MARMARA UNIVERSITY
EUROPEAN UNION INSTITUTE

INDIVIDUAL ACCESS TO THE EUROPEAN COURT OF JUSTICE

Thesis Submitted in Partial Fulfilment of the Requirements
For the degree in Master of Arts

AYDIN ATILGAN

İSTANBUL, 2008

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AYDIN ATILGAN

SUPERVISOR
ASSOC. PROF. DR. SİBEL ÖZEL

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LIST OF ABBREVIATIONS

AG	Advocate General
AÜHFD	Ankara Üniversitesi Hukuk Fakültesi Dergisi
CFI	The Court of First Instance
CMLR	Common Market Law Review
EAEC	European Atomic Energy Community
EC	European Community
ECB	European Central Bank
ECJ	The European Court of Justice
ECR	European Court Report
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union

INTRODUCTION

The individuals, as appeared in the Treaties establishing the European Communities, as natural persons, undertakings, association of consumers, companies and the other legal persons, are the essential sources of legitimacy of the European Union which has been of considerable effects on the social and economic life of people of the Member States and the other countries'.[1] Therefore, there has been a direct relationship between the individuals and the Communities since the earlier years of the establishment process.

The system of the European Communities, has included the individuals with the Member States and the Community institutions into the the judicial review and political mechanisms as a result of the rule of law principle. However, even though the individuals have been held as one of the major actors of the Communities system, considering the locus standi rights, it is observed that the individuals have always been non-priviledged parties of the judicial review since the Treaties gave place to individual access. Besides, in the compensation system of the EU Law, the admissibility criteria of the individuals are of restrictive features which are not common to the systems in the Member States. Therefore, it is stated that "the individual is a subject of Community Law though he does not possess a status equal to the Member States".[2]

However, the jurisdiction of the European Court of Justice is of a vital importance for judicial protection of individuals fundamental rights as the Court has always considered the protection of fundamental rights of the individuals though the Treaties establishing the Communities did not include any provision concerning the fundamental rights for a long period.[3]

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[1]Tezcan, Ercüment. **Avrupa Birliği Hukuku'nda Birey,** İstanbul: İletişim Yay., 2002, p.13

[2] Gormley, P.W. "The Procedural Status of the Individual before Supranational Judicial Tribunals", University of Detroit Law Journal, 1963, Vol. 5, p.41-42 quoted by Albors-Llorens, Albertina. **Private Parties In European Community Law: Challenging Community Measures**, New York: Oxford University Press, 1996, p. 8

[3] Binder, Darcy S. "The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action", Jean Monnet Working Papers, No: 4 available at http://www.jeanmonnetprogram.org/papers/95/9504ind.html, last visit 14.03.2008

One of the aims of this thesis is to examine the reasons of these restrictions brought for the private parties by the Community treaties. It is also important to observe the view of the Community to the individuals, citizens of the Member States and the others from past to present in political and judicial process. Therefore, the progress introduced by this thesis is convenient for implications on the political character of the Communities and the European Union in the context of the legal positions of the individuals in the EU Law.

Another aim is to show the admissibility conditions of challenges brought by the individuals which have become too complicated in years since the Communities were established and the Court of Justice began to hear the actions brought by the individuals, in a well-organized way.

In the EU Law, the individuals may access the European Court of Justice by direct and indirect ways. The indirect ways are the preliminary ruling which is governed by the Article 235 of the EC Treaty and can be put in action through the national courts of the Member States and besides the plea of illegality which is governed under the Article 241 of the EC Treaty and an alternative way of challenging Community acts indirectly. These sorts of actions are excluded from this study considering the wide scope of the preliminary ruling procedure and the plea of illegality and extent of this study that is determined by the aim of indicating the position of the individuals in Community judicature.

The direct actions are the main ways to join a judicial review and compensation system in a judicature. In the European Union Law, these are the action for annulment, action for failure to act and the action for damages as governed under the EC Treaty. The individuals may access the Court through bringing these actions and participate in the judicial review process and demand compensation of the damages which they suffered after a Community action.

This thesis consists of two chapters. At first chapter, general features of the direct actions under the EC Treaty are held. Definitions and purposes of the action for

annulment, action for failure to act and action for damages are explained with the general admissibility conditions and the other procedural features.

At second chapter, locus standi of natural and legal persons is analyzed in light of the case law of the European Court of Justice. The admissibility criteria of individual applications adopted by the Court are mentioned pointing out the significant judgments of the ECJ. Besides, the restrictions which in general appear as settled admissibility tests or formulas of the ECJ for individual access brought by the Treaties and the case law is held in this chapter. At this chapter, the locus standi of individuals under the Article 230(4) is of a special gravity on the ground that admissibility conditions for individuals are much more complicated in action for annulment than the other action types. On the other hand, the action for annulment is the heart of the judicial review system in the EU Law, Besides, the critics and the debates on the restriction of individual access among the academic writers and also the Court Advocate Generals are held in another part of this chapter.

JUDICIAL REVIEW, COMPENSATION SYSTEM AND PRIVATE PARTIES IN THE EUROPEAN UNION LAW

1.1 An Overall View Of The Judicial Review and Compensation System in The European Union

By establishment of the European Communities Treaties, a new legal order which has often been described as a supranational law[4] has been constituted. Besides the institutions of the Communities and the Member States, natural and legal persons are the subjects of this legal order. In the famous Van Gend en Loos judgment, the Court pointed out this issue and held that "the European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals.

[4] Toth, A.G. "The Individual and European Law", **International and Comparative Law Quarterly**, 1975, Vol. 24, p. 659; Günuğur, Haluk. **Avrupa Topluluğu Hukuku**, 3. Baskı, Ankara: Avrupa Ekonomik Danışma Merkezi Yayını, 1996, p. 13

Independently of the legislation of member states, Community Law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."[5] It can be said that this judgment have put the individuals and their rights at the heart of the Community Law.[6]

The European Communities and the European Union have been based on the rule of law. It was also submitted in the case law of the ECJ as "it must first be emphasized in this regard that the European Economic Community is a community based on the rule of law."[7] This means institutions of the Union are bound by the Constitutional Charter of the European Communities, by the Treaties and their subsequent amendments, their Annexes and Protocols, and the Treaties of Accession of new Member States and also general principles of law and by the international agreements concluded by the Community.[8] In a system like the European Union's in which the Parliament is of a limited supervisory role, the European Court of Justice carries out the leading role in protection of rule of law in the Union. This situation is stated in the EC Treaty as "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed" in Article 164. As a result of that, the duty of the European Court of Justice to save the rule of law brings ensuring the legal protection without any gaps and interpretation of concerned provisions liberally.[9]

The rule of law makes it necessary that participation of individuals in judicial review processes and to make good damages of them when they suffer losses as a result of the Community actions. In accordance with the aims to render the rule of law in the Communities, judicial review and compensation mechanisms for individuals have been

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[5] Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 1, pr.II-B
[6] De Witte, Bruno. "Direct Effect, Supremacy and the Nature of Legal Order", in Craig, Paul and Grainne De Burca (Ed.). **The Evolution of EU Law**, New York: Oxford University Press, 1999, p.205
[7] Case 294/83 Parti écologiste "Les Verts" v. European Parliament [1986] ECR 1339
[8] Albors-Llorens, Albertina. **Private Parties In European Community Law: Challenging Community Measures**, New York: Oxford University Press, 1996, p. 3
[9] ibid, 4

constituted by the Treaties. Besides this, the fundamental rights of the individuals is to be respected as adopted in the Treaties and the case law.[10]

In traditional international law systems, in general, individuals constitute a "lacking international legal personality"[11] as they cannot easily take place in international political and judicial process. In Toth's view, the most distinguished features of the European Union law system which differentiates it from the traditional international law are "the creation of independent legislative, executive and judicial institutions exercising quasi-sovereign powers transferred to them from the respective national institutions and the elevation of the individual to the rank of a subject of law alongside of the Member States".[12] It is stated that participation of private parties to the European Union law is one of the revolutionary features of the Union on the ground that the European Union has "gone beyond the boundaries of the international law" by creating legal effects on the rights and obligations of the individuals.[13] Granting direct access to the private parties in the European Union law has been seen as a "bold new experiment in transnational justice"[14]

However, locus standi rights of the individuals against the European Union acts are not equivalent to the Member States' and the institutions of the Union's and by reason of the restrictions for access of the individuals to the Court brought by the Treaty.

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[10] Respecting the fundamental rights is a general principle of Community law as mentioned in Article F(2) of the Maastricht Treaty: "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protections of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law", for the other sources of fundamental rights in Community law and a wider information, Iglesias, G.C. Rodriguez. "The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities", **Columbia Journal of European Law**, 1995, Vol. 1, pp.169-181

[11] Stein, Eric and G. Joseph Vining. "Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context", **The American Journal of International Law**, 1976, Vol.70, No.2, p. 219

[12] Toth, 659

[13] Albors-LLorens, 7

[14] K. A. Parkinson, 'Admissibility of Direct Actions by Natural or Legal Persons in the European Court of Justice: Judicial Distinctions between Decisions and Regulations' (1989) 24 Texas Int. LJ 433; quoted by Albors-LLorens, 8

The ways of challenging the acts of the Union can be categorized in two parts as the direct actions and the indirect actions. The action for annulment which is seen as the core of the judicial review in the European Union by many authors, the action for failure to act and the action for damages constitute the direct actions category whereas preliminary ruling procedure and the pleas of illegality are the indirect ways of challenging acts. Another categorization which can be considered comes from the distinction between the contentious and non-contentious procedures. The action for annulment, the action for failure to act, the action for damages and the plea of illegality form the contentious procedures category in the EU Law and the preliminary ruling procedure is a non-contentious procedure which emanates from the principle of co-operation of national courts and the ECJ.[15]

The Court of First Instance is the competent court of the direct actions brought by the individuals at present. The European Court of Justice, which was transformed into the Court of Justice of the European Communities from the Court of Justice of the Coal and Steel Community was the only court in Community judicature until 1988. The Single European Act, which entered into force in 1987, has been of a provision which envisaged establishment of the Court of First Instance. By reason of the increase in cases brought before the ECJ and accession of new Member States[16], The Court of First Instance was founded in 1988 and began to hear the cases in 1989. It was attached to the European Court of Justice before and by Nice Treaty it became an independent part of the Community judicature.[17] The jurisdiction of the Court of First Instance was governed under the Article 3 of the Council Decision establishing the Court of First Instance.[18] According to the Article 3 of the decision, the jurisdiction of the Court of First Instance was

"(a) in disputes as referred to in Article 179 of the EC Treaty (1) and Article 152 of the EAEC Treaty;

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[15] Albors-LLorens, 7

[16] Millet, Timothy. "The New European Court of First Instance", **The International and Comparative Law Quarterly**, 1989, Vol. 38, No. 48, p. 811

[17] Mathijsen, P.S.R.F. **A Guide to European Union Law**, 8th Edition, London: Sweet&Maxwell, 2004, p. 139

[18] Council Decision 88/591

(b) in actions brought by natural or legal persons pursuant to the second paragraph of Article 33, Article 35, the first and second paragraphs of Article 40 and Article 42 (2) of the ECSC Treaty;

(c) in actions brought by natural or legal persons pursuant to the second paragraph of Article 173, the third paragraph of Article 175 and Articles 178 and 181 (2) of the EEC Treaty (3);

(d) in actions brought by natural or legal persons pursuant to the second paragraph of Article 146, the third paragraph of Article 148 and Articles 151 and 153 (2) of the EAEC Treaty."

In this way, by the Article 3 of the decision and the latter amendments, whole direct actions may be brought by the individuals were transferred into the jurisdiction of the Court of First Instance. On the other hand, the ECJ is the appeal court which acts to review of the final decisions of the Court of First Instance.

1.2 The Individuals in the EU Law

The concept of "individual" in the European Community Law is defined as "any entity (natural or legal person) irrespective of his/its legal nature, nationality, place of residence or establishment, who/which may possess (substantive and procedural) Community rights and obligations and which is not a member State"[19].

Legal protection of the individuals in the law of the Communities has been concerned since the deliberations of the Schumann Plan which was the initiator of the establishment of the Communities and it has always been concerned in the main acts of the Community.[20]

The Treaties do not define the concept of the individual. The ECSC Treaty in Articles 48 and 80 defines the "association" and "undertaking", but do not give place to

[19] Toth, 660; Besides, for the debates on the concept of individual and its future in the EU in the context of the European Draft Constitution in comparison with the Member States constitutions', Alpa, Guido, "The Meaning of 'Natural Person' and the Impact of the Constitution for Europe on the Development of European Private Law", European Law Journal, Vol. 10, No. 6, November 2004, pp. 734–750.
[20] Schwarze, Jürgen. "Judicial Review in EC Law- Some Reflections on the Origins and the Actual Legal Situation", **International and Comperative Law Quarterly**, 2002, Vol. 51, No. 1, p. 18

the meaning of the other private persons. The Euratom Treaty mentions "nationals of member States" in Article 96 and "natural or legal persons" in Article 97. The EEC Treaty and the EC Treaty mention groups of persons which are subject to EC Law such as producers, workers, self-employed persons, carriers, companies or firms, private undertakings, their associations and public undertakings. Besides the jurisdictional provisions of the EEC Treaty and EC Treaty, in Articles 173 and 175 of the EEC Treaty and 230 and 232 of the EC Treaty, mention "any natural or legal persons" without defining them.

In the EC Law, three kinds of Treaty provisions concern the individuals. First of them is the provision addressed to Member States which constitute mutual rights and obligations between them and which are to be implemented by them to provide the provisions to be of legal effects. They are not directly applicable to the individuals and they can only be of indirect effects on the individuals. These provisions can be exemplified as the Articles concerning the Customs Union. Another category is the provisions which are addressed to institutions and which must be implemented by the secondary legislations which can be directly applicable measure as the regulations and decisions, in some cases directives addressed to individuals and non directly applicable measures such as directives and decisions addressed to Member States which is to be implemented by the addressed State. Articles 40 of the EC Treaty, "The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers (…)" can be given as an example of these provisions. A third kind is the provisions which are addressed to the Member States but declared by the ECJ that they are of direct effects on the individuals. These provisions are the Articles 9, 12, 13(2), 16, 31, 32 (1), 37 (2), 48, 52, 53, 59(1), 60(3), 85, 86, 92(1) and 95 of the EEC Treaty.[21]

As seen, both primary and secondary provisions of the EC Law affect the individuals either directly or indirectly. The individuals may be both beneficiaries of the rights ensured for them by the Community Law or the addressees of the Community

[21] Toth, 660-661

obligations. Therefore legal protection for individuals in the Community law may appear as aiming "to enforce rights and to protect themselves against obligations and sanctions arising (directly or indirectly) from (primary or secondary) Community law"[22].

The natural and legal persons in the EC Law, in the peculiar legal system of the European Union is of the rights to protect himself and to enforce his rights as mentioned above. In the European Communities jurisdiction system, the law envisages three kinds of direct actions for individuals as governed by the EC Treaty. These are:

a) Action for annulment (Article 230)

b) Action for failure to act (Article 232)

c) Action for damages (Article 288)

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[22] ibid, 662

CHAPTER ONE

DIRECT ACTIONS UNDER THE EC TREATY

1. THE ACTION FOR ANNULMENT (ARTICLE 230)

1.1 Definition and Purpose of the Action for Annulment

The action for annulment is governed by the Article 230 (ex Article 173) of the EC Treaty as:

"The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The 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 action for annulment was governed by the Article 33 of the ECSC Treaty and Article 173 of the EEC Treaty.

The grounds of illegality admitted by the Court are "lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers" which came into the EU Law by the inspiration of French administrative law.[23]

By the action for annulment the Court is asked to annul the act. The Court has only the options to annul or not to annul. The measure asked to annul cannot be replaced by another act and the Court cannot make amendments to it.[24] The Article 231(1) shows the way here: "If the action is well founded, the Court of Justice shall declare the act concerned to be void". This rule is of an exception for the regulations as stated in Article 231(2): "In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive". On the other hand, in cases where the Court finds the application admissible, decision of annulment is of general effect for everyone.[25]

Bringing an action for annulment does not cause the measure at issue to be suspended. However in particular situations, the Court may decide the measure to be suspended.[26]

1.2 Reviewable acts under the Article 230

It is stated that a measure is legally binding when "it produces a change in somebody's rights and obligations."[27]

The acts which may be subject to Action for Annulment are shown in Article 230(1).as acts adopted jointly by the European Parliament and the Council, acts of the

[23] Albors-LLorens, 16
[24] Schermers Henry G. and Denis F. Waelbroeck. **Judicial Protection In the European Union**, 6th Edition, The Hague: Kluwer Law International, 2001, p. 158
[25] ibid, 159
[26] ibid, 159
[27] Albors-LLorens, 19

Council and of the Commission and of the Central Bank, other than recommendations and opinions and acts of the European Parliament intended to produce legal effects vis-a-vis third parties.

In the wording of the Article 230, it is clear that the reviewable acts are directives, regulations and decisions. The Article 230 provides the judicial review of acts other than recommendations and opinions. Feature of recommendations and opinions which are not of legally binding effects and were stated in ERTA judgment[28] and the Court stated the are not reviewable. Besides, the Article 249(5) of EC Treaty states "recommendations and opinions shall have no binding force". However, the list of reviewable acts developed by excluding recommendations and opinions is not exhaustive, besides the regulations, directives and decisions, the sui generis acts which are of binding legal effects may be held as the reviewable acts under the Article 230.[29]

A measure is of legal effect until it is annuled by the Court. However, the acts which are assumed to be non-existent are the exceptions to this general rule. The time limits do not work for these kinds of acts.[30] On this point the Court stated, "[a]ctions against a non-existent measure must be dismissed on grounds of inadmissibility (…); it is unnecessary for the Court either to examine the plea of inadmissibility raised against the application of Shell International Chemical Company Ltd on the ground that it was out of time, since non-existent measures may be challenged without regard to time-limits."[31]

1.3 Applicants Capable of Bringing Action For Annulment

Conditions of bringing an action for annulment before the European Court of Justice differs depending on who is the applicant. Considering the wordings of first and fourth paragraphs of the Article 230, applicants are categorized as privileged, semi

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[28] Case 22/70 Commission v Council [1971] ECR 273, pr. 39

[29] Craig, Paul and Grainne De Burca. **EU Law, Text, Cases and Materials**, 3rd Edition, New York: Oxford University Pres, 2003, p. 483

[30] ibid, 486

[31] Case T-79/89 BASF AG and others v Commission [1992] ECR II-315, pr. 101

privileged and non-privileged applicants.[32] The meaning of being priviledged here is being of no conditions to bring the case. Therefore the level of priviledge decreases up to the conditions get more complex to be found admissible by the Court.

1.3.1 Priviledged and Semi-priviledged Applicants

Priviledged applicants are the Member States, the Commission and the Council. The reason of defining them as privileged is that this group of applicants are entitled to bring action for annulment of any Community measure which is of legal effects without the necessity of fulfilling any application conditions. The second group, the semi-privileged applicants, is consisted of the European Parliament and the European Central Bank. They may challenge any reviewable measures as the privileged applicants but they are entitled only to act protecting their prerogatives. The last category of non-privileged applicants are the natural and legal persons. They are defined as non-privileged on the ground that natural and legal persons are obliged to fulfil several conditions in cases where they challenge an act which does not address them. That categorization clearly indicates the distinction between the parties in wording of the Article 230. Therefore it can be stated that there are two different types of control of the legality of the acts in Article 230 which are the objective control of legality without requiring any standing conditions and the subjective control of illegality depending on fulfilling standing conditions of third and fourth paragraphs.[33]

Privileged applicants do not have to prove that their interests are affected by the measure which is challenged. It is assumed that the Commission and the Council are assumed to be concerned all the acts of the Union by reason of the public interest they represent.[34] Excluding the European Parliament from the privileged applicants is argued by the academic writers and position of the Parliament is thought weaker in legislative process of the Union than the national parliaments and granting a privileged locus standi right to the Parliament strengthens it in control of the acts of the Union.[35]

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[32] Albors-LLorens, 16; Ginter, Carri. “Access to Justice in the European Court of Justice in Luxembourg”, **European Journal of Law Reform**, 2002, Vol. 4, No. 3, p. 383;
[33] Albors-LLorens, 18
[34] ibid, 22
[35] ibid, 22

The European Parliament and the European Central Bank, as the semi-priviledged applicants, have to prove the certain interests of them which provide them to defend their prerogatives. The term of semi-privileged has been found appropriate since judgements of the Court excluded the Parliament from privileged and non-privileged applicants. The Parliament gained the right of bringing actions for annulment of acts by the Maastrich Treaty and before Maastricht it was not of such a right under the original EC Treaty. In a view, the liberal judicial trend in the Union provided the Parliament the right to bring action.[36] In former cases, the Court held an restrictive approach for the locus standi of the Parliament. The Comitology judgment[37] of the Court is a landmark case on this point. The Parliament claimed that it had to be conferred to enjoy the locus standi against the Community acts enacted by the other instutions and emphasized the principle of equality of the Community institutions. The Court rejected this claim on the ground that the Article 173 (Article 230 now) did not recognize the Parliament as an institution that can bring action for annulment and besides the Parliament could not be recognized as a legal person not being listed in Article 4 of the Treaty. Furthermore, the Court stated that it is a duty of the Commission to protect the prerogatives of the Parliament and therefore there were other ways to challenge the measure at issue and did not see the situation that the Parliament is not conferred to challenge the Community acts as a gap emanating from the Treaty. On the other hand, in another case the Court considered there was no other alternative way to challenge the measure and found the application admissible brought by the Parliament and besides accepted the European Parliament had to be of a limited right of standing.[38]

As the Parliament did, the European Central Bank gained the semi-privileged applicant status by the Maastrich Treaty too, pursuant to its raising importance in monetary policy.

