Conflict of Principle and Pragmatism
***Locus Standi* under Article 173(4) ECT**

It may appear surprising that, given a free choice of topic for this lecture, I should choose a subject which is as frequently written about as that of *locus standi* of private parties under Article 173 of the Treaty of Rome. I have to confess that this is partly due to a process of re-education - of myself. Before my appointment to the Court of First Instance earlier this year I had practised at the bar for almost thirty years and although a good deal of my practice was in the area of Community law, I contrived to avoid the complexities of Article 173 for most of that time. This is probably not as unusual as you might think. For most lawyers practising the broad range of commercial law at national level, their main encounters with Community law arise where Community law is of direct effect. The questions arise in the course of the usual run of cases which involve the construction of Community provisions so that questions of Community law get ventilated through the medium of Article 177. Apart from that, the average practitioner comes into contact with decisions in the area of competition law, state aids and so forth where he is acting for a client to whom the decision is addressed. As a result, it is only in rare cases that an issue of *locus standi* for the purposes of taking a direct annulment action against a Community measure before the European Court arises. In the light of what I am going to say to you this evening, that is, I think, an important practical consideration to be borne in mind when considering the problem of locus standi in the overall context of Community law. As I have tried to re-educate myself on this subject, one thing that has surprised me is the degree to which Community jurisprudence over a fairly short period reflects the development which has taken place over a far longer period in many national legal systems, especially in the common law countries. The debates have been similar. The progress has been one from a restrictive approach which protects the primacy of legislation and the efficiency of administration, towards a flexible and pragmatic one which seeks to give greater emphasis to protecting the rights of the individual without jeopardizing legal certainty. The fundamental issue in the debate is how a democratic society based upon the rule of law can best strike the balance between two potentially opposing interests, namely that of safeguarding the protection of the rights of the individual citizen against the oppressive exercise of administrative power, on the one hand, and securing, on the other, the efficient and effective exercise of executive authority on behalf of elected representatives.

How far can any system go in allowing the widest possible opportunities for the testing

of the validity of laws, administrative decisions and delegated rule-making powers without jeopardizing the efficient exercise of executive functions created by genuinely democratic institutions? The more concerned any system is with ensuring the effectiveness of executive power and the supremacy of enacted legislation, the more restrictive will be the conditions imposed upon judicial review of the decision-making process or the exercise of delegated legislative powers. At the other end of the spectrum is what the average parliamentarian would regard as "the appalling vista" of the *actio popularis* where any citizen or group of citizens can challenge the validity of a regulation or an administrative decision, whether or not the particular measure has any actual impact upon their own circumstances.

One learned commentator[1] has recently pointed to the fact that in the Member States, with only rare exceptions, laws cannot be challenged by private parties. In some, including, I understand, Germany, the same is true of regulations. From this, he suggests that it is not essential to a State based on the rule of law that individuals be permitted to challenge measures of abstract character and general application. In the European Community especially, such a right would have serious consequences for sound administration because regulations are very often the result of difficult compromises on majority or qualified votes and private litigants will frequently have ulterior motives for attacking legislation.

The need for a balanced solution to this social and constitutional problem becomes more acute as society itself becomes more complex and bureaucratic. We depend increasingly on public authorities and agencies to intervene in almost every aspect of social and economic life to provide all manner of services. Their decisions often require a technical expertise few of us understand. The functions we delegate to them often require the exercise of powers which have the potential for far-reaching effects on private individuals. The greater the

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[1] *José Carlos Moitinho de Almeida,* Le recours en annulation des particuliers: nouvelles réflexions sur l'expression 'la concernent ... individuellement", Festschrift für Ulrich Everling [1995], p. 849-874.

opportunities for oppressive intervention in the affairs of individuals, the more important it is for society to have an acceptable system for policing the lawful use of these powers. It is precisely because the former "common market" of the Rome Treaty is successfully moving to the "ever closer union" so as to become a social and political entity in its own right that these constitutional issues assume greater significance and why for lawyers they are a subject of constant interest. The degree to which the solution at any time leans towards the restrictive approach or the liberal one is also, I think, a measure of the self confidence of the system and of the constitutional maturity of the society the system serves.

The jurisprudence of the European Court very clearly recognizes the extent to which the Community finds itself bound up in this important social question. Indeed, Community jurisprudence has boasted from the very outset the adoption of a progressive and liberal approach to the problem. In the *Plaumann*[2] decision of 1963 in which the Court of Justice first addressed the question as to how the concept of "direct and individual concern" was to be interpreted, it very confidently asserted that the broadest possible construction was to be adopted. Twenty-three years later in the 1986 decision of the Court of Justice in *Les Verts*[3], you will find a very emphatic assertion made as to the central role of judicial review in the Community legal system as a comprehensive protection, by law, of the rights of the individual citizen of the Community in the face of the complex legislative and judicial structure which the Treaty had laid down. Given the very clear statement of the judicial function in the Community legal system which it contains, paragraph 23 of the judgment is worth quoting in full:

> "The European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor

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[2] Case 25/62 *Plaumann &T Co* v *Commission* [1963] ECR 95????.

[3] Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339.

its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against the implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and can cause the latter to request the Court of Justice for a preliminary ruling."

Membership of the Union involves radical transfer of regulatory competence to the organs of the Community from the Member States. What the European Court is saying in this judgment is that the far-reaching effects of this hand-over of power to the institutions is balanced by the guarantee that the legal order of the Treaty will protect the individual against the excessive and oppressive exercise of that power in a manner which is incompatible with the explicit provisions of the Treaty or, moreover, incompatible with superior rules of law and of fundamental human rights which the European Court will imply into the legal order of the Community for the purpose.

