

PERSPECTIVES ON THE NOTION OF “INDIVIDUAL CONCERN”: HOW TO ENHANCE THE NON-PRIVILEGED APPLICANT’S POSITION BEFORE THE EUROPEAN COURTS

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Introduction

Since 1963, when the European Court of Justice, hereinafter – the Court, adapted its famous *Plaumann* test,¹ the Court’s attitude towards the notion of individual concern has been widely discussed and, most frequently, criticised. Just a few years ago, AG Jacobs and the Court of First Instance, hereinafter – the CFI, came with an initiative for amending the interpretation of the notion of individual concern in, respectively, *UPA*² and *Jégo-Quéré*.³ However, the Court insisted on the correctness of its approach in the context of Community law and made it clear that it is for the Member States to introduce amendments in the EC Treaty⁴ if they want to change a non-privileged applicant’s position under Art. 230(4) EC.⁵ Member States responded to this invitation from the Court and amended the relevant legal provision when drafting the Constitution for Europe,⁶ hereinafter – the Constitution.⁷

During the meeting of the Council of the European Union in Brussels in June 2007, Member States decided “after two years of uncertainty over the Union’s treaty reform process [...] to move on”.⁸ As a result, an idea of the Constitution has been rejected and the EC Treaty and EU Treaty⁹ have been amended by the 2007 Intergovernmental Conference in line with the mandate given by the Brussels

¹ Case C-25/62 *Plaumann v Commission* [1963] ECR 95: “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.”

² Opinion of AG F. Jacobs, Case C-50/00P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

³ Case T-177/01 *Jégo-Quéré et Cie v Commission* [2002] ECR II-2365.

⁴ Consolidated version of the Treaty Establishing the European Community, OJ C 321 of 29 December 2006.

⁵ Case C-50/00P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 45.

⁶ Treaty establishing a Constitution for Europe, OJ C 310 of 16 December 2004.

⁷ J.A. Usher, “Direct and Individual Concern – an Effective Remedy or a Conventional Solution” (2003) 28(5) *E.L.Rev.*, p. 595.

⁸ The Presidency Conclusions of the Brussels European Council (21/22 June 2007), para. 8 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf> accessed 10 July 2007.

⁹ Consolidated version of the Treaty on European Union, OJ C 321 of 29 December 2006.

European Council.¹⁰ The work of the 2007 Intergovernmental Conference has resulted in the adoption of the Treaty of Lisbon¹¹ by Member States on 13 December 2007. In accordance with the IGC Mandate, “The innovations as agreed in the 2004 IGC will be inserted into the [EC] Treaty [...]”¹² That means that Art. 230(4) EC have been amended so as to correspond to Art. III-365 of the Constitution.

In this paper, the recent developments of the notion of individual concern in the Community legal system will be analysed. It is very important to understand the possible impacts of the “new” Article 230(4) EC,¹³ as a judicial review is one of the cornerstones of the principle of the rule of law.¹⁴ At the same time, one of the aims of this paper is to find out appropriate solutions for improvement of a non-privileged applicant’s position under Art. 230(4) EC. The legal orders of some Member States (Germany, France, Latvia, Estonia) could be helpful in order to achieve this aim, especially laws governing procedures of administrative and constitutional review in those Member States. In the author’s opinion, judicial review is another area of law, except fundamental rights, in which the European Union and its Courts could draw inspiration from the Member States in order to guarantee the rule of law within the Union.

The first part of this paper will be dedicated to a brief overview of the Court’s case law on the notion of individual concern. In the second part, the “new” Art. 230(4) EC will be analysed in order to identify novelties in comparison to its existing wording and possible weak points of the new wording. In the third part, the ability of the “new” Art. 230(4) to solve a “complete denial of remedy” and a “denial of effective remedy” problem will be analysed. The fourth part will be dedicated to the perspectives of the notion of individual concern and a non-privileged applicant’s position in the context of the “new” Art. 230(4) EC.

¹⁰ The Presidency Conclusions of the Brussels European Council (21/22 June 2007), para. 10 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf> accessed 10 July 2007.

¹¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007.

¹² IGC 2007 Mandate, para. 4 <<http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf>> accessed 10 August 2007.

¹³ According to the IGC 2007 Mandate, the EC Treaty is going to be renamed into the Treaty on the Functioning of the European Union. See: IGC 2007 Mandate, para. 2 <<http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf>> accessed 10 August 2007.

¹⁴ A.S. Mathiesen, “Public Participation in Decision-Making and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes” (2003) 12(2) European Env.L.Rev., p. 36 – 52.

1. Individual concern from *Plaumann* to *Jégo-Quééré* and *UPA* – a brief overview

In order to provide an appropriate analysis of the perspectives of the notion of individual concern, it is necessary and useful to consider its history and to recall some of the main points in the development of that notion. First, it is necessary to remember that “the influence of the French administrative court system is clearly evident”¹⁵ in the initial concept of judicial review in the Community legal system, although some German influence is evident as well.¹⁶ It follows that the idea of judicial review is not something unique and specially developed for the Community legal system. However, although the idea of judicial review has been inspired by the French legal system and influenced by some German legal traditions, the Court had a significant and even decisive role in developing the Community’s own system of judicial review through its case law.¹⁷ Therefore, at the end of this paper, it will be interesting to conclude whether the Court did the best it could have done for the development of the notion of individual concern and whether it could have taken more from the Member States in order to enhance the Community system of judicial review and especially the interpretation of that notion.

a. Substance of the Plaumann test

Art. 230(4) EC provides for a natural or a legal person the possibility to institute proceedings not only against the Community measure (usually a decision) which is addressed to that person, but also 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”. Direct concern generally means that a measure “directly affects the legal situation of the applicant and leaves no discretion to the addressees of [that measure], who are entrusted with its implementation”,¹⁸ and this condition

¹⁵ J. Schwarze, “Judicial Review in EC Law – Some Reflections on the Origins and the Actual Legal Situation” (2002) 51 ICLQ, p. 19; see also: M.-P. Grangier, “Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quééré et Cie SA v Commission* and *Unión de Pequeños Agricultores v Council*” (2003) 66 MLR, p. 132.

¹⁶ D. Hanf, “Facilitating Private Applicants’ Access to the European Courts? On the Possible Impact of the CFI’s Ruling in *Jégo-Quééré*” (2002) 3(7) *German L.J.* <<http://www.germanlawjournal.com/article.php?id=166>> accessed 10 June 2007.

¹⁷ J. Schwarze, “Judicial Review in EC Law – Some Reflections on the Origins and the Actual Legal Situation” (2002) 51 ICLQ, p. 20.

¹⁸ P. Craig, G. de Burca, *EU Law: Text, Cases and Materials*, 3rd edn (OUP, Oxford 2002) p. 518.

has not provided a ground for wide discussions and criticism. As mentioned before,¹⁹ this is not the case with the Court's interpretation of individual concern in *Plaumann*, where "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."²⁰ The approach taken by the Court in *Plaumann* has to be considered as "a highly restrictive substantive test"²¹ for private and natural persons who want to show that they are individually concerned by the Community measure at issue. However, the development of the Court's case law on the notion of individual concern has shown that the Court has strongly decided to keep its approach as strict as it was from the beginning.²² As a result, it is almost impossible for a non-privileged applicant to institute proceedings successfully against the Community measure of general application under Art. 230(4) EC,²³ and a question remains whether it was a real intention of the founders of the Community.

From the early 1960's the substance of the notion of individual concern has been developed by the Court by means of interpretation.²⁴ At the same time, the Court has always been of the opinion that the *Plaumann* test is the only way to interpret Art. 230(4) EC correctly.²⁵ It seems doubtful whether it was correct and even possible for the Court to avoid (or to ignore the possibility of) re-interpretation of the notion of individual concern by taking into account major modifications that have touched the European Community during at least forty years since the *Plaumann* test was adopted.

But it is not only the Court that has to be blamed for a too restrictive interpretation of the notion of individual concern. Also Member States have to take at least a part of the blame as they did not react when the Court in 1995 suggested amending the

¹⁹ See p. 3 above.

²⁰ Case C-25/62 *Plaumann v Commission* [1963] ECR 95.

²¹ A. Ward, *Judicial Review and the Rights of Private Parties in EC Law* (OUP, Oxford; New York 2000) p. 215.

²² *Ibid*, p. 216.

²³ C. Koch, "Locus Standi of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individual's Right to an Effective Remedy" (2005) 30(4) E.L. Rev., p. 513; see also: M.-P. Grangier, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quéré et Cie SA v Commission* and *Unión de Pequeños Agricultores v Council*" (2003) 66 MLR, p. 127.

²⁴ N. van den Broek, "A Long Hot Summer for Individual Concern? The European Court's Case Law on Direct Actions by Private Parties... and a Plea for a Foreign Affairs Exception" (2003) 30(1) Legal Issues of Economic Integration, p. 76.