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[36] Case 302/87 European Parliament v Council [1988] ECR 5615, Case 70/88 European Parliament v Council [1990] ECR I-2041, quoted by Albors-Llorens, 23
[37] Case 302/87, quoted by ibid, 23
[38] Case 70/88, quoted by ibid, 23

1.3.2 Non-priviledged Applicants

The legal persons and the natural persons compose the non-priviledged applicants of the action for annulment. The most restrictive provisions to bring an action for annulment is in the fourth paragraph of the Article 230 for non-privileged applicants. Application conditions of Article 230(4) which are peculiar to the natural and legal persons distinguish them from other applicants. These are going to be discussed below in the part “Application Conditons for Individuals”.

1.4 Other features of the Action for Annulment

Article 230(5) prescribes a two month time limit to bring the actions. The period of limit begins from publication of the measure or notification to plaintiff or the day on which the applicant learnt existence of the measure challenged.

The Article 231 of the EC Treaty indicates what the Court’s action will be at the end of the judgment. According to the Article 231, “if the action is well founded, the Court of Justice shall declare the act concerned to be void.

In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive”.

In Community Law an act has legal effects until it is declared void by the Court. [39]The Article 231 governs that through the annulment decision of the Court, the measure annuled becomes void, retroactively, beginning from the date which it was enacted. The exception of this rule is governed in the second paragraph of the article. According to that paragraph, in case of annulment of a regulation, the Court if it “considers this necessary”, may declare that the measure annuled will remain in force for a while beginning from the annulment.[40]

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[39] Hartley, T.C. **The Foundations of European Community Law,** 2nd Edition, New York: Oxford University Press, 1988, p. 331

[40] Arat, Tuğrul. **Avrupa Toplulukları Adalet Divanı**, Ankara: Ankara Üniversitesi Avrupa Topluluğu Araştırma ve Uygulama Merkezi, 1989, p. 76

The annulment decision of the Court is of erga omnes effect, in other words it is boundary for everyone. Therefore, besides the Community institutions, all Member States are incumbent not to execute the Community measure annuled by the Court.[41]

[41] ibid, 74

2. THE ACTION FOR FAILURE TO ACT (ARTICLE 232)

2.1 Definition and Purpose of the Action For Failure To Act

Action for failure to act is governed under Article 232 (ex Article 175) of the EC Treaty. According to the Article 232, if the European Parliament, the Council or the Commission has infringed Community law by failing to act, the Member States and the other institutions of the Community and private persons (against the acts excluding recommendations and opinions) may bring an action before the Court of Justice to have the infringement established. In other words the concept of action for failure to act is described by the official site of the European Union as "[p]roceedings for failure to act are based on the failure to act by the European institutions where Community law imposes an obligation to act, such as the obligation to adopt legislation. The failure to act is therefore illegal.

The European institutions which may be the subject of these proceedings are the Council, the Commission, the European Parliament and the European Central Bank. Failure to act by Member States is dealt with by proceedings for failure to fulfil an obligation."[42] This type of action is used when the Council or the Commission fails to act in cases where they are obliged to do so and it is also called "appeal against in-action".[43]

The action for failure to act and the action for annulment are sequential in the Treaty. The Article 232 is a sort of complemantory provision of Article 230 on the ground that it obstructs the institutions of the Union to fail to make legislation or to take decisions and therefore prevents effectiveness of the Article 230 reduce.[44] It is stated that if the action for failure to act was not governed in the Treaties, executive institutions of the Union could abstain adopting the acts which they had to do without meeting any sanction.[45] The action for failure to act was governed by all the Community

[42] europa.eu/scadplus/leg/en/lvb/l14551.htm, last visited 01.02.2008
[43] Schermers and Waelbroeck, 174
[44] Weatherill, Simon and Paul Beaumont. **EU Law**, 3rd Edition, London: Penguin Books, 1999, p. 306
[45] Albors-Llorens, 209

Treaties and it was envisaged in such a role of annulment proceedings in Article 35 of the ECSC.[46]

2.2 Preconditions of the Action For Failure To Act

The procedure which must be followed by the applicants is shown in the second paragraph of the Article 232. In wording, the Article 232(2) governs, "[t]he action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months." The paragraph envisages a few preconditions and the action may only be brought before the Court provided that these preconditions are fulfilled.

2.2.1 Obligations of the EU Institutions To Act

Firstly, to initiate the proceedings, it must be emphasized that there must be an obligation of a Community institution to act which has not been fulfilled. If the institution is of a discretion to decide to act or not, a failure to act does not exist.[47] According to Article 232, the Community institutions and the Member States may bring an action for failure to any act, whereas natural and legal persons may only bring an action for failure to a binding act.[48]

In case law, many cases that examine the obligation to act of the institutions may be pointed out. For example, the Court decided that the Commission is never obliged to bring an action against another Community institution which failed to fulfil its obligations[49], the Council is not obliged to adopt an anti-dumping regulation on a proposal from the Commission[50] and in another case the Commission is obliged to

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[46] Action for failure to act was governed under Article 175 of the EEC Treaty in the same form of the Article 232 of the EC Treaty. Also see, Albors-Llorens, 210

[47] Schermers and Waelbroeck, 478

[48] See Chapter II, Part 2 Action For Failure to Act by Individuals

[49] Case 327/97 Apostolidis and others v Commission [1999] ECR I-6709, quoted by Schermers and Waelbroeck, 478

[50] Case T-213/97 Eurocoton and others v Council [2000] ECR II-3727, quoted by ibid, 479

initiate a procedure and take a decision in case of a Member State fails to comply with the ECSC Treaty.[51]

2.2.2 To "Call upon" the EU Institutions To Act

According to the Article 232(2), first, the applicant must call upon the relevant institution to act. The institution must define its position in two months. If not, the applicant can bring an action in a period of two months. The invitation to the institution to act must include the measures demanded to be acted clearly and formal notice stating that the proceedings will be instituted in case that the institution does not issue the act.[52] Besides, the applicant must be identifiable and the parts who did not take place in the invitation procedure can not bring action before the Court.[53]

The institution may define the position as acting in a different way from the applicant expected or replying as it is not going to act. In such a case, the Court states what the failure to act is as "Article 175 of the Treaty refers to failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned".[54] If the position defined by the institution does not satisfy the applicant, action for annulment may be the way to challenge the decision of the institution which is in the form of a decision of not to act or to act in a different way from the expected by the applicant.[55] Action for failure to act can not be brought when the institution did not respond to a demand of revoking an act and in such a case the applicant should challenge the act by action for annulment within two months.[56] The Treaty does not determine any time limit

[51] Case 7-9/54 Groupement des industries sidérurgiques Luxembourgeoises v ECSC High Authority [1954-56] ECR 189, 190, quoted by ibid, 479; For a wider bundle of examples Schermers and Waelbroeck, 478-481
[52] Schermers and Waelbroeck, 468
[53] ibid, 468
[54] Joined cases 166 and 220/86 Irish Cement Limited v Commission [1988] ECR 6473, 6503, quoted by Weatherill and Beaumont, 308
[55] ibid, 308
[56] ibid, 308

to call upon the institution to act. However, the Court submitted that this procedure must be initiated “within a reasonable time”.[57]

If the institution is not under an obligation to act, there is no infringement of Treaty and the institution does not have to define its position. In case law, examples of this situation are seen in application of Article 226. According to Article 226, the Commission may initiate infringement proceedings if a Member State fails to fulfil an obligation brought by the Treaty and then delivers an opinion to that Member State. If the Member State fails to comply with the opinion, the Commission may bring the matter to the ECJ. In cases where an applicant asks the Commission to initiate these proceedings and the Commission prefers not to act, the action for failure to act brought by the applicant is inadmissible on the ground that the Commission is not under an obligation to initiate these proceedings and it is of a discretion to act or not.[58] Concisely, the applicant must demonstrate that the defendant is of an obligation to act to provide its claim be found admissible.

2.2.3 Time Limits

According to the Article 232(2), after calling upon the institution, if the institution concerned does not define its position, the applicant may bring the action within a further period of two months.

As mentioned above, to call upon must be initiated within a reasonable time. In certain cases, an obligation under the Community law must be fulfilled at a certain date and otherwise such an inaction is illegal.[59] In cases where a date is not fixed, the time limit may be determined by the implications or by the aim of the system which establishes covers such an obligation.[60] On the other hand if the institution is preparing to act at the date of the action is brought before the Court, the Court rejects the application and in such a judgment held that “(…) the Commission cannot be regarded

[57] For example, the Court declared an action in which the instituiton was called upon after 18 months of declaration of the Commission not to act inadmissible by reason of “legal certainty”, “the continuity of Community action”, Case 59/70 Netherlands v Commission [1971] ECR 639, pr. 15; Craig and De Burca, 522
[58] Weatherill and Beaumont, 308; Also see Case 247/87 Star Fruit Company v Commission [1989], pr. 11
[59] Schermers and Waelbroeck, 470
[60] ibid, 470

as having failed to act for the purposes of Article 175 of the Treaty if, when the complainant addresses a formal request to it to adopt a position on the complaint, it has already initiated the procedure for investigating the alleged breach of Article 85 of the Treaty but the progress of the investigation and the time spent on it are not sufficient to enable it to address a communication to the complainant in accordance with Article 6 of Regulation No 99/63 nor, a fortiori, to adopt a position on the complaint in the form of a rejection".[61]

2.3 Other features of the Action For Failure To Act

2.3.1 Applicants Capable of Bringing Action For Failure To Act

The Article 232 determines two categories of applicants, priviledged and non-priviledged applicants as the Article 230 does. The Article 232(1) identifies the priviledged applicants, the Member States and the institutions of the European Union. Non-priviledged applicants are defined by the third paragraph of the Article 232. Categorization of the applicants are the same as in action for annulment.

2.3.2 The Court's Action

By the action for failure to act, the Court is asked to find the inaction is illegal. Unlike the action for annulment, the finding of infringement does not bring a legal change in the action for failure to act. There is no act to annul retroactively. The Court declares the failure to act is illegal and so obliges the defendant institution to issue an act.[62]

If the application is admitted by the Court, the result is going to be pursuant to the Article 233 of the Treaty. The Article 233 of the EC Treaty states "[t]he institution or institutions whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice."

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[61] Case T-74/92 Ladbroke Racing Deutschland GmbH v Commission [1995] ECR II-115, summary of the text, pr. 1
[62] Schermers and Waelbroeck, 477

In the wording of the Article 232, it is clear that the applicant may bring an action for failure to act if the institution does not respond to him in two months. When the institution at issue makes a measure after the applicant initiates proceedings before the Court, the Court can not carry on the judgment. In such a case, the judgment is no more of a subject matter.[63]

Another point is regarding determining the illegality and how to interpret the statement of Article 232 "in infringement of this Treaty". A wide interpretation of this provision is suggested by the academic authors. Despite the fact that there is not any examples in the case law, it is stated that the wide interpretation of this provision should include "to failure to act in violation of a general principle of law", "misuse of powers" and also "the failure of a Community institution to carry out a duty imposed by the Treaty".[64]

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[63] Weatherill and Beaumont, 309
[64] Albors-Llorens, 212

3. THE ACTION FOR DAMAGES (ARTICLES 235 and 280)

3.1 Definition and Purpose of the Action for Damages

The base of the action for damages in the EC Treaty consists of Article 235 and Article 288 (ex Articles 178 and 215). The Article 235 of the EC Treaty is in wording "[t]he Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288" and the Article 288 of EC Treaty states "[t]he contractual liability of the Community shall be governed by the law applicable to the contract in question.

In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The preceding paragraph shall apply under the same conditions to damage caused by the ECB or by its servants in the performance of their duties.

The personal liability of its servants towards the Community shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of employment applicable to them."

3.2 Liability of the EU Institutions

The liability of the Community can be analysed in two categories, contractual liability and non-contractual liability.

3.2.1 Contractual Liability

The regimes of contractual and non-contractual liabilities are governed in different ways in the EC Treaty. Relying on the contractual liability of the EU institutions, actions can be brought against them before the national courts pursuant to "the law applicable to the contract in question". There are not any special remedies for jurisdiction of the ECJ in context of such liability and competent court and applicable

law is determined under the rules of private international law.[65] The only jurisdiction of the ECJ for contractual liability is showed in Article 238, "[t]he Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law".

3.2.2 Non-Contractual Liability

On the other hand, as seen in Articles 235 and 288(2), actions for the damages emanated from the non-contractual liability of the community institutions are regulated under the exclusive jurisdiction of the ECJ.

The action aimed at obtaining compensation for losses caused by acts of the Community institutions is vital for the judicial protection of the European Court of Justice.[66] According to the Articles 235 and 288, The Court of Justice shall have jurisdiction in disputes relating to compensation for damages caused by Community institutions and its servants in the performance of their duties. By this provision, acts or omissions of the bodies and servants of the Community are subjected to the judicial review within the framework of non-contractual liability.

Second paragraph of the Article 288 determines the applicable law in non-contractual liability, neither as the law indicated by the Treaty nor the one of the Member States law. The Court should consider the general principles common to the laws of the Member States in jurisdiction in disputes relating the damages caused by the acts of the Community institutions. This provision gives rise to a non-contractual liability case law peculiar to the Community Law.[67] By the reference to the "general principles common to the laws of the Member States", legal systems has proved to be a rich source of inspiration and legitimacy for the Court in tracing and developing precise criteria governing the Community's non-contractual liability.[68] Although the

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[65] Schermers and Waelbroeck, 520

[66] Albors-Llorens, p. 204. Increasing importance of this case can be seen also in the numbers of the cases which were brought before the court under Article 235. Schermers and Waelbroeck, p. 239.

[67] Arat, 93.

[68] Heukels, Ton and Alison McDonnel. **The Action For Damages in Community Law**, The Hauge-London-Boston: Kluwer, 1997, p..3.

wording of the Article 288 envisages that, as a matter of fact, the case law of the Court has developed the conditions for the basis of non-contractual liability. Three requirements of the admissibility are pointed out which arise from the case law of the Court[69] as,

"a) the existence of a wrongful act or omission,

b) damage,

c) the existence of a casual relationship between the wrongful act and the damage caused." [70]

The definition of a wrongful act in the EU Law cannot be found. Where the allegedly wrongful act is a general legislative measure, the applicants must prove that it fulfils the test laid down in case-law of the Court. For instance in Bayerische HNL ('Second Skimmed Milk Powder')[71] case the Court emphasised that there had to be a sufficiently serious breach of a superior rule of law. Superior rules of law which is for the protection of individuals include most Treaty Articles and the general principles of law, such as non-discrimination. In the Second Skimmed Milk Powder case, the Court stated that the rule against discrimination was for the protection of individuals and was so important to the system of legal protection established by the EC Treaty that it amounted to a superior rule.[72]

It is necessary to differantiate the legislative and administrative acts. This subject is going to be detailed below in second chapter. On the other hand, it is observed that, regarding the admissibility conditions, the Court has consistently held that "the Community's non-contractual liability and the right to compensation for damage suffered depend on the coincidence of a set of conditions as regards the unlawfulness of the acts alleged against the institution, the fact of damage, and the existence of a direct

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[69] Case 4/69 Alfons (Third) Lütticke v Commission [1971] ECR 325, pr.10
[70] Albors-Llorens, 204.
[71] Joined Cases 83 and 94/76 Bayerische HNL Vermehrungsbetreibe GmbH & Co. KG and Others v Council and Commission [1978] ECR, pr.4
[72] Berry, Elspeth, and Sylvia Hargreaves, **European Union Law Textbook**, 2nd Edition, Oxford: Oxford University Press, 2007, Online Resource Centre; available at http://www.oup.com/uk/orc/bin/9780199282449/01student/assessment_qs/, last visit 11.05.2008

link in the chain of causality between the wrongful act and the damage complained of'.[73]

As it is stated in the first requirement, liability emanates from a wrongful act or omission. In the case law the focus of the Court has been laid on the unlawfulness of the act more than the nature of the act. However the concept of the act is considerably wide and covers both administrative and legislative acts, but also physical acts (e.g. like driving a car). In fact anything capable of causing harm to others is defined as an act. Omissions are also included provided that there was a duty to act.[74] Whether liability arises from a decision or from a regulation it is necessary that the act should be declared wrongful by the Court.

On the other hand, in earlier case law, the Court submitted that to bring an action for damages caused by a wrongful EU act, first it must be annuled as stated in Plaumann Case, "an administrative measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage upon those whom it affects. The latter cannot therefore claim damages by reason of that measure"[75] Even though that attitude of the Court to the action for damages caused a fear of dependance of the action for damages to the restrictive conditions of action for annulment, in latter cases the Court changed its approach and declared the autonomy of action for damages.[76] In the Lütticke Case, which was a landmark case in the context of defining action for damages, the ECJ stated "the action for damages provided for by Article 178 and the second paragraph of Article 215 was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use conceived with a view to its specific purpose .

It would be contrary to the independent nature of this action as well as to the efficacy of the general system of forms of action created by the Treaty to regard as a

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[73] Case 308/87 Grifoni v. Euratom [1994] ECR I 341
[74] Schousboe, Claus Ulrich. "The Concept of Damage as an Element of the Non-contractual Liability of the European Community", RETTID, available at http://www.rettid.dk/artikler/2003.afh-3.pdf, 2003, p. 24, last visit 11.05.2008
[75] Case 25/62, Plaumann v. Commission, [1963] ECR 95, pr. II/4
[76] Albors-Llorens, 205

ground of inadmissibility the fact that, in certain circumstances, an action for damages might lead to a result similar to that of an action for failure to act under Article 175"[77] The Court also declared the distinguished feature of action for damages from the action for annulment was that the result of the action for damages was not abolition of a measure.[78]

3.2.2.1 The Wrongful Act and the Omission

The concept of wrongful act is not defined in the treaties and the Community Law and it has been created by the case law of the ECJ. A wrongul act of the Community may appear as a wrongful administrative act or a civil wrong.[79]

A civil wrong which causes a damage means a tort by a civil servant of the Community which constitutes the liability for the Community. That may occur as a car accident or as damaging a building of someone. In such situations, the Court stated that the compensation was to be done pursuant to the general rules common to the Member State Laws, and the compensation amount would have to be found pursuant to the conditions in the Member State concerned, as "[f]inancial and non-financial loss suffered by a natural person following an accident involving that person in the course of works carried out for the account of the European Atomic Energy Community on a building situated in a Member State must, under the second paragraph of Article 188 of the EAEC Treaty, be assessed and made good in accordance with the general principles common to the laws of the Member States.

