of remedies created by the EC Treaty.

Accordingly, no Community measure can escape judicial control as to its conformity with the Treaty because a measure may be challenged either through a direct action based on Article 230 (4) EC or through a preliminary

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<sup>31</sup> Quotation from Cases 789 and 790/79 *Calpak* [1980] ECR 1949 at 9, but see also the ‘post-Codorniu’ Case T-472/93 *Campo Ebro* [1996] ECR II-421.

<sup>32</sup> Although this decision reflects also the difference between the ECSC Treaty (being a “*traité-loi*”) and the EEC Treaty (being a “*traité-cadre*”). On this and the influence of the stricter German approach see M. Fromont, ‘L’influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes’, 3 (1966) *RTD eur.* 47 et seq.

<sup>33</sup> It may be worth to quote AG *Lagrangé* who stated, back in 1962, that the restrictive approach laid down in the Treaty and reinforced by the Court’s interpretation was supported by “... the extremely grave consequences that would follow from even a partial annulment of the regulations. As it is well known, particularly in the case of agricultural regulations, these texts have been arrived at only after considerable difficulty, and sometimes after a compromise reached in the Council, still wedded to the rule of unanimity.” See Cases 16 and 17/62 *Producteurs de fruits/Council* [1962] ECR 481 at 486.

<sup>34</sup> see, for a comprehensive discussion of the different policy arguments concerning standing of individuals, e.g. P. Craig/G. De Búrca, *EU Law. Text, Cases and Materials* (2nd ed., OUP, Oxford 1998), 479 et seq.

procedure pursuant to Article 234 EC.<sup>35</sup> Thus, “the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures by the institutions.”<sup>36</sup>

Putting it simply, the Court has relied on the following reasoning: a restrictive interpretation of Article 230 (4) EC limiting an individual’s standing does not create a real *lacuna* in judicial protection because individuals have the option of bringing actions against national application or implementation measures of the EC before the national courts, which have the obligation, according to Article 234 and the ECJ’s *Foto Frost* case law,<sup>37</sup> to refer questions concerning the validity of EC acts to the Court.<sup>38</sup>

### 3. Criticism of the Court’s Dogmatic Approach

Critics of the Court's approach<sup>39</sup> argue that the Treaty's system of remedies is in fact not as complete as the ECJ suggests.

In fact, there appear to be several *lacunae* in the system of judicial protection as defined by the Court. There are situations in which the procedure for preliminary rulings laid down in Article 234 EC does not provide individuals judicial protection at all or only at a high (viz unacceptable) price.<sup>40</sup> The three most important arguments in this context are the following:

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<sup>35</sup> Article 234 EC reads as follows: “The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty ; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB ; (c) the interpretation of the statutes of bodies established by an act of the Council, where the statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.”

<sup>36</sup> Case 294/83 *Les Verts* [1986] ECR 1339.

<sup>37</sup> Case 314/85 *Foto-Frost* [1987] ECR 4199.

<sup>38</sup> This view is supported by P. Nihoul, ‘La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale’, 30 (1994) RTD eur. 171 et seq. who argues that this form of ‘decentralised’ judicial control is also in line with the principle of subsidiarity.

<sup>39</sup> See the authors cited, *supra* (note 19, with the exception of P. Nihoul) and AG *Jacobs* who expressed his concerns already prior to the *UPA* in his opinion delivered in Case G358/89 *Extramet* [1991] ECR I-2501.

<sup>40</sup> see on this e.g. D. Waelbroeck/A.-M. Verheyden, ‘Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires à la lumière du droit compare et de la Convention des droits de l'homme’, (1995) Cahiers de droit européen, at 433 et seq.

*First*, one has to bear in mind that an Article 234 procedure requires – in most national legal systems - a national implementation measure and is, thus, often not available in those cases in which an individual seeks to challenge a directly applicable EC act which does not require implementation measures.<sup>41</sup> In such cases, the interested individual only has the possibility of provoking an infringement against the directly applicable act, which may then allow a challenge to the enforcement measure or sanction imposed either by the Community or by a Member State administration.<sup>42</sup>

*Second*, forcing private litigants to pass through the national courts in order to have access to the European Courts may prove to be extremely costly - both with regard to time and money.

*Third*, the procedure under Article 234 makes private applicants' access to the European Courts, to a large degree, dependent upon the national courts' willingness to make use of this procedure.

In sum, one cannot deny that the Court's restrictive approach towards individual standing under Article 230 (4) EC reduces, in determined situations, a citizen's access to justice. Some observers believe that this limitation may well be contrary to the general principle of access to justice - as laid down in Articles 13 and 6 of the ECHR,<sup>43</sup> in Article 47 of the (still not legally binding) Charter of Fundamental Rights<sup>44</sup> and which the ECJ itself has recognized in *Les Verts*.<sup>45</sup>

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<sup>41</sup> For an example see Art. 13 of the Television without Frontiers Directive cited by B. De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in: P. Alston (ed.), *The EU and Human Rights* (OUP, Oxford 1999), at 876.

<sup>42</sup> The enforcement EC measure can be challenged according to Art. 230 (4) EC, a Member State measure according to national procedural law.