The protection of the Community citizen against unlawful decisions and invalid regulations is thus available in the forms of direct actions for annulment under Article 173 or in a challenge before a national court to any attempt to enforce the measure at national level.

The Common Law Evolution

My own experience, of course, apart from my involvement in Community law since 1973 has been almost exclusively in the common law jurisdictions. But having been a barrister since the mid-1960s, it is impossible to be unaware of the huge change that has taken place in the judicial approach to these problems during the last thirty years. In one of the most important of the judicial review cases in England during this period (*R* v *Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses)*[4], one of the leading English judges of modern times, *Lord Diplock*, described the change in approach towards the criteria of *locus standi* that occurred with the reforms of the judicial review procedure in England in 1978 as being a change in legal policy which represented a "progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime". While it is undoubtedly true that the approach of the English courts in that and in other cases had a major influence on thinking of the judges in all of the other common law countries during the period, it is nevertheless true, I think, that similar changes were also underway in Ireland, Australia, New Zealand, Canada and were, for a variety of different reasons, frequently dictated by their own domestic constitutional circumstances.

The essential question at the heart of the matter is straightforward: in order to allow an individual to challenge

[4] [1982] AC 617.

any given administrative decision or the exercise of any rule-making power on the part of the executive, what degree of interest, if any, must be the applicant be able to demonstrate by reference to the decision under attack? In the common law world, the starting point is well illustrated by a statement of *Lord Chelmsford*, *Lord Chancellor*, in the case of *Ware* v *Regent's Canal Company*[5]:

"Where there has been an excess of powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no-one but the Attorney General on behalf of the public has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the legislature."

In other words, under the common law system an applicant for judicial review against an administrative decision or the exercise of a rule-making power had to establish that he himself had suffered or was shortly and inevitably going to suffer some direct injury or damage before he would be recognized as having the necessary interest to bring the application.

Although there had been a huge expansion in the volume of litigation in the administrative law area during the following one hundred years, the position of English law in, say, the 1960s when I was studying at university and then commencing practice, was extremely difficult and confused. The question of standing was bound up with the nature of the remedy sought. This in turn was confused by debates as to the significance of the difference between private law and public law and the assertion of private and public rights. The remedies of *declaration* and *injunction* were regarded as remedies of private law and could be sought only by litigants who could show that their private rights were at stake. The prerogative remedies of *certiorari*,

[5] [1858] 3 De G. & J. 212.

mandamus and *prohibition*, on the other hand, were public in character. As *Lord Devlin* put it in a case in the early 1950s, "orders of *certiorari* and *prohibition* are concerned principally with public order, it being the duty of the High Court to see that inferior courts confine themselves to their own limited sphere"[6]. In another case it had been said that the question of granting these orders "is not whether the individual suitor has or has not suffered damage, but is whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed". In the common law system, the Attorney General is regarded as the guardian of the public interest. Accordingly, if an applicant had no personal right at stake, he could only succeed if he could obtain the consent of the Attorney General in what was called a "relator action". In a famous case in 1978 (*Gouriet* v *Union of Post Office Workers*)[7], where a member of the public tried to obtain a declaration that the calling of a strike by post office workers would be a breach of the law, the House of Lords reaffirmed the fundamental principle of English law that private rights can be asserted by individuals but that public rights could only be asserted by the Attorney General as representative of the public. In theory, the position in relation to prerogative remedies of *certiorari, mandamus* and *prohibition* was that, being public in character, any member of the public was entitled to apply for relief but that the court had a discretion as to whether it would grant it. The discretion was exercised differently depending upon whether the applicant claimed to be personally affected or not. If the applicant could show that the unlawful decision or unlawful exercise of power caused him direct injury, then he was regarded as entitled to apply as of right. On the other hand, if he was merely seeking to challenge some illegal activity in the public interest, the court would exercise its discretion depending upon whether or not it considered the matter a sufficiently serious affront to the

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6 *R* v *Fulham etc. ex parte Zerek* [1951] 2 KB 1.

7 [1978] AC 435.

public interest.

Canada

By the mid-1970s, in some other common law countries and particularly those with provisions in a written constitution overriding effect of statutory provisions, there had been signs of a relaxation in the traditional strict approach to requirements of standing. For example, in a decision[8] of the Supreme Court of Canada in 1974 which in some ways reflects the distinctions made in Article 173 of the Treaty, it was held that the principle requiring personal standing applied to legislation of a regulatory character which affects particular persons or classes; but that where no-one or no group was affected more than any other and there was a justiciable issue, the court was entitled to grant declaratory relief to any citizen at its discretion. In that case, a tax-payer was held entitled to challenge the constitutional validity of the Official Languages Act in Canada. As the Court said, it was not the alleged waste of public funds alone that gave the applicants standing but the right of citizens to insist upon the constitutional behaviour of parliament where the issue in such behaviour is justiciable as a legal question.

In other words, while the Canadian court was moving away from an apparent preoccupation with specific rules attached to particular remedies and opening up opportunities for individuals to challenge measures where no immediate personal interest was at stake. The development produces a situation in which the approach of the courts is flexible and pragmatic and the courts retain a form of discretion to insist upon qualities of personal standing in "appropriate cases".

Ireland

[8] *Thorson* v *AG of Canada* (No 2) [1974] 43 DLR 1.