Although national law does not apply, compensation in respect of financial loss may be calculated by reference to the capitalization coefficient corresponding to natural life expectancy and to the rate of deduction to take account of active life expectancy on the basis of the statistical information available in the Member State concerned"[80]

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[77] Case 4/69 Alfons Lütticke GmbH v Commission [1971] ECR 325, pr. 6
[78] Case 5/71 Aktien-Zuckerfabrik Schöppenstedt v Council ECR [1971] ECR 971, pr.3
[79] Schermers and Waelbroeck, 541
[80] Case 308/87 Alfredo Grifoni v European Atomic Energy Community [1990] ECR 262, summary of text, pr, 1

Besides the civil wrongs, wrongful administrative or legislative acts may cause the liability of the Community. The wrongful administrative acts that bring the liability may appear in various ways. These can be listed as the improper use of power of the Community institutions, not performing the Community obligations, inadequate organization of the administration, not ensuring an adequate supervision, giving wrong information, abusive criticism of a person, infringement of the internal rules of the Community by an institution, failure to comply with the previous judgment of the Court and breaches of the duty of confidentially and the duty to warn the applicant.[81]

An instance to improper use of power of the Community institutions is exclusion of a servant from a post. The Court decided that the Court is of liability by reason of such an action which was done erroneously.[82] Besides, in cases where the Community action is of a fault of inadequate organization of adminisitrative actions or of inadequate supervision where it is obliged to do accurately, the Court awarded the compensation to the applicants which suffered a damage.[83] Like these, if a rule of Community law is interpreted wrongfully in a Community act, and eventhough detection of the wrong interpretation, it is not miscorrected, the Community must be liable.[84]

On the other hand, the Community institutions are bound by internal rules for organization of their internal administration. In case of infringement of these rules, the institution at issue is obliged to compensate the damage of the person who suffered.[85] Besides the internal rules, infringement of general principles of law may cause the liability of the Community. Such an example of this situation is infringement of confidentiality.[86]

Article 34 of the ECSC Treaty envisages a compensation for the damages stemming from invalid decisions and recommendations. It is interpreted as the all other

[81] Schermers and Waelbroeck, 541-545
[82] Case 47/93 Commission v Belgium [1994] ECR II-743, quoted by ibid, 542
[83] Cases 159/79 and 51/80 Pierre Gratreau v Commission [1980] ECR 3953, quoted by ibid, 543
[84] Joined cases 19, 20, 25 and 30/69 Denise Richez-Parise and others v Commission [1970] ECR 339, quoted by ibid, 544
[85] Cases 10 and 47/77 Nunzio di Pillo v Commission [1973] ECR 764-773, quoted by ibid, 544
[86] Case 145/83 Stanley George Adams v Commission [1985] ECR 3539, quoted by ibid, 545

wrongful legislative acts of the Community causes the liability of the Community.[87] Therefore any normative acts under the Article 249 of EC Treaty may cause liability of the Community. The Court accepted the liability of the Community caused by the normative acts referring the liability for legislative acts in national laws of the Member States and envisaged the compensation in case of infringement of a superior rule protecting the individuals, stating that "where legislative action involving choices of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty, *unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred.* For that reason the court, in the present case, must first consider whether such a violatıon has occurred. *"*[88].

That liability may occur as an omission to adopt an act besides adopting a wrongful legislative act which has been annulled by the Court[89]. The conditions for admissibility adopted by the ECJ is too strict and they can be stated in short as a "sufficiently flagrant violation of a superior rule of law for the protection of the individual" as the Court stated in Schöppenstedt Case.[90] This point is going to be held in Part II.

Another question arises in cases where the damage was caused by a valid act. As an interesting point, it has been observed that the Court has never admitted the applications for compensation in those situations. Nonetheless, the case law of the Court has not been of any statement of that the damages caused by valid acts never cause the liability of the Community. That is interpreted as the doors are open to the compensation on this base although the Court has not acted in this way thus far.[91]

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[87] Schermers and Waelbroeck, 546
[88] Case 5/71, pr. 11 emphasis added
[89] Joined cases 5, 7 and 13 to 24-66 Firma E. Kampffmeyer and others v Commission [1976] ECR 741, pr. 5
[90] Hartley, 474-483, Schermers and Waelbroeck, 549
[91] Schermers and Waelbroeck, 557

3.2.2.2 The Concept of Damage

The damage suffered by a person may be caused by three subjects. These are the Community institution, the action of the civil servants and the Member States in implementation of Community Law.[92]

In cases where the damage is caused by a Community institution, the Court decided that the institution which caused the liability of the Community would have to represent the Community as defendant in action for damages. Although the Article 282 of the EC Treaty states "[i]n each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission" and the Commission claimed that it was the only institution which would represent the Community relying on this provision, the Court asserted that the provision at issue was relevant with the representation of the Community in Member States' legal systems and the Community would have to be represented by the institutions which caused the liability for the sake of a proper administration of justice in Community Law.[93] Therefore, as settled in case law, an action for damages have to be initiated against the Community institution which caused the liability of the Community.[94] This rule is also valid in the cases which brought against the institution by reason of a performance of duties of a civil servant.[95] On the other hand, personal liability of a civil servant which is governed under the Article 288(4) as "[t]he personal liability of its servants towards the Community shall be governed by the provisions laid down in their

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[92] ibid, 524

[93] Case 63-9/72 Werhahn v Council and Commission[1973] ECR 1229 quoted by Schermers and Waelbroeck, 524

[94] The Court also submitted that the liability of the Community could never occur in cases where damage was not caused by a Community institution and therefore did not accept liability of the Community for a damage caused by a political party in the European Parliament, as stating "The distribution by a political group, within the meaning of Rule 26 of the Rules of Procedure of the European Parliament, of a publication alleged to be defamatory does not give rise to the non-contractual liability of the Communities . No provision in those Rules empowers a political group to act on behalf of the Parliament with regard to other institutions or third parties and there is no rule of Community law from which it may be inferred that the acts of a political group could be imputed to the Parliament as an institution of the Communities" , Case 201/89 Jean-Marie Le Pen and the Front national v Detlef Puhl and others [1990] ECR I-1183, summary of text pr. 1,

[95] Schermers and Waelbroeck, 525

Staff Regulations or in the Conditions of employment applicable to them" as an internal matter of the Community. The official acts of the servants cause the liability of the Community and the personal acts of them cause their personal liability and proceedings arising from these acts must be initiated in national courts.[96] Such a distinction between the official and personal acts of the Community servants was made in Sayag Case and the Court stated that in a case about a traffic accident of a civil servant by preliminary ruling "by referring at one and the same time to damage caused by the institutions and to that caused by the servants of the Community, Article 188 indicates that the Community is only liable for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions. (…) Only in the case of force majeure or in exceptional circumstances of such overriding importance that without the servant's using private means of transport the Community would have been unable to carry out the tasks entrusted to it, could such use be considered to form part of the servant's performance of his duties, within the meaning of the second paragraph of Article 188 of the Treaty."[97] By these expressions the Court made clear that driving his private car on the duty of a servant did not cause liability of the Community in the context of Article 288 except the situations of force majeure or the other exceptional situations.

In cases where the damage is caused by the Member States as they fail to implement the Community measures correctly, the Court refuses the liability of the Community.[98] On the other hand, the situations stemming from both the Community's and the Member States' liabilities is a substantial point. In combination of a situation causing the liability of the Community and a situation arising from an implementation of a Community measure by a Member State, a distinction of liabilities is required. The ECJ clearly stated that "the Court has exclusive jurisdiction pursuant to Article 178 of the EEC Treaty to hear actions for compensation against the Community under the second paragraph of Article 215 of the EEC Treaty. However, national courts retain jurisdiction to hear claims for compensation for damage caused to individuals by

[96] Schermers and Waelbroeck, 525

[97] Case 9/69 Claude Sayag and S.A. Zurich v Jean-Pierre Leduc, Denise Thonnon and S.A. La Concorde [1969] ECR 335. pr. 11

[98] Case 99/74 Société des Grands Moulins des Antilles v Commission [1975] ECR 1539, quoted by Schermers and Waelbroeck, 527

national authorities in implementing Community law"[99] and declared it is of no jurisdiction for the compensation of losses caused by the Member States' implementation acts. In this judgment, the Court also submitted that in cases where both the Member States' and the Community's liabilities exist, liabilities and the jurisdiction were to be differentiated and competent courts are the national court for the liability of the Member State and the ECJ for the liability of the Community. This means an applicant should bring two different actions, in the national court and in the ECJ, when the damage it suffered is caused by both a Member State and the Community. Therefore, when the liability in a case is shared by a Member State and the Community, the the degrees of liability of the parties must be assessed firstly. [100]

The damage must be precise.[101] The injuries suffered because of the Community, a specified amount of compensation and grounds for the damages must be indicated clearly by the applicant. Otherwise, the application will be rejected.[102]

However it is observed that these admissibility conditions have been of exceptions. For instance, in a case where the applicant brought an action for demanding a compensation of his loss caused by a Community act without stating the nature or extent of the alleged damage or the causal link between the acts of the Communıty and the damage allegedly sustained but reserving the right to give details of the extent thereof at a later stage. The Court considering the special conditions of the case, submitted that "when an action for damages is brought before the court under Article 178 of the Treaty and the legal basis of the Community's liability is disputed, the desirability of making the procedure more economical may lead the court to give a decision at an early stage of the proceedings on the question whether the conduct of the institutions has been such as to entail the liability of the Community, reserving consideration of questions relating to causality, as well as those concerning the nature and extent of the damage, for a later stage. Consequently the incomplete nature of an

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[99] Joined Cases 106 to 120/87 Asteris AE and others v Hellenic Republic and European Economic Community [1988] ECR 5515, pr. 15

[100] Schermers and Waelbroeck, 531

[101] However, in cases where the damage cannot be assesed precisely the action is found admissible by the Court to prevent the damages in the future. Case 104/89 Mulder and others v Commission and Council [2000] ECR I-203, pr. 35, 39, 48, 76-81

[102] Schermers and Waelbroeck, 558

application in which the applicant merely states that he has sustained pecuniary damage as a result of Community rules, reserving the right to give details of the extent thereof at a later stage, need not necessarily make it inadmissible."[103]

Through the case law of the ECJ, it has been accepted that the damage suffered by the applicant was to be of several points to open the way of compensation. Firstly, the damage must be "real and certain". Real and certain existence of the damage means that "the injury must exist at the time of litigation".[104] However in a latter case, the Court put an exception of that rule as "imminent damage foreseeable with sufficient certainty"[105] The Court held that "to prevent even greater damage it may prove necessary to bring the matter before the court as soon as the cause of damage is certain.

This finding is confirmed by the rules in force in the legal systems of the Member States, the majority, if not all, of which recognize an action for declaration of liability based on future damage which is sufficiently certain."[106] The point is that the damage expected in the future must be again real and certain. If not, it is observed that the Court has always preffered to reject the applications. For instance the Court stated "the damage for which compensation is sought must be actual and certain. In the present case, the existence of actual damage as pleaded by the applicant presupposes that its entitlement to Community financing has been recognized; however, finance can be granted only if it is clear upon examination that its project fulfils all the other conditions laid down by Decision 90/342. As the Commission has emphasized, no such examination has yet been carried out, and can only be carried out in the context of the measures which compliance with the Court's judgment involves and which the Commission is required to adopt pursuant to Article 176 of the Treaty" and after finding the conditions did not come into being for a foreseeble damage, "in view of the foregoing, the Court considers itself unable, as matters stand at present, to rule on the applicant's claim for damages; that claim must therefore be rejected as premature."[107]

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[103] Case 90/78 Granaria BV v Council and Commission [1979] ECR 1090, pr. 6
[104] Case 9-25/64 Feram and others v ECSC High Authority [1965] ECR 320, quoted by Schermers and Waelbroeck, 559
[105] Joined cases 5, 7 and 13 to 24/66, quoted by Schermers and Waelbroeck, 560
[106] ibid, 560
[107] Case T-478/93 Wafer Zoo Srl v Commission [1995] ECR II-1479, pr. 49, 50

3.2.2.3 The Causal Link

The causal link is between the damage and the wrongful act or the omission of the Community is required for the compensation of a damage under EC Law as the Article 288(2) of the EC Treaty (and the Article 40 of the ECSC Treaty) regulates. The causal link is also a general principle of compensation law common to the all Member State laws.[108]

The Court expressed the requirement of causal link in an earlier case as "the existence of a direct relationship of cause and effect between conduct of the administration constituting a wrongful act or omission and injury resulting from the fact that such conduct induced an error on the part of a person concerned presupposes that such conduct could and should cause such an error in the mind of a prudent person."[109]

Inquiring the causal link in action for damages which are caused by the Community measures implemented by Member States, the point is to determine whether the Community act or implementation of Member States caused the damage. It is clear that the ECJ has no jurisdiction in action for damages caused by the Member State's implementations as mentioned above. On the other hand it has been observed that in implementations which had to be approved by the Community institutions, the Court decided that the causal link occured between the approval and the damage.[110]

In cases where the liability is shared between the Member State and the Community, the degree of liabilities of the Member State and the Community is to be determined and if the liability of the Community is prevailing, the Court has to find the causal link between the the action of the Community and the damage.[111]

Besides being an admissibility condition of the action for damages, the causal link is also held as a substance of the action by the Court. Therefore the applicant must prove a "sufficiently direct link of causality" between the Community action and the

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[108] Schermers and Waelbroeck, 570

[109] Case 36/62 Société des Aciéries du Temple v High Authority of the European Coal and Steel Community [1963] ECR 298, summary of the text

[110] Joined cases 5, 7 and 13 to 24-66 Firma E. Kampffmeyer and others v Commission [1967] ECR 266, quoted by Schermers and Waelbroeck, 570

[111] ibid, 570

damage it suffered.[112] If a direct link does not exist sufficiently in a situation such as the contribution of the applicant to the occurance of the damage, it may be put forward that the causal link is broken by the plaintiff and the application may be found inadmissible.[113]

3.3 Other features of the Action for Damages

A five year time limit is envisaged by the Article 46 of the Statute of the Court of Justice to bring action for damages. The period to bring the action begins with the "occurrence of the event giving rise" to the liability. The time limit rule is not of public character and cannot be raised ex officio by the Court.[114] It was submitted by the Court in Roquette fréres Case as "[a] comparison of the legal systems of the Member States shows that as a general rule, subject to very few exceptions, a court may not of its own motion raise the issue of time limitation . It follows that, in an action to establish liability under Article 178 of the Treaty, it is not appropriate for the Court to examine, of its own motion, the question of any time limitation under Article 43 of the Protocol on the Statute of the Court of Justice of the EEC where that issue has not been raised by the defendant"[115] The interruption of the time limitation may occur when the proceedings are instituted before the Court or an application relevant is made by the concerned party to the relevant institution. Besides, the Article 46 provides a must to institute proceedings as "in the latter event the proceedings must be instituted within the period of two months provided for in Article 230 of the EC Treaty and Article 146 of the EAEC Treaty; the provisions of the second paragraph of Article 232 of the EC Treaty and the second paragraph of Article 148 of the EAEC Treaty, respectively, shall apply where appropriate". This situation arises in cases where the applicant, instead of bringing an action for compensation of his or her damages, prefers applying the institution for compensation and when that application is rejected by the institution, he or she brings an action for annulment of the decison of the institution or failure of the instituiton to act to compensate the damages.[116] On this head, the Court held that "the

[112] ibid, 570
[113] ibid, 570
[114] Schermers and Waelbroeck, 533
[115] Case 20/88 SA Roquette frères v Commission [1989] ECR 1582, summary of the text, pr. 1
[116] Schermers and Waelbroeck, 534

aim of the third sentence of the Article 43 [now 46] is merely to postpone the expiration of the period of five years when proceedings instituted or a prior application made within this period start time to run in respect of the periods provided for in Articles 173 or 175."[117] More clearly, it was submitted in the Giordano Case, as "[i]t is provided on this point that the period of limitation shall be interrupted either by the application brought before the Court, or by a preliminary request addressed to the relevant institution, it being however understood that, in such latter case, interruption only occurs if the request is followed by an application within the time limits determined by reference to Articles 173 and 175, depending on the case in issue".[118]

If the liability is caused by a regulatory act, the period to bring the action begins from the date of the damage occured, not the measure was enacted as the conditions of liability occurs.[119] The period to bring the action begins with the date of having knowledge of the event which caused the damage. In the case of continous damages, the Court stated that "the damage was not caused instantaneously but recurred on a daily basis, with respect to the date of the event which interrupted the limitation period, the time bar under Article 43 of the Statute of the Court of Justice applies to the period preceding that date by more than five years and does not affect rights which arose during subsequent periods"[120].

In addition, according to the Article 288(2), the defendant is the "Community" in actions for damages. That article indicates that any damage caused by a wronful act or ommission of the Community will be compensated by the Community. On the other hand, as have been accepted in the case law, the applicant must bring the action against the Community institution which caused the damage by its act. If more than one institution causes the damage, the suit must be brought to all of the institutions concerned.[121] Therefore, according to the Article 7 of the EC Treaty which indicates by which institutions the Community shall be carried out, the actions is to be brought

[117] Joined Cases 5, 7, 13-24/66, pr. 260
[118] Case 11/72 Luigi Giordano v Commission [1973] ECR 425, pr. 6
[119] Arat, 85; Schermers and Waelbroeck, 533
[120] Case T-20/94 Johannes Hartmann v Council [1997] ECR II-595, summary of the text, pr. 4
[121] Baykal, Sanem. **Avrupa Birliği Hukukunda Tazminat Davası: AB Kurumlarının ve Üye Devletlerin Tazminat Sorumluluğu Çerçevesinde Bir İnceleme**, Ankara: Yetkin Yay. 2006, p. 47

against the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditıors and European Central Bank (according to the Article 288(3) by reason of the damages caused by each of them. .

CHAPTER TWO

THE LOCUS STANDI OF INDIVIDUALS IN DIRECT ACTIONS

1. LOCUS STANDI OF INDIVIDUALS UNDER ARTICLE 230(4) OF THE EC TREATY

According to Article 230(4) of the EC Treaty, individuals may act against;

a) Decisions addressed to them,

b) Decisions which addressed to another person which are of direct and individual concern to them,

c) Decisions which are in the form of regulations and which are of direct and individual concern to them.[122]

The Article 230(4) shows what sorts of acts the individuals may challenge. Decision and disguised regulations are the only acts which can be challengeable by individuals according to the wording of this paragraph of Article 230. Thus, application conditions of action for annulment for individuals may be analyzed under three sections: Qualification of the measure, individual concern and direct concern.

1.1 Qualification of the Measure

1.1.1 Challenging Decisions

Individuals can always challenge decisions which are addressed to them pursuant to the Article 230(4) EC. Actions against decisions addressed to other people can be issued only if they are of individual and direct concern to them. It is stated that individual and direct concern as preconditions of these sorts of challenges express the

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[122] Craig and De Burca, 487; Baykal, Sanem. "Avrupa Topluluğu Hukukunda İptal Davası ve Özel Kişilerin Davacı Olabilme Koşulları: Topluluk İçtihadı Işığında Bir İnceleme", **AÜHFD**, 2005, Cilt. 54, Sayı. 3, p. 206

will of the drafters of the Treaty which is “to restrict the individual’s possibility of availing himself of this form of action”.[123]

An individual must prove that he is directly and individually concerned by the measure which is addressed to another person whereas he can bring a direct action against a decision addressed to himself. To be found admissible by the Court, both of these criteria, individual concern and direct concern must be fulfilled. These criteria are explained below.[124]

In the literal sense, it may be stated that the Article 230(4) provides actions merely against the measures except the generic norms provided that the applicant is of individiual and direct concern to them.[125] Such an interpretation excludes regulations and directives, being of general applicability. Legal character of a norm is considered to be granted locus standi by the Court and it is obvious that, in the literal interpretation of Article 230(4), decisions which are adressed to the applicant or concern the applicants directly and individually can be challenged. What decision in the form of a regulation means is not so clear in practice, as will be mentioned below, and challenging these sorts of measures has brought some problems in case law. Nonetheless, despite the fact that they are generic norms and legal character of them prevent challenging against them in literal sense, in the case law of the European Court of Justice, there are also examples of actions challenging the regulations and directives.

1.1.2 Challenging Directives

Directives are not mentioned as the measures which individuals may act against in the Article 230(4). Hence it can be easily stated that the EC Treaty does not allow individuals to bring action against the directives. Directives were never challenged in the Court until 1988, the Fédération Européenne de la Santé Animale Case. In this case, the Court rejected the application on the ground that the applicant was not individually concerned by the directive in question and did not apply the legal

[123] Schermers and Waelbroeck, p: 166
[124] See below part Individual Concern and Direct concern
[125] Adaoğlu, Hacer Soykan. “AT Hukukuna Aykırı Hukuki Tasarrufların İptalinde Kişilerin Rolü”, **AÜHFD,** 2006, Cilt 55, Sayı 2, p. 13

nature test to determine the directives were applicable in general and thus could not be challenged.[126] Besides, it was submitted that individuals may not challenge directives by reason of their legislative and a measure of general application character by the Court in Gibraltar Case.[127]

However, in recent judgments of the Court, it is seen that the Court presents a different approach about challenging directives. This approach is concerning the "disguised decisions" which are not true directives but are decisions in fact. One of the cases which that approach can be seen is the Asocarne Case.[128] In this case, the Court inquired the legal nature of the directive at issue by the words "even supposing that it were possible contrary to the wording of the fourth paragraph of Article 173 of the Treaty to treat directives as regulations in order to allow proceedings against a decision "in the form of" a directive, Directive 93/118 on the financing of health inspections and controls of fresh meat and poultry meat neither constitutes a "disguised" decision nor contains any specific provision which has the character of an individual decision"[129] and thus found the application inadmissable depending on the legislative nature of the measure. The significant point here is the emphasis on the inquiry of the true character of the measure and to indicate that a directive may be of a decision character.