<sup>43</sup> Which the ECJ respects in line with Article 6 (2) EU. The compatibility of the ECJ's interpretation of Article 230 (4) EC with Article 6 ECHR the is developed by D. Waelbroeck/A.-M. Verheyden, 'Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires à la lumière du droit compare et de la Convention des droits de l'homme', (1995) *Cahiers de droit européen*, at 425 et seq.

<sup>44</sup> Which states that everyone "... has the right to an effective remedy before a tribunal ..." (para. 1) and "...is entitled to a fair and public hearing within a reasonable time ..." Note, however, that according to the "official explanations" (written by the *Praesidium* of the Convention which elaborated the Charter, see <http://ue.eu.int/df/default.asp?lang=en> ) "[t]he inclusion of this precedent in the Charter is not intended to change the appeal system laid down by the Treaties, and particularly the rules relating to admissibility. This principle is therefore to be implemented according to the procedures laid down in the Treaties".

<sup>45</sup> see Case 194/83 *Les Verts* [1986] ECR 1365 at 23.

### III. Reform Proposals and the ECJ's Position

While the reform proposals made by AG Jacobs and the CFI advocated a relaxation of the standing requirements, the ECJ preferred to maintain the traditional, limited conception described above.

#### *1. AG Jacobs in UPA and the CFI in Jégo-Quére: Relaxing the Standing Requirements*

Confronted with individual requests for judicial review of directly applicable EC acts, which appeared not to be challengeable before national courts, both AG Jacobs in *UPA* and the CFI in *Jégo-Quére* proposed to operate a radical change in the Court's case law and to soften the strict interpretation of the notion of "individual concern" contained in Article 230 (4) EC.

AG Jacobs' proposal was less radical. He stated that:

*"... it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests."*<sup>46</sup>

The CFI proposed that:

*"... a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard."*<sup>47</sup>

Both proposals sought liberalize the interpretation of individual concern. While the CFI would have required that the incriminated measure affect the applicant's "legal position," AG Jacobs' formula referred only to the applicant's "interests." On the other hand, the AG would have demanded that the measure

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<sup>46</sup> AG Jacobs C-50/00 P *UPA* at 60.

<sup>47</sup> Case T-177/01 *Jégo-Quére* at 51.

have a “substantial adverse effect” while the CFI accepted a “definite and immediate” restriction. It is difficult to assess the differences between the proposals. These differences depend upon the exact definition of the notions employed – in particular those of “legal position” and “interests” - which are, however, not more fully articulated by the AG and the CFI.

These proposals marked, however, a very interesting stage in the European Courts’ search for the proper definition of individual standing. Both interpretations aim at abandoning the focus on the drafting and on the possible addressees of the EC act under review – a perspective which has too often proven to lead to rather unconvincing results.<sup>48</sup> Instead, they suggest that the “standing test” should analyse, when assessing the individual concern of an applicant, the specific applicant's situation under the contested act.

## 2. *The ECJ in UPA: Maintaining the Restrictive Approach to Individual Standing*

The ECJ refused to follow these proposals and to soften the standing requirements as they have been developed in the Court’s case law interpreting the notion of “individual concern” contained in Article 230 (4) EC.<sup>49</sup> Instead, the Court continues to insist on the “cooperation model” of judicial protection in the EU as established by the EC Treaty and its complete system of judicial remedies.

In spite of this “conservative” approach, the ECJ did not deny the assertions of AG Jacobs and the CFI according to which there *lacunae* do (or may) exist in the EU’s present system of judicial protection. However, the ECJ refused to avoid them by means of a *revirement de jurisprudence*, instead assigning this duty to the Member States:

“[I]t is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty [now: Article 10 EC], national courts are required, so far as possible, to interpret and apply national procedural rules governing the

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<sup>48</sup> See on this the authors quoted *supra* note 25.

<sup>49</sup> Case C-50/00 P *UPA* at 43.

exercise of rights of action in a way that enables natural and legal persons to challenge before the Courts the legality of any decision or other national measure relative to the application to them of a Community act of general application ... .”<sup>50</sup>

#### IV. Assessing the ECJ Approach: Centralized or Decentralized System of Judicial Protection for Individuals ?

The ECJ did not accept the reform proposals but preferred the traditional conception of a decentralized system of judicial protection for individuals. At first glance, the ECJ appears to have opted for a *regressive and one-sided* solution which - instead of taking the way of a fresh innovation – favours a rather *inefficient* mechanism promoting the proliferation of *lacunae* in judicial protection at the expense of individuals. The Court’s decision can be labelled *regressive and one-sided* because it appears to immunize the EC law-maker from strict judicial review, in spite of the fact that the ECJ has rarely shown reluctance when it came to establishing judicial safeguards for individuals against Member State acts, which are liable to violate Community law. The decision can be termed *inefficient*, on the other hand, because national courts, to which an applicant must first make an appeal, will nonetheless be obliged to refer questions on the validity of EC acts to the ECJ. The Court’s decision accomplishes all of this while at the same time *endangering fundamental rights* because (efficient) judicial protection may be left too much to the discretion of national judicial systems and/or the “sensitivity” of national judges.

On closer inspection, the ECJ’s approach may, however, present fewer shortcomings than the more radical solution of centralizing the judicial protection of individuals at the EU level. The Court’s solution requires, however, some further clarifications in order for it to work in a satisfactory manner and to grant effective judicial protection.