In my own country, Ireland, the development has been very similar. In an important case of *Cahill* v *Sutton*[9], the Supreme Court refused to allow a litigant to challenge the constitutional validity of a particular provision in the statute of limitations. The provision in question laid down a three-year limitation period for a particular type of action and the plaintiff sought to suggest that it was unconstitutional because it failed to allow for a situation in which a plaintiff might be unaware that the damage had occurred until after the three years had expired. That was not her own situation as she had always known of the existence of the damage but she was seeking to have the provision struck down in order to go ahead with an action commenced after the three-year period. The Supreme Court refused to permit a constitutional claim to be brought on the basis of a hypothetical situation. The Court held that permitting unrestricted liberty to challenge statutes would lead to abuse and, as Chief Justice *O'Higgins* (later a judge at the European Court) said, it would lead to the Court's becoming "the happy hunting ground of the busybody and the crank".

But in subsequent cases, the Irish Supreme Court, like the Canadian Supreme Court, has distinguished between cases involving purely hypothetical arguments, on the one hand, and cases involving challenges to laws which affect all members of the public generally. In Ireland, the classic example of the latter is the case of *Crotty* v *An Taoiseach*[10] where a university professor sought to challenge the constitutionality of Ireland ratifying the Single European Act in 1986. Interestingly, the initial application was made on Christmas Eve to a High Court judge for an injunction restraining the Government depositing its instrument of ratification on the last day of the year, so that the full constitutional challenge could be heard. The temporary injunction was granted with the result that the implementation of the Single European Act in all of the Member

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9 [1980] IR 269.

10 [1987] IR 713.

States was delayed for several months. Ironically, that temporary injunction was granted by Judge *Barrington* who was then a High Court judge and who was, once the Court of First Instance was finally established, my predecessor as the Irish judge in that Court.

Mr *Crotty* did not, however, seek to establish that he was personally affected in any particular way by the adoption of the Single European Act. Notwithstanding the approach that had been taken in *Cahill* v *Sutton*, however, the Supreme Court held that in the particular circumstances where the impugned legislation would affect every citizen once it became operative, the plaintiff had the *locus standi* to challenge the Act, notwithstanding his failure to prove the threat of any special injury or prejudice to himself.

The Present UK Position

In the United Kingdom, the judicial review process was reformed in a major way in 1977 when the prerogative remedies and the remedies of declaration and injunction were all made available in a single form of procedure known as "judicial review". An initial application is made to the court *ex parte* for leave to seek judicial review and a common test of *locus standi* is laid down in the stipulation that the court is not to grant leave unless it considers that the applicant has shown "a sufficient interest in the matter to which the application relates". A similar reform was introduced in Ireland in 1980.

At least in the United Kingdom, one of the results of this reform has been to achieve a situation of maximum flexibility and pragmatism in which an *actio popularis* is effectively permissible but subject to the exercise of the courts' discretion in "appropriate cases". This was the result of the decision of the House of Lords mentioned a few moments ago - the case of *R* v *Inland Revenue Commissioners ex parte National*

Federation of Self Employed and Small Businesses in which a trade association sought to challenge an agreement made by the Revenue Commissioners to abandon the collection of substantial arrears of income tax which were owed by workers in the newspaper industry in London. The workers had for years defrauded the Revenue by working under false names and being paid in cash by the newspapers without the deduction of tax. The Revenue Commissioners had come to an agreement with the workers to waive the arrears of tax if the workers agreed to regularize their position by registering as tax-payers and paying tax in the future. The Federation claimed that the Revenue Commissioners were failing to enforce the law. The lower court had held that question of *locus standi* was a preliminary issue and that the applicants had failed to show a sufficient interest. The House of Lords reversed this decision but, in effect, held that *locus standi* was not a separate and preliminary issue but was bound up with the inherent merits of the case. In England, therefore, the question of *locus standi* in judicial review is now a two-stage process. When the initial application is made, the test of "sufficient interest" is merely a filter to eliminate hopeless and mischievous cases. But on the full hearing of the case, the court is required to examine all of the issues of law and fact in order to establish if a sufficiently serious illegality has been demonstrated. One of the results of the decision, therefore, is that once an applicant shows that an administrative body is acting unlawfully, he will be regarded as having the necessary "sufficient interest" in order to maintain the application, however remote his actual personal circumstances may be from the impact of the illegality. In other words, English law now permits the court to entertain a form of *actio popularis* if, in its discretion, the court considers the issue sufficiently serious from the point of view of public policy.

In a case somewhat similar to the Irish case on the Single European Act (*Crotty* above), the former editor of The Times

newspaper sought a declaration that it was unlawful for the UK to ratify the Maastricht Treaty. There was no challenge to his *locus standi*. The Court of Appeal said, "we accept without question that Lord *Rees-Mogg* brings the proceedings because of his sincere concern for constitutional issues".

It is difficult to think of a more liberal, flexible and pragmatic test for *locus standi* in these matters than "a sincere concern for constitutional issues".

French Law

Although, as you can imagine, I have no expertise whatsoever in French law, I have the impression from my own amateur interest in it that the evolution of administrative law in France has produced a somewhat similar situation in so far as the issue of *locus standi* is concerned. The basic rule before the French administrative courts has always been that an applicant must show some personal interest in the decision which is the subject of the proceeding. It is expressed in the maxim *pas d'intérêt, pas d'action*. The applicant must be able to show that the decision he is attacking is one which affects his interest; a decision *faisant grief*.