In UEAPME Case[130], the Court stated that "Although Article 173, fourth paragraph, of the Treaty makes no express provision regarding the admissibility of actions brought by legal persons for annulment of a directive, it is clear from the case-law of the Court of Justice that the mere fact that the contested measure is a directive is not sufficient to render such an action inadmissible (…). Thus, in its order in Asocarne v Council, after noting that the contested measure was a directive, the Court of Justice examined the question whether what was really concerned was a decision - albeit adopted in the form of a directive - of direct and individual concern to the applicant within the meaning of Article 173, fourth paragraph, of the Treaty. In that respect, it

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[126] Albors-Llorens, 171
[127] C-298/89 Gibraltar v. Council, [1993] ECR I-3605 quoted by Baykal, 206
[128] Case T-99/94 Asocarne v. Council [1994] ECR II-871, pr. 18
[129] ibid, pr. 18
[130] CaseT-135/96 Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v Council [1997] ECR II-373, pr. 63, 64

must be observed that the Community institutions cannot, merely through their choice of legal instrument, deprive individuals of the judicial protection offered by that provision of the Treaty (…). Furthermore, as regards the present case, Article 4(2), first subparagraph, of the Agreement provides that `agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission'. That being so, the mere fact that the chosen form of instrument was that of a directive cannot in this case enable the Council to prevent individuals from availing themselves of the remedies accorded to them under the Treaty.

It is necessary therefore to determine, first, if Directive 96/34 is a legislative measure or whether it must be regarded as a decision adopted in the form of a directive. In order to determine whether or not a measure is of general application, it must be assessed in the light of its character and of the legal effects which it is intended to produce or actually produces."

As seen, the Court explains that the Community institutions can not deprive individuals of the judicial protection by taking refuge behind pretext of defining the measure as a directive or a legislative measure. Furthermore, the Court emphasizes determining the character and the legal effects intended and then granting locus standi to individuals if a measure is of legal effects of a decision for them. Nonetheless, some authors suggest that individuals are of locus standi against the directives whenenever the individuals are of directly and individually concerned by the directive at issue, considering the directives are indeed decisions addressed to the Member States.[131]

In the light of the case law of the Court regarding the actions for against the directive provisions, it is stated that the attitude of the Court is to find the directives challangeable in a liberal way and the statement of the Court in Alcan Case is argued to support this idea: "The aim of this provision is to ensure legal protection of individuals

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[131] Baykal, 206

in all cases in which they are individually concerned by an EEC measure -in whatever form it appears- which is not addressed to them".[132]

1.1.3 Challenging Regulations

By the literal interpretation of the statement of "decisions which are in the form of regulations and which are of direct and individual concern to them" of the Article 230 (4), it may be stated that the Treaty provides individuals a right only to challenge regulations which are indeed decisions.[133] However, it is seen that the case law of the Court has presented different approaches thus far at judgments of acts against the regulations.

Essentially, definitions of concepts of the regulation and the decision of European Union legislation is indicated in the Article 249 of the EC Treaty. According to the Article 249, "a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States" and "a decision shall be binding in its entirety upon those to whom it is addressed". Three articles of the Treaty only envisages enacting regulations and these are Article 39(3) which provides the Commission to make regulations 'to regulate the right of workers to remain in the territory of a Member State after have been employed in that State'; Article 89 which provides the Council to make regulations 'for the application of Article 87 and Article 88'; Article 279(1) which provides that the Council shall 'make financial regulations specifying in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts', despite the fact that much more areas can be regulated by the directives and decisions. The regulations under the EC Treaty may be of a legislative or a general administrative character.[134]

Considering the acts against the regulations, as will be mentioned below, testing the legal nature of a measure has in general caused the actions to be dismissed. However, the Court is of other interpretation ways as well and it is stated that

132 Case, 69/69 Alcan v. Commission [1970] ECR 385, pr. 4

133 Biernat, Ewa. "The Locus Standi of Private Applicants under article 230(4) EC and the Principle of Judicial Protection in the European Community", Jean Monnet Working Papers, available at www.jeanmonnetprogram.org/papers/03/031201.html, last visit 12.10.2007, p. 8

134 Albors-Llorens, 107

inconsistent approaches of the Court in different cases has never been explained by the academic authors.[135]

In earlier cases, the Court took a clear position of denying locus standi of individuals about challenging regulations and granted locus standi only for the actions against the decisions. In Confédération Nationale des Producteurs de Fruits et Légumes, the Court submitted the distinction between the concepts of decision and regulation referring Article 249 (ex 189) and stated that "the Court is unable in particular to adopt the interpretation suggested by one of the applicants during the oral procedure, according to which the term 'decision', as used in the second paragraph of Article 173 [now 230], could also cover regulations. Such a wide interpretation conflicts with the fact that Article 189 makes a clear distinction between the concept of a 'decision' and that of a 'regulation'. It is inconceivable that the term 'decision' would be used in Article 173 in a different sense from the technical sense as defined in Article 189"[136] Therefore, individual applicants would not have a right of locus standi against regulations even though they were of individually and directly concerned by them.[137] Besides, in Compagnie Française Case, the Court emphasized again that an individual can not challenge a regulation eventhough the applicants affected by it individually and eventhough it was possible to determine the number and the identity of the persons affected, it does not cause a change in the legal character of a regulation.[138] Nonetheless, there were several cases where the Court emphasized that it is possible to act against the regulations by the individuals when the measure is of a decision character indeed as the statement in the Confédération Nationale Des Producteurs de Fruits et Légumes Case "in examining this question, the court cannot restrict itself to considering the official title of the measure, but must first take into account its object and content"[139]. Besides the Court ascertained the the essential characteristics of the decision and regulation as "under the terms of Article 189 of the EEC Treaty, a regulation shall have general application and shall be directly applicable in all member

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[135] Albors-Llorens, 112
[136] Joined cases 16/62 and 17/62 Confédération nationale des producteurs de fruits et légumes and others v Council [1962] ECR 478, pr. 478
[137] schermers and Waelbroeck, 425
[138] ibid, 425
[139] Joined Cases 16-17/62, pr. 478

states, whereas a decision shall be binding only upon those to whom it is addressed. the criterion for the distinction must be sought in the general 'application' or otherwise of the measure in question. The essential characteristics of a decision arise from the limitation of the persons to whom it is addressed, whereas a regulation, being essentially of a legislative nature, is applicable not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety. Consequently, in order to determine in doubtful cases whether one is concerned with a decision or a regulation, it is necessary to ascertain whether the measure in question is of individual concern to specific individuals".[140] In contrast to decisions, the Court points the general applicability of regulations which provides them to be applied to people abstract and not identified and as the main feature of the regulations.[141]

In addition, the Court asserted that, in cases where the regulation affected small and identifiable groups, a regulation would not lose its abstract character. In Zuckerfabrik Case, the applicant claimed that the regulation in question was indeed a decision affecting a clearly defined group including itself and the Court pointed the practical effects of a regulation could not contradict the legal nature of a regulation, in words, "a measure does not lose its character as a regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which it applies at any given time as long as there is no doubt that the measure is applicable as the result of an objective situation of law or of fact which it specifies and which is in harmony with its ultimate objective".[142] The main idea of the Court in this case is that the measure is still a regulation even though the applicant is individually concerned being in a closed category of people defined who are affected by the measure and besides it saves its regulation character when its aim is to regulate the objective situations in the market and thus there is no need to consider the people affected by it.[143]

[140] ibid
[141] Albors-Llorens, 114
[142] Case 6/68 Zuckerfabrik Watenstedt GmbH v Council [1968] ECR 409, pr. 415
[143] Albors-Llorens, 119

However, in Confédération nationale des producteurs de fruits et légumes Case, the Court also envisaged that some provisions if a regulation could have been of a character of a decision and this situation would not affect the legislative character and general applicability of a regulation.[144] The Court stated that "if a measure entitled by its author a regulation contains provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons, it must be admitted, without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation, that in any case those provisions do not have the character of a regulation and may therefore be impugned by those persons under the terms of the second paragraph of Article 173."[145]

This approach was seen in other cases, such as the CAM Case[146]. The applicant claimed that the regulation at issue was indeed a bundle of decisions addressed to a fixed number of exporters and therefore it would have to be granted locus standi. Hereupon, the Court submitted that "a measure applying to a fixed number of traders identified by reason of the individual course of action which they pursued or are regarded as having pursued during a particular period, even if it is one of a number of provisions having a legislative function, individually concerns the persons to whom it applies in that it effects their legal position because of a factual situation which differentiates them from all other persons and distinguishes them individually just as in the case of the person addressed."[147] As seen, the Court here did not consider the legal nature of the measure and preferred to inquire whether the applicant was of individually and directly concerned.

The main test applied by the Court to determine the legal character of the measure when it is claimed that the regulation in question is indeed a decision is called "abstract terminology test". This test was exemplified in Calpak judgment clearly. It is expressed clearly in Calpak v. Commission case as "The second paragraph of Article 173 empowers individuals to contest, *inter alia*, any decision which, although in the form of a regulation, is of direct and individual concern to them. The objective of that

[144] ibid, 115
[145] ibid, 115
[146] Case 100/74 Société CAM SA v. Commission [1975] ECR 1402, summary of the text, pr. 2
[147] ibid, pr. 2

provision is in particular 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; it therefore stipulates that the choice of form cannot change the nature of the measure. (…) A provision which limits the granting of production aid for all producers in respect of a particular product to a uniform percentage of the quantity produced by them during a uniform preceding period is by nature a measure of general application within the meaning of Article 189 of the Treaty. In fact the measure applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner. The nature of the measure as a regulation is not called in question by the mere fact that it is possible to determine the number or even the identity of the producers to be granted the aid which is limited thereby."[148] According to this test, the measure in question is a true regulation if it "objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner". On the other hand, the abstract terminology test is applied in accordance with the purpose of the Article 230(4) which is suggested by the European Court of Justice, is to obstruct the institutions to defeat the locus standi rights of individuals by making regulations at different times.[149] However, this purpose may be alleged where the type of the measure is not clear in the Treaty.[150] Besides, it must be noted that if a measure, whereas it must be made as a regulation according to related laws, is made as a decision, that measure should be annuled by the Court, by the reason of not coming into force considering the decisions do not take effect without notifying the addressees.[151]

Thus, the Court considers the character of a measure instead of how it is called by the institutions while identifying it as a regulation or a decision. The significant point is the general applicability of the measure. In case of binding a specific group, it is appropriate to identify it as a decision.[152] Regulations are the legislative acts which are

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[148] Case 789-790/79 Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission [1980] ECR, 1949, pr. 7, 9

[149] Case 162/78, Wagner v. Commission, [1979] ECR 3467 quoted by Baykal, 207

[150] ibid, 207

[151] ibid, 207

[152] ibid, 208

binding everyone. The court expressed that as “A measure which is applicable to objectively determined situations and involves legal consequences for categories of persons viewed in a general and abstract manner constitutes a regulation”[153] and in Calpak decision “…the criterion for distinguishing between a regulation and a decision is whether the measure is of general application or not…”[154] Another criterion to distinguish the regulations and the decisions were declared in Plaumann Case as “a measure must be considered as a decision if it refers to a particular person and binds that person alone.”[155]

Another test applied by the Court in this question is the “closed category test”. International Fruit Company Case, at this point, is worth to mention. In this case, the Court found the regulation in question in fact a “bundle of decisions” considering the applicants were in a closed category whom the measure was merely applied and submitted that “a provision of a regulation concerning a group of requests for import licences after the time-limit for submission of requests has expired, so that no other requests can be made, is not in the nature of a regulation in the sense of the second paragraph of Article 189 of the EEC Treaty, but must be regarded as a conglomeration of individual decisions, each of which is such as to be of individual concern, within the meaning of the second paragraph of Article 173 of the Treaty, to the person or persons making each request”. However, the application was found admissible, but dissmissed as unfounded.[156] According to this test, the challenge against a regulation is admitted as it is indeed a decision if the regulation at issue concerns a fixed, closed category of persons. The closed category is determined in case of “the disputed regulation applies to the past events, and does not have a future impact”.[157]

. In addition, it should be noted that in the cases where the Court applied the abstract terminology test, it put the applicant’s claim to be in a closed category aside.

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[153] Case 6/68, summary of the text
[154] Case 789-790/79, pr. 8
[155] Case 25/62, pr. summary of the text, pr. 1
[156] Case 41-44/70 NV International Fruit Company v. Commission [1971] ECR 411, summary of the text, pr. 1;
[157] Craig and De Burca, 495

The closed category test is rather applied in cases in which the subject of the case is concerned with a completed past events.[158]

As the Court stated, the purpose of allowing challenging to measures in the form of regulations is to prevent the institutions to deprive individuals to challenge the measures by drafting unchallengeable measures. In such a case, the Court should ascertain whether the measure is a real regulation or decision addressed to applicants despite it is in the form of a regulation. However the problem arising in that point is making these measures in a way of applying "objectively determined situations" and producing legal effects for persons determined "in a generalized and abstract manner" is always possible. Therefore, it is difficult to claim that this test serves to the purpose mentioned above.[159]

As mentioned above, regulations are of general applicability and of deep effects on the rights of the individuals in the European Union.[160] In contravention of affecting the interests of people in the Union, the need to limit the rights of the individuals of locus standi has been argued by the authors and the conclusion indicates two main justifications for the limitations: "The extreme consequences that stem from the annulment of regulations, which, especially in the early years of Community life, were adopted after laborious negotiations conducted by a Council tied to the rule of unanimity in a great variety of fileds and the quasi-legislative character of regulations, which are normally identified with 'Commnunity Laws'".[161] However, these conclusions have been objected by some others as all sorts of Community regulations were not of legislative character, considering whereas the regulations enacted by the Council was of a true legislative character, the regulations of the Commission were the question in dispute as they were neither of legislative character or general administrative acts.[162]

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[158] Biernat, 9; Craig and De Burca, 495
[159] Craig and De Burca, 494
[160] Albors-Llorens, 109
[161] ibid, 109
[162] ibid, 111

Consequently, it can be stated that in challenges against regulations claiming that they are indeed decisions, the tests of abstract terminology and closed category must be considered to ascertain the real character of the measures in actions for annulment. Besides, it should be considered that the Court also refuses to inquire the legal nature of the measures in a few particular areas. These are anti-dumping, competition and state aids cases. The general approach of the Court is explained below, in the context of the individual concern.

1.2 Individual Concern

Individual concern is the most restrictive requirement for individuals to bring an action for annulment. Even though more liberal ways have been discussed in recent case law and in academic studies, the Court still applies the restrictive test which it has been holding since the earlier case law.

1.2.1 Plaumann Formula

Firstly, it must be pointed out that individual and direct concern is sought in the cases where a decision addressed to other persons or a decision in the form a regulation is challenged. As it is submitted clearly in Article 230(4), in the cases where decisions addressed to applicant are challenged, direct concern and individual concern tests are not applied.

The criterion of individual concern is strictly applied for the individual applicants.[163] Moreover, the case law of the Court about the individual concern has been consisted of inconsistent interpretations.[164]

The essential individual concern principles of European Court of Justice were established under the famous Plaumann case.[165] Plaumann, a German fruit importer firm, challenged the Commission decision which was "refusing to authorize the Federal Republic of Germany to suspend in part customs duties applicable to 'mandarins and clementines, fresh' imported from third countries". In this case, the expression of the

[163] Baykal, 211
[164] Adaoğlu, 10
[165] Baykal, 210

Court decision which was identifying and setting out the individual concern was "persons other than those to whom a decision is addressed 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. In the present case the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity, which may at any time be practiced by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee"[166]. The Court found the application inadmissible by reason of these criteria.

That test seeking the individual concern in this way is named "Plaumann Test".[167] In summary, Plaumann test seeks if the aplicants are affected by the decision by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons or if they are distinguished individually by these factors as in the case of the person who is addressed by the decision at issue. As seen, the private applicant should be able to replace the third party in such a case of the decision at issue addressed to a third party.[168] By reason of these certain circumstances, it is stated that the Plaumann Criteria has been "an incontestable barrier" to private applicants in many cases.[169] However, it is still the leading test to determine the individual concern.[170]

According to Plaumann judgement, the Court first seeks the individual concern of the applicant with the decision at issue. If the applicant is not concerned individually, the Court does not need to seek the direct concern.[171]

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[166] Case 25/62, pr. I/8
[167] Adaoğlu, 10;
[168] Ginter, 392
[169] ibid, 392
[170] Craig and De Burca, 488
[171] "if the applicant is not individually concerned by the decision, it becomes unnecessary to enquire whether he is directly concerned", Case 25/62, pr. I/7

The Plaumann decision of the Court is criticized by some authors being "economically unrealistic."[172] The reason of rejection, "…the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee" is found unconvincing by Craig and De Burca, stating that in a market in which ordinary principles of supply and demand work, the firms in the market currently are expected to come into action in any surge of demand and therefore the claim of importing the clementines is an activity which may be practiced any time by anyone is factititous. İt is stated that usual market conditions make Plaumann differentiated from all other persons and thus the applicant was indeed individually concerned in this case.[173] Besides, they criticize the reasoning of the Court in conceptual terms, stating that "since it renders it literally impossible for an applicant ever to succeed, except in a very limited category of retrospective cases".[174] Therefore, impossibility of individual concern in any case because of possibility of entrance by anyone to the market is alleged. That causes to take account of the effects of the decision in the future and hence was objected by the Advocate General Romer as well.[175] Nonetheless, the emphasis on "differentiated from all other persons" has been used by the Court to dismiss many applications by private parties.[176]

In following cases, it is also observed that the Court considered closed category test together with the Plaumann test to ascertain the individual concern and an intersection of these tests is seen in the case law.[177] The Court set out the base of the closed category test according to which "the measure can only be of individual concern if the group addressed is such that the number of its members is limited to its current size"[178] If the group is identified as a potentially expanding one, applicants are not

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[172] Craig and De Burca, 489
[173] ibid, 489
[174] Besides for an opposite idea of Hartley claiming that Plaumann was a member of an open category, ibid, 489
[175] Craig and De Burca, 489
[176] Ginter, 392
[177] According to the AG Gand, notion of closed category underlies the individual concern, Albors-Llorens, 47
[178] Ginter, 393

found individually concerned. At this point, another case, Toepfer v. Commission is worth deliberating.

In Toepfer case, the Court envisaged that a closed category exists when the persons are ascertainable when the decision at issue was made by saying "(…) the only persons concerned by the said measures were importers who had applied for an import licence during the course of the day of 1 October 1963. The number and identity of these importers had already become fixed and ascertainable before 4 October, when the contested decision was made. The Commission was in a position to know that its decision affected the interests and the position of the said importers alone. The factual situation thus created differentiates the said importers, including the applicants, from all other persons and distinguishes them individually just as in the case of the person addressed". The Court found the aplication addmissable.

Nonetheless, the Court mentions "a decision of general economic scope and effect within the common market cannot be of individual concern to an undertaking, even if the latter occupies, a special position as regards the relevant product in the market of one of the member states"[179] in Toepfer Case.