##### 1. *The Reform Proposals in the Light of the ECJ’s Functional Limits*

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<sup>50</sup> Case C-50/00 P *UPA* at 41 and 42.



Relaxing standing requirements would allow individuals to avoid the “national track” and instead challenge EC acts directly before the ECJ. As already noted, such a centralization of judicial review is advocated, first, in order to enhance efficiency (as the *detour* via the national judge is a waste of time and resources) and, second, in order to reduce the risk that the existence of judicial protection is left to the discretion of the national court.

However, one has to bear in mind that the capacities of the ECJ are limited. The Court already suffers some from a crowded docket, which will certainly increase as a result of the future constitutional reforms and the next enlargements.<sup>51</sup> There are good reasons to consider that the ECJ’s capacities will not be enhanced to match the expansion of its jurisdiction and mandate.<sup>52</sup> Hence, advocating an improvement in individuals’ access – a centralization in the name of effective judicial protection - may well prove to have unexpected results. There is a risk that overburdening the ECJ might lead to longer delays and, in the long run, to an even less effective provision of judicial protection at EU level.

Such considerations limit considerably the value of the reform proposals and plead in favour of the ECJ’s position. The former appear not to take sufficiently into consideration that the *detour* through the national courts has, in fact, an

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<sup>51</sup> 673 cases in 2001: the Court of First Instance completed 275 cases, the Court 398 cases. See the *Statistics of judicial activity of the European Court of Justice* published on the ECJ’s Internet site (<http://curia.eu.int/en/pai/rapan.htm>). These numbers may not be very impressive compared to those of some of the Member States Supreme Courts. However, one has to bear in mind that the ECJ (as all institutions of the EU) has to deal with a serious “language problem” unknown in other judicial systems. Although the Court itself has one single working language (French), all parties and interveners as well as the AGs can submit their observations and conclusions in the ten official languages of the EU. Finally, also the Courts’ judgments are to be translated into the different languages. Some lawyers appear to exploit this situation by submitting very voluminous observations in order to expand the length of the procedures. It may perhaps also be useful to recall the wide field of subject matters covered by the Court (according to the *Statistics*): agriculture, approximation of laws, arbitration clauses, association of the overseas countries and territories, commercial policy, common customs tariff, company law, competition, culture, customs union, energy, environment and consumers, European citizenship, external relations, fisheries policy, foreign and security policy, free movement of goods, industrial policy, freedom to provide services, freedom of establishment, freedom of movement for persons, intellectual property, justice and home affairs, law governing the institutions, principles of Community of law, regional policy, research, information, education, and statistics, social policy, social security for migrant workers, staff regulations, state aid, transport, taxation.

<sup>52</sup> In particular the language problem will increase greatly with the next enlargement convened upon during the Copenhagen European Council in December 2002. The accession treaties do even recognize Maltese as an official language of the Union.

important “filtering function”: applicants have to demonstrate some evidence that the incriminated EC act does (or is liable to) violate principles of EC law.

Moreover, one should also bear in mind that neither the CFI nor AG Jacobs advocated for an *actio popularis* at the EU level, which would allow any applicant to challenge any EC act. If the only limitation is not to be the two-month time limit of Article 230 (5) EC,<sup>53</sup> both proposals constituted only a first step towards a more liberal re-definition and clarification of the standing requirements. Refining the new approach would have necessitated a great number of further ECJ judgments – and, hence, much extra work for the Court.

In the light of the functional limits of the ECJ one cannot deny that relaxing the standing requirements would have resulted in overburdening this jurisdiction and, thus, likely reducing rather than increasing the efficiency of judicial review at the EU level. The Court’s solution avoids such risks.

## 2. *Assessing the ECJ’s Approach in UPA*

The functional limits of the ECJ – and perhaps also subsidiarity arguments – plead in favour of the ECJ’s solution which combines limited access to the European Courts for individuals with a duty of national courts to grant effective judicial protection.

However, it is submitted that this approach will only work in a satisfactory way provided that two conditions are met. First, as acknowledged by the Court itself, national courts have to grant effective judicial protection. Second, the ECJ should ensure subsidiary judicial protection in those cases in which protection is not granted at national level. Although it is doubtful that such a duty can be derived from Articles 13, 6 ECHR and Article 6 (2) EU, I would suggest that the EU bears, even if one accepts a decentralized system of judicial protection, the primary responsibility of granting such protection against its own legal acts.

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<sup>53</sup> “The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.”

The ECJ recalled in *UPA* its case law which outlines the duty of sincere cooperation (Article 10 EC) along with national procedural law<sup>54</sup> which requires Member States to grant individuals the rights of action to challenge the legality of any *national* measure applying EC law.<sup>55</sup> The real question of the case was, however, whether this duty also applies to judicial protection against directly applicable *EC* acts. Instead of providing a clear answer, the Court established the general principle that “it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.”<sup>56</sup> The ECJ indicated, thus, that it is ready to hold the Member States responsible for *lacunae* in such protection – and perhaps that it is also disposed to oblige them, in its future case law, to provide for rights of action in national law against directly applicable *EC* acts.<sup>57</sup> This would – not for the first time in the history of the ECJ’s case law – require major changes in the procedural law of some Member States.<sup>58</sup>

One can therefore conclude that the ECJ may be ready to ensure that the first of the two conditions identified above as necessary for a proper functioning of a decentralized system of individual judicial protection will be met: that national courts actually grant such protection.