But it seems clear that the *Conseil d'État* and the Administrative Tribunals have adopted a very flexible and pragmatic approach to the character of the sufficient interest to be required from one case to another. Although the policy of the law in France, as in other countries, has been to resist permitting the *actio popularis* to become available on the grounds that it would lead to abuse and open flood-gates of litigation which would jeopardize efficient public administration, there appear to have been numerous instances in decisions of the *Conseil d'État* during the last thirty or forty years in which something very close to an *actio popularis* has been entertained. This seems to be particularly so where

associations of various kinds have been permitted to litigate in their "collective interest". In 1990, for example, an organization called "*Association pour l'objection de conscience à toute participation à l'avortement*" brought an action before the *Conseil d'État* challenging a decision of the Minister for Health to authorize a "morning after" abortion pill upon the ground that it violated the European Convention on Human Rights. No objection was taken to the application on grounds of *locus standi*.

Community Law

When one turns then to Community law and to the development of the jurisprudence of paragraph 4 of Article 173, it is perhaps not surprising that much of the literature which has been generated echoes the familiar criticisms that have been heard elsewhere. It has been said that the approach of the Court has been unduly restrictive and has unnecessarily excluded annulment actions brought by private parties which could readily have been entertained. It is claimed that the Court has been unduly lenient in protecting administrative decisions of the institutions against judicial scrutiny, especially in the area of the agricultural sector, by allowing an exceptionally wide margin of administrative discretion on technical and economic issues. Critics say that the jurisprudence of the Court is inconsistent and unpredictable in that uniform principles tend to be applied in different areas with different results. Thus, requirements of personal interest are far more stringent for an attempt to challenge measures in the area of the agricultural policy compared with challenges brought against, say, anti-dumping regulations. I suspect, however, that while these features of the jurisprudence can well be characterized as matters for criticism from the point of view of the purist seeking legal clarity and the firm application of a well-defined principle, the better view is that the jurisprudence reflects merely the same tensions and conflicts that have been

experienced in the development of administrative law elsewhere.

Article 173 ECT

Article 173 does a number of things. It confers judicial review competence upon the Court of Justice: it lays down the grounds upon which acts of the institutions may be annulled; and it confers automatic *locus standi* upon the Member States and the institutions for this purpose. Paragraph 4 then provides:

> "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."

In so far as admissibility of applications is concerned, this provision provides no difficulty where a decision is under attack and the decision had been addressed to the individual seeking to challenge it. Nor has the concept of "direct" concern posed any real difficulty. The word is used as indicating an absence of any intermediate agency such as a national implementing measure giving effect to the act. The problems which the interpretation of the provision have thrown up can be summarized, I think, in the following questions:

> (1) How is the concept of "individual concern" to be defined and does it mean the same thing in all circumstances?
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> (2) In so far as admissibility is concerned, what function is performed by the distinction between a regulation and a decision in the form of a regulation? and
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> (3) What function, if any, is performed in the application of the paragraph by the fact that a possible alternative

remedy may be available to the applicant by means of a remedy before a national court invoking Article 184 and utilizing the mechanism of Article 177?

The Alternative Remedy

Looking at these questions in reverse order, I think it is fair to say that there has been a good deal of ambiguity as to the precise significance of the third factor. Clearly, there is nothing in either Article 173 or 184 which would suggest that a challenge to a regulation under the former should be treated as inadmissible upon the ground only that it could equally be brought through the medium of Article 184. If the application is lodged within the two-month period and the applicant has *locus standi*, the Court cannot refuse to entertain the application. The rationale of Article 184 is, no doubt, to ensure that in a Community based upon the rule of law, invalid legislation does not come to be enforced at national level by reason only of the fact that nobody with a sufficient interest to do so has challenged its validity within the time available under Article 173. Nevertheless, the Court has made it clear that a party with a clear entitlement to take a direct action under Article 173 who fails to do so within the time-limit cannot then seek to circumvent the limitation period by devising an action at national level for the express purpose of having it set aside under Article 184 (Case C-188/92 *TWD Textilwerke*[1]). It also seems reasonably clear that the availability of an alternative remedy under Article 184 could not in itself have any bearing upon the concept of "direct and individual concern". And yet, there is a striking preoccupation with the need to address the issue in very many of the cases. For example, in two judgments delivered on 22 October last, the Court of First Instance considered two parallel challenges brought against decisions allegedly taken by the Commission in the state aid context. The Commission had previously approved a proposal by the Netherlands Government for a general regional aid scheme as compatible with

the Common Market under Article 92(3). A year later, the Dutch Government proposed to grant a particular subsidy for the building of a new salt plant to a company called Frima. A British competitor of Frima, Salt Union Ltd, and the French trade association for that industry both complained to the Commission and called upon it to take measures to prevent the subsidy. The Commission sent letters in reply, pointing out that the general scheme had been approved the previous year so that the specific application of its provisions in favour of Frima did not need any separate approval from the Commission. The two actions[11] were then brought, challenging those letters as a decision refusing to take appropriate measures under Article 93. The applications were declared inadmissible upon the ground that there was no "decision" with binding legal effect contained in the letters which were merely replies on the part of the Commission explaining the situation. One of the arguments made by the applicants was that if the applications were declared inadmissible, the judicature would be deprived of any opportunity of reviewing the legality of an aid of the kind in question. They pointed out that there was no domestic legal remedy because only Article 93(3) of the Treaty requiring notification of a proposed aid was of direct effect, while the Commission was claiming that payment of an individual aid approved under a general scheme needed no notification. In each case, the Court went out of its way to point out in the concluding paragraph of each judgment that these arguments were incorrect. It was open to the applicants to challenge the decision of the national authorities to grant the state aid in question before the national courts and, if the aid was part of a general scheme, to challenge the validity of the Commission's approval and to seek, if appropriate, to bring the issue before the European Court through the mechanism of Article 177.