In Glucoseries Reunies Case[180], with another considerable decision of the Court, application was for "annulment of the Decision of the Commission of 28 November 1963 authorizing the levying of countervailing charges on the importation into the French Republic of glucose (dextrose) originating from certain member states". The applicant claimed that it was the leading glucose manufacturer in te Community and the only importer of glucose from Belgium and its significance in the market differentiated it and made it individually concerned. However, the Court dismissed the application by reason of applicability of the measure to all Member States and to all imports and thus not being of individually concerned. Besides, the Court stated that ban of imports from all Member States was necessary for the effet utile of the measure and therefore it was stated that "the Court seems to indicate that if the applicant can prove

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[179] Joined cases 106-107/63.Alfred Toepfer and Getreide-Import Gesellschaft v Commission [1965] ECR 405, summary of the text, pr. 2

[180] Case 1/64 Glucoseries Reunies v. Commission [1964] ECR 413

that the intent pursued by the measure is to exclude the imports of this applicant, they could be considered individually concerned”.[181]

In a following case, UNICME, the Court decided that it does not provide a sufficient basis to be individually concerned even though the number and identities of persons affected by the measure was fixed.[182] In Court’s view, carrying on merely a commercial activity is not a sufficient basis to claim being individual concerned, in such a case, to be in an open category should be discussed.[183]

In a few cases with exceptional circumstances, despite the applicant was not in a group, the Court found it individually concerned and admissed the application, such as Les Verts.[184] Parti écologiste "Les Verts", which was a political party in France, applied the court to provide annulment of “two decisions of the Bureau of the European Parliament, the first dated 12 and 13 october 1982 and the second dated 29 october 1983, concerning the allocation of item 3708 of the budget are void”. The Parliament decision at issue was about granting funds to the parties in the upcoming elections. Only the parties already in the Parliament were granted funds, and the applicant, who was not in the Parliament, brought the action by reason of the discrimination between the parties by the decision. The Court held the case in a liberal approach.[185] Aplication was admitted despite the applicant was not in a differentiated position and not in a closed group[186]. The Court made an exception in a liberal way, considering there were no other ways to hear this case stating that “such an interpretation would give rise to inequality in the protection afforded by the court to the various groupings competing in the same elections”. This attitute was certainly a positive improvement in the case law of the European Court of Justice, however it was not adequate to dispel the critics to the Court based on the restrictive approach of the Court for other cases in which inequalities were

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[181] Ginter, 393
[182] 123/77 UNICME v. Council [1978] ECR 845, pr. 17
[183] Baykal, 211
[184] Case 294/83 Parti écologiste "Les Verts" v. European Parliament [1986] ECR 1339, pr. 32-38
[185] Baykal 211; Ginter 396
[186] Ginter, 396

much more greater.[187] Thus, Les Verts is a unique case and never embodies the dominant approach of the Court in acts for annulment brought by private applicants.[188]

The Court does not accept locus standi of the trade associations which are acting as the representatives of their members on the ground that they are not individually concerned. However, submitting "(…) the regulation at issue does not affect the applicant's own interests as an association, nor are its institutional role and its capacity as a body responsible for the payment of aid to its members such as to distinguish it individually. Furthermore, the fact that the admissibility of an action for annulment brought by an association representing the interests of certain undertakings may depend on the relevant regulatory framework - since, in one context, it can distinguish itself individually by participating in the administrative procedure preceding the adoption of the contested act, whilst, in a different context, it would not be able to do so in the absence of a legislative provision providing for such participation - does not constitute a breach of the principle of equality provided that it has not been established that, by so acting, the Community legislature infringed general principles of Community law, such as the right to be heard"[189], the Court finds these kinds of associations individually concerned if the measures challenged grant them locus standi precisely.[190]

Though the Plaumann Test has been the leading test to ascertain the individuals concern, in case law, it is observed that there have been exceptions of that test and debates on the restrictive nature of it and the need for liberalizing this area.

1.2.2 Codorniu and Recent Case Law

The Court has been of different approaches considering facts of the each case thus far. Depending on the facts of some cases, the Court even submitted that the applicants can be individually concerned when they are suffered by the regulations in a

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[187] ibid, 396
[188] ibid, 396
[189] Case T-122/96 Federazione nazionale del commercio oleario (Federolio) v. Commission [1997] ECR II-1559, summary of the order of the CFI
[190] Baykal, 212

serious level. Extramet is shown as the fundamental case in this direction by some authors.[191]

Codorniu Case, where the Court intended to compose a certain interpretation of application conditions for private applicants[192] is another landmark case in Court's case law. The fact that makes this case so significant is that "non-priviledged applicants could challenge a true regulation without having to show that the regulation was by nature in fact a bundle of decisions. The Court recognized that there are special cases, where the applicant can challenge a generic measure."[193] Application was for providing annulment of a "Council Regulation (EEC) No 2045/89 of 19 June 1989 amending Regulation (EEC) No 3309/85, laying down general rules for the description and presentation of sparkling wines and aerated sparkling wines "[194] by which the applicant claimed that use of its trademark including the term "Crément" was limited. The Council, defendant of the case, alleged that the applicant was not of locus standi by reason of character of the measure challenged was a "true ragulation" in the meaning of Calpak case. The Court, in this case suggested that the number and the identities of the persons which are addressed by a measure are the inadequate criterions to determine the legal character of the measure. However, in the same decision, in the contrary to the former decisions, the Court stated that the legislative nature of the regulations is not an obstacle for existence of the individual concern by the words, "[a]lthough it is true that according to the criteria in the second paragraph of Article 173 of the Treaty the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them".[195] Therefore, the Court submitted individual and direct concern of the applicant was sufficient for a void application in case of the measure was a regulation. Even though the court repeated the general conditions for application referring the Plaumann case, it found the measure affected the applicants interests in a significantly a sufficient criterion to determine the individual concern. It is stated that afterwards the Codorniu, challenging the regulations

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[191] Ginter, 405
[192] Baykal; 214
[193] Ginter, 405
[194] Case 309/89 Codorniu v. Commission [1994] ECR I-1853
[195] ibid, pr. 19

is related to the effects of the measure on the applicant more than the name or content of the it.[196] Besides, despite the fact Plaumann test is still the criterion to show the individual concern, the need for accompaniment of the liberal approach in Codorniu to Plaumann is asserted.[197]

After Codorniu, it is stated that the Court had a tendency to soften the conditions of application and with the establishment of Court of First instance, this prescience got strong.[198]

Nonetheless, according to Craig and De Burca, three distinguished interpretations appeared in the case law of the ECJ, after Codorniu. The first one is named "infringement of rights or breach of duty approach."[199] This approach arised in the Eridania Case, where the regulation at issue infringed the trademark rights of the applicant and therefore the applicant was found individually concerned.[200] The second one is "degree of factual injury approach" which deliberates how the regulation at issue produces effects on the applicant. Extramet, which was a challenge against an anti-dumping regulation and where the applicant was the biggest importer of the product subject to the regulation in question, was held to be individually concerned, considering the large effects of the regulation for the applicant.[201] The last approach is named "pure Plaumann approach" by Craig and De Burca. This approach betrays the Plaumann test is still alive after Codorniu as a dominant approach in the case law.[202] In Buralux Case, the Court justified the rejection of the application as the abstract formulation of the regulation challenged and "to be capable of being regarded as individually concerned, their legal position must be affected because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as a person to whom a measure is addressed. (…)That provision therefore concerns the

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[196] Baykal, 215
[197] Craig and De Burca, 496
[198] Baykal, 215
[199] Craig and De Burca, 496
[200] Case T-158/95 Eridania Zuccherifici Nazionali SpA v. Council [1999] ECR II-2219; also see Case T-480 and 483/93 Antillean Rice Mills NV v. Commission [1995] ECR II-2305 where the applicants were individually concerned according to the Court by the reason of "the Commission was under a duty to take account of the negative effects of such a decision introducing safeguard measures on the position of those such as the applicants", quoted by Craig and De Burca, 497
[201] ibid
[202] ibid

appellants only in their objective capacity as economic operators in the business of waste transfer between Member States, in the same way as any other operator in that business, so that, by holding that the appellants were therefore not individually concerned."[203]

As a recent case where the third approach is held in a different way, Greenpeace Case draws attention. The application was for annulment of the Commission decision which was granting funds for power stations construction in Canary Islands. The Applicants were consisted of environmental interest groups and individuals from the region of power stations, such as farmers, fishermen and other residents which claimed to be concerned by the effects of the power stations. However the CFI applied the Plaumann Test in "pure Plaumann approach" and held that the applicants were not individually concerned stating that "(…) the criterion which the applicants seek to have applied, restricted merely to the existence of harm suffered or to be suffered, cannot alone suffice to confer locus standi on an applicant, since such harm may affect, generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually in the same way as the addressee of a decision, in accordance with the case-law cited above. (…)"[204]

The applicants were not of individual concern on the ground that the decision in question granted financial asisstance for the contstruction of two power stations in Canary Islands and it was a measure which is of effects on objectively, generally and different categories of people. Besides the applicants who were relying on their "objective" status like "local resident", "fisherman", "farmer" did not rely on any attribute differing from the other people who live in the concerned region and thus "the applicants thus cannot be affected by the contested decision other than in the same manner as any other local resident, fisherman, farmer or tourist who is, or might be in the future, in the same situation (…)"[205]

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[203] Case 209/94P Buralux SA, Satrod SA and Ourry SA v Council [1996] ECR I-615, pr. 9, 28;
[204] Case T-585/93 Stichting Greenpeace Council v. Commission [1995] ECR II-2205, quoted by Craig and De Burca, 499
[205] ibid

Moreover, the Court also held the situation of Greenpeace and the other environmental interest groups. The CFI, referring the case law, suggested that the interest groups cannot be individually concerned by a decision which did not entitle them or their members to bring an action.

Notwithstanding, at the appeal judgement of the case the European Court of Justice states "where, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act."[206] It is claimed that this is a new formula to determine the individual concern by the European Court of Justice.[207] According to this formula, the Court seeks whether the decision-makers concerned the applicant when they made the decision instead of inquiring if he is in a closed category.[208]

1.2.3 The UPA and the Jego Quere Facts of Case Law

In recent case law of the European Court of Justice, one of the most significant cases and facts is UPA Case and opinion of the Advocate General Jacobs in this case.[209] As will be mentioned below, the arguments of this case has been a "strong pressure"[210] for the Court to change its strict attitude on individual concern criteria in case law.

Unión de Pequeños Agricultores (UPA), which is a trade association of Spanish farmers brought an action before the Court of First Instance, for annulment of Regulation 1638/98 which was reforming the common organisation of the olive oil market. Through that regulation, a new system of aid for private storage contracts was envisaged to be composed. In terms of the new system, consumption aid and the specific allocation of aid to small producers were dismissed, olive groves planted after

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[206] Case 321/95 Greenpeace and the others v. Commission, quoted by Weatherill and Beaumont, 268
[207] ibid
[208] ibid, 268
[209] Case 50/00P Union de Pequenos Agricultores v. Council [2002] ECR I-6677; Case T-173/98 Unión de Pequeños Agricultores v. Council [1999] ECR II-3357, For a case study of UPA judgment, Nicol, Danny. "Right of Judicial Protection Before The EC Courts", **Journal of Civil Liberties**, 2002, Vol. 7, pp. 147-151
[210] Ginter, 439

1st May 1998 were excluded from the aids and the stabiliser mechanism for production for the Community was being apportioned among the producer Member States in the form of national guaranteed quantities.

The CFI rejected the application on the ground that the regulation in question was of a legislative character and the applicant was not individually concerned with the regulation challenged. Pursuant to settled case law, the Court submitted, "(…)the applicant has not established that its members are affected by the contested regulation by reason of certain attributes which are peculiar to them or by reason of factual circumstances in which they are differentiated from all other persons. (…) it need merely be pointed out that the fact that the regulation may, at the time it was adopted, have affected those of the applicant's members then operating in the olive oil markets and, in some circumstances, caused them to cease trading, cannot differentiate them from all the other operators in the Community, since they are in an objectively determined situation comparable to that of any other trader who may enter those markets now or in the future".[211] Besides, the Court stated that the applicant was not differentiated by reason of any tests of case law as an association and could not claim that the regulation at issue affected its specific interests.

The applicant claimed that it was individually concerned by the regulation and any other interpretations could cause obstruct it to receive effective judicial protection[212], which is a fundamental right for itself, considering there is no legal

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[211] Case 50/00P, pr. 10

[212] Although it has never been defined by the ECJ, effective judicial protection is one of the fundamental principles of the EU legal order. It can be defined as "the obligation to protect and safeguard all the rights conferred upon individuals by EC Law", Biernat, 22. The roots of this principle in the EU Law derive from the ECHR and the constitutions of the Member States and the obligation of protection is imposed on both the Member States and the EU institutions. The Court uttered this principle is a part of its law in Marguerite Johnston Case, "the requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their joint declaration of 5 April 1977 (…) and as the court has recognized in its decisions, the principles on which that convention is based must be taken into consideration in community law" Case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, pr. 18; For a wider interpretation of effective judicial protection of the individuals, Stefanou, Constantin and Helen Xanthaki. "The Principle of the Effective Protection of the Individual in EC Law and the Dialectic of European Integration Theory", **Northern Ireland Legal Quarterly,** 1999, Vol. 50, No. 2, pp. 212-233

remedy way in even the national law that would provide any legal review of the regulation by preliminary ruling. However the Court suggested the conditions to access the Community judicial system could not be subject to the particular conditions of each Member States while all the Member States were bound to implement the Community measures to allow the judicial review of the measures adopted by the Community institutions referring to Article 5 of the EC Treaty (now Article 10 EC).

The applicant appealed the judgement of the Court of First Instance. In the appeal judgement of the European Court of Justice, the Court first submitted "it is necessary to examine whether the appellant, as representative of the interests of its members, can none the less have standing, in conformity with the fourth paragraph of Article 173 of the Treaty, to bring an action for annulment of the contested regulation on the sole ground that, in the alleged absence of any legal remedy before the national courts, the right to effective judicial protection requires it"[213], and thus rejected the claims of the applicant which was seeking application of effective judicial protection considering the lack of remedies in national level for its case. The ECJ here, referring the Articles 230, 234 and 241 of the EC Treaty, emphasized the "complete system of legal remedies" and suggested that where it is not possible to challenge the community measures because of the conditions of the Article 230 for natural and legal persons, these measures are able to be challenged or reviewed directly and indirectly before the Community Courts under the Article 241 or by preliminary ruling. Thus, the Court declared the rejection of the case by the CFI was not contrary to effective judicial protection principle and emphasized the musts to ensure the effective judicial protection by the Member States implementing their law. Besides, the Court repeated its case law setting the individual concern rules for challenging a regulation which had been of general application, referring both Plaumann and Codorniu decisions and therefore dismissed the appeal.

Even though the Court denied to adopt a liberal approach in this judgement, the opinion of the AG Jacobs is another fact on the arguments of individual concern in case law of the European Court of Justice. AG Jacobs begins with uttering the only way of

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[213] Case 50/00P, pr. 33

providing an effective judicial protection for individuals is “to change the case-law on individual concern”[214]. Thus far, the criteria of the Court has not changed considering the suggestions of the AG Jacobs, nonetheless they are still substantial “principled critique of the existing law”[215].

Jacobs, unlike the Court, stated preliminary ruling could never provide an effective judicial protection on the ground that “under the preliminary ruling procedure the applicant has no right to decide whether a reference is made, which measures are referred for review or what grounds of invalidity are raised and thus no right of access to the Court of Justice; on the other hand, the national court cannot itself grant the desired remedy to declare the general measure in issue invalid”[216]. Moreover, he noticed the difficulties of challenging a general measure in an indirect way and disadvantages of Article 234 in comparison with Article 230 for individuals. Furthermore, the objections to the Court’s approach took place in the opinion as while there was no way of a reference to for a preliminary ruling in the national laws, granting standing to applicants would not be of any basis in the Treaty and would cause the interpretation and application of the national laws by the Community courts although they were not competent and would cause inequality by the acts of different Member States, and so, absence of legal certainty; and impossibility of “postulating an obligation for the legal orders of the Member States to ensure that references on the validity of general Community measures are available in their legal systems”[217].

AG Jacobs suggests the solution as “to recognise that **an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests”[218].** The justification of this solution is stated with the advantages of resolving all the problems he mentioned in his objections and providing a more effective judicial review for individuals, being a simpler test than the ones case law applied and compatibility with the general tendency

[214] Opinion of Advocate General Jacobs, delivered on 21 March 2002, Case C50/00 P, pr. 4
[215] Craig and De Burca, 500
[216] Opinion of AG Jacobs, pr. 102
[217] ibid,
[218] ibid, emphasis belongs to the original text

of the Court which appeared in ERTA, Le Verts and Chernobyl Cases, to strengthen the judicial protection against the Community institutions whose powers are getting strong.

According to AG Jacobs, such an interpretation is not contrary to the wording of Article 230 and it will not cause an overloading for the Court of First Instance as long as the fifth paragraph of the Article 230, which sets the time limits for application, exists and direct concern, as another criterion, will prevent the overloading of the Court. He defends the opinion of that admissibility criteria of the case law of the ECJ have become complex and unpredictable in its present form and not complied with the liberal developments in Member States laws. Finally, an effective judicial protection requires the changes suggested in the opinion.[219]

This approach has been adopted in Jego Quere[220] judgement of the Court of First Instance. Jego Quere et Cie SA, which was a fishing company established in France, brought an action seeking annulment of two articles of the Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in particular areas and associated conditions for the control of activities of fishing vessels. As the applicant asserted in UPA Case, Jego Quere claimed there was not any other way of remedy which had been adopted in national law for itself and rejection of its application would cause it to be devoid of receiving effective judicial protection.

The Court of First Instance, in this judgement adopted a new perspective differing from the settled case law, which would partially solve the problems emanating from the execution of the Article 230(4).[221] Referring the Les Verts judgement of the European Court of Justice, the CFI admitted access to justice is one of the fundamental rights in the Community by the statement of "access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty, inasmuch as the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality

[219] ibid,
[220] Case T-177/01 Jégo Quéré et Cie SA v. Commission [2002] ECR II-0000, For a case study of Jégo Quéré judgment, Nicol, Danny. "Citizen Access to the European Community Courts", **Journal of Civil Liberties**, 2002, Vol. 109-113
[221] Ginter, 440

of acts of the institutions". Moreover, the Court referred the Articles 6 and 13 of the European Convention on Human Rights which are titled "Right to a Fair Trial" and "Right to an Effective Remedy" and submitted "The Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR (…) and Article 47 of the Charter of Fundamental Rights of the European Union, regarding right to an effective remedy and fair trial in the EU and stated "the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union (…)"[222]. Considering these measures the Court noticed that dismissing a challenge against a measure which is of general application and of direct effects on its legal situation "would deprive the applicant of the right to an effective remedy."[223] Hence, the Court handled the other ways of remedies set in the Treaty and came to the conclusion that they would not be adequate for the review of legality of the challenged measure. Here the significant point is reference of the Court to the UPA ruling and statement of "there is no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee"[224]. The CFI noticed the requirement of revision of the former approach of the Court for the definition of the individual concern and considering the effective judicial protection principle put forward its own approach as "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

[222] Case T-177/01, pr. 41
[223] ibid, pr. 43
[224] ibid, pr. 49

who may be so, are of no relevance in that regard"[225]. This approach connotes absolutely a radical change in the case law of the European Union Courts.[226]

The applicant was found individually concerned in this ruling by the CFI. However, in the appeal ruling, the ECJ did not adopt the same approach and set aside the judgment of the CFI. The ECJ, although accepting the effective judicial protection principle and necessity for judicial review of acts of the Community institutions, like in UPA judgment before, referred the Articles 230, 234 and 241 of the EC Treaty and iterated that the in case of the conditions of the Article 230 do not allow individuals a direct action against a general application rule, in the complete system of the EC Treaty they can challenge these measures even in indirect ways as in Article 241 indicated and before the national courts, for that reason reminded the must for the Member States to establish a judicial system which will provide the effective judicial protection. The European Court of Justice asserted that an interpretation like CFI's removes the meaning of the term of individual concern. Furthermore the ECJ noticed that the Court would "beyond the jurisdiction conferred by the Treaty", by setting aside the certain meaning of the Article 230(4).[227]

Consequently, despite the opinion of AG Jacobs which suggests a revision of individual concern tests in UPA Case and Jego Quere ruling of the Court of First Instance, it seems that the European Court of Justice has not changed the attitude for the concept of individiual concern question in both cases and a liberal approach has not been dominant in case law thus far.[228]

Despite the Court emphasizes the literal interpretation of Article 230(4) in both UPA and Jégo Quéré, it is stated that the opinion of the AG Jacobs does not manipulate the Court to act ultra vires and rather it requests the interpretation of the Article 230 considering th effective judicial protection principle and the other fundamental rights of the individuals which already have taken place in the Community legal order.[229] In

[225] ibid, pr. 51
[226] Ginter, 441
[227] Case C-263/02 P Commission v. Jégo Quéré et Cie SA [2004] ECR I-3425, pr. 36
[228] Baykal, 218
[229] Ginter, 442, For an interpretation of these cases in the context of effective judicial protection, Kombos, Constantinos C. "The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A

addittion, it seems that there has been an expectation of modification of the current approach of the Court in the future since UPA and Jégo Quéré judgments[230] and it is clear that, in this way, the judicial system in the EU will provide the effective judicial protection and be more transparent and faithful.

In conclusion, the Plaumann test is still the most effective way to determine individual concern of the applicants.[231] Nonetheless, different attitudes which have arised in some cases may open the doors to a more liberal approach. Here, it is a must to analyse the particular cases where the case law of ECJ adopted a more liberal approach.