However, this system should be completed by a kind of “safety net” in the form of a subsidiary judicial control of the ECJ in cases in which national courts fail to comply with their duty. The *UPA* judgment does not address this important question.

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<sup>54</sup> See e.g. Case 106/77 *Simmenthal* [1978] ECR 629; Case 314/85 *Foto Frost* [1987] ECR 4199; C-231/89 *Factortame* [1990] ECR I-2433; C-92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415.

<sup>55</sup> Case C-50/00 P *UPA* at 42: ‘decision[s] or other national measure[s] relative to an application to them of a Community act of general application’.

<sup>56</sup> Case C-50/00 P *UPA* at 41.

<sup>57</sup> Such an obligation would also derive from the ECHR provided the Strasbourg Court considers the individuals’ limited access to justice against directly applicable *EC* measures as being contrary to Articles 13 and/or 6 of the Convention. Such a judgment would not be addressed to the *EC/EU* (which is not signatory of the *ECHR*) but to its Member States.

<sup>58</sup> German law provides e.g. for the *Feststellungsklage* (§ 43 *VwGO*) which can be used in order to comply with the duty to grant effective judicial protection as noted by M. Nettesheim, “Effektive Rechtsschutzgewährleistung im arbeitsteiligen System europäischen Rechtsschutzes”, (2002) *Juristenzeitung* 928 at 934. Similar solutions exist in English and Portuguese law, while the other Member State would have to introduce such a possibility (see on this J.C. Moitinho de Almeida, “Le recours en annulation des particuliers”, in O. Due (eds.), *Festschrift für Ulrich Everling* (Nomos, Baden-Baden 1995), 849 et seq. at 868.

### 3. *UPA: Opting For A – Still Incomplete - Decentralized System of Judicial Protection*

If there are good – mainly functional - reasons justifying the ECJ's choice to maintain its restrictive approach towards individuals' standing under Article 230 (4) EC and to opt for the traditional decentralized system of judicial protection, one has nevertheless to state that this system still appears to be incomplete.

As noted above, it is not sufficient that the ECJ interprets the duty of sincere cooperation in a way which will oblige the national courts to re-interpret – and even the Member States legislatures and parliaments to modify – their national procedural rules in order to make sure that national judges will be able to grant effective judicial protection against EC acts. However, the ECJ should develop criteria allowing it to grant subsidiary protection in the case of “Member State failure” since the EU bears the primary responsibility to ensure effective judicial protection against its own acts.

Granting subsidiary judicial protection for individuals challenging EC acts raises two problems. First, to define the exceptional situation in which such a protection has to be granted and, second, to define a less strict interpretation of “individual concern” which applies to these exceptional cases.

The first problem can be resolved in the sense that such an exceptional situation can be recognized when the individual has been denied access to the national courts. This means, from a practical point of view, that future plaintiffs will have to challenge the EC act before both the national court and the CFI in order to make sure that their action will not be inadmissible for reasons of delay (Article 230 (5) EC); the CFI will in turn only deal with that action when the national court refuses the individual's action as inadmissible.<sup>59</sup>

The second problem is more difficult to resolve as it returns to the fundamental question to which extent standing requirements have to be softened in order to make sure that effective judicial protection is granted. The “default interpretation” of individual concern confirmed in *UPA* cannot apply to these

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<sup>59</sup> This point is also made by M. Nettesheim, “Effektive Rechtsschutzgewährleistung im arbeitsteiligen System europäischen Rechtsschutzes”, (2002) *Juristenzeitung* 928 at 934.

exceptional cases, in which judicial protection has not been granted by the national courts since the ECJ's strict approach presupposes, precisely, the existence of such a national control. I would suggest that the Court should admit in these cases one of the *formulae* proposed by AG Jacobs and the CFI. Such a preferential access to the CFI should, however, only be opened when the national court refused to review the individual's action. Once it has examined the question of individual implications of the incriminated EC act, the individual has been granted access to justice and does not necessarily need further protection by the European Courts.<sup>60</sup>

Such a solution appears to be apposite to a decentralized system of judicial protection such as emphasized by the ECJ. Relaxing the standing requirements in those cases which have been dismissed as inadmissible by national courts – which will be required, more than in the past, to allow the review of EC acts – appears to be a fair compromise between the functional limits of the ECJ, on the one hand, and the obligation of the EU to grant effective judicial protection against its acts, on the other hand.

## V. UPA – Self-restraint or Self-protection ?

In our previous analysis of the *UPA* judgment we have exclusively focused on its main substantive aspect – the defense of the ECJ's restrictive approach towards individuals' standing under Article 230 (4) EC within a still incomplete system of decentralized judicial protection. However, this case is also interesting under the aspect of the “constitutional dialogue” taking place between the ECJ and the *pouvoir constituant*. In fact, the *UPA* judgment is exclusively based on one main argument: the limits of the Court's competences (discussed below in subsection 1). This argument, however, is hardly convincing (subsection 2).

