

Locus Standi for Private Applicants under Article 230 EC- ...And Justice for All?

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1. Introduction

Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. "It is possible," says the gatekeeper, "but not now."

(Franz Kafka's "Before the Law" quoted in: Johnston, 2007)

Much like Kafka's gatekeeper, the Community Courts stand guard before the access to justice and stop every "man from the [Member] country" who seeks annulment of an EU measure. Although the granting of locus standi to non-privileged applicants under Article 230(4) EC "is possible", the gatekeepers have developed a list of overtly restrictive conditions for achieving it. It appears that more democratic, in the sense of conducive to European citizens' participation in the judicial processes, and guaranteeing legal protection rules for standing are not on offer now. The limitations to gaining access to judicial review acquire more prominence in light of the dubious democratic credentials of the European Union. In a Union where only one of the key institutions is directly elected (the European Parliament) it is even more crucial than in the case of nation states to develop a legal system that curbs misuses of power by the institutions. One of the mechanisms to ensure this and to allocate a more active role of civil society and individual citizens is to allow for direct challenges of the legality of Community acts. This paper claims that opposite to trends in the Member States' legal systems the European Court of Justice (ECJ) maintains an excessively restrictive locus standi for private applicants. More controversially, the study attempts to unveil possible motivations for the Court's conservative stance by applying political science theories.

Elaborating on several points of criticism, the first part will establish why the conditions for standing of individuals under Art. 230 EC are considered too limiting. The second part will take a comparative approach to the issue and present the French and British rules for *locus standi*. The objective here will be to highlight the anti-progressive position of the ECJ when contrasted to the liberal approach of administrative courts in the aforementioned Member States. The third part of the paper will present possible explanations for the reluctance of the ECJ to substantially reform the conditions for *locus standi*. Several motivations will be analyzed using the

theoretical tools of political science. Building upon the conceptual framework of rational-choice and historical institutionalism, the position of the ECJ in the debate on standing is explained within the wider context of European integration and inter-institutional balance.

2. Overview of the Restrictive Attributes of Article 230(4)

The restrictive nature of the rules on access to judicial review under Art. 230 EC must firstly be demonstrated before commencing with the analysis of possible reasons for its existence. In order to provide such a background, the following chapter of the paper will review the conditions for locus standi of private applicants and the fundamental case law on it. Furthermore, the constraints in challenging Community decisions and regulations will be considered in light of the democratic deficit in the EU. The chapter also elaborates on several missed opportunities for reforming locus standi, namely the opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores*¹, the judgment by the CFI in *Jégo-Quéré*², and the new wording of Art. 230(4) in the Treaty of Lisbon.

2.1. Background of Locus Standi- Important Case Law

The Community courts have fenced the Holy Grail of access to judicial review for non-privileged applicants behind several legal obstacles of varying height. A brief overview of the important case law will identify those hurdles and clarify their restrictive attributes. In particular, standing for private applicants is made excessively difficult by the conditions for direct and individual concern, as well as, to some extent, the type of Community measures that can be brought before the Court.

Non-privileged applicants are required by Art. 230 (4) to prove, among other things, that the contested measure concerns them directly. The Court has formulated that there is direct concern when the act constitutes “a complete set of rules which are sufficient in themselves and require no implementing provisions”³. In essence, the condition requires establishing a direct causal link between a Community measure and the legal position of the applicant.

By far the most contested condition for *locus standi* is the test for individual concern. It was developed in the landmark *Plaumann* case⁴ during the early 1960s and has continued until present day to be applied in assessing admissibility. What has

¹ Case T-173/98 [1999] ECR II-3357.

² Case T-177/01 *Jégo-Quéré v Commission*, para. 51.

³ Case 294/83 *Les Verts* [1986] E.C.R. 1339, para. 31.

⁴ Case 25/62 [1963] E.C.R. 95.

been termed ever since as the *Plaumann* test was spelled out by the ECJ in the following formulation:

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.⁵

The Court's subsequent rulings exhibit a restrictive interpretation of the *Plaumann* formula through the so-called "closed class test". In order to be awarded individual concern the applicant must prove that he belongs to a group that could not be expanded after the Community act has entered into force (Parfouru, 2007, p. 383). The market reality of supply and demand usually implies that there is naturally a certain number of firms which does not change dramatically (Craig, 2003, p. 494). The Court's formalistic insistence that a class is only closed if no one can even potentially enter it at any time in effect shuts the door, or at best leaves a tiny crack, for admissibility. This is so because of the type of economy in the EU- it operates as a free market economy governed by the rules of supply and demand rather than heavy regulation of sectors and closed-off industries.