1.2.4 Particular Areas Where the Court Adopted a More Liberal Approach

Even though the ECJ has applied the individual concern criteria very strictly, there are a few areas which the Court in particular acts softening these criteria. They are anti-dumping, competition and state aids cases. One of the reasons setting these areas apart from the others is the participatory rights of relevant norms. For instance, in the preamble of the Regulation 17, which is implementing the Articles 81 and 82 of the EC Treaty, it is stated that, "undertakings concerned must be accorded the right to be heard by the commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their comments beforehand, and it must be ensured that wide publicity is given to decisions taken"[232] and that kind of a provision, without dispute, enables asserting individual concern for an applicant which participated the procedure declared.[233] Another reason, as Craig and De Burca stated, "the interpretation accorded to the key criterion of individual concern is still arguably more liberal in these areas than it is in others"[234]

Missed Opportunity or A Velvet Revolution?", **European Integration online Papers (EIoP)**, 2005, Vol. 9, No. 17; Available at http://eiop.or.at/eiop/texte/2005-017a.htm last visit 12.03.2008

[230] Ginter, 443

[231] Baykal, 214; Ginter, 405

[232] Ginter, 406

[233] ibid, 406

[234] Craig and De Burca, 503

a) Competition Cases

The Competition issues of the Union in Article 81 and 82 of the EC Treaty. According to the Article 3/2 of the Regulation 17, titled Termination of Infringements, "natural or legal persons who claim a legitimate interest" are entitled to make application.

In Metro Case[235], the applicant, under Article 3(2) of Regulation 17, brought an action against the Commission decision of refusing the complaint of the applicant which was concerning the anti-competitive actions of SABA on the ground that there was not any breach of Article 81 of EC Treaty. The Commission decision was addressed to SABA (as competition decisions are addressed to subjects[236]) and whether Metro would be individually concerned or not was the main question. Considering the Court's decision was caused by the Metro's initiation and to protect the legitimate interests of it, the Court found Metro individually concerned and the application admissible.

The liberal approach is clear in this judgment and it is claimed that if the Plaumann test had been applied the application would certainly have been dismissed considering the applicant was in a open category which was affected by the decision addressed to SABA.[237] However, it is also possible to state that Metro was differentiated from all other undertakings in that category by the authorization of the Regulation 17.[238]

The Court's attitude was similar in other cases. In opinion of AG Fennelly in Krudivat Case, that statement was submitted to explain why the applicant was individually concerned: "The Community has an interest in receiving the most accurate and precise information in the administrative proceedings leading to any decision by an institution, and that Community interest is in close harmony with the protection of the interests of persons capable of furnishing that information . A person who plays a part in the decision–making process is so distinguished from other market participants as to

[235] Case 26/76 Metro-SB-Grossmarkte GmbH & Co KG v. Commission [1977]ECR 1875, quoted by Ginter, 407-408
[236] Ginter, 407
[237] Craig and De Burca, 507
[238] Ginter, 408

have an individual concern in the decision"[239]. As cited above, the rights of the applicants to participate the administrative process directs the Court to grant locus standi.

In another interesting judgment of the Court regarding the competiton measures, Vittel Case, the ECJ submitted "[a] Commission decision on the compatibility with the common market of a concentration, taken pursuant to Regulation No 4064/89, is of individual concern, within the meaning of the fourth paragraph of Article 173 of the Treaty, to the representatives, recognized in national law, of the employees of the undertakings in question, simply because that regulation which allows the Commission to take into consideration the social effects of the concentration if they are liable to affect adversely the social objectives referred to in Article 2 of the Treaty expressly mentions them among the third parties showing a sufficient interest to be heard by the Commission during the procedure for examination of the planned concentration, regardless of whether they have actually taken part in that procedure"[240]. The decision at issue was not addressed to the applicant which was a representative of the employees and besides the applicant did not hold a place in decision-making procedure. However as seen in judgment, the Court found to have sufficient interest to be heard during the procedures was adequate to grant standing considering the Regulation which the Commission decision in question relied and did not consider whether the applicant took part in the procedure.

b) State Aids Cases

The state aids are regulated under the Articles 87 and 89 of the EC Treaty. The aim of these provisions is "to prevent the conditions of competition from being distorted, which would be the case if the firms in one State could obtain aid subsidied from their government"[241]. In any case of complainment the Commission addresses the decision to the relevant Member State. Altough these applications are not clear to grant

[239] Opinion of AG Fenelly in Judgment of 17 November 1998 in Case 70/97 P Kruidvat BVBA v. Commission [1998] ECR I-7183, quoted by Ginter, 407
[240] Case T-12/93 Comité Central d'Entreprise de la Société Anonyme Vittel and Comité d'Etablissement de Pierval and Fédération Générale Agroalimentaire v Commission [1995] ECR II-1247, summary of the text, pr. 1
[241] Craig and De Burca, 508

locus standi to private applicants as in competiton proceedings, the Court accepts the complainants individually concerned showing a liberal attitude.[242]

One of these cases is COFAZ Case. The applicants were three French companies which complained the Netherlands to the Commission by reason of acting against the tariff structure for natural gas prices in favour of Dutch fertilizer companies. The Commission investigated the case accompanied by the complainant companies and decided that the investigation to halt because of modification of modification of the tariff be Netherlands. The applicant brought an action before the ECJ seeking annulment of the Commission decision. The Court submitted "in view of the fact that Article 93(2) of the EEC Treaty recognizes in general terms that the undertakings concerned are entitled to submit their comments, the decision whereby the commission terminates a procedure initiated under that provision is of direct and individual concern to the undertakings which were at the origin of the complaint that led to the opening of the procedure and which subsequently payed a decisive role in the conduct thereof, provided that their position on the market is significantly affected by the measure granting aid which is left intact and allowed to take effect by the contested decision" [243]. As seen, even though there was not a ultimate decision, the Court considered the special rights of the applicants under the Treaty and decided to find the applicants individually concerned.

According to the settled case law at this issue, the applicant must be a part of the administrative procedure and the aid in question must affect interests of the applicant.[244]

c) Anti-dumping cases

The European Union institutions are capable of enacting regulations to protect the rights of the traders of the Union against the ones from outside the Union which attempt to sell goods at low prices. In such a case the firms at issue are imposed anti-

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[242] ibid
[243] Case 169/84 Compagnie Française de l'Azote (COFAZ) SA v. Commission [1986] ECR 391, quoted by ibid, 508
[244] ibid, 509

dumping duties. Applicants can be discussed in three types. First one is the complainant of the dumping, second is the producer of the goods whom the duty is addressed and last, importer of the goods whom the duty is addressed.[245] The crucial point here is the must to impose anti-dumping duties by the regulations.[246]

One of the most significant cases is Timex on this issue. The applicant in this case was first type of the applicants. Timex, a watch producer company from Britain challenged a regulation which imposed an anti-dumping duty on watches from Soviet Union on the ground that the duty was too low and therefore it was affected adversely. The Court found the applicant individually concerned and grant standing stating "(…) the measures in question are, in fact, legislative in nature and scope, inasmuch as they apply to traders in general; nevertheless, their provisions may be of direct and individual concern to some of those traders. In this regard, it is necessary to consider in particular the part played by the applicant in the anti-dumping proceedings and its position on the market to which the contested legislation applies".[247] Timex was the complainant which led to the investigation procedure. Furthermore the Court emphasized that Timex was the leading producer of mechanical watches in the Community and the only one in United Kingdom and the preamble of the regulation challenged noticed "(…) 'taking into account the extent of the injury caused to Timex by the dumped imports'. The Contested regulation is therefore based on the applicant's own situation."[248]

The second type of the applicants were exemplified in Allied Corporation Case[249]. The Court found that the exporters or producers identified in the measures adopted by the Community or concerned in the investigations were individually concerned.

Finally, Extramet Case is an example of third type which includes the importers of the product to whom the anti-dumping duty imposed. The Court found the

[245] ibid, 503
[246] ibid, 503
[247] Case 264/82 Timex Corporation v. Council and Commission, [1985] ECR 849, quoted by ibid, 504
[248] ibid
[249] Joined Cases 239/82 and 275/82 Allied Corporation and others v. Commission [1984] ECR 1005, quoted by ibid, 505

applicant individually concerned on the ground, referring Allied judgment, although regulations imposing anti-dumping duties are of legislative character and applied to all traders, provisions of these regulations without losing their legislative character may be of individual concern to "certain traders". Besides the Court emphasized that the applicant was the largest importer of the product at issue and the end user of the product and therefore it was affected seriously by the measure challenged. [250]

1.3 Direct Concern

According to the Article 230(4), proving individual concern of a private party is not sufficient to fulfil the requirements to have a right of locus standi. Simply, a measure has direct concern "when it leaves no discretion to the national authorities of the Member states responsible for implementing it. Therefore an individual is directly concerned if the measure per se brings material effects to the rights of that individual."[251] In other words, direct concern is accepted by the European Court of Justice, "when the addressee is left no lattitude of discretion, when the decision affects the applicant without the addressee being necessitated to take any decision himself"[252]

In this way, there are two criteria to ascertain what the direct concern is: First the measure has to be capable of affecting the individual's legal situation and secondly, it has to leave no discretion to the authorities in implementing the measure. In cases where the Member States are of wide discretion to implement acts or not, it is observed that the ECJ did not accept to grant standing to the parties.[253] The Court submitted that criterion as "[a] Community measure can only directly affect the legal position of an individual, and thus entitle him to bring an action against it under the fourth paragraph of Article 173 [now 230] of the Treaty, if that measure leaves no discretion to its addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules alone. The same applies where the

[250] Case 358/89 Extramet Industrie SA v. Council [1991] ECR I-2501, quoted by ibid, 506
[251] Ginter, p: 386
[252] Schermers and Waelbroeck, 170
[253] Ginter, 387

possibility for addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt"[254].

In cases where the third party adressee has no discretion to implement any measure, the Court focuses on the legal effects of the measure to applicant. Here, a second definition of direct concern can be added as "existence of a direct causal link between a Community measure and the effect of that measure on the legal position of the private party applying for its annulment"[255]. Therefore, it is stated that the center of the notion of direct concern is the direct relationship between the Community measure and the damage suffered by the applicant.[256] In the case of decisions addressed to the Member States, the aim of concerning the discretion of the addressee is "to ensure that the chain of causation is not broken by the intervention of an intermediary whose choice may direct in one way or another the course of the Community decision".[257]

Besides, when the acts are lined in a procedure of several stages, the measures which exist to prepare the final decision are not open to challenge. The Court explained the situation as "[t]he rejection by the Commission of a proposed undertaking in the course of an anti-dumping proceeding is not a measure having binding legal effects of such a kind as to affect the interests of the traders concerned, because the Commission may revoke its decision or the Council may decide not to introduce an anti-dumping duty. Such a rejection is an intermediate measure whose purpose is to prepare for the final decision, and is not therefore a measure which may be challenged by an action for its annulment"[258]. It was also explained by AG Grand stating the necessity for a "(…) direct relationship of cause and effect between the measure and its possible effects on the person in question"[259] to prove the direct concern. Therefore intermediate measures

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[254] Case T-54/96 Oleifici Italiani SpA and Fratelli Rubino Industrie Olearie SpA v Commission [1998] ECR II-3377, summary of the text pr. 2

[255] This definition was handled in Toepfer, Alcan, Simmenthal, Bock, Piraiki-Patraiki Cases where the Court found the applicants directly concerned with the challenged measure. Albors-Llorens, Albertina; "The Standing of Private Parties To Challenge Community Measures: Has The European Court Missed The Boat?", **Cambridge Law Journal** Vol. 62(1) March 2003, p 72

[256] ibid, 73

[257] ibid, 73

[258] Joined cases 133/87 and 150/87 Nashua Corporation and Others v Commission [1990] ECR I-719, pr. 9

[259] Opinion of AG Grand, Case 69/69 Alcan Aluminium Raeren and Others v Commission [1970] ECR 385, quoted by Ginter, p: 387

which aim to prepare the final decisions are not challengeable on the ground that they are not of direct relationship of cause and effect.

As mentioned before, in the early cases, the Court preffered the individual concern test first and when found out that individual concern was not existed, dismissed the case without searching direct concern.[260] Although the wording in Article 230(4) which is "… of direct and individual concern…" does not give priority to individual concern, to explain the manner of the Court it is stated that "this approach could reflect the fact that the test of individual concern is more difficult to satisfy than the test of direct concern, and therefore the Court sought to consider it first, especially in cases where the action was inadmissable, in order to comply with requirements of procedural expediency. A strong supporting argument is that, in cases where the actions were declared admissable, the Court changed its approach and considered direct concern first.[261]

In these cases, even though the Court did not discuss the direct concern, Advocate Generals construed it as the concern "without intermediary"[262]. In Plaumann Case, the landmark case regarding the individual concern, Advocate General suggested that in cases which a Member State was authorized to follow a way of action, third parties would never be concerned directly. The reason for that was "only when the Member State avails itself of the authorisation, which is left to its discretion, are the legal effects created for the individual."[263] A similar approach was seen in Glucoseries Réunies Case. The disputed decision was authorizing France to take protective measures of the levying of countervailing charges on the importation into France of glucose. The Member State addressee had the right of choice to use the authorization or not. The Court emphasized that the applicant was not individually concerned with the decision at issue and dismissed the application. However, opinion of Advocate General was that the applicants were not directly concerned in respect of such a condition. The reason of the opinion was that "there may be changes in the political intention of the Member States, because of a better understanding of the situation, because of a change

[260] Supra, footnote 171
[261] Albors-Llorens, 64
[262] ibid, 64
[263] ibid, 64

in the composition of the political decision-making organs or in the economic situations, because of obstacles raised by national law or because the Commission has made its authorisation subject to conditions which discourage the Member States from using or making full use of authorisation."[264]

As seen, the discretion granted to the Member States by a decision is a crucial point. The Court made it clear that where a Member State would be entitled to take a decision by any decision of the institution of the Community, the individuals could not be of any rights to challenge the decision taken by the Community institution in Alcan judgment. The applicants challenged a Commission decision addressed to Belgium which refused to grant a quota of unwrought aluminium imports at a low rate of duty. Inquiring the direct concern, the Court stated "an authorization granted by the Commission to a Member State to open a tariff quota merely creates a power in favour of the state concerned neither the grant nor the refusal of a tariff quota can therefore be of direct concern to undertakings which might possibly have benefited from such a quota. (…) A decision taken by the Commission in pursuance of the provisions quoted above, has thus no effect other than to create a power in favour of Member States concerned and does not confer any rights on possible beneficiaries of any measures to be taken subsequently by the said States"[265].In such a case, the Court's interpretation is that the private parties could only be directly concerned by only the measures enacted by the Member States, where the Member States were given a discretion as enacting a decision or not and therefore individual parties could not prove that they were directly concerned by the decision taken by the Commission.[266]

However, it is observed that the Court may act in different ways in similar situations with the Alcan. In Bock case, the issue was authorization of Germany by Commission to take several protective measures again. The argument of the Court was that the Member State could choose either to use or not to use the authorization as in Alcan case. However, in this case, the Court preferred the interpretation of the concept

[264] Opinion of AG Roemer, in Case 1/64, quoted by ibid, 65
[265] Case 69/69, summary of the text
[266] Albors-Llorens, 67

of direct concern in a liberal way and found the applicants directly concerned by the decision at issue.[267]

By Hartley, it is stated that the reason of two different approaches in two judgments was that, the Belgian Government in Alcan was acting in favour of the interests of the applicants and the Member State would run annulment proceedings on behalf of the applicant whereas in Bock, the Member State was acting against the interests of the applicant.[268] However, this view has been rejected considering the latter judgments of the Court. For instance, in Glucoseries-Reunies judgment, where the Member State's action was against the interests of the applicant as well, the applicants were not found directly concerned in this case. In Albors-Llorens' view, the only convincing explanation is that the Court's approach was transforming into a liberal construction by the Bock judgment. Moreover, according to Albors-Llorens, "it can never be completely certain that the Member State in question will bring annulment proceedings no matter how likely it is that it may do so."[269]

Naturally, in cases where any discretion was not conferred to the Member States, the private parties would have to be found directly concerned. Toepfer Case was the first case the applicant was found directly concerned pursuant to the Court's approach.[270] The Court reached that conclusion, considering the regulation relevant to the challenged decision stated "the commission's decision shall come into force immediately"[271]. Therefore, the Court suggested that decision will be directly applicable to the applicant and "a decision which comes into force immediately is of direct concern to an interested party within the meaning of the second paragraph of Article 173 of the EEC Treaty"[272].

In some cases where eventhough the applicant is one of the addressees, if the Member State is of discretion of implementing the measure, the Court rejected the application on the ground that the applicant was not directly concerned. In Eridania

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[267] Case 62/70 Werner A. Bock v Commission [1971] ECR 897, quoted by ibid
[268] Hartley, 363
[269] Albors-Llorens, 68
[270] ibid, 65
[271] Joined cases 106 and 107/63, pr. 411
[272] ibid, summary of the text, pr. 1

Case which the decision at issue was addressed partly to the Italian Government and partly to three Italian refineries which were recipients of the aids from European Agricultural Guidance and Guarantee Found, the Court did not found Eridania, the applicant and a competitor of the addressees, directly concerned. The reason for that was the Italian Government used a degree of discretion that obstructs the direct concern between the applicant and the decision.[273]

The view that the applicants are directly concerned by a decision addressed to a Member State if the Member State has no discretion in the implementation of a measure was supported in the Advocates General's opinions in the early cases and in Alcan and Eridania judgments of the Court. Nonetheless, to find direct concern of the applicants in cases which the Member State had a certain discretion in implementaton began with the Bock ruling.[274] The significant point was that the Member State would have to declare how the discretion would be used in the area authorization was granted. According to Eridania decision of the Court, applicants were not directly concerned if the Member State did not declare his intention for discretion.

Piraiki-Patraiki judgment of the Court is another example of less stricted approach of direct concern. In this case, France was authorized to impose a quota system on the importation of cotton yarn from Greece and it was of a discretion to constitute that quota system or not. Even though national implementing measures were necessary, the Court said "that fact does not in itself prevent the decision from being of direct concern to the applicants, if other factors justify the conclusion that they have a direct interest in bringing the action".[275]

In Piraiki-Patraiki case, the Court emphasized 'the other factors that justify the conclusion that they have a direct interest in bringing the action' as: "the fact that France was already applying a very restrictive system of licences for imports of cotton yarn from Greece and the fact that the system requested by France to be authorized by

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[273] Joined cases 10 and 18/68. Società "Eridania" Zuccherifici Nazionali and others v Commission [1969] ECR 459 quoted by Albors-Llorens, 66

[274] ibid, p. 68

[275] Case 11/82 SA Piraiki-Patraiki and others v Commission [1985] ECR 207, pr. 7

the Commission was more restrictive than the one finally adopted".[276] Therefore, the Court believed that the possibility of not using the authorization was "entirely theoretical" and effects of the new system to the applicant was adequate to find applicants directly concerned.

It is suggested that the test of direct concern in this manner involves three flaws.[277] First one is the difficulty of defining discretion clearly. Second one is the question of why the Member States did not use any discretion in the implementations of the decisions whilst applicants were not found directly concerned in some cases. Thus, last flaw is that the Court's test of direct concern is not useful to determine where the individuals are directly concerned actually. Considering these flaws of the test, it is suggested that inquiring the presence of causal link in the cases at issue may be a better way to ascertain the direct concern.[278]

In many cases where the addressee Member State was not of any discretion, it is seen that the Court usualy concluded the applicants were directly concerned. Nonetheless, there a few examples of cases where the Court rejected the application not finding direct concern even though addressee Member State was not of any discretion to implement the Community measure. In such cases the Court dismissed the application as there was no causal link between the measure challenged and the interests of the applicant. This attitude is seen in L'etoile Commerciale and Comptoir National Technique Agricole (CNTA) case and STS case.