### 1. *The Main Argument of the ECJ: Limits on Its Competences*

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<sup>60</sup> Should individuals be consistently refused access to national judges this would constitute a violation of the duty to grant effective judicial review one can derive from the *UPA* judgment. As in the case of continuous breach of Article 234 EC by national courts of last instance, the Commission may then file an action against the Member States.

The Court referred twice to limits on its competences, which, following its line of thinking, preclude any increased flexibility regarding the standing requirements for individuals.

Regarding possible exceptions to its strict rule of admissibility in cases of appeals against general EC measures applying directly and which, thus, at least in principle, cannot be challenged by individuals before national courts, the ECJ noted:

“Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.”<sup>61</sup>

As to the reform of the whole system, the Court conceded that: “... it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles,” but then stated that “it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.”<sup>62</sup>

## *2. The Shortcomings of the Court's Reasoning in UPA*

Both branches of the Court's “limits of competences” argument are flawed.

The ECJ's conception of a decentralized system of judicial review should not exclusively be built on the obligation imposed on national courts to secure effective judicial protection for individuals against EC acts. Such a system would better accommodate concerns of effective judicial review if the ECJ were ready to grant subsidiary judicial protection when the national courts fail to comply with this duty. Only in such exceptional cases, should the Court - being ultimately responsible for securing the judicial review of EC acts - relax its traditional standing criteria.

Such a – limited but desirable – liberalization of the ECJ's case law on Article 230 (4) EC does not require the Community Courts to examine and interpret, in

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<sup>61</sup> Case C-50/00 P *UPA* at 43.

<sup>62</sup> Case C-50/00 P *UPA* at 45.

each individual case, national procedural law. The plaintiff will have simply to demonstrate that the national court has rejected the action as inadmissible. One can hardly see how verifying this formal requirement will force the EU judges to enter into an interpretation of national law and to overstep their competences.

This limited extent of the reform - which should ensure that the decentralized system of judicial review advocated by the ECJ meets the principle of access to justice - also casts serious doubts on the Court's assertion, according to which, any change of its case law would amount to a "substantive modification" of the Treaty's system of judicial review. However, even admitting this point, one has to ask whether such a "substantive" modification indeed requires a formal Treaty revision or not. The ECJ's own case law on Article 230 EC suggests a negative answer.

Taking the Court's "limits of competences"-argument in the *UPA* judgment seriously, the ECJ would not have been competent to endorse the various (although modest) liberalization of the standing requirements for individuals, as it did e.g. in *Codorniu*.<sup>63</sup> The same applies to several substantial modifications to the system of judicial review established by the founding Treaty which have resulted from the ECJ's case law; the most famous example of such a "dynamic interpretation" in this field being the *Chernobyl* case.<sup>64</sup> This judgment conferred to the EP a limited right of standing, which was absent in the former EEC Treaty, in order to secure a "fundamental interest"<sup>65</sup> of the Community. One can, thus, hardly see why a limited liberalization of standing requirements aimed at maximizing access of individuals to justice in the decentralized EC system of judicial review could not also be accomplished by means of judicial interpretation.

Should one, thus, read the *UPA* case as a new element in the Court's move away from a "law maker" stature and towards a *judicial restraint* approach? There is an important objection to such an understanding: in line with other judgments based on the duty of sincere cooperation, the ECJ has expanded

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<sup>63</sup> Case C-309/89 *Codorniu* [1994] ECR I-1853. See for this argument also AG *Jacobs* in Case C-50/00 P *UPA* at 83.

<sup>64</sup> Case C-70/88 *EP/Council* [1990] ECR I-2041

<sup>65</sup> In the maintenance and observance of the institutional balance, see Case C-70/88 *EP/Council* [1990] ECR I-2041 at 25.

considerably the scope of Article 10 EC which appears to comprise, since *UPA*, a far-reaching obligation of the Member States to secure judicial protection against EC acts.<sup>66</sup>

This suggests that the ECJ's "limits of competences"-discourse was not really concerned with preserving Member States' competences. It appears that its objective was to "constitutionalize" its own traditional – and unnecessarily restrictive – interpretation of Article 230 (4) EC and to insulate this approach from any further reform attempt by means of judicial interpretation. One may, thus, conclude that *UPA* was not so much about confirming the ECJ's trend towards a less "dynamic" interpretation of Treaty provisions but that the Court used *judicial self-restraint* language in order to stall the judicial debate on relaxing standing requirements for individuals within the European Courts.

#### *D. The UPA Judgment in the Context of the Constitutional Reform Process*

Although one cannot interpret the *UPA* judgment as constituting a new example of *judicial self-restraint*, it is perhaps not necessarily to be read as a case of *self-protection* if one takes into account the particular political context in which the Court was to deliver its judgment: the permanent constitutional reform process. This process has to some extent changed the framework in which the "constitutional dialogue" between the ECJ and the *pouvoir constituant* takes place.

#### I. The Acceleration of Treaty Reform "Cycles" and the Enhanced Public Debate on Constitutional Reform

The first treaty reform was the Single European Act which entered into force 30 years after the signature of the original EEC Treaty.<sup>67</sup> Since then the treaty

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<sup>66</sup> See the case law quoted *supra* at note 54.