²⁵ C. Berg, F. Bain, "No room at the European Court?" (2002) 152 NLJ, p. 1533.

EC Treaty in order to increase the non-privileged applicants' rights.²⁶ Such reluctance on behalf of Member States obviously sent a signal to the Court that application of the *Plaumann* test could, or even had to, be continued in the previous manner.

b. Legal instruments in the context of Art. 230(4) EC

While having a very strict approach towards the notion of individual concern, the Court has interpreted Art. 230 EC "very widely with regard to the acts which may be challenged".²⁷ At first sight, only two legal instruments in relation to the notion of individual concern are relevant – a decision addressed to another person and a decision in the form of a regulation. In accordance with Art. 249 EC, a distinction between a decision and a regulation is that the former is binding upon those to whom it is addressed, but the latter has general application. However, the main principle is that the Community institutions cannot deprive a natural or a legal person of his or her right to institute proceedings against the Community measure under Art. 230(4) EC just by choosing a generally applicable Community measure as an instrument to affect that particular person's legal position.²⁸ At the same time, that does not mean that proceedings instituted by a non-privileged applicant against the Community measure of general application (a regulation and even a directive) will succeed before the European Courts – as it has been pointed out earlier in this paper, the strictness of the *Plaumann* test is a significant obstacle in the way of non-privileged applicants.²⁹

Since the beginning of the 1980s, there have been just a few cases when the Court admitted that a regulation is of individual concern to an applicant.³⁰ The most famous, of course, was the *Codorniu* case.³¹ It is not necessary to return to facts of that case here. It would be enough just to mention that the Court recognised that a true regulation can be of individual concern to the applicant.³² It is obvious that

²⁶ T. Hartley, *The foundations of European Community law: an introduction to the constitutional and administrative law of the European Community* (OUP, Oxford 2003), p. 370.

²⁷ J.A. Usher, "Direct and Individual Concern – an Effective Remedy or a Conventional Solution" (2003) 28(5) E.L.Rev., p. 576.

²⁸ P. Craig, G. de Burca, *EU Law: Text, Cases and Materials*, 3rd edn (OUP, Oxford 2002) p. 487.

²⁹ See: *supra*, p. 6, where the definition of the *Plaumann* test and consequences of its application has been discussed.

³⁰ A. Ward, *Judicial Review and the Rights of Private Parties in EC Law* (OUP, Oxford; New York 2000) p. 218.

³¹ Case C-390/89 *Codorniu SA v Council* [1994] ECR I-1853.

³² Case C-390/89 *Codorniu SA v Council* [1994] ECR I-1853, para. 18; see also: S. Enchelmaier, "No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC" (2005) 24 YEL, p. 176; and J.A. Usher, "Direct and Individual Concern – an Effective Remedy or a Conventional Solution" (2003) 28(5) E.L.Rev., p. 577.

Codorniu is a really exceptional judgment in the Court's case law and, as a result, it has been honoured and evaluated as a turning point in the Court's strict approach towards the notion of individual concern.³³ However, this judgment has also a negative factor – as an exception, it only added more uncertainty in the understanding of Art. 230(4) EC. It has been admitted that "A remarkable feature of the Union's set of legal instruments is the absence of a genuine hierarchy of legal acts that is well known in the national legal orders".³⁴ In addition, the Court's case law through the years has shown that it is not the name of a measure that determines its legal nature. It is rather the substance of that act. As a result, a non-privileged applicant's position under Art. 230(4) EC gets even more complicated and it is questionable whether such a situation enhances the availability of judicial review for Union citizens.

c. Relaxations – closed classes, specific rights, and procedural participation

The restrictive *Plaumann* test has been applied through the years in all cases where the question of the individual concern of the contested measure to the applicant was at issue. At the same time, the Court provided some relaxation to that test in certain categories of cases, namely, in anti-dumping, state aids, and competition cases.³⁵ But that does not mean automatically that in all cases in these areas of Community law an applicant will obtain standing under Art. 230(4) EC. It is necessary to show, e.g. that an applicant belongs to the closed class – "a class of persons the membership of which is fixed when the measure comes into force".³⁶ Another possibility to acquire standing under Art. 230(4) EC would be to show that specific rights of a non-privileged applicant are impaired. *Codorniu*³⁷ is a good example in that regard – the applicant was able to demonstrate that he had obtained certain rights long before he was deprived of these rights by the Community regulation.

³³ See, e.g.: P. Craig, G. de Burca, *EU Law: Text, Cases and Materials*, 3rd edn (OUP, Oxford 2002), p. 494; A. Ward, *Judicial Review and the Rights of Private Parties in EC Law* (OUP, Oxford; New York 2000), p. 224; E. Biernat, "The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community" (2003) 12/03 *Jean Monnet Working Paper*, p. 10 <<http://www.jeanmonnetprogram.org/papers/03/031201.pdf>> accessed 10 June 2007.

³⁴ K. Lenaerts, M. Desomer, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures" (2005) 11(6) *European Law Journal*, p. 745.

³⁵ S. Enchelmaier, "No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC" (2005) 24 *YEL*, p. 179.

³⁶ T. Hartley, *The Foundations of European Community law: an introduction to the constitutional and administrative law of the European Community* (OUP, Oxford 2003), p. 361; see also: Case C-11/82 *Piraiki – Patraiki v Commission* [1985] ECR 207.

³⁷ Case C-390/89 *Codorniu SA v Council* [1994] ECR I-1853; see also: Joined cases T- 480/93 and T-483/93 *Antillean Rice Mills NV. v Commission* [1995] ECR II-2305.

However, it is important that those specific rights are absolute (as opposed to contractual rights) and definitive, *i.e.* the holder of these rights has them against everyone and he cannot be deprived of these rights unless he receives compensation for such a deprivation.³⁸ The third group of “exceptional” cases are related to the participation of the applicant in the process of the adoption of the act³⁹ as, *e.g.* “The companies on whose expertise the Commission has drawn are the most competent to spot any flaws in the division of the regulation ultimately adopted”.⁴⁰

In addition, it would be appropriate to mention here the *Les Verts* judgment⁴¹ where the Court took a “lenient”⁴² approach to the notion of individual concern, but this is really an exceptional case as it concerned the very specific question of allocation of funds for covering expenses of political parties taking part in the European Parliament elections in 1984.

d. The EC Treaty – a complete system of remedies

In its *UPA* judgment,⁴³ the Court insisted that the system of judicial protection is complete. In the Court’s opinion, three Articles of the EC Treaty – 230, 234, and 241 – ensure “effective judicial protection of the rights they derive from the Community legal order”.⁴⁴ The Court had to make this statement as in two cases – *UPA*⁴⁵ before the Court and in *Jégo-Quééré*⁴⁶ before the CFI – applicants pled that their rights to effective judicial protection are violated by too restrictive conditions for standing laid down in Art. 230(4) EC. However, that seemed to be more a plea against constant application of a too restrictive *Plaumann* test by the Court rather than a real attack against the wording of that Article.

On the other hand, if the Court would have hesitated to highlight the completeness of the system of judicial protection within the Community that would automatically mean that the Court would have to reconsider its previous case law on the

³⁸ S. Enchelmaier, “No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice’s Jurisprudence on Art. 230(4) EC” (2005) 24 YEL, p. 189.

³⁹ *Ibid.*, p. 184; see also: E. Biernat, “The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community” (2003) 12/03 *Jean Monnet Working Paper*, p. 15 <<http://www.jeanmonnetprogram.org/papers/03/031201.pdf>> accessed 10 June 2007; J. Shaw, *Law of the European Union*, 3rd edn (Palgrave, Basingstoke 2000) p. 518.

⁴⁰ S. Enchelmaier, “No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice’s Jurisprudence on Art. 230(4) EC” (2005) 24 YEL, p. 180.

⁴¹ Case C-294/83 *Parti Ecologiste “Les Verts” v Parliament* [1986] ECR 1339.

⁴² P. Craig, G. de Burca, *EU Law: Text, Cases and Materials*, 3rd edn (OUP, Oxford 2002), p. 509.

⁴³ Case C-50/00P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 40.

⁴⁴ *Ibid.*, para. 39.