A further problem throughout the years has been for non-privileged applicants to seek judicial review of regulations. This would only be allowed if the party could prove that the Community measure is not in essence a regulation, but rather a decision of individual concern which is merely in form a regulation. That strict requirement, also known as the *Calpak* test⁶ or abstract terminology test, was allegedly created for the benefit of private applicants. The Court envisioned it as a safeguard against a *de facto* immunity of legislators against challenges by simply drafting the measure in the form of a regulation. The aim of the *Calpak* test was to look behind the form, in order to assess the substance of the act. However, the Courts were so excessive in their formalist approach to the test that legislators could anticipate ECJ's limited interpretation and draft the regulation in such a manner as to escape claims by individuals (Craig, 2003, p. 494-5). The abstract terminology test was somewhat

⁵ Ibid, p. 107.

⁶ Case 789 and 790/79, *Calpak SpA and Societa Emiliana Lavorazione Frutta SpA v. Commission* [1980] ECR 1949

liberalised in the *Codorniu* case⁷ when the Court stated that even when the regulation is in fact a ‘true’ regulation, the non-privileged applicant can still challenge it if he proves it concerns him individually (Biernat, 2003, p. 8). The significance of *Codorniu* is that the impact, rather than the form of the measure is taken into account when assessing the *locus standi*. However, as exemplified by consequent case law, this relaxation was limited. Despite the mellowed problem of distinguishing between a decision and true regulation, the applicant would still be required to prove individual concern according to the pure *Plaumann* formula. Thus, in effect, in very few cases could judicial review of a true regulation be allowed, due to the almost impassably elevated hurdle of individual concern.

To sum up, the text of the Treaty gives substantial freedom of interpretation to the Community Courts regarding the tests for direct and individual concern. The ECJ could have developed through case law a more relaxed and flexible construction of the conditions for annulment proceedings by private parties.

2.2. Signs for Possible Reforms by the Community Courts

The *locus standi* of non-privileged applicants to bring action for annulment has received criticism not only from the academic circles but also from within the Community Courts. The need for reform has become so flagrant that internal division in the Community judiciary has manifested. In particular, two attempts for reform from within (both of which resulting in failure) will be discussed- the opinion of Advocate General on the appeal of *Unión de Pequeños Agricultores* and ruling of the CFI in *Jégo-Quéré*.

In his opinion Jacobs AG outlines the objections to the current rules guiding standing, the changes that should be done, and alleviates the fears that such a reform could be problematic. Jacobs AG questioned the availability of effective judicial protection when replacing direct challenges for indirect based on Art. 234. The right to effective judicial protection is one of the cornerstones of societies governed by the rule of law and judicial access is a key aspect of that right (Delaney, 2004, p. 3). However, that right is compromised because the opportunities for private parties to start direct action for annulment are very limited and in some situations it is also impossible to indirectly contest Community measures by means of the preliminary ruling procedure.

⁷ Case C-309/89 *Codorniu SA v. Commission*, [1994] ECR I-1853

The problem stems either from the lack of national implementing acts which could be challenged at the national court or the absurdity that the applicant would have to break the law in order to be able to start proceeding against the sanctions and consequently the measure.

Other objections for Art 234 being an adequate substitute for direct action that Jacobs put forward are the procedural disadvantages for the applicant. If the proceeding is started under Art. 230 the private party could choose which Community measure, or parts of it, wants to challenged. Under Art. 234 it is up to the national court to make that decision, or even to decide whether the case should be referred to the ECJ. Furthermore, preliminary ruling is a more lengthy, and hence more costly, procedure than a direct challenge.

The solution that Jacobs AG proposed was to introduce a new interpretation of individual concern in which the applicant only has to prove that “the [Community] measure has, or is liable to have, a substantial adverse effect on his interests” (Head, 2002, p. 3). The Advocate General proceeded with defending such a solution from a variety of possible attacks. Reform oppositionists could claim that the new test would stand in confrontation with a decades-old case law. Jacobs argued that the case law is not so stable, is too complex, and incoherent with trends from Member States. The other big claim in defense of the traditional approach to individual concern- the apprehension that relaxed conditions for standing will lead to overload of cases, was also refuted. The contra-argument of Jacobs AG was that an unmanageable potential flood of litigation will be prevented by the existence of the CFI and by the remaining conditions of direct concern and time limit for commencing the procedure for annulment.