<sup>67</sup> Although one should remember that the founding Treaties have already earlier been amended/modified by the Merger Treaty, various Accession Agreements, the Treaties on Certain Budgetary and Financial Provisions, or the Act on direct and universal suffrage of the EP (although on the basis of a particular Treaty amendment procedure).



reform “cycles” have been constantly “speeded-up”: Maastricht 1992, Amsterdam 1997, Nice 2000. All these amending treaties - but also the accession agreements concluded in 1994 with Austria, Sweden and Finland - were characterized by the time consuming processes of preparation, negotiation and ratification. Moreover, the Treaties of Maastricht,<sup>68</sup> Amsterdam<sup>69</sup> and also the recently ratified Treaty of Nice<sup>70</sup> contain “*rendez-vous-clauses*” which convene a new IGC. All this has led to a new situation in which the constitutional reform process has become permanent.<sup>71</sup>

The next IGC is to be held in 2004.<sup>72</sup> However, the present stage of the constitutional reform process differs from previous ones as the next IGC is not to be prepared exclusively by more or less closed diplomatic circles, which are dominated by government representatives. This is now mainly the task of a “Convention of the future of Europe.” Although the Convention is formally only a “working assembly” charged with elaborating proposals to be considered by the next IGC, its composition (the majority of whom are parliamentarians) and its working method (publicity, participation of experts and of interest groups) has considerably broadened the number of participants in the EU’s “constitutional dialogue.” This is particularly the case for the European and national parliamentarians. They are given a public political forum, which affords them considerably more influence over the content of the reform than in they enjoyed in the past when they were limited to different forms of informal persuasion through their national governments.<sup>73</sup>

In short, preparing, negotiating, concluding and ratifying Treaty revisions has become a permanent feature of the EU and this constitutional revision process. The use of the Convention marks a new stage in this process and has

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<sup>68</sup> Art. N (2) EU (Maastricht), “Protocol on the institutions with the prospect of enlargement of the European Union” annexed (Amsterdam), “Declaration No. 23 on the future of the Union” (Nice).

<sup>69</sup> See the “Protocol on the institutions with the prospect of enlargement of the European Union”.

<sup>70</sup> Declaration No. 23 on the future of the Union.

<sup>71</sup> See for a concise description De Witte (note 7) at 42/43 using the more cautious term “semi-permanent treaty revision process”.

<sup>72</sup> According to Declaration No. 23. It is, however, still possible that it will be held under the Italian Presidency in the second semester of 2003.

<sup>73</sup> The MEPs on the sole basis of their arguments, national MPs (from countries in which ratification does not require a referendum) by threatening to refuse approval at the later stage of the national ratification process.

considerably widened the possibilities of various political “players” to participate in the “constitutional dialogue.”

## II. Implications for the ECJ

This radical change of the political context since the early 1990s has profoundly affected the ECJ’s position as a participant in the “constitutional dialogue.”

In order to measure the importance of this change, it may be useful to remember that the ECJ’s “law maker approach” was based on two interconnected premises. First, the Court operated from the premise that the Treaty had established an autonomous legal order in spite of the fact that it contained some important *lacunae*. Second, the Treaty was to be interpreted accordingly and loopholes were to be filled by means of judicial interpretation – at least as far as this was not done by the Community law makers and/or the “Masters of the Treaty” (both being, to a large extent, identical under the regime of the Luxembourg compromise). Their “failure to act” – the “*carence du législateur*” (Judge Pescatore) – justified, during many years, the ECJ’s “law-making” approach.

Following this line of argumentation, the ECJ’s margin for “law making” was logically to decrease the more the *pouvoir constituant* was itself tackling the problem of “constitution building”. As already noted, the “Masters of the Treaty” have well accepted and even codified most of the “constitutional pillars” built up by the ECJ. However, they have also shown some signs of scepticism in particular by limiting the Court’s powers in the new fields of competences conferred to the Union.

The appearance of the *pouvoir constituant* as a permanently present player since the beginning of the 1990s reduced, hence, the ECJ’s role in the “constitutional dialogue”. More than in the past, the Court is to limit its “law-making” role to those fields and issues in which it could expect that its

contributions were to be accepted by the Member States. This explains judgments such as *Keck*, *Opinion 1/94* and *Ban of Tobacco Advertising*.<sup>74</sup>

If the ECJ had, thus, to some extent, lowered its powerful voice by choosing in determined, particular sensible cases a *judicial-restraint* approach, it nonetheless uses a “softer” instrument in order to participate in the “constitutional dialogue”: written contributions to the IGCs.<sup>75</sup> In the context of the *UPA* case, it is particularly interesting to note that the ECJ had invited, in its contribution to the IGC 1996/97, the *pouvoir constituant* to consider a reform of Article 230 (4) EC.<sup>76</sup> The latter preferred, however, not to deal with the topic.