⁴⁵ Case C-50/00P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

⁴⁶ Case T-177/01 *Jégo-Quééré et Cie v Commission* [2002] ECR II-2365.

application of the notion of individual concern. AG Jacobs in his Opinion in *UPA*,⁴⁷ para. 39, has pointed out, with a reference to *Johnston*,⁴⁸ that the principle of effective judicial protection is “grounded in the constitutional traditions common to the Member States and in Articles 6 and 13 of the European Convention on Human Rights”. Reference to Art. 47 of the Charter of Fundamental Rights of the European Union⁴⁹ has been mentioned at the same time. Thus, if the Court would not have underlined that the system of judicial remedies under Community law is complete, it would have acknowledged that its restrictive interpretation of the notion of individual concern, *i.e.* the *Plaumann* test, has been in breach of the principle of effective judicial protection.⁵⁰ At the same time, it has to be admitted that “The [EC] Treaty and the right to effective judicial protection have always been in conflict, and the European Courts had to do their best in order to ensure that both are respected”.⁵¹ The constant application of the *Plaumann* test shows that the Court has given preference to the EC Treaty as it provided the Court with a possibility of manoeuvre⁵² within the EC Treaty system in order to apply the law by using its own discretion. Thus the Court was to a lesser extent tied by the case law of the European Court of Human Rights on Articles 6 ECHR and 13 ECHR.

Another possible reason why the Court insisted on the completeness of the system of judicial remedies in the Community was that it wanted to stipulate to a greater extent the application of Art. 234 EC as the Court has obtained a strong authority in the Community legal system since the *CILFIT*⁵³ decision through the rules of application of Art. 234 EC. In the *CILFIT* decision, the Court used a “give and take” strategy, and its real intention was not to give national courts and tribunals of last instance any discretion in deciding whether or not to refer a question for a preliminary ruling to the Court.⁵⁴ In fact, the *CILFIT* decision was the next step logically taken by the Court in order to strengthen the system of precedent in Community law introduced *de facto* by the *Da Costa* decision,⁵⁵ which in its turn

⁴⁷ Opinion of AG F. Jacobs, Case C-50/00P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

⁴⁸ Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

⁴⁹ OJ 2000 C 364, p. 1.

⁵⁰ See also: C.C. Kombos, “The Recent Case Law on *Locus Standi* of Private Applicants under Art. 230(4) EC: A Missed Opportunity or A Velvet Revolution” (2005) 9 European Integration Online Papers, <<http://eiop.or.at/eiop/texte/2005-017a.htm>> accessed 10 June 2007.

⁵¹ M. Varju, “The Right to Effective Judicial Protection in the System of Judicial Review in the European Community” (2003) 44 Acta Juridica Hungarica, p. 99.

⁵² *Ibid*, p. 107.

⁵³ Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

⁵⁴ H. Rasmussen, “The European Court’s *acte clair* strategy in CILFIT” (1984) 9 E.L.Rev., pp. 256, 259.

⁵⁵ Case C-28-30/62 *Da Costa v Nederlandse Belastingadministratie* [1963] ECR 31.

sought for enhancement of the authority of the Court's decisions.⁵⁶ Feasible explanation for developing its case-law in that direction would be the Court's willingness to create new judiciary where the Court would be a kind of "last instance" court in relation to national courts and tribunals for all matters related to Community law.⁵⁷ Thus, it looks like there were more political rather than legal reasons for the Court to apply the too restrictive *Plaumann* test through the years.

Returning to the "complete system of remedies" question, it has to be admitted that Art. 234 EC has a couple of weaknesses which mean that the preliminary reference procedure is not an adequate substitute for a reformed Art. 230(4) EC procedure. The main obstacles for this are the principle of the procedural economy and the uncertainty of the preliminary reference procedure – there is no guarantee that a national court will refer the question to the Court even if the parties in domestic proceedings request this, and even if a national court decides to refer a question to the Court it still has a discretion on the scope of that reference. The Court may declare the reference from a national court as inadmissible.⁵⁸ Also the Court's decision in a preliminary ruling procedure affects legal certainty as the measure at issue remains valid on its face and other individuals cannot be expected to know all the decisions of the Court,⁵⁹ especially if the number of judgments and the expanding (not only in terms of its borders, but also of its competences) Union are taken into account.

As a result, it is not so certain that the system of judicial remedies in the Community is complete and provides sufficient judicial protection for an individual. Although the European Court of Human Rights has stated in *Bosphorus*⁶⁰ that the mere fact that an individual is not granted direct access to the Community Courts under Art. 230(4) EC in all cases does not constitute a breach of Article 6 ECHR as long as a remedy in the national court is offered as an alternative,⁶¹ an indirect challenge is not always able to provide an efficient protection of an individual's rights.

⁵⁶ P. Craig, G. de Burca, *EU Law: Text, Cases and Materials*, 3rd edn (OUP, Oxford 2002), p. 449. See also: G. Bebr, "The Rambling Ghost of "*Cohn-Bendit*": *Acte Clair* and the Court of Justice" (1983) 20 CML Rev., p. 463.

⁵⁷ See, e.g.: M.-P. Grangier, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quéré et Cie SA v Commission* and *Unión de Pequeños Agricultores v Council*" (2003) 66 MLR, p. 128.

⁵⁸ A. Biondi, "Effectiveness Versus Efficiency: Recent Developments on Judicial Protection in EC Law" (2000) 6(3) European Public Law, p. 321.

⁵⁹ C. Berg, F. Bain, "No room at the European Court?" (2002) 152 NLJ, p. 1533.

⁶⁰ *Bosphorus Airways v Ireland* (App no 45036/98) ECHR 30 June 2005.

⁶¹ A. Arnulf, *The European Union and its Court of Justice*, 2nd edn (OUP, Oxford 2006) p. 86.

e. The "complete denial of remedy" and the "denial of effective remedy" – two major reasons requiring Member States' intervention

In the *UPA*,⁶² "the Court decided to hear the case in plenary session with a view to reconsidering its case-law on individual concern" and Opinion by AG Jacobs⁶³ in that case was "evidently a response to that invitation".⁶⁴ As it was concluded by AG Jacobs⁶⁵ and approved by some legal writers,⁶⁶ one of the problems with the existing system, based on the *Plaumann* test, was that in the cases where the contested regulation does not require national measures of implementation, persons affected by such a regulation cannot get access to the Court. This is one of the main objections against ability of the Art. 234 EC procedure to retain the "complete system of remedies" argument effective – the so-called "complete denial of remedy".⁶⁷ Such a situation may arise where, *e.g.* an individual possesses some absolute and definitive right⁶⁸ under national law but he is deprived from this right by a more recent Community measure which does not require implementation at national level.⁶⁹ In such a case it is impossible for an individual to explore Art. 234 EC in protection of his right to an effective remedy. Thus, there are two possibilities for an individual to obtain access to the Court under Art. 234. The first one is to proceed intentionally under the "old" rule in order to obtain a negative administrative decision for breaching Community law. This can be done in cases where the more recent Community measure takes away an existing benefit acquired previously under national law. The other possibility is to ignore the new Community rule imposing some obligation and to wait for an enforcement action which can then be challenged before a national court.⁷⁰ However, the above mentioned criticism of Art. 234 EC⁷¹ and that fact that individuals should not be required to break a law in order to get

⁶² Case C-50/00P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

⁶³ Case C-50/00P *Unión de Pequeños Agricultores v Council*, Opinion of Advocate General [2002] ECR I-6677.

⁶⁴ J. Usher, "Direct and Individual Concern – an Effective Remedy or a Conventional Solution?" (2003) 28 E.L. Rev., p. 579.

⁶⁵ Case C-50/00P *Unión de Pequeños Agricultores v Council*, Opinion of Advocate General [2002] ECR I-6677, para. 40 – 44.

⁶⁶ See, *e.g.*: F. Ragolle, "Access to Justice for Private Applicants in the Community Legal Order: Recent (R)evolution" (2003) 28(1) E.L.Rev., p. 91.

⁶⁷ C. Koch, "*Locus Standi* of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individual's Right to an Effective Remedy" (2005) 30(4) E.L. Rev., p. 515.

⁶⁸ *Supra*, n.37.

⁶⁹ A. Arnall, *The European Union and its Court of Justice*, 2nd edn (OUP, Oxford 2006), p. 82.

⁷⁰ C. Berg, F. Bain, "No room at the European Court?" (2002) 152 NLJ, p. 1533

⁷¹ See: *supra*, Chapter 1d, where the weak points of Art. 234 EC were discussed in the context of the "complete system of remedies" argument.

access to justice⁷² shows that the above mentioned possibilities are not a way out from the “complete denial of justice” situations.