In CNTA case, the applicants applied for a subsidy from French body of European Agricultural Guidance and Guarantee Fund, namely Société interprofesionelle des olégineux (SIDO). The Commission addressed a decision to France refusing to recognize the amount of the subsidy chargeable to the EAGGF. SIDO could not use any discretion in the implementation of the decision. The Court said, "it is true that in this case the Commission, addressed to the French Republic, not to recognise the subsidies as chargeable to the EAGGF prompted the SIDO to recover these amounts. However, that was not a direct consequence of the contested decision itself but derived from the

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[276] ibid, pr. 6
[277] Albors-Llorens, 70
[278] ibid, 70

fact that SIDO had made the definitive grant of subsidies conditional upon their finally being charged to the EAGGF."[279] The Court concluded that the applicant was not directly concerned. According to the Court, the decision did not influence the legal situation of the applicants. The damage occured by reason of the action of the national authorities and there was no causal relationship between the decision and the damage of the applicants.[280]

On the other hand, the cases where action brought against the decisions addressed to private parties other than the applicants have been less problematic. There have not been many examples of these in the case law of the ECJ and in existing cases were often found admissible.[281] A significant point is that the Court inquired discretion of any third party to determine the direct concern in Les Vert Case eventhough the measure challenged was addressed to the political parties of the European Parliament and found the applicant directly concerned on the ground that the measures at issue "constitute a complete set of rules which are sufficient in themselves and which require no implementing provisions , since the calculation of the share of the appropriations to be granted to each of the political groupings concerned is automatic and leaves no room for any discretion"[282] Despite the fact that there is no implementation procedure in decisions addressed to private parties, it is stated that "the requirement of direct concern reflects the concern of the drafters of the Treaty that the Community measure at issue be the direct cause of damage to the interests of the applicant".[283]

Reasoning of testing direct concern lies in a basic rule of the administrative law, as it is stated "an individual cannot challenge an act that does not violate his or her subjective rights".[284] Therefore, the challenged act must be of legal effects on the applicant's subjective rights. For instance, it is asserted that the Court rejects the applications against the preparatory acts on the ground that they do not affect the

[279] Joined cases 89 and 91/86 L'Étoile commerciale and Comptoir national technique agricole (CNTA) v Commission [1987] ECR 3005, pr. 13,
[280] Albors-Llorens, 72
[281] These cases are regarding the award of contracts by the Commission to successful tenderers and it is observed that direct concern was not came up as the Commission did not made objection to the admissibility of locus standi of the applicants, ibid, 75
[282] Case 294/83, pr. 31
[283] Albors-Llorens, 74
[284] Ginter, 388

subjective rights and directly concern the applicants.[285] The Court uttered that situation as "[i]n view of their legal nature and effects, neither the preliminary observations made by the Commission at the beginning of a procedure relating to an infringement of the competition rules nor the communication to the complainant provided for in Article 6 of Regulation No 99/63 may be regarded as decisions within the meaning of Article 173 of the Treaty, against which an action for annulment is available. In the context of the administrative procedure (…), they do not constitute measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant, but preparatory measures.[286]

[285] ibid, 388
[286] Case T-64/89 Automec SRL v Commission [1990] ECR II-367, pr. 3

2. THE LOCUS STANDI OF INDIVIDUALS UNDER ARTICLE 232(3) OF THE EC TREATY

The right to bring an action for failure to act of non-priviledged applicants is governed under the third paragraph of the Article 232 of the EC Treaty as "[a]ny natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion." Qualification of the measure challenged is the crucial point at this issue.

2.1 Qualification of the measure

The wording of the Article 232(3) is also more restrictive than the Article 230(4) as it allows to intiate proceedings against only the acts which was "failed to address to that person". As cited above, a private applicant may challenge the decision addressed to another person provided that he is individually and directly concerned under the Article 230(4). However, interpretation of the wording of the Article 232(3) was argued also in the ECJ and first by Advocate-General Roemer and then by Advocate-General Dutheillet de Lamothe and a wide interpretation of the Article 232(3) was suggested.[287] In First Mackprang Case, Advocate-General Dutheillet de Lamothe suggested interpretation of the Article 232(3) in the parallel of the Article 230(4) and submitted that "if the concept of a measure susceptible of challenge on the part of individuals had a different scope for the application of Article 173 than that for the application of Article 175 the result would be that, in certain cases, the existence or absence of a judicial remedy would depend on the behaviour of the Community authorities to which the request was submitted.

If these authorities responded to the request either by accepting it or by rejecting it the author of the request would be entitled to proceed under Article 173, even if he is not the addressee of the measure adopted or demanded, as soon as this measure affects him directly and individually.

[287] Schermers and Waelbroeck, 474

On the other hand, if the Community authorities did not respond to the person concerned he would, according to the Commission's argument, be deprived of any means of redress if he is not the addressee of the measure requested, even if the measure affects him directly and individually".[288]

Even though the Court rejected the application in First Mackprang, it is observed that the ECJ took a close position to the suggests of the Advocate-General in the following cases. The Court decided to the application of the same rules of locus standi in actions for failure to act as it is done in action for annulment. The Court uttered in Chevalley Case, "the concept of a measure capable of giving rise to an action is identical in Articles 173 and 175 [230 and 232 now], as both provisions merely prescribe one and the same method of recourse"[289]. This point was confirmed in a more recent case. The Court stated "[t]he Court has, however, held that Articles 173 and 175 merely prescribe one and the same method of recourse (…). It follows that, just as the fourth paragraph of Article 173 allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article 175 must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in the same way. The possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act."[290] As seen, the Court considers the type of the measures challenged are the same in both actions and finds direct and individual concern necessary in actions for failure to act brought by the individuals.

The finding of the Court in Nordgetreide Case also showed the intent to make the locus standi conditions for individuals in action for annulment and the action for failure to act same[291] as stating "such a provision would have affected the applicant only

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[288] Opinion of AG Dutheillet de Lamothe, Case 15/71 First Mackprang v Commission [1972] quoted by ibid, 474
[289] Case 15/70 Amedeo Chevalley v Commission, [1970] ECR 975,979, pr. 6
[290] Case 68/95 T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung [1996] ECR I-6065, pr. 59
[291] Albors-Llorens, 214

in so far as it belongs to a category viewed in the abstract and in its entirety and not as the person to whom an act of direct and individual concern to him was addressed."[292]

ENU judgment of the Court is critically important at that point. The applicant brought an action against the Commission for failure to take a decision pursuant to Article 53 of the Euratom Treaty in this case. In its judgment, considering the Commission's claim if that decision was taken it would have to be addressed to the Supply Agency and therefore the applicant was not of a locus standi. The Court in its finding considered that if the decision at issue was taken by the Commission, the applicant would be directly and individually concerned and could challenge it, stating "even though addressed to the Agency, such a decision is of direct and individual concern, within the meaning of the second paragraph of Article 146 of the Treaty, to the person who has referred it to the Commission, with the result that if the Commission fails to take a decision, the person concerned must be given judicial protection for the right he has, under the second paragraph of Article 53, to bring the matter before the Court by way of an action under Article 148 of the Treaty for failure to act"[293]. The application was found admissible. The decision may be analyzed as the intent in the ECJ to provide the unity of reviewable acts under Article 230 and 232 and it found the locus standi conditions would have to be the same under Article 230 and Article 232 for individuals. Therefore, considering that judgment it can be stated that an individual may act against a failure to act which is indeed not addressed to itself in case of being individually and directly concerned.[294]

The action for annulment and the action for failure to act are of similarities as the Court found and will be cited below. However, the point that in the actions for failure to act, the measure challenged must be reviewable acts as the Article 230(4) envisage is argued in case law and by the academic authors. It can be stated that there are some exceptions about the Court's finding of that the types of the measures challenged are the same in two actions. However the wordings of two articles have to be considered here. The Article 232(1) states "(…) in infringement of this Treaty, fail to

[292] Case 42/71 Nordgetreide v Commission [1972] ECR 105, pr. 5
[293] Case 107/91 Empresa Nacional de Urânio SA (ENU) v Commission [1993] ECR 599, summary of the text, pr.1
[294] Albors-Llorens 214

act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established" and the Article 232(3) states "any natural or legal persons may, (…) complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion". There is not such a distinction in wording of the Article 230 for the individuals and the Member States and the institutions. The question arising here what kind of measures are challengeable under Article 232. In Comitology case the Court accepted that the Parliament could bring an action under Article 232 to the Council by the reason of not presenting the draft budget, which was a preparatory measure and which was not itself a reviewable act.[295] Craig and De Burca suggest that the measures which are not of legal effects can only be challenged under Article 232(1) as the Article 232(3) clearly specifies the types of the measures which cannot be subject to actions brought by the private applicants.[296] Borromeo judgment of the Court confirmed this situation. In this case, the applicants who were the agricultural lands owners in Italy brought an action against the Commission on the ground that the Commission infringed the Treaty by failing to address to them a decision which "would have involved fixing the detailed rules to be followed by the applicant for the wording of leases of their agricultural land when a draft law on the method of fixing the rents for agricultural land, which had been adopted by the senate of the Italian Republic". The Court considered what the applicants sought is an advice of the Commission and eventhough the Commission decided to act as the applicants demanded, the measure taken by the institution would not be a decision, but it would have to be a non-binding act. Therefore the Court dismissed the application.[297] The Court rejected the application relying on the same justification in Chevalley Case which the applicant was seeking an advice from the Commission according to Court and that would only be fulfilled by making an opinion instead of a decision.[298]

However, findings contrary to this opinion are observed in case law. For instance, the CFI decided to compel the Commission to adopt a measure which did not

[295] See footnote 36 above
[296] Craig and De Burca, 521
[297] Case 6/70 Gilberto Borromeo Arese and others v Commission [1970] ECR 819, pr. 6-9
[298] Case 15/70, pr. 9-15

have legal effects in Asia Motor France Case, in which the plaintiff was a private applicant. That measure was an Article 6 letter pursuant to Regulation 99/63 and it could not be challenged by bringing an action for annulment under Article 230.[299] However the Court held that the applicant was entitled to obtain from the Commission a provisional communication (the letter at issue) and failure of the Commission at that point provided the applicant to bring an action under the Article 175 (3) eventhough it was not reviewable under Article 230(4)[300]. Therefore it can be stated that Article 232 "simply refer to failure to act"and the act which is failed by the institution must not be a reviewable act.[301]

The first paragraph of the Article 232, provides the Member States and the other institutions of the EU bring an action for failure to act of any measures.[302] However, private applicants cannot bring an action for failure to act of generic norms as the Court stated "a provision of a general regulatory character having the same legal scope as a regulation cannot be described by reason either of its form or its nature as an act addressed to a natural or legal person within the meaning of the third paragraph of Article 175".[303] The result of this approach is that individuals may initiate proceedings under the Article 232(3) only for failure to act of decisions.[304] Nonetheless, there was not such a distinction among the individuals and the other (priviledged) applicants in the ECSC Treaty as the Article 35 stated "in the cases where the High Authority is required by a provision of the present Treaty or of implementing regulations to issue a decision or recommendation, and fails to fulfill this obligation, such omission may be brought to its attention by the States, the Council or the enterprises and associations, as the case may be". An interpretation for that difference is "(…) given that the authors of the Treaty created the fiction of an implied decision of refusal following the silence of the Commission, private parties would anyway need to satisfy the locus standi requirements

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[299] Case T-28/90 Asia Motor France SA and others v Commission, [1992] ECR II-2285, quoted by Weatherill and Beaumont, 307
[300] ibid, 307
[301] Craig and De Burca, 520
[302] "Other institutions" statement of the Treaty in Article 232(1) includes the institutions which can not bring action under the Article 230, such as the European Parliament and the European Court of Justice, see Schermers and Waelbroeck, 472
[303] Case 134/73 Holtz & Willemsen GmbH v Council [1974], summary of the text
[304] Schermers and Waelbroeck, 482; Besides private applicants cannot bring actions for failure to act of directives by the same reasoning. Albors-Llorens, 212

of Article 33(2) ECSC Treaty in order to bring annulment proceedings against that decision of refusal".[305] Therefore, a restriction for individuals would arise by the action for annulment procedure of the Article 33. On the other hand, considering the private applicants can bring action for annulment of true regulations in some cases as cited above, it is suggested that individuals have to have a right to challenge the failure of enacting regulations when they are individually and directly concerned. This is seen a logical result of complementary relation between the Article 230 and the Article 232. Even though the Court has adopted the restrictive interpretation of the Article 232, in cases where the applicants participate the administrative proceedings and Court takes a liberal approach, such as anti-dumping cases, competition and state aids cases, this suggestion may be found more conceivable.[306]

2.2 Other Appearances of Interpretation of Article 232(3) in the ECJ Case Law

In cases where an institution is obliged to institute a decision for an individual, after being called upon, if the institution takes the position that it will not take the requested decision, this action should be interpreted as a decision.[307] The Court puts forward that this situation affects the legal situation of the applicant. This attitude was clearly seen in Nordgetreide Case. In that case, the applicant claimed that the Commission breached the Treaty failing to give ruling on its request. However, The Court considered the latter reply including the rejection of the defendant and held that "Commission, within the time-limit fixed by Article 175, defined its position in its communication of 16 June 1971, the conditions for application of that article are not satisfied; the admissibility of the action must, in consequence, be considered in the light of Article 173 alone".[308] Thereby, the Court considered the Commission determined its position by rejecting the applicant's request and therefore decided that the action would only be brought under the Article 230.

[305] ibid, 211
[306] ibid, 215
[307] Schermers and Waelbroeck, 482
[308] Case 42/71 Nordgetreide GmbH & Co. Kg v Commission [1972], pr. 4

3. THE LOCUS STANDI OF INDIVIDUALS UNDER ARTICLE 288 OF THE EC TREATY

As the individuals are the only plaintiffs which are able to bring the action for damages before the Court, there is no distinction of priviledged and non-priviledged applicants as in the action for annulment and the action for failure to act[309]. Therefore, any additional admissibility conditions is not required for the private applicants in the action for damages. However, a few points of individual application should be stressed, besides the general application conditions.

The first significant point in admissibility conditions of the actions for damages is that there is not very restrictive conditions for application before the Court under the Article 288(2) as in the Articles 230 and the 232. Firstly, the non-restrictive wording of the Article 288(2) ensures being a plaintiff demanding a compensation stemming from a Community action, even though the applicant is not a citizen of a Member State. Thereby it can be put forward that the drafters of the Treaty acted in a more liberal way than they did in Articles 230 and 232. However, it is observed that the Court rather rejected the applications relying on the substances of the cases mostly.[310]

On the other hand, it is observed that another noticeable point in actions for damages brought by private applicants is the low rate of admissibility of actions. For instance, according to a report, only 13 of 177 actions for damages were found admissible by the Court in 1990.[311] It is therefore observed that the strict approach of the Court for admissibility conditions in cases brought by the private applicants have often directed them to initiate proceedings against implemented measures which caused damages in the national courts and then to the ECJ by preliminary ruling procedure to see the Court's attitude on the validity of the measure at issue. By this way, it is seen

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[309] Even though there is not any example of the applications brought by the Member States in case law, it is asserted that they can bring actions for damages caused by the Community, Baykal, Avrupa Birliği Hukukunda…, 46

[310] ibid, 46

[311] XXIVth General Report on the Activities of the European Communities (Brussels 1990) quoted by Albors-Llorens, 206

that the actions brought by individuals after getting the ECJ's declaration of invalidity have been more succesful.[312]

There are a few special criteria as admissibility conditions considered by the Court depending on the characteristics of the measures which caused the damage of an individual. Therefore, admissibility conditions for individuals will be handled considering the characteristics of the measures.

3.1 Qualification of the Measure Which may Cause Action For Damages

3.1.2 Action for Damages Caused by a Decision

In cases where the liability stems from decisions, whereas the Court has to find that the decision is illegal, it does not have to inquire the heaviness of the illegality and finding causal link between the damage and the decision at issue is sufficient to grant compensation to the applicant. The Court's action is to declare the measure is illegal if it is and then to find the damage and the causal link between the damage and the measure in an order.[313]

However it is also observed that the Court has not considered to act in this order in cases where the causal link did not exist as in a case it held that the applicant "has not been able to prove that the conditions of the fact of damage and the existence of a causal link between the contested act and the alleged damage are fulfilled in this case. That is sufficient ground for dismissing the action without it being necessary for the court to pronounce on the lawfulness of the Council decision (…)"[314]

3.1.3 Action for Damages Caused by a Regulative Act and Schöppenstedt Formula

The admissibility conditions differ where the liability stems from the regulations in the case law. In such cases, the Court inquires a special gravity of illegality. The test applied to determine such a gravity of illegality by the Court in the

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[312] ibid, 207
[313] ibid 205
[314] Case 253/84 Groupement agricole d'exploitation en commun (GAEC) de la Ségaude v Council and Commission [1987] ECR 123, pr. 21

case law is named "Schöppenstedt Formula".[315] This formula was first applied in Aktien-Zuckerfabrik Schöppenstedt Case first, as stated by the Court, "where legislative action involving choices of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred."[316] Therefore, the breach of law must be sufficiently serious and the subject of the breach must be a superior rule of law for protection of individuals. To determine the breach of the law is sufficiently serious, there are three criteria distinguished by the Advocate-General Capotorti. These are "importance of the infringed rule, the degree of blame to be attributed to the author of the measure and the extent of the loss suffered".[317]

Superior rules of law protecting the individuals are the general principles of law, Treaty provisions and the fundamental human rights rules.[318] It was submitted by the Court as "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community"[319]. Thereby, the fundamental rights protecting the individuals accepted by the ECJ are rights of property, non-discrimination principle, the rights of defence, the principle of proportionality, the prohibition of abuse of power, the incorrect legal basis of an act, duty of care, principle of proportionality.[320]

On the other hand, according to the case law of the ECJ, public responsibilities of the Community do not give rise to the liability. In earlier case law, the Court stated "the establishment of the financial arrangements and the principle enunciated in the

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[315] Albors-Llorens, 205
[316] Case 5/71, pr. 11
[317] Opinion of Advocate General Capotorti, in Joined Cases 83 and 94/76, 4, 15 and 40/77 Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission [1978] ECR 1232, quoted by Schermers and Waelbroeck, 549
[318] ibid, 554; Baykal, Avrupa Birliği… 81
[319] Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1134, pr. 4
[320] Schermers and Waelbroeck, 554

recital to the abovementioned general decision, of the liability assumed by the high authority for the regular functioning of this scheme, belong to the political and administrative sphere and cannot thus constitute an obligation to the undertakings under its authority or a guarantee giving rise to objective, contractual or legal liability on the part of the high authority, even when no wrongful act or omission can be imputed to it. This submission must therefore be dismissed."[321] Thus, it can be held that in situations determined by the political and administrative climate of the Community, no liability of the Community arises. In the mentioned case the applicant had submitted that the High Authority was liable on the ground that it did not provide a good functioning of the price equalization system of ferrous scraps. Besides, according to the Court insufficient reasoning of an act and technical faults in the text of an act which may be cause the annulment of these acts do not give rise the liability of the Community as the other acts which do not aim to protect the individuals.[322].

It is clear that the admissibility condition above, "sufficiently flagrant violation", is very difficult to fulfil and caused many actions brought before the Court dismissed.[323] An explanation of this formula was stated in Bayerische HNL case, in which the application was found inadmissible, as "in a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the common agricultural policy, the Community does not therefore incur liability unless the institution concerned has *manifestly and gravely disregarded the limits on the exercise of its powers."*[324]

Therefore, it can be put forward that, as did in action for annulment and action for failure to act; the Court adopted a restrictive approach in actions for damages brought by the individuals.

However, action for damages is suggested for individuals, considering admissibility of this sort of action by the Court brings the declaration of invalidity of the

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[321] Case 23/59 Acciaieria Ferriera di Roma (F.E.R.A.M.) v High Authority of the European Coal and Steel Community [1959] ECR 259, pr. 250
[322] Schermers and Waelbroeck, 555
[323] Albors-Llorens, 205
[324] Cases 83 and 94/76 Bayerische HNL Vermehrungsbetreibe GmbH & Co. KG and Others v Council and Commission [1978] ECR, pr. 6 (emphasis added)

measure intended to be challenged and where they cannot fulfil the requirements of action for annulment, on the grounds that;

"a) there are no limitations as to the kinds of acts likely to give rise to Community liability, or in other words, acts producing legal effects, whether general or individual, are included;

b) there are no locus standi conditions to be satisfied by a prospective applicant other than having suffered prejudice caused by a Community institution, and

c) there is a five-year time-limit for bringing an action for damages against the strict time-limits of Article 173 EC Treaty."[325]

3.2 Other features of Bringing Action For Damages by Individuals

In case of the damages suffered by the members of trade unions and trade associations, the Court did not accept the locus standi of the trade unions and trade associations. The Court stated "an application seeking compensation for damage caused by a Community institution must state the evidence from which, inter alia, the damage allegedly sustained by the applicant and, in particular, the nature and extent of that damage can be identified. An association has the right to bring proceedings for damages under Article 215 of the Treaty only where it is able to assert in law either a particular interest of its own which is distinct from that of its members or a right to compensation which has been assigned to it by others" and found the application of a trade association inadmissible[326]. On the other hand the Court admits the locus standi of trade associations inquiring the loss they suffered as well and it stated "the applicants are entitled to bring an action for damages, in so far as the action is based on the loss suffered by them in their capacity of dealers."[327]

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[325] Albors-Llorens, 208

[326] Case T-149/96 Confederazione Nazionale Coltivatori Diretti (Coldiretti) and 110 farmers v Council [1998] ECR II-3841, pr. 47

[327] Case 114/83 Société coopérative agricole "Société d'initiatives et de coopération agricole" and Société d'intérêt collectif agricole "Société interprofessionnelle des producteurs et expéditeurs de fruits, légumes, bulbes et fleurs d'Ille-et-Vilaine" v Commission [1984] ECR 2597, pr. 5

On the other hand, a point for individual access is that there is not a must to be a Member State citizen to bring an action for damages. The case law which ensures the associations and trade unions to bring an action for annulment where they are concerned with the challenged measure is also valid in action for damages as they can only be plaintiffs in case of the damage suffered by them not only by their members.[328]

Furthermore, individual's right to compensation has also been a fundamental right under the Community Law. Charter of Fundamental Rights recognizes the compensation of damages caused by the Communities as a fundamental right in third paragraph of Article 41 titled "Right to good administration", in wording "Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States".