The formal participation of the ECJ as an institution in the Convention’s work is, however, limited. The Presidium of the Convention can invite the President of the Court “to address the Convention.”<sup>77</sup> Individual members of the ECJ can also be invited to hearings in order to express their opinion on specific aspects of the constitutional reform.<sup>78</sup> Such opinions of individual members of the Court can furthermore also be submitted by members of the Convention as their own contribution: this happened, e.g. with a note prepared by AG Jacobs “on

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<sup>74</sup> This development has been early anticipated by J.H.H. Weiler. See ‘The Transformation of Europe’ 100 (1991) *Yale Law Journal* 2403 et seq. This author has, thus, proposed to adapt the institutional landscape this new situation and to create a *Conseil constitutionnel* for the Union composed by national constitutional or supreme judges chaired by the President of the ECJ (see J.H.H. Weiler, “ICG 2002: The Constitutional Agenda”, in E. Best etc. (eds.), *Rethinking the European Union – ICG 2000 and Beyond* (EIPA, Maastricht 2000) 219 at 235. Such proposals have been discussed in the European Convention’s Working Group I on Subsidiarity (in the context of a possible creation of a “chamber of competences/subsidiarity” ) but have finally not been retained in the group’s conclusions. It is, thus, unlikely that they will find their way in the Convention’s proposal for a new treaty.

<sup>75</sup> Some of them can be found on the Court’s Website at <http://curia.eu.int/en/txts/intergov/index.htm> .

<sup>76</sup> *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union* (May 1995) at 11

<sup>77</sup> See *Laeken Declaration* (at [http://europe.eu.int/futurum/documents/offtext/doc151201\\_en.htm](http://europe.eu.int/futurum/documents/offtext/doc151201_en.htm)). The President of the Court has been invited to do so in a special Working Group, the “Discussion Circle Court of Justice”. See the oral presentation by Judge *Rodríguez Iglesias*, CONV 572/03, Working Document 6, 10 March 2003. Also the President of the CFI has been heard, see the oral presentation by Judge *Vesterdorf*, CONV 575/03, 10 March 2003 (both at <http://european-convention.eu.int>).

<sup>78</sup> Accordingly Judge *Skouris* has delivered an opinion on the incorporation of the Charter of Fundamental Rights into the Treaties (see Working Group II, Working Document 19, 17 September 2002) and Judge *Lenaerts* on the simplification of the EU’s instruments see Working Group IX, Working Document 7, 6 November 2002. These documents are available at <http://european-convention.eu.int> .

necessary changes to the system of judicial remedies.”<sup>79</sup> This latter example demonstrates clearly that such opinions made by individual members of the ECJ can hardly be considered as contributions of the Court as an institution.

### III. Assessing UPA in Light of the Changing Context in which the “Constitutional Dialogue” Between the ECJ and the Pouvoir Constituant Takes Place

In the light of the new context in which the “constitutional dialogue” between the ECJ and the *pouvoir constituant* takes place, it is possible to assess differently the Court’s assertion regarding the limits of its competences in the *UPA* judgment.

First, *UPA* can be read as a renewal of the ECJ’s invitation to the “Masters of the Treaty,” initially formulated in its contribution to the IGC 1996/97, to reconsider a reform of the system of judicial review as established by the Treaties and subsequently interpreted in the Court’s case law.

Second, *UPA* appears to acknowledge that the Court’s margin of *manœuvre* for “law-making” has been reduced by fact that it has to act within the particular political context of a permanent constitutional reform process.

From this follows a third consideration, namely, that the ECJ does not believe that the *pouvoir constituant* has already “failed to act” although it has chosen to ignore its invitation to address the question of individual standing before the European Courts. This makes clear that stating a “*carence du législateur*” in times of permanent constitutional re-adaptation is much more problematic than it has been in the first decades of the EC characterized by a stable constitutional framework. Moreover, the ECJ was to decide the question of individual access to justice at a critical moment in which the reform process was just entering into a new qualitative phase: on the one hand, the choice for the “convention method” broadened considerably the number of participants in the “constitutional dialogue,” increasing thereby the democratic legitimacy of this

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<sup>79</sup> See Working Group II, Working Document 20, 27 September 2002, contribution from B. Fayot (at <http://european-convention.eu.int>).

discourse; on the other hand, the mandate of the Convention is nearly unlimited.

It follows that the Court's decision in *UPA* not to proceed to a substantive change of its approach towards individuals' standing under Article 230 (4) EC takes perfectly into account these new circumstances. Given the broad mandate of the Convention composed in its large majority by democratically accountable "players" it would have been very unwise to intervene by judicial means in a question which the Court has "marked," some years ago, as a "political" one to be addressed by the *pouvoir constituant*. Moreover, one may guess that the ECJ used its relatively strong - in another context rather unconvincing - "limits of competences"-argument in order to put the question again on the reform agenda.

If this was the Court's intention, it has succeeded: one day after the ECJ's judgment in *UPA*, the European Ombudsman made a reform proposal.<sup>80</sup> Relaxation of standing requirements for individuals was then discussed in the Convention's working group dealing with specific aspects of fundamental rights.<sup>81</sup> In its final report, the group acknowledges that "a certain lacuna of protection might exist" but agreed that "the present overall system of remedies, and the 'division of work' between Community and national courts it entails, should not be profoundly altered by a possible reform."<sup>82</sup> The group considered that the question "certainly has a nexus with fundamental rights" and "commends the possible reform of Article 230 §4 TEC, together with the valuable contributions admitted thereon, for further examination by the Convention."