Another main objection against ability of the preliminary reference procedure to make the “complete system of remedies” argument effective is the so-called “denial of effective remedy”.⁷³ The substance of this objection has been already partly described earlier in this paper when the weak points of application of Art.234 EC had been discussed.⁷⁴ But it still has to be recalled that a mere ability to gain access to a national court does not mean that such a procedure – an application to national court with a perspective of possible reference to the Court for a preliminary reference under Art. 234 EC – is an appropriate procedure for examining the validity of the Community measure at issue.⁷⁵ AG Jacobs also refers to the Court’s decision in the *Greenpeace* case⁷⁶ by arguing that “[T]he greater the number of persons affected by a measure the less likely it is that judicial review under the fourth paragraph of Article 230 EC will be made available”.⁷⁷ Notwithstanding the Opinion of AG Jacobs, argumentation of the CFI in *Jégo-Quééré*⁷⁸ and a long-lasting criticism from legal scholars, the Court refused to change its interpretation of the notion of individual concern. Thus, the gap in the system of remedies remained, because the Court was not ready to follow the argumentation provided by AG Jacobs and the CFI.⁷⁹ It is impossible to say that the system of judicial remedies is complete if there are at least a few cases where an individual cannot exercise his right to effective judicial protection. If this right cannot be exercised because of the existing interpretation of a legal norm, a suitable interpretation must be provided by the judiciary.⁸⁰ However, in *UPA* judgment, as well as in *Jégo-Quééré* afterwards, the Court stated explicitly that to do so would mean to step over the jurisdiction given to the Court by the EC Treaty.⁸¹ This judgment was, at the same time, “a clear invitation” to the Member

⁷² Case C-50/00P *Unión de Pequeños Agricultores v Council*, Opinion of Advocate General [2002] ECR I-6677, para. 43; Case T-177/01 *Jégo-Quééré et Cie v Commission* [2002] ECR II-2365, para. 45.

⁷³ C. Koch, “*Locus Standi* of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individual’s Right to an Effective Remedy” (2005) 30(4) E.L. Rev., p. 515.

⁷⁴ *Supra*, Chapter 1d.

⁷⁵ C. Koch, “*Locus Standi* of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individual’s Right to an Effective Remedy” (2005) 30(4) E.L. Rev., p. 515.

⁷⁶ Case C-321/95P *Greenpeace and Others v Commission* [1998] ECR I-1651.

⁷⁷ C-50/00P *Unión de Pequeños Agricultores v Council*, Opinion of Advocate General [2002] ECR I-6677, para. 59.

⁷⁸ Case T-177/01 *Jégo-Quééré et Cie v Commission* [2002] ECR II-2365.

⁷⁹ J. Usher, “Direct and Individual Concern – an Effective Remedy or a Conventional Solution?” (2003) 28 E.L.Rev., p. 584.

⁸⁰ S. Enchelmaier, “No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice’s Jurisprudence on Art. 230(4) EC” (2005) 24 YEL, p. 212.

⁸¹ Case C-50/00P *Unión de Pequeños Agricultores v Council*, Opinion of Advocate General [2002] ECR I-6677, para. 44; Case C-263/02P *Commission v Jégo-Quééré et Cie* [2004] ECR I-3425, para. 36.

States to amend the EC Treaty so as to relax *locus standi* rules for private applicants.⁸²

⁸² J. Usher, "Direct and Individual Concern – an Effective Remedy or a Conventional Solution?" (2003) 28 E.L.Rev., p. 595.

2. Political response to the Court's decisions in *Jégo-Quéré* and *UPA*

Art. III-365 of the Constitution was a political response to the Court's invitation in *Jégo-Quéré* and *UPA* for Member States to amend the standing requirements for non-privileged applicants. It stated that "Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2 [of Art. III-365 of the Constitution], institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures". However, as the idea of the Constitution was rejected by the Brussels European Council in 2007,⁸³ a new formulation for Art. 230(4) EC in the Treaty on the Functioning of the European Union, hereinafter – the FEU Treaty, has been proposed⁸⁴ which almost does not differ from the formulation in Art. III-365 of the Constitution: "Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct or individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures." Thus, in this part of the paper a new formulation of Art. 230(4) will be analysed and its relation to other amendments of the EC Treaty and the EU Treaty provided for in the Treaty of Lisbon will be examined.

a. Novelties in comparison to the "old" Art. 230(4) EC

There are two major novelties in the proposed Art. 230(4) FEU. Firstly, the listing of legal instruments (a decision, a decision addressed to another person, and a decision in the form a regulation) is replaced by "an act" and "a regulatory act". Such an amendment has been introduced because of novelties regarding the system of legal instruments in both the Constitution and in the FEU Treaty which will be discussed in more detail in the next part of this paper as it could be important for the perspectives of non-privileged applicants under Art. 230(4) FEU. Secondly, Art. 230(4) EC is supplemented with an additional phrase that seems to be a direct

⁸³ The Presidency Conclusions of the Brussels European Council (21/22 June 2007), para. 10 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf> accessed 10 July 2007.

⁸⁴ Draft Treaty amending the Treaty on the European Union and the Treaty establishing the European Community, Article 2(218) <<http://www.consilium.europa.eu/uedocs/cmsUpload/cg00001.en07.pdf>> accessed 10 august 2007.

response to the Court's invitation in *Jégo-Quééré* and *UPA* – that a non-privileged applicant may institute proceedings “against a regulatory act which is of direct concern to him or her and does not entail implementing measures”.⁸⁵

The content of the Treaty of Lisbon is based on the results of the 2004 IGC which have been implemented in the Constitution.⁸⁶ Before the 2004 IGC the Convention on the Future of Europe and, namely, its Working Group II, hereinafter – the WG II, had done serious work in order to reform Art. 230(4) EC in accordance with the fundamental right to effective judicial protection “as recognised by the Court of Justice and restated in Article 47 of the Charter”.⁸⁷ The WG II had considered three possible options for further action in regard to Art. 230(4) EC.⁸⁸ The first option was to introduce a special remedy based on alleged violations of fundamental rights. Such a remedy is familiar to a number of legal systems in the Union, e.g. Germany, Spain, Poland, Latvia, as a constitutional complaint. The only basis for a complaint can be an infringement of the constitutional rights and freedoms of a particular applicant.⁸⁹ However, this option was declined and never appeared in the Constitution or in the Treaty of Lisbon. Most probably it was because there was no intention to engage in a wholesale reform of the system of judicial protection and the main aim of Member States was to resolve problems identified both in *Jégo-Quééré* and *UPA*.⁹⁰

The second option for further action in regard to Art. 230(4) EC was to amend Art. 230(4) EC “in order to alleviate the rigidity currently resulting from the condition of “individual concern””.⁹¹ This option had two “sub-options”. One of them was to change the wording of Art. 230(4) EC in such a manner that notions of individual concern and of direct concern would become alternative notions in contrast to the existing situation under which both the individual and the direct concern has to be

⁸⁵ Draft Treaty amending the Treaty on the European Union and the Treaty establishing the European Community, Article 2(218) <<http://www.consilium.europa.eu/uedocs/cmsUpload/cg00001.en07.pdf>> accessed 10 August 2007.

⁸⁶ IGC 2007 Mandate, para. 4 <<http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf>> accessed 10 August 2007.

⁸⁷ Document CONV 116/02 Section II 6, p. 15 *et seq.*, <<http://register.consilium.eu.int/pdf/en/02/cv00/00116en2.pdf>> accessed 10 June 2007

⁸⁸ The European Convention, Document WGII-WD021, p. 3 *et seq.* <<http://european-convention.eu.int/docs/wd2/3299.pdf>> accessed 10 June 2007.

⁸⁹ E. Biernat, “The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community” (2003) 12/03 *Jean Monnet Working Paper*, p. 45 <<http://www.jeanmonnetprogram.org/papers/03/031201.pdf>> accessed 10 June 2007; see also: S. Douglas-Scott, *Constitutional Law of the European Union* (Longman, Harlow 2002) p. 345.

⁹⁰ T. Tridimas, “The European Court of Justice and the Draft Constitution: A Supreme Court of the Union?” (2004) 05 *The Federal Trust for education and research Online paper*, p. 6, <http://www.fedtrust.co.uk/uploads/constitution/05_04.pdf> accessed 10 June 2007.

⁹¹ The European Convention, Document WGII-WD021, para. 8 *et seq.* <<http://european-convention.eu.int/docs/wd2/3299.pdf>> accessed 10 June 2007.

proved in order to gain access to the Court. However, as it has already been noted in this paper, the notion of direct concern has been made a more formalistic requirement for *locus standi* by the Court's case law.⁹² As a result, there would not be any real restrictions for individual applicants to get access to the Court under Art. 230(4) EC – a result that seemed to be unwelcome both for the Court, if its case law on the application of Art. 230(4) EC is taken into account, and also for the WG II.⁹³ The other “sub-option” was to add “language opening-up access exceptionally in cases of Community acts [that do not require implementing measures at national level]”.⁹⁴ This is exactly the approach adopted in Art. III-365 of the Constitution and in Art. 2(214) of the Treaty of Lisbon.

The third option for the WG II was to introduce a new provision obliging Member States to provide for remedies by national courts in order to ensure the effective judicial protection within the Union. This was also a response to the Court's opinion that “national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such act”.⁹⁵ As a result, a new provision was inserted in the Constitution – Art. I-29(1) – under which Member States have to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. Identical provision is transferred by the Treaty of Lisbon, Art. 1(20) to the EU Treaty, Art. 9f(1). It is important to realise that this new provision is addressed to Member States' legislators rather than to national courts as only the legislator is entitled to amend national law so as to comply with this new requirement in the Treaty of Lisbon.⁹⁶ However, this provision seems to be controversial because possible amendments to national procedural laws in different Member States can result in different requirements for individuals to acquire access to their national courts.⁹⁷ Therefore the 2007 IGC or the Commission, or the Council afterwards must have provided guidelines for implementation of the prospective Art.