The second spark of hope for relaxation of the rules on standing manifested itself in the judgment of the CFI in *Jégo-Quéré*. In that case a group of fishermen contested the validity of a Community Regulation that prohibited drift-net fishing. According to the traditional line of argumentation on individual concern, as exhibited in *Greenpeace*, the fishermen should have been denied *locus standi* because the Regulation was a measure of general effect that did not affect the applicants individually (Harlow, 2002, p. 152). Strengthening its resolve to create a precedent through the opinion of Jacobs AG in *UPA* and the willingness of the ECJ to consider the *UPA* appeal, the CFI granted standing to the applicants in *Jégo-Quéré*. It was a decision to focus on the merits of the case, rather than the formality of the individual

concern requirement. With the ECJ's ruling on *UPA* still pending, and in a dramatic departure from existing case law the CFI formulated a new test for individual concern:

“...in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard”⁸

Although this new interpretation of individual concerns contradicts the long-standing case law on *locus standi* it was not overstepping the boundaries set in Art. 230 (4) EC. The CFI ruling merely presented a new way of interpreting the Treaty-based condition for individual concern.

The unfortunate outcome of the aforementioned attempts to revise the rules on standing was that neither of them brought real change. In the case *UPA* the ECJ confirmed the initial traditional ruling of the CFI. In *Jégo-Quéré* the highest Community Court chose not to follow the innovative judgment of the Court of First Instance and reverted to an interpretation of individual concern according to the pure *Plaumann* formula. Furthermore, in *UPA* the ECJ maintained its opinion that a complete system of legal remedies is available to the citizens of the EU. An important sign for the future of the *locus standi* debate was the Court's statement in the same judgment that a new system of judicial review could be possible. However, its introduction should be the result of a decision by the Member States in the form of explicit Treaty revision. Thus, the ECJ passed the proverbial ball to the Member States and refused to engage in judicial activism. In the analysis of the Court's motivation for this position it will be considered why the ECJ is withdrawing from a pro-active role, while it has not shied away from assuming it in a number of previous groundbreaking cases.

2.3. Implication of Conditions for Standing for the Democratic Deficit of the EU

The debate about the democratic legitimacy of the EU has revolved mostly around the fact that the quasi legislative and executive institutions of the Union- the Council and

⁸ Case T-173/98 [1999] ECR II-3357.

the Commission, are not directly elected. Only the Members of the European Parliament can claim popular legitimacy, however, even the elections for the EP are not truly European as they are often dominated by national issues and have very low turnouts. Decisions about the approval of new Treaties is also taken out of the hands of European citizens, as most Member States do not hold referenda on such occasions. The public often sees decision-making in Brussels, and the EU in general as an impermeable black box. Unfortunately, the current rules on standing for legal and natural persons hardly improve the sense of inclusion in the policy making of the EU and the accountability of its institutions.

According to Christopher Lord, there are two elements that constitute legal accountability- the law must be “enforceable by an independent judicial authority” and allow “any citizen on a basis of equality” to bring before court “a complaint that power-holders are seeking to evade or distort the rules by which they are themselves brought to account” (1998, p. 96). The second aspect of this definition is relevant to the subject of study in this paper. Typically, the legal system is utilized to start public interest actions because it is a direct way to challenge public authorities for their use of power (Harlow, 2002, p. 150). In most cases, public interest actions are initiated by interest or pressure groups rather than individuals (ibid). However, interest groups are denied standing due to the Courts’ interpretation of individual concern (e.g. the ECJ’s ruling in *Greenpeace*⁹). Hence, a vital tool for the expression of public interest is made unavailable.

As it was argued in the previous parts, the limiting conditions for standing and the occasional unavailability of remedies before the national courts tarnishes the ability of the Community legal system to provide effective and complete legal protection for European citizens. In that sense, the rules on *locus standi* as they are today exemplify a failure of European law to: (1) protect the rights of Europeans, and (2) include the citizens of the EU in the review of Community measures. The latter point frustrates the process of European integration and even the legitimacy of the Community legal system. Current attempts to forge a feeling of Europeanness and to make the EU a more transparent and accessible entity would be boosted in efficiency if EU citizens had more available access to judicial review of Community measures. The ability to directly challenge an act creates a powerful sense that the individual has

⁹ Case T-585/93, *Stichting Greenpeace Council (Greenpeace International) v. Commission* [1995] ECR II-2205.

a say in the decision-making process and that the institutions that create the laws can be held accountable. The status quo of *locus standi* implies that the EU has an intergovernmental, rather than supranational, federal nature (Parfouru, 2007, p. 365). As a citizen of a nation state, the individual has better opportunities to challenge domestic administrative acts (see part 3), which fosters a sense of well-functioning democracy and a perception that the national institutions represent the interests of the citizens. On a European level the same conclusions cannot be made as the chain of accountability is severed at the point of access to judicial review. A decision either by the ECJ, or by the Member States to reform the rules for *locus standi* would diminish the democratic deficit. However, in the final analytical chapter the paper will explore whether the conditions are purposefully maintained so rigid with the aim to isolate the Community legal order from citizens' challenges.