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<sup>80</sup> J. Söderman, "Proposals for Treaty changes" (CONV 221/02, 26 July 2002 at <http://european-convention.eu.int>). Already before - some days after the publication of *Jégo-Quéré - H. Farnleitner* had presented a reform proposal to the Convention (see "Facilitating individual action before the ECJ and the CFI", CONV 45/02, 14 May 2002).

<sup>81</sup> The group worked on the modalities and consequences of an incorporation of the EU Charter of Fundamental Rights into the Treaty and of an accession of the Union to the ECHR. On individual's standing see the proposal made by J. Meyer, Contribution to Working Group II (Working Document 17, 16 September 2002, available at: <http://european-convention.eu.int>) and the contributions of Judge *Skouris* (note 78) and AG *Jacobs* (note 79).

<sup>82</sup> *Final report of Working Group II* (CONV 354/02, 22 October 2002) at 15/16 (available at: <http://european-convention.eu.int>).

The issue was debated, some months later, in a special Working Group of the Convention called “Discussion Circle on the Court of Justice”.<sup>83</sup> Its members discussed several possible reforms<sup>84</sup> and heard the European Courts’ presidents.<sup>85</sup> The Discussion Circle reached consensus on reforming Article 230 EC in the sense that *locus standi* should be granted to an individual challenging a regulatory EC act “which is of direct concern to him without entailing implementing measures”<sup>86</sup>. However, its members remained divided on the question of whether or not to extend such protection to “an act of general application”.<sup>87</sup> It is, thus, to be expected that a limited – but nevertheless significant - liberalization will be proposed by the Convention to the next IGC.

### E. Conclusion

In sum, the *UPA* judgment can neither be entirely understood as being a new example in line with previous cases following a *judicial-restraint* approach nor

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<sup>83</sup> This “Circle” was set up by the Praesidium of the Convention since “some Convention members felt that there was a need to look seriously at the implications that certain proposals made within the Convention might have for the operation of the Courts of Justice. (...) This circle should in particular look at matters on which the Convention has not yet adopted fixed positions and could explore the following points amongst others: ... (d) Should the wording of the forth paragraph of Article 230 EC concerning direct appeals by individuals against general acts of the institutions be amended? ...”. The mandate has been annexed to the Circle’s final report (CONV 636/03, Circle 1, Working Document 13, 25 March 2003, available at <http://european-convention.eu.int>).

<sup>84</sup> See Note of the Convention’s secretariat, Cercle 1, Working Document 1, 26 February 2003 available at <http://european-convention.eu.int>.

<sup>85</sup> The Court’s presidents have, however, been rather cautious. Both pointed out that the possible reform is first and foremost a policy choice and also closely linked to the restructuring of the sources of Community law. However, while Judge *Rodríguez Iglesias* stated that “the Court considers that the current system, which is based on the principle of subsidiarity in that the national courts in particular are responsible for protecting the rights of individuals, satisfies the requirements essential for the effective judicial protection of those rights, including fundamental rights” (see CONV 572/03, Working Document 6, 10 March 2003, 3, <http://european-convention.eu.int>), Judge *Vesterdorf* reported “that opinion among the Members of the CFI is divided as to whether the judicial protection afforded to individuals by Article 230 EC is adequate” (see CONV 572/03, 10 March 2003, 3, <http://european-convention.eu.int>). In the event that judicial protection under Article 230 (4) EC would be increased, Judge *Rodríguez Iglesias* suggested that “it would seem appropriate to continue to take a restrictive approach to actions by individuals against legislative measures and to provide a more open approach with regard to actions against regulatory measures” (see CONV 572/03, 4).

<sup>86</sup> See Final Report of the Discussion Circle on the Court of Justice, CONV 636/03, Circle 1, Working Document 13, 25 March 2003, 7 (available at <http://european-convention.eu.int>).

<sup>87</sup> See Final Report (previous note) at 8, which reflects the reservations made by Judge *Rodríguez Iglesias* quoted in note 84.

as a mere act of *self-protection* by which the ECJ aims at insulating its traditional restrictive conception of individual standing under Article 230 (4) EC.

*UPA* marks the Court's use, for the first time, of a new kind of voice in its "constitutional dialogue" with the Union's *pouvoir constituant*. This development coincides with the entry into the next phase of the European integration process which adopts a new method of constitutional reform, the "convention method."

## RESEARCH PAPERS IN LAW

1. Dominik Hanf et Tristan Baumé, “Vers une clarification de la répartition des compétences entre l'Union et ses Etats Membres? Une analyse du projet d'articles du Présidium de la Convention”, 2003.
2. Dominik Hanf, “Der Prozess der europäischen Integration in Belgien. Voraussetzung und Rahmen der Föderalisierung eines ehemaligen Einheitsstaats”, 2003.
3. Dominik Hanf, “Talking with the “pouvoir constituant” in times of constitutional reform: The European Court of Justice on Private Applicants’ Access to Justice”, 2003.
4. Horst Dippel, “Conventions in Comparative Constitutional Law”, 2003.
5. Ludwig Krämer, “Access to Environmental Information in an Open European Society - Directive 2003/4”, 2003.
6. Ludwig Krämer, “Überlegungen zu Ressourceneffizienz und Recycling”, 2003.
7. Ludwig Krämer, “The Genesis of EC Environmental Principles”, 2003.
8. Takis Tridimas, “The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?”, 2003.