⁹² *Supra*, p. 5, where the substance of the notion of direct concern has been analysed; see also: J.A. Usher, “Direct and Individual Concern – an Effective Remedy or a Conventional Solution” (2003) 28(5) E.L.Rev., p. 596.

⁹³ The European Convention, Document WGII-WD021, para. 11 <<http://european-convention.eu.int/docs/wd2/3299.pdf>> accessed 10 June 2007.

⁹⁴ *Ibid.*

⁹⁵ C-50/00P *Unión de Pequeños Agricultores v Council*, Opinion of Advocate General [2002] ECR I-6677, para. 41 and 42.

⁹⁶ C. Koch, “*Locus Standi* of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individual's Right to an Effective Remedy” (2005) 30(4) E.L. Rev., p. 518.

⁹⁷ *Ibid.*

9f(1) EU in Member States in order to avoid possible discrimination of the Union's citizens in different Member States.

Although the main novelties regarding the prospective Art. 230(4) FEU have been discussed above, these are only *prima facie* novelties as the Treaty of Lisbon contains new legal provisions that might have a significant influence on *locus standi* requirements. This will be discussed further in this paper.

b. Possible influence of the Charter of Fundamental Rights

The notion of individual concern is closely related to the issue of fundamental rights. Articles 6 ECHR and 13 ECHR together with constitutional traditions of Member States provide a basis for the protection of a principle of effective judicial protection both on the Community level and on the national level when Member States are acting within the scope of Community law.⁹⁸ A restrictive approach towards the notion of individual concern taken by the Court "is against the principle of effective judicial protection and may lead in many cases to the denial of justice",⁹⁹ as the Court very often even does not look at the substance of the case – proceedings are terminated just because of purely formal criterion of non-compliance with requirements set in Art. 230(4) EC. Such a situation may raise doubts about the legitimacy of Community law because it is very complicated for an individual to participate in a judicial review procedure set up in the EC Treaty, especially when broad policy matters which concern individuals are concerned.¹⁰⁰ Also AG Jacobs has pointed at this relationship between effective protection of fundamental rights and legitimacy of the Union.¹⁰¹

In the 2004 IGC Member States had agreed to give effect to the Charter of Fundamental Rights,¹⁰² hereinafter – the Charter, by incorporating this document into the Constitution. However, Member States have not refrained from their intention to make the Charter a legally binding legal instrument after rejecting the

⁹⁸ J.A. Usher, "Direct and Individual Concern – an Effective Remedy or a Conventional Solution" (2003) 28(5) E.L.Rev., p. 575.

⁹⁹ E. Biernat, "The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community" (2003) 12/03 *Jean Monnet Working Paper*, p. 4 <<http://www.jeanmonnetprogram.org/papers/03/031201.pdf>> accessed 10 June 2007.

¹⁰⁰ N. van den Broek, "A Long Hot Summer for Individual Concern? The European Court's Case Law on Direct Actions by Private Parties... and a Plea for a Foreign Affairs Exception" (2003) 30(1) *Legal Issues of Economic Integration*, p. 78.

¹⁰¹ The European Convention, Document WGII-WD020, p. 2 <<http://european-convention.eu.int/docs/wd2/3222.pdf>> accessed 10 June 2007.

¹⁰² Charter of Fundamental Rights of the European Union OJ C 364/01 of 18 December 2000.

idea of the Constitution.¹⁰³ Thus, the Court will have to take into account a legally binding provision of the Charter conferring a right to an effective remedy. At the same time, it does not automatically mean that the Court might have relaxed its interpretation of the notion of individual concern. There has been a tension noticed between Articles II-107 and III-365(4) of the Constitution.¹⁰⁴ However, this tension seems to be just an illusory one since the explanation of Art. II-107 of the Constitution states explicitly that the aim of this Article had not been to change the system of judicial review under the EC Treaty.¹⁰⁵ As a result, the Court is fully entitled to consider the system of judicial protection of the Union as complete. At the same time, an exclusion of legislative acts of the Union of any judicial review is not compatible with the *Posti and Rahko* judgment¹⁰⁶ of the European Court of Human Rights.¹⁰⁷ In *Posti and Rahko*, on the one hand, the European Court of Human Rights has stated, with a reference to *Extramet*,¹⁰⁸ that it “resembles” the position of the Court that a general legal measure can be of individual concern under certain circumstances. On the other hand, the European Court of Human Rights has interpreted Article 6(1) ECHR in a manner which, firstly, contradicts to a certain extent the Court’s approach taken in environmental law cases, e.g. *Greenpeace*.¹⁰⁹ This is because the European Court of Human Rights considers that “a group of persons in a similar situation” should be able to institute proceedings against a general measure affecting their civil rights or obligations.¹¹⁰ Secondly, the European Court of Human Rights puts more emphasis on the substance of the measure in question and not on the form in which that measure is embedded.¹¹¹ This interpretation could be considered as an invitation for the Court to pay a closer attention to the question of fundamental rights, to be more exact – the right to effective judicial protection, when deciding whether the Community measure of general application is of individual concern to the applicant. Thus, the Charter might

¹⁰³ IGC 2007 Mandate, para. 9, <<http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf>> accessed 10 August 2007.

¹⁰⁴ C. Koch, “*Locus Standi* of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individual’s Right to an Effective Remedy” (2005) 30(4) E.L.Rev., p. 517.

¹⁰⁵ Declaration concerning the explanations relating to the Charter of Fundamental Rights (no.12), annexed to the Final Act adopting the Constitution [2004] O.J. C310/01, p. 450.

¹⁰⁶ *Posti and Rahko v Finland* (App no 27824/95) ECHR 2002-VII. In this case the European Court of Human Rights examined whether the applicants had an effective access to a national court in order to challenge a national legislative measure restricting fishing rights legally obtained by applicants before the legislative measure at issue came into force.

¹⁰⁷ K. Lenaerts, M. Desomer, “Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures” (2005) 11(6) European Law Journal, p. 762.

¹⁰⁸ Case C-358/89, *Extramet Industrie SA v Council* [1991] ECR I-2501.

¹⁰⁹ Case C-321/95P *Greenpeace and Others v Commission* [1998] ECR I-1651.

¹¹⁰ *Posti and Rahko v Finland* (App no 27824/95) ECHR 2002-VII, para. 54.

¹¹¹ *Ibid*, para. 53.

have a significant role in enhancement of a non-privileged applicant's position under Art. 230(4) EC with only one pre-condition – that the Court will take seriously the interpretation provided by the European Court of Human Rights in *Posti and Rahko*.

c. Possible influence of the "new" Article 249 EC

The Union to a large extent lacks a transparency of legislative procedures as well as a "simple selection of [...] legal instruments on which political accountability and popular democracy traditionally operate".¹¹² The Constitution could have, at least partly, solved this problem. It was intended to introduce a new system of legal acts by the Constitution. If the position under the EC Treaty was that the designation of one or another Community measure does not determine its rank in the legal system and there is generally no hierarchy of legal acts in the Community,¹¹³ the Constitution was providing a division of legal acts in legislative and non-legislative ones. It was also noticed that Art. III-365 of the Constitution reflected this division provided in Articles I-34 to I-37 of the Constitution that could have resulted in a more relaxed approach to the notion of individual concern in cases where non-legislative Community measures are at issue.¹¹⁴ It shows that there is an important correlation between *locus standi* of non-privileged applicants and the system of legal acts within the Union.¹¹⁵

The 2007 IGC decided to move away partly from the system of legal acts established by the Constitution by excluding from the system of legal instruments under the Constitution European laws and European framework laws.¹¹⁶ However, the distinction between legislative and non-legislative legal acts has been retained in the FEU Treaty.¹¹⁷ This distinction will depend on the procedure under which an act is adopted. For this purpose, two new Articles have been introduced in the FEU Treaty, namely – Art. 249a and 249b.¹¹⁸ Under these Articles, legislative acts will be acts which are adopted by the legislative procedure, *i.e.* acts adopted jointly by the

¹¹² A.S. Mathiesen, "Public Participation in Decision-Making and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes" (2003) 12(2) European Environmental Law Review, p. 38.

¹¹³ K. Lenaerts, M. Desomer, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures" (2005) 11(6) European Law Journal, p. 746.

¹¹⁴ J.A. Usher, "Direct and Individual Concern – an Effective Remedy or a Conventional Solution" (2003) 28(5) E.L.Rev., p. 598.

¹¹⁵ See also: K. Lenaerts, M. Desomer, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures" (2005) 11(6) European Law Journal, p. 760.