In a decision of 5 June this year, the Court of First Instance

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[11] Case T-154/94 *Comité des Salines de France* v *Commission* (22 October 1996, not yet reported) and Case T-330/94 *Salt Union Ltd* v *Commission* (22 October 1996, not yet reported).

made the opposite point that the clear absence of any remedy in respect of the decision before the national courts could not operate of itself so as to create a *locus standi* for the applicant under Article 173. In that case (*Kahn Scheepvaart*[12]), a Netherlands company sought to challenge a decision of the Commission approving a German state aids scheme for the shipbuilding industry taken in accordance with the provisions of the Seventh Council Directive on Aids to Shipbuilding. The applicants sought to argue that the aids proposed by the German Government, when taken in conjunction with the effect of the tax allowances available under German income tax law, exceeded what was permissible under the terms of the directive. The Commission sought to argue that the applicants should have attacked the German decision to grant the aid before the German courts. The applicants argued very forcibly that it was unrealistic to suggest that a Dutch company which had no standing as a tax-payer in Germany could have the necessary status under German law to take such a proceeding. Having held that the applicant was not in any event "individually concerned" by the Commission decision, the Court pointed out that "even the possible absence of a remedy under German national law, as the applicant claims, cannot constitute a ground for the Court to exceed the limits of its jurisdiction as set forth by the fourth paragraph of Article 173".

There are, therefore, two clearly established propositions. On the one hand, the complete absence of a remedy for the applicant at national level cannot operate so as to create the conditions of admissibility under Article 173 where they do not otherwise exist. On the other hand, the possible availability of an alternative remedy at national level will not render the direct action inadmissible if the criteria of paragraph 4 are satisfied.

Nevertheless, while the availability of the alternative remedy

[12] Case T-398/94 *Kahn Scheepvaart BV* v *Commission* (5 June 1996, not yet reported).

is not an ingredient of the test of admissibility under Article 173(4), it seems reasonably clear that it is a factor which has some influence upon the approach of the Court in these cases, given the frequency with which the Court finds it necessary to answer the arguments whenever they are raised and even though the answer does not form part of the admissibility decision in the case. This is, I believe, an indication of the practical considerations which influence the policy of the Court in the evolving jurisprudence of Article 173.

The real obstacles, however, in the way of an evolution of the jurisprudence towards a more generous and flexible approach to the *locus standi* of individuals were the requirements of "individual concern" and the apparent stipulation that if the attacked measure was in the form of a regulation it had to be shown to be in substance a decision.

Until relatively recently, and notwithstanding the promise of "the broadest interpretation" in the *Plaumann* case, the twofold implication of the jurisprudence appeared to be that, first, paragraph 4 had to be given a very literal interpretation on these points and, secondly, the requirements were regarded as being separate and cumulative. On the face of it, the literal construction is difficult to avoid. Under paragraph 1, the jurisdiction of the Court is a jurisdiction to "review the legality of acts" in very general terms and only recommendations and opinions are excepted. Paragraph 4, on the other hand, is very explicitly confined to proceedings brought against a decision. A natural or legal person may bring a proceeding against three particular types of decision: a decision addressed to himself; a decision addressed to another person, provided that decision is of direct and individual concern to the applicant; and a decision which, although it is apparently in the form of a regulation, is of direct and individual concern to the applicant. In other words, in relation to this third category, the jurisdiction of the Court depended upon the

applicant demonstrating that what was apparently a regulation in form was in substance a decision and, moreover, a decision of direct and individual concern to him.

In the *Plaumann* decision in 1963, the Court had defined the distinction between a regulation and a decision by reference to Article 189 of the Treaty. Regulations were legislative in character and intended to apply to persons generally or to categories of persons viewed in the abstract. Decisions are by definition more focused and apply to a limited number of persons who are, in effect, addressed by the decision.

The "Closed Category" Cases

Not surprisingly, this distinction has proved extremely difficult to apply in particular cases, especially, for example, in the agricultural sector where a form of regulation is frequently used for a measure which will in practice regulate only the affairs of a very small number of traders in particular products; who may already be known to the institution and who will have had a hand in the deliberations which led to its formulation. In the *Calpak*[13] cases, for example, a number of producers of Williams pears sought to annul a regulation made by the Commission which had the effect of limiting the amount of aid granted to processors to 105 percent of the quantity that had been produced during a particular marketing year. Previously, the aid had been calculated on average production over three years. The number of processors involved was very small (38) and they were readily identifiable and even known to the Commission. The case is an example of one of many attempts to invoke the so-called "closed category" argument according to which a legislative measure directed at a specific group of identified persons is properly regarded as a series of individual decisions applicable to their particular cases. In the *Calpak* case, the argument was rejected by the Court which

[13] Joined Cases 789/79 and 790/79 *Calpak* v *Commission* [1980] ECR 1949.

said that a provision limiting the grant of aid for all producers of a particular product is by nature a measure of general application. It said, "the measure applies to objectively determined situations and produces legal effects with regard to categories of person described in a generalized and abstract manner. The nature of a measure as a regulation is not called into question by the mere fact that it is possible to identify the number or even the identity of the producers to be granted the aid". Another recent application of this approach can be found in the judgment of the CFI of 7 November last in *Roquette Frères SA* v *Council*[14].