2.4. The Reformed Locus Standi in the Lisbon Treaty?

The Court of Justice in its ruling on *UPA* passed to the Member States the burden of deciding the fate of *locus standi* for private parties. The response to that shifting of responsibility takes a concrete form in the drafting of the Constitutional Treaty and the Lisbon Treaty. Article 230 EC was replaced by Article III-270 CT. However, following the failed ratification of the Constitutional Treaty, the latest version of the provisions for act of annulment can be found under Art. 263 of the Lisbon Treaty. The wording of latter coincides exactly with the corresponding article of the Constitutional Treaty. The next paragraphs explore the difference between the provisions of the current article on acts of annulment, according to the Nice Treaty, and the proposed text of the Constitutional/Lisbon Treaty.

In order to facilitate the grasping of the differences between the old and the new articles the paragraphs relating to non-privileged applicants are cited. The current formulation in Art. 230 (4) is:

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 wording of Art. 263 (4) in the Lisbon Treaty (and also the text of CT Article III-270) reads:

Any 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.

The changes that are introduced in the new article on action for annulment fail to address the real issue of reforming the conditions for direct and individual concern. Rather, they reflect the new distinction that is made between legislative and regulatory acts (Kombos, 2005, p. 14). Analysis of that dichotomy reveals that some relaxation has manifested, albeit not to the degree needed. For regulatory acts that do not require implementing measures the private applicant would only have to establish direct concern. However, experts criticize the novel formulation of the article on two grounds- that it leads to terminological confusion and that it is still incompatible with the principle of effective judicial protection. On the first issue, Toth points that the only element of lowered threshold for standing, the regulatory acts, is not clearly defined elsewhere in the Treaty which mentions terms such as legislative, non-legislative, and non-binding acts but not the specific term regulatory acts (2004, pp. 2-3). The second problem with the new article consists in the fact that it does not provide remedy for the gaps in the right for effective judicial protection. It does not reform the test for individual concern, thus keeping the possibilities for direct action by non-privileged applicants limited.

The Member States did not pick up the gauntlet that was thrown in their direction by the ECJ in the *UPA* ruling. At present it appears that they are satisfied to keep the conditions for standing restrictive.

3. Comparative Study- Locus Standi in France and the United Kingdom

The following part approaches the problem of locus standi in Community law from a comparative perspective. In particular, the object of study will be the conditions regulating standing of individuals to challenge administrative acts under two different national legislative systems. The choice has been done to analyze administrative law of France and the United Kingdom based on dual grounds- (1) they are pivotal Member States with well-established legal traditions, and (2) they exhibit slightly divergent approaches to legal standing but nonetheless are fitting examples of the trend in Member States' national administrative law regarding the subject.

3.1. The French example- intérêt à agir

A starting point in the investigation of legal standing of private individuals in French administrative law is the establishing of a meaningful link between the latter and European law. According to Bell and Brown “...*droit administratif* has had a profound influence on the law and procedure of the Court of Justice of the European Communities” (Bell & Brown, 1998, p. 279). Moreover, the controversial Art. 230 dealing with Community action for annulment was originally tailored after the French *recours pour excès de pouvoir* (procedure for judicial challenge of administrative law) which has, however, subsequently foregone substantial liberalising changes (Granger, 2003, p. 132). On that occasion, the following analysis delves into the current conditions for *intérêt à agir* in France and why they constitute a more relaxed model of access to justice for private applicants.

In contrast to the Anglo-Saxon legal system which will be considered afterwards, the French administrative system views locus standi for individuals as a means to ensure that administrative bodies are checked by courts (Elgar, 2006, p. 26). In French law there is a clear distinction between legislative and administrative acts. Article 34 of the French Constitution prevents private applicants from challenging legislative acts while Article 37 allows them to contest administrative acts through the REP procedure (Parfouru, 2007, p. 378). In that sense, the French system appears more restrictive regarding the types of acts that are contestable by individuals than the EU which allows regulations to be challenged. However, establishing direct and

individual concern under EU law is much more difficult than fulfilling the respective conditions under French law (*ibid.*).

The interpretation by the French administrative courts of the condition equivalent to direct concern in EU law is distinctly more liberal than that by their European counterparts. Although the formal requirement by the Conseil d'Etat is that the private applicant is affected in a sufficiently direct manner¹⁰ the case law shows that courts merely require that the link between the measure and the applicant should not be “exaggeratedly indirect” (Parfouru, 2007, pp. 381-2). For example, a spa hotel keeper who contested a school regulating measure reducing the number of allowed water cures per year (thus having an impact on his business) was granted direct concern by the French court (*ibid.*).