¹¹⁶ IGC 2007 Mandate, para. 3, <<http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf>> accessed 10 August 2007.

¹¹⁷ *Ibid*, para. 19(v).

¹¹⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007, Article 2(236).

European Parliament and the Council as well as acts adopted by the European Parliament with the participation of the Council and *vice versa*. Non-legislative acts will be acts adopted by the Commission under the delegation to be found in legislative acts. This system seems to be capable of implementing a hierarchical order of legal acts within the Union.¹¹⁹ In addition, non-legislative acts are capable of providing stricter implementing conditions in order to ensure uniform conditions throughout the Union.¹²⁰ At the same time, the provisional Art. 249b(1) FEU raises some doubts about effective functioning of this hierarchy as it provides a possibility for the Commission to amend legislative acts by non-legislative acts. Although this possibility has a pre-condition that only “non-essential elements of [a] legislative act” may be amended, there are no indicative characteristics of the essential elements of legislative acts. Hopefully, this will not become a burden for private parties to prove before the European Court that a certain provision of a legislative act could not be amended by a non-legislative act, because it was the essential element of the legislative act at issue.

A very important amendment in Art. 249 EC is the one introducing the new definition of a decision. Under the Treaty of Lisbon, “A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only to them”.¹²¹ This will definitely change a non-privileged applicant’s position under the provisional Art. 230(4) FEU, as under the EC Treaty a decision was a legal instrument which was addressed to a certain person. Under the FEU Treaty, a decision becomes a general measure except cases when its addressee or addressees are indicated in a decision. If compared to provisions of the Constitution, a decision under the FEU Treaty could be both a legislative and a non-legislative act, whereas under Art. I-33 of the Constitution decision was intended to be a non-legislative act. As a result, not all decisions will be subjected to judicial review under the provisional Art. 230(4) FEU but only those which will be addressed to a certain person or persons. Thus, an expectation that it could be easier to acquire standing under Art. 230(4) FEU before the European Courts in cases where a non-legislative act is at

¹¹⁹ A. Turk, “The Concept of the “Legislative” Act in the Constitutional Treaty” (2005) 6(11) *German Law Journal*, p. 1567 <http://www.germanlawjournal.com/pdf/Vol06No11/PDF_Vol_06_No_11_1555-1570_Special%20Issue_Turk.pdf> accessed 10 august 2007; K. Lenaerts, M. Desomer, “Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures” (2005) 11(6) *European Law Journal*, p. 763.

¹²⁰ K. Lenaerts, M. Desomer, “Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures” (2005) 11(6) *European Law Journal*, p. 753.

¹²¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007, Article 2(235).

issue¹²² has to be rejected as the wording of the latter norm (“act addressed to that person”) suggests that only a decision addressed to a certain person or persons is relevant in the context of *locus standi* requirements. Moreover, it is not of importance whether this decision is a legislative or a non-legislative act under the provisional Articles 249a FEU and 249b FEU. In the Community legal order, it is not relevant that a legal act is called a decision as it could mean both an act addressed to a specific person or persons and a measure of general application providing rules in a specified field.¹²³

d. The notion of “regulatory acts” – a possible source for uncertainty

The provisional Art. 230(4) FEU contains another type of legal instrument – a regulatory act. It is intended that individuals should be allowed to institute proceedings against “a regulatory act which is of direct concern to [the applicant] and does not entail implementing measures”. However, the use of this term is “unfortunate”.¹²⁴ The main problem is that this notion is not defined in the FEU Treaty. Art. 230(4) EC is the most important instrument allowing individuals to have an impact on the legislative process and quality in the Union, and Art. 230(4) FEU will retain this significance in the future. Therefore it is important that such a substantial legal provision is defined with a high level of certainty.¹²⁵ The notion of regulatory act was used also in the Constitution, and it is even more unfortunate that nothing has been changed in order to eliminate this defect while preparing the Treaty of Lisbon. Thus, it is important to understand the notion “regulatory act” and to realise its possible implications on the application of Art. 230(4) FEU.

It is suggested that a regulatory act is an act “of general application of an executive nature”,¹²⁶ *i.e.* a non-legislative act. This also includes decisions which are not addressed to a certain person or persons. However, it is not clear why the provisional Art. 230(4) FEU contains the notion of regulatory act instead of the term “non-

¹²² C. Koch, “*Locus Standi* of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individual’s Right to an Effective Remedy” (2005) 30(4) E.L. Rev., p. 520 - 525; K. Lenaerts, M. Desomer, “Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures” (2005) 11(6) European Law Journal, p. 760.

¹²³ T. Tridimas, “The European Court of Justice and the Draft Constitution: A Supreme Court of the Union?” (2004) 05 *The Federal Trust for education and research Online paper*, p. 5, <http://www.fedtrust.co.uk/uploads/constitution/05_04.pdf> accessed 10 June 2007.

¹²⁴ K. Lenaerts, M. Desomer, “Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures” (2005) 11(6) European Law Journal, p. 762.

¹²⁵ C. Koch, “*Locus Standi* of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individual’s Right to an Effective Remedy” (2005) 30(4) E.L.Rev., p. 519.

¹²⁶ K. Lenaerts, M. Desomer, “Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures” (2005) 11(6) European Law Journal, p. 762.

legislative act". The only explanation is that Member States have an intention to leave the notion of regulatory act open for the further interpretation in the European Courts' case law. The problem is that all three kinds of legal acts in the FEU Treaty, *i.e.* a directive, a regulation, and a decision can be both legislative and non-legislative acts depending on the procedure under which they are adopted. At the same time, it is still possible that the name of a legal act will not embody its actual nature and the Court will be obliged to determine the legal nature of an act at issue before deciding the question of admissibility.¹²⁷ Thus, the Court hypothetically may come to the conclusion that an act which is adopted under the procedure provided in the FEU Treaty for legislative acts should have been adopted as a non-legislative act because of its nature and purpose. It has been already mentioned in this paper that the Union institutions cannot deprive a natural or a legal person of his or her right to institute proceedings against the Union legal measure just by choosing a generally applicable Community measure as an instrument to affect that particular person's legal position.¹²⁸ The same has to be applied to the new system of legal acts, *i.e.* the Union institutions cannot deprive an individual from his right to an effective judicial protection by intentionally choosing a legislative procedure in the situation where a non-legislative procedure would have been more appropriate. As a result, it is possible that this is one of the considerations for using the notion of regulatory act instead of the term "non-legislative act" in the Treaty of Lisbon. At the same time it means less certainty in the application of the Art. 230(4) FEU.

¹²⁷ *Supra*, Chapter 1b, where the legal instruments of the Union has been analysed in the context of Art. 230(4) EC.

¹²⁸ *Supra*, n. 27.

3. Ability of the Article 230(4) FEU to solve the “complete denial of remedy” and the “denial of effective remedy” problems

As stated earlier, two major problems of the existing system of judicial remedies are the “complete denial of remedy” and the “denial of effective remedy”.¹²⁹ Art. 230(4) FEU as well as other amendments to the EC Treaty and the EU Treaty have to be able to solve these problems. The *prima facie* effects of amendments to the EC Treaty and the EU Treaty which are relevant for a non-privileged applicant’s position before the European Courts have been already discussed in the previous Chapter. Therefore, this Chapter will be dedicated to the more detailed analysis whether the innovations provided by the Treaty of Lisbon are capable of enhancing availability of the judicial review in the Union for non-privileged applicants and what else can be done in order to enhance their position before the European Courts.

a. The new system of legal acts – “legislative”, “executive” and “administrative” nature of acts

As it has been mentioned earlier in this paper, an action for annulment under Art. 230(4) EC has its origins in administrative law of Member States¹³⁰ and, in particular, in proceedings against unlawful administrative acts at the national level.¹³¹ In most Member States individual administrative acts¹³² can be challenged relatively easily, while challenging legislative acts is significantly limited or even excluded.¹³³ Of course, “It is not possible to draw direct comparisons with domestic law, because reviewable acts under Art. 230 EC correspond neither to primary nor secondary legislation in national law”.¹³⁴ At the same time, the recent developments, namely, the new system of legal acts in the Constitution and, with some amendments, in the Treaty of Lisbon are giving a good basis for an approximation of national and Union law in that regard. Thus, it would be appropriate to discuss the

¹²⁹ *Supra*, Chapter 1e, where the substance of “complete denial of remedy” and “denial of effective remedy” has been discussed.

¹³⁰ *Supra*, p. 5, where origins of an action for annulment have been described.

¹³¹ E. Biernat, “The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community” (2003) 12/03 *Jean Monnet Working Paper*, p. 3 <<http://www.jeanmonnetprogram.org/papers/03/031201.pdf>> accessed 10 June 2007.

¹³² Here and hereinafter, by “individual administrative acts” not only are administrative acts addressed to one person meant, but also acts which are addressed to more than one person in cases where this circumstance is mentioned in the act itself.