By way of contrast, the *Weddel*[15] case in 1990 is an example of a series of cases where the argument succeeded. There, the regulation under attack directed how import licences for the allocation of an import tariff quota under the GATT arrangements were to be dealt with by the national authorities. Under those arrangements, a fixed quantity of beef or veal could be imported into the Community each year and licences were issued to Community importers for the purpose. Applications had to be lodged by traders with the national agencies, and once the total demand for licences was known, the applications were scaled back proportionately to enable the available quantity to be allocated. In the case in question, a further adjustment reducing the percentage quantities allocated to the traders became necessary and this was done by the contested regulation. The Commission defended the case on the basis that this was a true legislative measure and the fact that it was possible to determine the number and even the identity of the traders enacted by the regulation did not make it a "disguised decision" which could be reviewed. According to the Court, the factor which distinguished this situation from that of *Calpak* was that the category of applicants for licences became fixed once the closing date for applications was reached and no new traders

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14 Case T-298/94 *Roquette Frères SA* v *Council*, not yet reported.

15 Case C-354/87 *Weddel* v *Commission* [1990] ECR I-3847.

could join the closed group. Because the regulation effectively determined the quantities to be allocated to each member of that closed group, it was properly categorized as a series of decisions on those applications. The regulation was not of general application. As the Court put it, the measure "must be regarded as a bundle of individual decisions taken in the guise of a regulation, each of those decisions affecting the legal position of each applicant".

Part of the difficulty in identifying the essential ingredients of *locus standi* is the fact that there appears to be a degree of confusion or, at least, overlap of the concepts of individual concern, on the one hand, and the so-called "disguised decision", on the other. The classic definition of "individual concern" was given the Court of Justice in the *Plaumann* case and the particular formula has been repeated over and over again in all relevant cases ever since. The actual wording used in the English text of the judgment as published is as follows:

> "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 by which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed."

In passing, I would like to point out that this is one of those unfortunate passages of Community jurisprudence which have acquired an almost legendary status through constant repetition but which, at least in the English text, are somewhat obscure. One of the reasons for this, of course, is that the *Plaumann* case dates from 1963 so that the text of the judgment was not originally rendered in English but was one of many translated into English very hurriedly in 1973 when the two English speaking countries joined the Common Market. Apart from its

grammatical deficiencies, the English text does not closely reflect the French text and, indeed, seems to depart significantly from the wording used in the Treaty itself. Perhaps a more helpful paraphrase of the passage would be as follows:

> "It is settled case-law that persons other than those to whom a decision is addressed cannot claim that the decision is of individual concern to them unless it affects them by reason of specific attributes peculiar to themselves or of factual circumstances which distinguish them from all other persons; so that the presence of these factors singles them out as if they were the person addressed."

It is very difficult, therefore, to identify any major difference between the test for individual concern and the test for distinguishing a regulation from a decision. The test for individual concern is whether or not the measure impacts upon an applicant because of circumstances peculiar to him which differentiate him from everyone else. The test for distinguishing a regulation from a decision, as identified in the *Plaumann* case as well, is that "one must inquire whether the measure concerns specific persons" as opposed to being of general application. But if a measure (whether in the form of a decision or in the form of a regulation) must be treated as a decision because it is a measure which concerns specific persons, it necessarily follows that the measure is also of individual concern to any one of those specific persons. Or so it seems to me. Perhaps the essential feature which distinguishes the true "closed category" situation such as in *Weddel* from the cases such as *Calpak* or *Roquette Frères*, where the class is limited but not permanently closed, is that when you ask precisely what it was the institution was doing when it adopted the measure, it is possible in the closed category instances to answer that the institution was not genuinely enacting a law but was taking a decision as to how a small

number of identifiable cases would be dealt with.

Anti-Dumping Cases

Another feature of the jurisprudence which suggests that the concept of "individual concern" is the dominant ingredient in any test of *locus standi* under paragraph 4 and that the concept of the "disguised decision" is something of a red herring, is to be found in the series of cases dealing with applications for annulment of anti-dumping regulations. Under the series of basic regulations laying down the rules for anti-dumping measures against imports from non-Member States, the anti-dumping duties can only be imposed by measures adopted in the form of regulations. *Prima facie*, therefore, an anti-dumping regulation is a genuine normative measure applicable to all of the parties with an interest in the trade in question. Nevertheless, the procedure leading to the adoption of anti-dumping regulations invariably commences with a complaint from aggrieved competitors within the Community against cheap imports from enterprises in third countries. There follows an investigation by the Commission which looks in detail at costs and pricing of the products and invariably involves the submission of evidence and observations from either the foreign manufacturers or exporters or from their importing agents within the Community. Discussions and negotiations may well take place between the Commission and enterprises concerned. The fact that these have taken place may well be mentioned in the recitals to the eventual regulation and the enterprises in question may even be identified. The judgment of the Court of First Instance on 18 September last in the case of *Climax Paper Converters Ltd*[16] is a typical example. The anti-dumping regulation challenged in that case had its origin in a complaint made by the Committee of European Photo Album Manufacturers against imports of photo albums manufactured by a particular company in China and exported to the Community by a related company in Hong Kong. The regulation imposing the anti-

[16] Case T-155/94 *Climax Paper Converters Ltd* v *Council* (18 September 1996, not yet reported).

dumping duty was formulated in terms of general application and imposed the duty on all imports of those products from the People's Republic of China. Climax Paper Converters Ltd had taken part in the investigation procedure and submitted evidence. It took part in meetings with the Commission. Indeed, the only evidence available to the Commission which formed the basis of the calculation of the duty was evidence submitted in relation to the applicant's products. The applicant was named in the recitals.