A further indicator for the liberal stance of the French administrative courts in comparison to the CFI or ECJ relates to the application of the condition of individual concern (*intérêt personnel*). The French court concludes in the *Administrateurs Civils* decision that the “negative consequences [of the measure] must reach the applicant in a particular quality, by belonging to a defined and limited category” (*ibid.*, p. 391). However, the familiarly sounding “defined and limited category” is given a generous interpretation by French administrative courts, thus distancing it from the constricting jurisprudence on the European counterpart termed “closed class”. In fact, case law in France has shown that the courts implement the “defined and limited category” term merely as a precautionary measure to prevent an *actio popularis*. Generally, the courts require only that the situation of the applicant is connected to the challenged act (*ibid.*, p. 392). In that sense, *intérêt personnel* which is applied as a condition to prove personal, rather than individual concern excludes the necessity of belonging to a closed class established by the ECJ.

The ECJ's line of reasoning in *Universale Bau* that challenges under Art. 230 are admissible only in the absence of national legislation in the subject is also found in the French legal system. Starting a REP before the Conseil d'Etat is allowed only in the absence of parallel relief (Bell & Brown, 1998, p. 169). This is done to prevent a large influx of challenges to the French administrative courts.

Judicial review of administrative acts in France also has a time limit. A procedure can be started within 2 months of the act's publishing or notification (Bell

¹⁰ Conclusions Théry in CE Sect. 28 mai 1971, *Sieur Damasio*, Rec. 391, 397.

& Brown, 1998, p. 170). Nevertheless, the plaintiff can raise a point even after those 2 months if the administrative act is argued to have been illegal (*exception d'illégalité*) (ibid, p.171).

A comparison between *intérêt personnel* and individual concern reveals how a similarly written condition can be interpreted in tangibly different ways. This is an example of the great limits of discretion given to courts to put practical meaning to abstract terms. Regretfully, the European Court of Justice has chosen the path of restrictive interpretation. Its claim that changes in the condition for individual concern is possible only through Treaty reform can be contested in light of the French example. It is possible to interpret the textual provision of individual concern in a more liberal manner- something that the Conseil d'Etat has been doing.

3.2. An Example from the United Kingdom

It was mentioned previously that the British and French legal systems attach different importance to the access to justice for private applicants. Whether French law on the subject is motivated by the goal to keep judicial control over the administration, British law perceives locus standi for individuals as a guarantee for the upholding a fundamental citizen right to justice (Elgar, 2006, p. 26). This subsection will show how the British rules on standing have been liberalized into their present form, what is the reason for that transformation and whether it can be related to the situation of *locus standi* in Community law.

The British law on standing underwent substantial changes in the early 1980s. The old administrative law contained a number of restrictive rules and procedures. For example, there existed different rules for different remedies and there lacked a single proceeding for judicial review of measures by public authorities (Forsyth & Wade, 2004, p. 680). Locus standi for some of the remedies (i.e. certiorari and prohibition) was quite relaxed, however, for others (i.e. mandamus and injunctions) it was much stricter and it required proving that “the person’s legal rights have been affected or a person to have suffered special damage” (Jones & Thompson, 1996, p. 295). This formulation in the old laws on standing is quite reminiscent of the wording of the condition for direct concern that still guides the test for *locus standi* in EU law. In the new law on standing of claimants the various tests for personal standing were substituted by a uniform, liberal requirement- the applicant must show “a sufficient

interest in the matter to which the application relate” (Cane, 2004, p. 64). This requirement was written in the groundbreaking reformist Order 53 of the Rules of the Supreme Court (nowadays the Civil Procedure Rules 1998 part 54) which was then incorporated in Section 31(3) of the Supreme Court Act of 1981. In effect, the “sufficient interest” test for proving personal standing opens the possibility of access to judicial review in a wide array of situations.

The British equivalent of the Community condition of individual concern is the requirement to show representative standing. Already the terms imply that in the UK the condition allows for a significantly wider participation of private applicants. Apart from the individual himself, British courts accept claims by three other types of applicants- those claiming surrogate, associational, or citizen standing (ibid, p. 68). This means that British law provides for the protection of wider components of the population by allowing representation of group interests (e.g. unions, women, environmental protection), or even claims in the name of the public interest (ibid, p. 69). The rule is so all-encompassing that it comes to approximate an *actio popularis*. Bell and Brown go as far as to claim that even in comparison to the relatively liberal French rules on *locus standi* the UK requirements on standing are so lax that they are merely an “afterthought” for British judges who “proceed to deal with the substance of the case” (1998, p. 168).