¹³³ M.-P. Grangier, “Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quééré et Cie SA v Commission* and *Unión de Pequeños Agricultores v Council*” (2003) 66 MLR, p. 135.

¹³⁴ S. Douglas-Scott, *Constitutional Law of the European Union* (Longman, Harlow 2002), p. 345.

possibility of introducing “different review mechanisms distinguishing between administrative and legislative measures”¹³⁵ that could result in the enhancement of a non-privileged applicant’s position before the European Courts.

Under the Art. 249 FEU a decision can, at the same time, be either a legislative or a non-legislative measure depending on the procedure of adoption. A decision is intended to be a generally applicable measure unless the addressee or addressees are indicated in a decision itself. Indication of an addressee is one of the substantial characteristics for an individual administrative act in a number of national legal systems in the Union.¹³⁶ Thus, “a decision which specifies those to whom it is addressed [and is] binding only to them”¹³⁷ can be assumed to be an individual administrative act of the Union. Other legal measures provided in Art. 230(4) FEU, including a decision which is not addressed to a certain person or persons, cannot be regarded as individual administrative acts because they are binding in their entirety, *i.e.* they do not specify persons to whom they are addressed.

Undoubtedly, a legislative act under Union law and a legislative act under national law are comparable notions. In both cases, the main characteristic of a legislative act is that it is adopted by a special institution or institutions which are vested with the legislative power.¹³⁸ The Treaty of Lisbon suggests that the Union legislator will be the European Parliament and the Council.¹³⁹ In national legal systems, legislative acts are either excluded from the challengeable measures or it is particularly difficult to challenge them.¹⁴⁰

¹³⁵ M.-P. Grangier, “Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quééré et Cie SA v Commission* and *Unión de Pequeños Agricultores v Council*” (2003) 66 MLR, p. 135.

¹³⁶ See, e.g.: German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) of May 25th 1976, Article 35, <http://www.bmi.bund.de/Internet/Content/Common/Anlagen/Gesetze/VwVfg_englisch.templateId=raw_property=publicationFile.pdf/VwVfg_englisch.pdf> accessed 10 June 2007; Estonian Administrative Procedure Act (*Haldusmenetluse Seadus*) of June 6th 2001, para. 51(1) <http://www.legaltext.ee/en/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=1&m=000&query=Administrativ_e+Procedure> accessed 10 July 2007; Latvian Administrative Procedure Act (*Administratīvā procesa likums*) of October 25th 2001, Section 1(3), <<http://www.ttc.lv/index.php?skip=15&itid=likumi&id=10&tid=59&l=LV>> accessed 10 July 2007.

¹³⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007, Article 2(236).

¹³⁸ See: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007, Article 2(236), and, e.g. The Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*), para. 59, <<http://www.legaltext.ee/text/en/X0000.htm>> accessed 10 July 2007; The Constitution of Republic of Latvia (*Latvijas Republikas Satversme*), Section 64, <http://www.saeima.lv/LapasEnglish/Constitution_Visa.htm> accessed 10 July 2007.

¹³⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007, Article 2(236).

¹⁴⁰ *Supra*, n. 132.

A non-legislative act under Art. 249b can be interpreted as similar to a general executive act under national systems of legal acts. Non-legislative acts, in accordance with the Treaty of Lisbon, are going to be adopted by the Commission under the delegation provided for in the legislative act.¹⁴¹ Although it has been noticed that the European pattern suggests that “general executive regulations are usually susceptible to review at the suit of individuals in administrative courts”,¹⁴² it is doubtful whether the same should be applied to non-legislative acts of the Union as they are going to be binding in their entirety, *i.e.* they will lack an individual nature. It is also important to notice the fact that in specially provided cases non-legislative acts may be used in order to amend or to supplement non-essential provisions of legislative acts.¹⁴³ As a result, only if a non-legislative act of *prima facie* general application is actually addressed to a “definable [group of persons] on the basis of general characteristics”,¹⁴⁴ it could hypothetically be subjected to the judicial review in the proceedings instituted by a non-privileged applicant.

b. System of judicial review under the FEU Treaty – “constitutional” and “administrative” proceedings

Once it is established that the Union system of legal acts, similarly to national law, includes division between legislative, general executive and individual administrative acts, it would be just logical to have a system of judicial review which reflects this division. An opinion that “Art. 230(4) EC may take on the character of administrative law [or] constitutional law” by taking into account the legal nature of the Community measure¹⁴⁵ can be partly supported. It is because, under the influence of the *Plaumann* test, a non-privileged applicant could challenge only individual acts which were directly affecting him.¹⁴⁶ It was only in a few cases where non-privileged applicants could obtain standing before the Court while contesting the Community measure of general application.¹⁴⁷ As a result, the Court under Art. 230(4) EC has developed only the “administrative” proceedings and remained reluctant, with only a

¹⁴¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007, Article 2(236).

¹⁴² S. Douglas-Scott, *Constitutional Law of the European Union* (Longman, Harlow 2002), p. 369.

¹⁴³ *Supra*, p. 21, where the provisional Art. 249b(1) FEU has been analysed.

¹⁴⁴ German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) of May 25th 1976, Article 35, <http://www.bmi.bund.de/Internet/Content/Common/Anlagen/Gesetze/VwVfg_englisch.templateId=raw_property=publicationFile.pdf/VwVfg_englisch.pdf> accessed 10 July 2007.

¹⁴⁵ S. Douglas-Scott, *Constitutional Law of the European Union* (Longman, Harlow 2002), p. 343.

¹⁴⁶ *Ibid*, p. 369.

¹⁴⁷ These issues have been discussed in more detail earlier in this paper. See: *supra*, Chapters 1a and 1b.

few exceptions,¹⁴⁸ towards “constitutional” proceedings, *i.e.* towards proceedings instituted by non-privileged applicants against *prima facie* generally applicable Community measures. However, mechanisms which establish judicial review of the activities of both executive and legislative bodies are a very important characteristic for a modern democratic society based on the rule of law and their effectiveness depends on the availability of the judicial review to private applicants.¹⁴⁹

c. Perspectives of the “constitutional” proceedings before the European Courts – a possible way to enhance a non-privileged position

Two kinds of “constitutional” proceedings acknowledged in national legal orders could be relevant for the Union system of judicial review. The first one would be proceedings instituted before the constitutional court by a national court of general jurisdiction (the so-called preliminary ruling procedure), and the second one would be proceedings instituted by an individual whose fundamental rights have been breached (the so-called constitutional complaint procedure).¹⁵⁰ The main objective of the “constitutional” proceedings is to decide whether a law complies with the constitution, or whether normative acts or their parts comply with the legal norms or acts of higher legal force.

It is obvious that Art. 234 EC contains characteristics of the first kind of national “constitutional” proceedings, *i.e.* national courts must obtain preliminary rulings if the question arises before them concerning interpretation of the Community law. The situation is the same when a national court asks the constitutional court to provide a preliminary ruling on whether a law complies with the constitution, or whether normative acts or their parts comply with the legal norms or acts of a higher legal force. As has been mentioned before, the Court has provided a thorough case law on the preliminary rulings procedure.¹⁵¹ The Treaty of Lisbon does not suggest that any substantial amendments will affect the Art. 234 EC proceedings. Thus, the “constitutional” preliminary ruling procedure will continue to function within the Union even after the amended EU Treaty and the FEU Treaty will come into force.

¹⁴⁸ *Supra*, Chapter 1b, where possibilities for a non-privileged applicant to challenge Community measures of general application have been discussed.

¹⁴⁹ A. Arnall, *The European Union and its Court of Justice*, 2nd edn (OUP, Oxford 2006), p. 91.

¹⁵⁰ Constitutional Court Law of the Republic of Latvia (*Satversmes tiesas likums*), Section 17(1), <<http://www.satv.tiesa.gov.lv/?lang=2&mid=9>> accessed 10 July 2007. See also: S. Michalowski, L. Woods, *German Constitutional Law: The Protection of Civil Liberties* (Ashgate/Dartmouth, Brookfield 1999) p. 37 – 48.

¹⁵¹ *Supra*, p. 11, where the Court’s case law on Art. 234 EC (especially, the impact of the *CILFIT* decision) has been discussed.