[328] Baykal, Avrupa Birliği Hukukunda… 46

4. DEBATES ON THE RESTRICTIONS BROUGHT FOR INDIVIDUALS TO ACCESS THE EUROPEAN COURT OF JUSTICE

4.1 Debates and Critics on the Restrictions under the EC Treaty for Locus Standi of Individuals

The restrictions for individuals to bring actions for annulment stemming from the Treaty and the case law of the Court, as mentioned above, have been criticized by academic authors and even by the Advocate Generals of the Court.

As mentioned above, the Plaumann Test requires to be in a closed category which is fixed and ascertainable at the time of adoption of the decision. It is a big hurdle for individuals to bring actions before the Court. This situation has been criticized on the ground that it is of adverse effects on effectiveness of the judicial protection.[329] The principle of effective judicial protection obliges both the EU institutions and the Member States to protect the rights of individuals. However, whereas the European Court of Justice has always been very rigid to the courts of Member States when they fail to comply with the effective judicial protection principle, it is observed that it does not attach importance to application of this principle in its case law adequately.[330]

The overall view of the case law indicates that the Court has preferred to stick to the literal interpretation of the Article 230(4) and has not intended to extend this approach in a more liberal way.[331]

It is stated that there are several factors that orient the Court to apply the Article 230(4) restrictively. These are stemming from the intentions of the drafters of the Treaty and others stemming from the Court's view which came into being realizing the needs of the Community system.[332] One of these was uttered by the Court in Confédération nationale des producteurs de fruits et légumes Case as "the Court admits

[329] "**The Role And Future of The European Court of Justice**", A report by Members of EC Section of the British Institute's Advisory Board chaired by The Rt. Hon. The Lord Slynn of Hadley, Published by The British Institute of International and Comparative Law, 1996, p. 93
[330] Biernat, 22, For critics of the general approach of the Court for fundamental rights, Coppel, Jason and Aidan O'Neill. "The European Court of Justice: Taking Rights Seriously?", 1992, **Common Market Law Review**, Vol. 29, No: 2, pp. 669-692
[331] Baykal, 219
[332] Arnull 47

that the system thus established by the treaties of Rome lays down more restrictive conditions than does the ECSC Treaty for the admissibility of applications for annulment by private individuals"[333]. However, this view is declared to be unconvincing for today since the development of the European Union thus far could not be foreseen by the drafters of Treaty of Rome then.[334]

Considering the European Union is based on the rule of law, it is a must to provide judicial review on the legislative and administrative activities of the Union and therefore to grant locus standi against the measures affecting interests of private applicants in a large extent. This may be seen as a fundamental right and so as an "aspect of citizenship".[335]

Moreover, one of the claims to explain the restrictions by some authors was that the Court had aimed to modify the judicial system of the Community to be transformed into a supreme appellate court by restricting the direct actions of individuals.[336] However it is clear that the restrictive approach of the Court was constituted in 1960's when such an intention was not argued in Community law and thus this claim is not convincing.[337]

Another claim is that the Court has wished to prevent itself from overloads. In that point Hartley draws attention to the subject matters of the cases.[338] The Court's attitude to restrict the standing of the individuals where the norm in question is discretionary has been observed by this author and to analyse the subject matters of these cases is suggested.[339] One of the sorts of cases which the Court mostly rejected are the cases concerning the Common Agricultural Policy and according to the author, the Commission and the Council are enabled to enact discretionary measures in respect of the objectives of the Union in these fields and the possibility of displeasure of the concerned groups by these discretionary measures impels the Court to apply the

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[333] Joined cases 16/62 and 17/62, pr. 478
[334] Arnull 47
[335] ibid, 47
[336] Biernat 17
[337] ibid 17
[338] ibid 18
[339] Craig and De Burca513

restrictive methods for individual applicants to obstruct the overloading of cases in these areas.[340] Besides the issues of Common Agricultural Policy, allowing challenging the generic norms by individuals may cause increase of trivial actions by "busybodies" is argued. However, it is stated that the Article 69(2) of the Rules of Procedure which is governing that the unsuccessful party will be ordered to pay the costs of judgment, would prevent occuring of such a sitiuation.[341]

In addittion, while analyzing these reasons, the time limit to bring an action must be considered. As mentioned before, Article 230(5) of the Treaty brings a time limit of two months beginning from the publication of the measure or of its notification to the plaintiff or the day on which the measure came to the knowledge of the plaintiff. Therefore, expecting a huge overloading of cases is not appropriate.

On the other hand, eventhough the Court envisages restrictions for private applicants at large, it acts in a more liberal way in the cases regarding anti-dumping, competition and state aids as seen above. The Court's liberal approach in these areas can be explained by the several facts. Firstly, according to the procedural acts of these areas individuals are of roles to stimulate the Commission in case of breaches of law. Individuals can act as complainants and play a role to determine the breaches. This procedure is described as quasi-judicial and the Court considers this situation while granting locus standi to individuals in these areas.[342] The other fact is about another point of the subject matter and suggested as the interests of the European Union in these areas are more clear.[343]

Through the UPA and Jego Quere judgments of the Court, it is possible to observe the expactations to soften the restrictions under Article 230(4) for the locus standi rights of individuals. The new approach suggested by the AG Jacobs which envisages rethinking the test of individual concern may be a beginning point for the

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[340] Biernat, 18
[341] Ginter, 442
[342] Craig and De Burca, 515
[343] ibid, 515

European Court of Justice although it has not taken a place in the case law of the Court yet.[344]

The restrictions for individuals have been criticized as developing the European Union in an undemocratic nature. Undoubtedly, democracy is not only ensuring the people elect the representatives for law-making process. It is also a must that protecting the rights of the people by ensuring the accession of them into judicial process in a modern democracy. The individuals are of serious interests in the execution of the Union. However it is difficult to say the Treaty takes them seriously as their importance in the Union requires.[345] At this point, crucial lack of standing rights can be submitted. First, the individuals in the European Union are not of a right to bring an action against the Member States directly by asserting the infringement of the Treaty by them although the Commission or another Member State can do this relying the Articles 226 and 227 of the EC Treaty. These are defined as the gaps waiting to be fulfilled to make individuals join the legislative processes for the sake of the development of the democracy in the Union.[346] Furthermore, combination of this situation with deficiency in application of effective judicial protection principle and also lack of complete parliamentary control of the acts of the Union expands the undemocratic picture in the European Union as putting the union away from "checks and balances" system of democracies.[347] Besides judicial system in the EU at present is criticized on the ground that it ensures accession of the big businesses and large interest groups more than the small firms and the individuals.[348]

As cited above, the preliminary ruling procedure as an alternative judicial remedy is suggested for individuals where bringing action for annulment is impossible. However, a trial in the past should be considered here. In TWD case the applicant challenged a state aid decision addressed to a Member State claiming it is unlawful, before the national court. The case was brought to the ECJ by preliminary ruling

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[344] Ginter, 442
[345] Mancini, Federico G and David T. Keeling. "Democracy and the European Court of Justice", **The Modern Law Review**, 1994, Vol. 57, No. 2, p, 181
[346] ibid 189
[347] Schermers and Waelbroeck, 451; Biernat, 22
[348] Costa, Olivier. "The European Court of Justice and Democratic Control in the European Union", **Journal of European Public Policy**, 2003, Vol.10:5, p, 744

procedure. The ECJ held that if the addressee of the decision did not challenge the decision in time limits under the Article 173 (230 now), validity of the decision could not be asked by preliminary ruling procedure stating "national court is bound by a Commission decision adopted under Article 93(2) of the Treaty where, in view of the implementation of that decision by the national authorities, the recipient of the aid to which the implementation measures are addressed brings before it an action in which it pleads the unlawfulness of the Commission's decision and where that recipient of aid, although informed in writing by the Member State of the Commission' s decision, did not bring an action against that decision under the second paragraph of Article 173 of the Treaty, or did not do so within the period prescribed."[349]

The suggestion of broadening the scope of the Article 230(4) is almost common in the context of ensuring an effective judicial protection and of strengthening the democracy in the EU. On the other hand, considering the probable overloads, it is suggested that the capacity of the Court of First Instance should be expanded by increasing the number of judges, appointment of assistant rapporteurs, specialized chambers, single judges etc .[350]

In actions for damages the effective judicial protection is a valid principle to save the rights of the individuals as well as it has taken a place in judgments of the ECJ. For an instance view of the effective judicial protection in the case law the Court held that "[r]eparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights. (…) The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage"[351]. That is to say, it can be asserted that the Court considers it necessary to provide an adequate reparation for the damages of individuals, relying upon the effective judicial principle.

[349] Case 188/92 TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland [1995] 2 CMLR 145, pr. 8
[350] "The Role And Future of The European Court of Justice", A report… p. 94; Millett, 833
[351] Case 46-48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport ex parte: Factortame Ltd and others [1996] ECR I-1029, pr. 5

However, the criterion for admissibility of actions for damages which caused by the normative act which has been adopted by the Court as "sufficiently serious breach of superior rule of law" is also criticized by the academic authors on the ground that that criterion restricts individual access to the Court for compensation of damages. It is true that the compensations awarded by the Court thus far is only a few. Although the Article 288(2) refers to the national laws of Member States in wording "(…) the Community shall, in accordance with the general principles common to the laws of the Member States (…)" and the existence of the causal link is sufficient to award compensation in most of the Member States, to bring an an additional criterion is found inequitable.[352]

In conclusion, the resolution of the problems arising from the restrictions brought for the individual access to Court is foreseen in political and constitutional reforms instead of expecting a revision by the Court by legal interpretations. Therefore, the new legislative measures concerned should be watched to see the new steps in this area.[353]

4.2 Provisions Concerning Individual Access to The ECJ by Direct Actions of the Draft Reform (Lisbon) Treaty

It can be seen that the debates on the restrictions for individuals under the Article 230 of EC Treaty have been influential on the drafters of the EU Draft Constitution and the Draft Reform Treaty. The changes in those treaties show the intention to reply the expectations to liberalize the application conditions for individuals. The Article 214 of the Draft Reform Treaty envisages amendment of the Article 230(4) of the EC Treaty as "[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures" as the Draft Constitution did the same.

[352] Mancini and Keeling, 189
[353] Albors-Llorens, Albertina. "The Standing of Private…", p. 92

The first remarkable change for application conditions of individuals in this article is that it confirms an individual may challenge a true regulation. Besides it liberalizes the scope of the acts which individuals may challenge more as it envisages an individual may challenge “an act” and this opens the way of challenging legislative and regulatory acts for individuals. Such a wording provides legal certainty and prevents the arguments of legal nature of a measure whether it is legislative or regulatory.[354] To be of a locus standi, the act at issue must be addressed to the applicant and if not addressed to him, it must be directly and individually concern the applicant as envisaged in the EC Treaty for decisions. Moreover, if the applicant is directly concerned with a regulatory act, implementation of this act is not a must for challenging it. However, individual concern exists in the article as an application condition for the acts which are not addressed to the applicant. Albeit individual concern is not required to be fulfilled to challenge the regulatory acts, its existence in the article shows the liberalization of application conditions is quiet limited in the Draft Reform Treaty and individual applicants will have to prove that they are individually concerned by the measure challenged pursuant to Plaumann Test. Therefore it seems that the Draft Reform Treaty does not envisage a whole reform of application conditions for individuals and it perceives direct action of the individuals to the European Court of Justice, although it can be said that the wording of the Article III-365(4) may be seen as a partial revision.[355] Therefore it can not be easily stated that the provision of the Draft Reform Treaty and also Draft Constitution governing the action for annulment for individuals is complied with the rule of law entirely.[356]

On the other hand, the Draft Reform Treaty and the Draft Constitution do not innovate the provisions concerning the application conditions of individuals to action for failure to act and the action for damages.

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[354] Tridimas, Takis. “The ECJ and the Draft Constitution: A Supreme Court for the Union?”, Available at SSRN: http://ssrn.com/abstract=490603, 2004, last visit 11.05.2008, p. 5-6

[355] For an opinion which asserts the Draft Constitution takes decisions as regulatory acts and thus individual concern will not be inquired in challenges against decisions, ibid, p. 5

[356] For an interpretation of recent development of democracy in the European Union in the context of Charter of Fundamental Rights of the European Union and critics of the approach adopted for the action for annulment in the Draft Constitution, Karakaş, Işıl. “Ulusalüstü Anayasada Temel Haklar Problematiği: Teorik ve Pratik Sorunlar”, **Anayasa Yargısı Dergisi**, 2005, Cilt. 22, ss.292-305

The Draft Reform Treaty in Article 216 envisages a change for the Article 232(3) as “in the third paragraph, the words ‘body, office or agency’ shall be inserted after ‘an institution’” and ensures the legal and natural persons to bring an action for failure to act of a body, office or an agency besides the Community institutions.

The Article 283 envisages a change for the Article 288(3) as “"[n]otwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties."

As can be seen, the Draft Reform Treaty replies the expectations of liberalization of individual access conditions in the EU judicature partially.

CONCLUSION

The direct actions governed under the Treaties are of critically important functions both for judicial review of the Community acts and for interpretation and improvement of the principles of the Community Law.[357] It is observed that the European Court of Justice and the Court of First Instance exercised the powers conferred them in an activist way to succeed the aims of the European Communities set by the Treaties.

However, it is seen that the European Court of Justice has been of a conservative attitude to the restrictions of locus standi of individuals under the Treaties and preferred to be bound by the literal interpretation of the Treaty provisions concerning the admissibility conditions of the challenges of the individuals. The Plaumann test has still been the effective formula of the Court to examine the admissibility conditions of the individuals for the action for annulment. The approach adopted in Plaumann is also influential in inquiring the locus standi of individuals in actions for failure to act. Besides, the Schöppenstedt test which has been applied to examine the application conditions of natural and legal persons in actions for damages caused by the Community regulations is still another barrier to access the Court. Many examples of the case law prove that the actions brought by the natural and legal persons before the European Court of Justice and the Court of First Instance have been dismissed on the ground that the applications did not fulfil the admissibility conditions to a large extent. The alternative ways of challenging Community acts has been suggested by the Court for an effective judicial protection. However, it is observed that, as many academic authors agree, the alternative ways of remedies such as the preliminary ruling procedure or initiating proceedings in the national courts which have been suggested by the Court do not always reply the need for an effective remedy mechanism in the Community territory.

On the other hand, as seen in UPA and Jego Quere judgments, the Court of First Instance has preferred to be innovative at this issue, even though the European Court of

[357] Baykal, 222

Justice, as the appeal body of the Community judicature, has still been the determinant of the case law of the Community.

The admissibility conditions for individuals brought by the Treaties and considered by the Court in direct actions is still a big barrier to access the judicial review system of the EU. Many actions brought by the legal and natural persons have been dismissed as inadmissible by the Court by reason of the application conditions set by the Treaties were not fulfilled. In such cases the restrictive approach of the Court may cause rejection of the actions although the other conditions are fulfilled in substances of the cases. Consequently, judicial protection of the individuals and their fundamental rights is questioned as this situation obstructs to meet out justice for individuals.

As mentioned above, although the expectations of liberalizing the admissibility conditions of private applicants, the Court has insisted on the classical restrictive approaches in settled case law thus far. In some points, the Court's claim that liberalization must be realized by the drafters may be recognized as it stresses that it is bound by the legislative acts of the Community while acting. Because exercising the function of the Court is limited to the power conferred to it by the Treaties. However, the rule of law and the individual rights common to the Member States today and the role of the Court in judicial policy making progress makes this view invalid.

On the other hand, in constitutionalizing process of the European Union, it is observed that the drafters have considered these expectations partially. The new provisions of the Draft Reform Treaty, intended to replace the Article 230(4), in case of enactment the Treaty, are seem to end the debates on challenging the regulative acts and provide the Court not to act in insistent ways on this issues on the contrary of the application thus far. Thus, enacting the Draft Reform Treaty the expectations to liberalize the admissibility conditions for individuals for the action for annulment and also the action for failure to act by an interpretation may be strengthened. It can safely be put forward that considering the European Court of Justice has preferred to act in limits of literal interpretation of concerned provisions, if any legislative change by the

Member States does not occur, the restrictive system up to present may go on without any liberalization attempt.

Continuance of such a process, without any doubt, is going to cause all critics for undemocratic nature and the legitimacy of the European Union to continue increasingly. On the other hand, considering efficiency of the Charter of Fundamental Rights, a revision for conditions of the individuals to access the European Court of Justice is to be activated. It is without dispute that putting the reasons of the narrow interpretation of the Court assigned above is contrary to both the rule of law and the effective judicial protection system for individuals accepted by the Court. The debates which have been going on since almost the establishment of the Communities show that such a revision is required without any delay by either amendments of the Community legislations or the case law of the European Court of Justice.

In conclusion, considering the relevant Treaty provisions and settled case law of the European Court of Justice, it can be brought forward that the European Union needs more progressive steps in respect of locus standi of individuals to reach the aims of contributing the individuals into the Community legal and political system which were mentioned in Van Gend en Loos judgment. There is no doubt that such steps may cause the critics arising from the democracy deficit in the European Union to decrease considerably.

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ANNEXES

Annex 1: ÖZET

GENEL BİLGİLER

İsim ve Soyadı	: Aydın Atılgan
Anabilim Dalı	: Avrupa Birliği Hukuku
Tez Danışmanı	: Doç. Dr. Sibel Özel
Tez Türü ve Tarihi	: Yüksek Lisans – Temmuz, 2008
Anahtar Kelimeler	: Avrupa Topluluğu Hukuku, Avrupa Toplulukları Adalet Divanı, İptal Davası, Hareketsizlik Davası, Tazminat Davası, Özel Kişiler, Tüzel Kişiler, Davacı Olma Koşulları

ÖZET

AVRUPA TOPLULUKLARI ADALET DİVANI'NA BİREYSEL ERİŞİM

Bireyler Avrupa Topluluğu hukukunun bir süjesi olup bunun bir sonucu olarak Topluluk hukuku tarafından kendilerine bağlayıcı hukuki tasarrufların hukuki denetimi ve Topluluğun tasarrufları ya da fiileri nedeniyle ortaya çıkan zararların tazminini talep etme hakkı tanınmıştır. Bunu gerçekleştirmeye yönelik olarak bireylerin Avrupa Topluluğu kurucu antlaşmalarında düzenlenen iptal davası, hareketsizlik davası ve tazminat davası gibi doğrudan dava yollarıyla Avrupa Toplulukları Adalet Divanı'na erişimleri mümkün olmaktadır. Fakat bireylerin Divan'a doğrudan erişim yolları gerek kurucu antlaşma metinleri ve gerekse bu alanda Divan'ın geliştirmiş olduğu içtihatlarla belirli kriterlere tabi olup üye devletlere ve Topluluk kurumlarına tanınan dava açma koşullarıyla karşılaştırıldığında son derece sınırlıdır. Konu, Divan'ın bu alandaki önemli kararlarına değinilerek incelenmekte, bireylerin dava açma koşullarına ilişkin Divan uygulamasının geçmişte günümüze geçirdiği aşamalar ortaya konulmaktadır. Bununla birlikte, Divan'ın uygulamasına ilişkin doktrinde ortaya çıkan eleştiri ve tartışmalara yer verilmektedir.

Annex 2: ABSTRACT

GENERAL KNOWLEDGE

Name and Surname	: Aydın Atılgan
Field	: European Union Law
Supervisor	: Assoc. Prof. Dr. Sibel Özel
Degree Awarded and Date	: Master – July, 2008
Keywords	: European Community Law, European Court of Justice, Action For Annulment, Action For Failure To Act, Action for Damages, Natural Persons, Legal Persons, Locus Standi

ABSTRACT

INDIVIDUAL ACCESS TO THE EUROPEAN COURT OF JUSTICE

Individuals are one of the subjects of the European Community Law and as a result of that they are granted the right of the judicial review of the legally binding measures of the Community and compensation of the damages caused by the Community measures and acts. To achieve this, the individuals may access the European Court of Justice through the action for annulment, the action for failure to act and the action for damages which are the direct actions governed by the establishing Treaties of the Community. However, locus standi of the individuals for direct actions is subject to the criteria constituted by the establishing Treaty provisions and the case law provided by the Court and considerably restricted in comparison with the locus standi of the Member States and the Community Institutions. The issue is analyzed attributing the significant decisons of the Court in this field and the Court's practice for the admissibility conditions of individual access thus far is betrayed. Besides, the critics and the debates on the Court's practice in the doctrine is argued.