Nevertheless, it was noted that laws on standing in the UK were not initially so relaxed as at the current point in time and that the status quo is a result of the legal reform from the late 1970s- early 1980s. British judges were reluctant to relax the rules on standing due to apprehension that the courts will be overwhelmed by a huge number of cases (Forsyth & Wade, 2004, p. 680). We can thus easily draw the comparison between the concerns regarding *locus standi* in Britain 30 years ago and the problems being experienced on a European level at the present. Perhaps the motivation for braving to adopt new laws on standing in the UK could be an inspiration for the ECJ as well. A closer examination of the statements by leading British practitioners of law in the late 1970s sums up the driving force behind the reforms. For example, Lord Roskill comments in 1981 on the changes introduced by Order 53: “They were designed to stop the technical procedural arguments which had too often arisen and thus marred the true administration of justice...” (ibid, pp. 695-6). Similar considerations are expressed in Lord Diplock’s statement:

“It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation [of taxpayers], or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.” (ibid, pp. 693-4)

In other words, the reforms on standing in the UK aim at creating an efficient system of administrative law, guided by liberal principle, and able to focus on the substance, rather than the formality of the case. The new laws on standing are a reflection of the realisation that citizens must be given the opportunity to “...prevent illegalities in government which otherwise no one would be competent to challenge” (ibid, p. 680).

3.3. Lessons from the Comparative Study

The two comparative case studies on domestic laws regarding standing that provided examples from France and the UK shed a rather unflattering light on the stance of the ECJ on *locus standi*. The rules on standing in the two Member States present two different approaches to the issue. The French doctrine is formally reminiscent of the European, however, the case law developed by the French administrative courts has infused a more liberal meaning to the word of the law. It is an example how even in the frame of the existing text of Article 230 the conditions for direct and individual concern can be relaxed in favour of a more inclusive right of access to justice for private applicants. The ECJ, unlike the Conseil d’Etat, has continuously interpreted the conditions to the detriment of individuals. Despite the fact that the French system is not as liberal as the British, compared to the European doctrine it is nonetheless very progressive. Due to the similarities in the foundational conditions of French and European rules on standing, it is feasible to envision a reform in the Community *locus standi* modeled after the mode of interpretation in France.

The second approach to standing of private applicants is the British one. Compared to the European access to justice, it stands out as an example of citizens’ rights and democracy considerations taking precedent over technocratic fears of litigation overload. Although a reform of the Community *locus standi* to the extent of the British relaxed rules seems unrealistic, it should at least serve to alleviate ECJ’s concerns of opening the floodgates of Art. 230(4) cases.

The overall conclusion that can be drawn from this comparative study is that the ECJ is upholding an outdated interpretation of the conditions for standing. That

approach of the Court is creating an increasing divide between the Community legal system and the judicial trends in the Member States. Such a conservative behavior of the Court of Justice starkly contradicts its reputation of a progressive judicial tribunal. Past innovative decisions by the ECJ have established it as a legal trend-setter, rather than trend-follower but the Court is not even willing to learn from national examples in the issue of *locus standi*. In the next part the possible reasons for this conduct are being analyzed.

4. Analysis of the Motivations for Resisting Changes

So far, the paper has presented some of the key controversies in the debate on *locus standi* for natural and legal persons. Often, academic studies of the problems with Art. 230(4) EC do not investigate further about the motivations of the Court of Justice to maintain the conservative interpretation on standing. Even if there are some explanations mentioned, they tend to run along the lines of purely legal reasoning. However, the ECJ is not functioning in a hermetically sealed environment. Despite the presumption of judicial independence the Court is nevertheless one of the main institutions in the highly political organization that is the European Union. Moreover, the decisions of the Community Courts often have political implications. In light of this political side of the EU judicial institutions, there is merit in applying theories from the realm of political science to the analysis of the ECJ's stance on *locus standi*. This paper proposes three ways in which the Court's motivation could be explained. Firstly, we look at the problem through the prism of rational-choice institutionalism and use as supporting empirical evidence the Court's promotion of the standing of the EP and the ruling in *UPA* to resolve the individual concern issue through Treaty amendment. Secondly, historical institutionalism suggests an alternative argumentation for the lack of judicial activism in reforming standing for private parties. In this case, the analysis uses examples of previous innovative legal doctrines which were initiated by the ECJ and contrasts them to the rules on *locus standi*. Thirdly, remaining within the concepts of the historical institutionalist theoretical framework, the study focuses on the significance of path dependence due to the firmly established case law on standing.

4.1. Rational-Choice Approach to Explaining the Status Quo

The continued traditional interpretation of standing by the Court of Justice could be explained in line with rational-choice institutionalism (RCI). The facts on which the explanation is based are the active role of the ECJ in upgrading the standing of the European Parliament to full-fledged privileged applicant and the consequent choice to leave the decision regarding the *locus standi* of private parties in the hands of the Member States.