As regards the “constitutional complaint system”, the Community legal system does not provide such a judicial remedy. Even in national legal orders it is not easy to get access to the constitutional court because usually an applicant has to show that he has exhausted all possible legal remedies in ordinary courts before he obtains standing before the constitutional court.¹⁵² However, a constitutional complaint is a legal remedy available for individuals in a number of the Member States, e.g. Germany (*Verfassungsbeschwerde*), Spain (*recurso de amparo*), Poland, Latvia (*konstitucionālā sūdzība*). A criticism against the Court’s case law on the notion of individual concern¹⁵³ is actually a criticism of the Court’s reluctance to interpret that notion in a manner which would correspond to constitutional traditions of Member States and which would pave a way for the constitutional complaint proceedings in the Community. The reason for this could be either the Court’s unwillingness to reassess “legislation which has a strong discretionary component” or “an underdeveloped approach to the right to legal redress of European citizens”.¹⁵⁴

Hypothetically, the constitutional complaint system may be introduced into the Union legal order after the Art. 9f(1) EU will become legally binding. Under this Article, Member States will be obliged to implement sufficient remedies in order to ensure effective judicial protection in the fields covered by Union law.¹⁵⁵ This can resolve to some extent a “complete denial of remedy” problem – a non-privileged applicant might obtain access to the judiciary in cases where the Union measure does not require implementing measures. On the other hand, the Art. 230(4) FEU provides an even more effective solution to a “complete denial of remedy” problem by allowing a non-privileged applicant to institute proceedings against such a measure directly before the European Courts. Thus, the effectiveness of the Art. 9f(1) EU becomes questionable. There is only one possible explanation for this provision – it is not intended to solve a “complete denial of remedy” problem. It rather seems to be intended for the enhancement of the non-privileged applicant’s chances to obtain access to the European Courts.

Such a conclusion can be based on the following considerations. The wording of Art. 230(4) EC has not been changed by the Convention for Europe so as to force the Court to relax its interpretation of the notion of individual concern. Thus, it is useless to expect the abolition of the *Plaumann* test. Art. 230(4) FEU just provides for an

¹⁵² S. Enchelmaier, “No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice’s Jurisprudence on Art. 230(4) EC” (2005) 24 YEL, p. 207.

¹⁵³ *Supra*, Chapter 1, where this criticism has been reflected.

¹⁵⁴ S. Douglas-Scott, *Constitutional Law of the European Union* (Longman, Harlow 2002), p. 354.

¹⁵⁵ *Supra*, p. 17, where the proposals from WG II has been discussed.

obligation of the European Courts to accept applications by non-privileged applicants in cases instituted against regulatory acts, *i.e.* binding measures other than legislative acts issued by the Union institutions.¹⁵⁶ However, if Member States will be obliged to implement procedural rules enhancing individuals' judicial protection in the field of Union law, the Union citizens will be able to refer to their national courts – courts which are closer to them and which proceed in their native language.¹⁵⁷ As soon as an individual refers to the national court with a question of Union law, the Court's case law on Art. 234 EC becomes automatically relevant. If a non-privileged applicant will claim that his rights are violated by the regulatory measure and this measure should be declared invalid, national court will be obliged to refer the question to the Court as it cannot decide questions on the validity of the provisions of Union law. But, most importantly, an individual by applying to the national court will avoid the difficult task to prove an individual concern of the regulatory act to him. As a result, the Court will have to provide a legally binding interpretation of Union law to enable the national court to solve the case pending before it.

d. Possible problems with implementation of the system of "constitutional" proceedings

There are possible problems with the implementation of the system described in the previous Chapter 3c. One of them is that the Court, after receiving a question under the provisional Art. 234 EC, may apply the *Plaumann* test also in the preliminary reference proceedings. However, it has been already suggested in this paper that one of the reasons for the Court to invite Member States to amend Art. 230(4) EC was the Court's willingness to strengthen its position as a "supreme" court of the Union.¹⁵⁸ It does not seem realistic that the Court will once again put obstacles to non-privileged applicants' access to the European Courts by applying the *Plaumann* test also in the preliminary ruling procedure. This is because the Court has already reached its above mentioned goal. Also the European Court of Human Rights has stated clearly its opinion on the Court's approach towards the *locus standi* rules in the Union by its decision in *Posti and Rahko*,¹⁵⁹ and it has to be recalled that the

¹⁵⁶ T. Tridimas, "The European Court of Justice and the Draft Constitution: A Supreme Court of the Union?" (2004) 05 *The Federal Trust for education and research Online paper*, p. 5, <http://www.fedtrust.co.uk/uploads/constitution/05_04.pdf> accessed 10 June 2007.

¹⁵⁷ S. Enchelmaier, "No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC" (2005) 24 YEL, p. 203.

¹⁵⁸ *Supra*, p. 11, where the *CILFIT* decision has been discussed.

¹⁵⁹ *Supra*, p. 20, where the substance and conclusions of this case has been discussed.

Charter is going to obtain legally binding nature.¹⁶⁰ Thus, even if the Court will reconsider a possibility of applying the *Plaumann* test also in the preliminary ruling proceedings, individuals will be able to claim that their fundamental right to an effective judicial protection is violated.

¹⁶⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007, Art. 1(8).

Conclusions

The *Plaumann* test is not the result of an academic or legal debate – history of the *Plaumann* test started actually with the formulation of that test itself by the Court in early 1960s. Through the decades, the Court was in a permanent defendant's position against criticism towards its approach regarding the notion of individual concern, and one can just approve its firmness in the protection of the *Plaumann* test. Even when the Opinion of AG Jacobs in *UPA* and the CFI judgment in *Jégo-Quéré* appeared, the Court remained strong in its positions – the *Plaumann* test complies with Community law, and any other interpretation of the notion of individual concern would only create non-compliance with the Treaties. However, it is still questionable whether such an approach of the Court complies with what the founders of the Community really intended when drafted the relevant provision (now Art. 230(4) EC). It is also still questionable whether the Court based its restrictive approach towards the notion of individual concern on purely legal considerations – there are also arguments suggesting that the Court was guided by political agenda while constantly applying the *Plaumann* test.¹⁶¹

In *UPA* and *Jégo-Quéré*, the Court invoked the “complete system of judicial remedies” argument in order to justify its extremely restrictive approach towards non-privileged applicants. However, two major problems with this argument have been identified – the “complete denial of remedy” and the “denial of effective remedy”. Moreover, those problems, especially the “complete denial of remedy”, were so obvious that the Court's “complete system of judicial remedies” argument was at least abstruse.

After the idea of the Constitution was rejected by Member States, the new FEU and EU Treaties, especially Art. 230(4) FEU, are expected to avert those problems. The analysis carried out in this paper demonstrates that basically the “complete denial of remedy” problem seems to be solved by Art. 230(4) FEU as this provision now allows to institute proceedings against regulatory acts which do not require implementation. However, that does not mean that the *Plaumann* test could be cast aside by the Court because Art. 230(4) has been only supplemented, not amended substantially. At the same time, the “denial of effective remedy” problem remains. It has been concluded that the system of Community legal acts will be brought nearer to hierarchical system of legal acts in Member States by the upcoming amended

¹⁶¹ See Section 1(d) in that regard, where the tension between the EC Treaty and the right to effective judicial protection, as well as implications of *CILFIT* decision, were discussed.

Treaties. However, this will not be reflected in the system of judicial review – although the preliminary ruling procedure, which is also known in a number of Member States, will remain (the prospective Art. 234 FEU), it does not seem however that the constitutional complaint procedure might be introduced into Union law. Thus, a non-privileged applicant's position has not been enhanced in this context. Moreover, it seems that Member States, intentionally or unintentionally, have followed the Court's agenda under which the latter is trying to put more emphasis on the Art. 234 (or preliminary ruling) procedure by introducing new provision – Article 9(1)(f) – in the EU Treaty. This will not allow enhancing the effectiveness of judicial protection within the Union, especially if length of proceedings before the European Courts and, in some cases, also before national courts is taken into account. To solve the “denial of effective remedy” problem, it is not enough just to amend separate provisions in the Treaties – Member States along with the Community institutions have to reconsider the judiciary within the constantly growing Union, as two courts with one judge per one Member State is much too less within the Union with its half a billion population.

At this stage it seems that the only realistic tool for the enhancement of a non-privileged applicant's position before the European Courts could be the correct application of provisions of the legally binding Charter of Fundamental Rights. However, nuances of its application by the Court in the context of Art. 230(4) FEU is not predictable at this moment, especially if the long-lasting application of the *Plaumann* test and the Court's opinion of the Community system of legal remedies are taken into account. It seems that the Court will continue to insist on the completeness of the system of judicial protection and on the appropriateness of the preliminary ruling procedure, because the amended Treaties provides for such an option.

Although the Brussels European Council has stated in the Presidency Conclusions that “[It] reaffirms the need to enhance access to justice in the European Union via simplified and more efficient and accessible proceedings [...]”,¹⁶² it does not seem at all that it has been done enough to achieve this aim by adopting the Lisbon Treaty. However, that does not mean that non-privileged applicants should give up their rights – only if they will actively follow the legislative and decision-making processes in the Union and protect their rights by any possible legal mean the Union will grow

¹⁶² Presidency Conclusions of the Brussels European Council (14 December 2007), para. 33 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/97669.pdf> accessed 10 January 2008.

not just in its borders and competences, but also in its quality as on of the main bastions of democracy in the modern world.