RCI, much like liberal intergovernmentalism, views states as the leading actors. They set up institutions in order to reduce transaction costs and, in general terms, because “states benefit from the functions performed by them” (Eilstrup-Sangiovanni, 2006, p. 195). It is crucial to note that according to RCI preference formation is external to the institutions, thus they do not pursue their own interest simply because that interest is not something originating from the institution itself. Instead, “institutions are seen as crucial in distributing decision-making power among competing actors” (ibid). This explains why the ECJ took an active role in awarding privilege standing to the EP- it was merely fulfilling its function as re-distributor of power. The Member States still have the authority, according to Garrett, to reverse that decision by the ECJ through treaty revision, however, if they choose not to it is because the Court’s activism has provided “an efficient solution to problems “(Garrett quoted in Eilstrup-Sangiovanni, 2006, p. 196). Apparently, the Member States did see an efficient solution in the Court’s initiative to elevate the standing of the EP because the treaty was altered to accommodate for that change. Garrett continues that the Court of Justice can be perceived as a strategic actor that anticipates when states will not be in approval of its decisions and therefore does not even make them (ibid). This means that the Court only engages in judicial activism when it foresees that the Member States would endorse it. The fact that in *UPA* and *Jégo-Quéré* the ECJ refrained from initiating reforms is a reflection of the Court’s expectations that the Member States would disapprove. We could deduce that the Court was correct in its estimation, because at the next treaty revision the states made their position clear by not substantially revising the conditions for standing (see 2.4).

4.2. Locus Standi and Previous Judicial Activism from Historical Institutional Perspective

A different explanation of the ECJ’s reluctance to initiate a reform of the conditions for standing takes the theoretical angle of historical institutionalism (HI). HI also allocates an important role to Member States at the initial stage of creating the institutions as a instrument to serve their interests (Eilstrup-Sangiovanni, 2006, p. 198). In other words, when the ECJ was set up the Member States designed it to their liking. However, after this original moment of full control the new institution becomes entrenched and more difficult to change. Examples for the growing relative

independence of the ECJ are the doctrines of direct effect and state liability which defied the wishes of Member States. As Rosamond elaborates, once created institutions tend to pursue their own interests (e.g. continuing their agenda, self-preservation) and may contradict their initial makers (2003, p. 116). In that respect HI differs from RCI because in the former the preference of the institution can be internally formulated. This means that the ECJ generates its own interests and seeks to achieve them, rather than be merely a distributor of inter-institutional power that receives its preference from the outside actors. According to HI, the Court can have an influence that its creators had not anticipated or desired because the levers to control the institution become more limited with the pass of time. The independence that the Member States' have delegated to the ECJ can only be revoked through a unanimous Treaty revision. The same is valid also when the Court engages in judicial activism. The joint-decision trap, a term coined by Fritz Scharpf, points precisely to the fact that Member States are constrained by unanimity voting when they want to block changes desired by other actors (Eilstrup-Sangiovanni, 2006, p. 195). This is way the Court's doctrine of state liability was permitted to be established.

The argument proposed by this paper is that the ECJ does not wish to reform the rules on standing of non-privileged applicants not because it is afraid of being sanctioned by its creators, the Member States- in the past the Court has on multiple occasions managed to push through legal changes in the backdrop of national resistance (direct effect and state liability doctrines). Then, on the basis of HI, it can be claimed that the ECJ is resisting reforms on the grounds of its own self-interest. One possible self-interest could be the protection against an overload of litigation as a result from the expected increased number of applicants that would be granted standing. That argument was put forward by Jacobs AG in his opinion on *UPA*.

It is more intriguing though to analyze another type of self-interest- one that is more politically, rather than practically motivated. This study suggests that the ECJ is assuming the role of quasi guardian of the Treaty and is defending the very nature of the Community legal order- its genesis as an international treaty (Delaney, 2004, p. 3). This claim can be illustrated with a comparison between the instances when the Court has engaged in judicial activism and the issue of *locus standi* where the ECJ refuses to take the lead. In order to pursue such an analysis we must assume that the first motivation for upholding the status quo which was explained in the previous subsection is not the real factor influencing the stance of the Court. Put differently, for

the purpose of this potential impetus we exclude the ability of Member States to effectively intervene in an act of judicial entrepreneurship and the cautious approach by the ECJ as a result of anticipatory apprehension of Member States retaliation. Commencing with the analysis, a question immediately arises, namely, what distinguishes the reform of *locus standi* from the establishment of direct effect and state liability? Apparently, there is some aspect that induces the ECJ to be innovative and daring in the case of the latter, and conservative and cautious in the case of the former. The previous instances in which the Court exhibited pioneering activism concerned the promotion of Community law over national (direct effect and supremacy of EU law), improving the accountability of the Member States (state liability) or forwarding the interests of another supranational institution (elevating the standing of the EP in Art. 230). What all these examples have in common is that they advance the prominent status of the EU as a supranational structure. That preference of the ECJ is not random. The Court has an inclination towards a supranational type of EU (Parfouru, 2007, p.365) because it serves its interests better and strengthens its own position *vis-à-vis* the Member States. On the other hand, a liberal interpretation of standing makes Community measures more vulnerable to external attacks. Consequently, by refusing to reform the conditions for *locus standi* the ECJ is acting as a guardian of the Community, giving it immunity to challenges.

4.3. Path Dependence

Yet another possible cause for the Court's position is the path dependence of long-standing case law on *locus standi* which cannot be done away with easily. The concept of path dependence is one of the main premises of HI . As Levi remarks regarding path dependence, after an initial choice that starts “down a track, the costs of reversal may be high and will tend to increase over time. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice” (Levi quoted in Eilstrup-Sangiovanni, 2006, p. 198). In the case of *locus standi* the initial choice of interpretation of the Treaty conditions was made with the ruling in *Plaumann*. Since then the ECJ has had multiple opportunities to reverse the test for individual concern. Instead, as predicted by the path dependence tenet of historical institutionalism, the Court found itself entrenched by the long-standing case law and is adhering to the path of strict *locus standi* doctrine. The costs

of reversing it would include not only higher case load, but also loss of legal certainty. However, this leads to “path inefficiency”, manifesting itself in incomplete system of legal protection and sub-optimal accountability of the EU through judicial means. Eilstrup-Sangiovanni describes the problem of path inefficiency in the following manner: when the institution (ECJ in our case) was first created it offered “efficient solutions to given social problems” (ibid, p. 199). Indeed, it can be observed that in its early days the interpretation of standing by the Court of Justice was in line with the national doctrines at the time. However, the continued description of path inefficiency states that “in the long run, the outcome that becomes ‘locked in’ may generate lower payoffs than a foregone alternative would have” (ibid). The “lower payoffs” are demonstrated by the increasing dissatisfaction with the status quo.

5. Conclusion

The study that was concluded exhibits that the ECJ remains persistent to keep *locus standi* for non-privileged applicants to judicial review of Community acts trapped in a limbo. At present, the ECJ is torn between the heaven of being credited for developing an active European civil society and upholding the principle of effective judicial protection and the hell of opening the floodgate of case law and wreaking, yet again, the wrath of the Member States through judicial activism.

Presumably, the highest value added of this paper is contained in the part dealing with possible explanations for the conservative stance of the ECJ. The interdisciplinary approach of applying theories of political science on a legal subject has revealed several motivations for the Court's position on *locus standi*. If we assume that the ECJ is only an externally influenced distributor of power among the EU institutions, then its reluctance to reform standing for individuals is due to anticipating negative reception of substantial changes on behalf of the Member States. According to the reasoning of rational-choice institutionalism, the Court only engages in activism when it is given the impetus by external actors and expects the changes to be approved by the majority of Member States. Therefore, one can deduce that a reform of the *locus standi* conditions will be conducted only when the EP, Commission, and most importantly, the Member States push for it. As is clear by the new formulation of the article on action for annulment in the Constitutional and Lisbon Treaties the Member States are still unwilling to change the tests for direct and individual concern. An alternative approach to the question what motivates the Court's lack of initiative is rooted in the theory of historical institutionalism. It was argued in the paper that the ECJ is acting on the basis of self-interest. The Court's willingness to perform doctrinal changes was evident in the cases of direct effect and supremacy of EU law, and the establishment of Member State liability for breaches of Community legislation. However, that judicial activism was undertaken to enhance the Court's influence in the EU and promote a top hierarchical position of Community law vis-à-vis national legal systems. Having the immunity of the joint decision trap that Member States face when they want to reverse a judgment by the ECJ, the Court could have also established new rules for standing on its own valuation. The last interpretation of the status quo on access to judicial review uses the concept of path

dependence. Policy choices made in the early days of the life of the institution (i.e. the interpretation of individual concern in *Plaumann* during the 1960s) have become entrenched and too high costs would have to be incurred in order to change them. Therefore, despite the path inefficiencies that are sustained due to the incompleteness of the system for judicial remedies, the initial choice is maintained.

The qualitative analysis presented in this paper is not meant as a conclusive answer to the ongoing polemics on *locus standi* of non-privileged applicants under Art. 230 (4). Rather, it should be perceived as an attempt to approach the discussion from a different academic perspective. The motivations and the theories on which they were based are only some of the multiple possibilities that could be explored. Further research that intertwines the legal and political disciplines could produce additional argumentations. This could be enriching for the debate on standing which has so far been predominantly dominated by legal reasoning.

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