The Council, in defending the claim, objected to the admissibility of the application on the basis that the applicant could not be directly and individually concerned. The regulation was directed at all imports of the products from China and was not, therefore, addressed to the applicant alone. As China is a state trading country, all exports are effectively regulated by the state and issues of cost and pricing are not generally within the independent discretion of a trading entity such as the applicant.

The Court of First Instance followed the approach which had been laid down in earlier cases such as *Allied Corporation*[17] and *Extramet*[18] in which it had held that although the anti-dumping regulations are by nature and scope of a normative character, they can nevertheless be of direct and individual concern to those producers and exporters trading in the products in question.

Throughout the jurisprudence, the Court has explained the rationale of the distinction between a regulation and a decision and the justification for the requirement that the regulation be a disguised decision as that of ensuring that the institutions may not, by mere choice of a form of a measure, deprive

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17 Joined Cases 239/82 and 275/82 *Allied Corporation and others* v *Commission* [1984] ECR 1005.

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

individuals of their right to challenge the validity of a measure. But in the case of the anti-dumping duties, the relevant institution has no such choice. The use of the regulation is mandatory. The measure is a regulation in every case because that is what the basic regulation requires. Nevertheless, the reality of the situation, as recognized by the Court in these cases, is that the entire formulation of the regulation is based upon detailed consideration of the specific circumstances of a small number of identified traders including specific traders who may have been in direct consultation with the Commission for the purpose. Although the anti-dumping regulation remains both in form and substance a legislative or normative measure, the Court has nevertheless been prepared to reflect the reality of the situation by acknowledging that the traders in question are individually concerned and therefore have the *locus standi* to challenge the regulation.

The *Extramet* Case

The *Extramet* case is a particularly good illustration of the way in which the anti-dumping cases appear to depart from the more general principle pursued in other cases. In that case, the regulation had imposed a duty on imports of calcium-metal from China and the Soviet Union. The applicant, Extramet, was neither the exporter nor the producer of the product but one of the largest independent importers within the Community. The Council objected to admissibility upon the basis that Extramet could not be individually concerned because it was an independent importer whose selling prices had not been taken into consideration for the purposes of the investigation. Nor had Extramet taken part in the investigation or been named or identified in the regulation itself. The Court acknowledged that the requirements for individual concern could be satisfied by producers and by exporters who were themselves involved in the investigation or identified in the recitals to the regulation, but simply said that "such recognition of the right of certain categories of

traders to bring an action for annulment cannot prevent other traders from also claiming to be individually concerned". The fact that the applicant was the largest importer of the product into the Community and that "its business depends to a very large extent on those imports and are seriously affected by the contested regulation" was sufficient to satisfy the *Plaumann* requirement of attributes and circumstances peculiar to the applicant.

Unfortunately, this appears to lead to a situation in which the jurisprudence propounds two propositions which cannot easily be reconciled. First, there is the proposition of the *Calpak* cases, and frequently repeated in others, that a measure does not lose its general and abstract legislative character because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to whom it will apply at any given time. The anti-dumping cases show, however, that a measure must necessarily preserve its character as a regulation and still be open to attack by an undertaking which has genuine individual concern by reason of the extent of its impact upon its business.

In dumping cases, therefore, it seems now reasonably clear that it is not a necessary ingredient of *locus standi* in an action for annulment under Article 173 that the applicant must show that the dumping regulation is a disguised decision. In effect, because of the close similarity between the test as to the distinction between a regulation and a disguised decision, on the one hand, and to the test of individual concern, on the other, the applicant will be entitled to be heard so long as he can show the circumstances or attributes of individual concern. This can be done either by showing that he has taken part in the discussions which led to the formulation of the duty and is referred to in the recitals to the regulation; or that his trade in the products on which the duty is imposed is such that he is exceptionally injured by the effect of the duty.

The *Codorniu* Case

The most recent major step in this evolution of Community jurisprudence is the *Codorniu*[19] case which is, in its own way, the Community equivalent of the House of Lords' decision in the Federation of Small Businesses case.

The *Codorniu* case was an application for annulment of part of Council Regulation No 2045/89 which inserted an amendment in an earlier regulation laying down general rules for the description of sparkling wines. One of its effects was to reserve the term *"crémant"* as a designation for sparkling wines produced in France and Luxembourg only. The applicant was a major producer of sparkling wine in Spain and, in fact, the Community's single largest producer of sparkling wine described as *"crémant"*. Furthermore, since 1924, it had used the registered trade mark *"Gran crémant de Codorniu"* on its products. The Council, as defendant, raised an objection as to admissibility on the ground that the measure was a true regulation with general application to all producers of sparkling wines. In the classic language of the case-law it was claimed to be a measure "applicable to an objectively determined situation which had legal effects in respect of categories of persons considered in a general and abstract manner". The applicant, accordingly, was only concerned by the provision in the same way as any other producer. Codorniu responded by arguing that the regulation did not in reality have a general scope but was directed at a well-known and closed category of producers of these products which were readily identifiable when the legislation was introduced. The applicant relied heavily on the *Extramet* judgment. It is worth, I think, quoting the crucial paragraph of the Court's judgment in full:

> "Although it is true that according to the criteria in the second paragraph of Article 173 of the Treaty, the

[19] Case C-309/89 *Codorniu SA* v *Council* [1994] ECR I-1853.

> contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them. Natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances by which they are differentiated from all other persons (*Plaumann*). Codorniu registered the trade mark *"Gran crémant de Codorniu"* in Spain in 1924 and traditionally used that mark both before and after registration. By reserving the right to use the term *"crémant"* to French and Luxembourg producers, the contested provision prevents Codorniu from using its graphic trade mark. It follows that Codorniu has established the existence of a situation which, from the point of view of the contested provision, differentiates it from all others."

What is remarkable about this passage is that for the first time and in explicit terms, the Court of Justice has disregarded the issue as to whether the applicant had demonstrated that the regulation was a disguised decision. On the contrary, the Court fully recognizes that the regulation in question was genuinely of general application to all traders in sparkling wines. Nevertheless, by virtue only of the fact that the applicant was a trader who had a particular trade mark for the product concerned, he was entitled to claim to be directly and individually concerned by the regulation. In other words, the regulation operated as such in its application to the world at large: but was simultaneously a decision so far as Codorniu alone was concerned. It decided his case: it threatened to ruin him. While the judgment may in one sense appear to be remarkable, it is also possible to regard it as being no more than an extension of the approach already taken in the anti-dumping cases where the legislative character of the regulation

as applied to traders in general did not prevent it being treated as of individual concern to one or more traders in particular.

It is interesting to note that in the *Extramet* case, Advocate General *Jacobs* had openly invited the Court to abandon the ingredient of the "disguised decision" as part of the conditions of *locus standi* when he said:

> "The Court should, in my view, make clear what is already implicit in the prevailing trend of its case-law, namely that the requirement of a decision does not exist independently of the requirement of individual concern."

In the *Codorniu* case, Advocate General *Lenz* seemed to be suggesting in very similar terms that the jurisprudence of the Court in this area was due for a comprehensive review. He said, "I am of the opinion that the general classification of the contested provision as a measure in the nature of a regulation, is not sufficient for the action to be dismissed as inadmissible. On the contrary, it must be considered whether the applicant is individually concerned by it".

The Conspiracy Theory

The *Codorniu* judgment was handed down on 18 May 1994 and effectively coincided with the transfer of direct actions brought by individuals against measures of the institutions to the Court of First Instance. It is tempting to consider that this relaxation in the conditions of *locus standi* was a form of welcoming gift from the Court of Justice to the Court of First Instance on that occasion. What is intriguing about that possibility is that in the course of educating myself about *locus standi* under Article 173 since I arrived in Luxembourg, I came across an article[20] written back in 1980 by the Danish

[20] *Hjalte Rasmussen*, Why is Article 173 interpreted against private plaintiffs?, European Law

professor, *Hjalte Rasmussen*, in which he put forward a form of conspiracy theory about Article 173. In examining the jurisprudence to date, he concluded that Article 173(4) was construed very restrictively against the interests of individual applicants. He suggested that the reason for this was that the Court of Justice at the time had a hidden agenda. The objective of the Court in the manner in which it construed paragraph 4 was, he thought, to bring about pressure for the restructuring of the judicial function of the Community. According to him, the Court saw itself as a final appellate jurisdiction dealing only with pure questions of law. Issues of *locus standi* required a more detailed examination of facts and circumstances which would be appropriate to an inferior jurisdiction operating as a tribunal of first instance. According to Professor *Rasmussen*, the policy of the Court was to enlarge the responsibility of the national courts and of any possible tribunal of first instance in the area of providing Community citizens with protection for individual rights. By unburdening itself of direct actions, claims for damages and staff cases, the Court could then become a final appellate court dealing exclusively with issues of law and the actions brought by and against the Member States for failure to comply with Community law.

The intriguing question arises, therefore, if Professor *Rasmussen*'s conspiracy theory was correct, as to whether the European Court used the *Codorniu* case in order deliberately to relax the conditions for *locus standi* under Article 173(4) so as to equip the Court of First Instance with a far more flexible and pragmatic basis for assessing the admissibility of direct actions for annulment brought by private persons.

If the overall policy was to place the judicature of the Community as a whole in a position to take a more flexible and more pragmatic approach to the question of *locus standi* and, in that sense, to bring the Community jurisprudence into line with

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Review 1980, p. 112.

developments elsewhere in the world, then it seems fair to say that the development has been reflected in the approach of the Court of First Instance since 1994. In the case of *Antillean Rice Mills NV* v *Commission*[21] decided in September 1995, for example, the CFI added a further dimension to the element of individual concern. In the *Plaumann* test, you will recall, the element of individual concern turned upon the special attributes or peculiar circumstances of the applicant himself. In *Antillean Rice Mills*, the CFI held that "where the Commission is, by virtue of specific provisions, under a duty to take account of the consequences of the measure which it envisages adopting for the situation of certain individuals, that fact distinguishes them individually" for the purposes of the *locus standi* test. In other words, an applicant can be treated as being individually concerned if the conditions governing the adoption of the contested measure by the institution require, as a matter of law, that the applicant's circumstances be taken into consideration. Unlike the *Codorniu* case, the approach of the CFI was not to see if the effect of the measure was to deprive the applicants of particular pre-existing rights. The element of individual concern was satisfied by the fact that the Community provisions themselves demanded that regard be had to the particular circumstances of the applicants in the context in question.

Merger Cases

Similar reasoning was applied by the Court of First Instance to related cases in April of last year in the *Perrier*[22] and *Vittel*[23] cases. These cases had been brought by employee organizations seeking the annulment of a Commission decision under the Merger

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21 Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills NV and Others* v *Commission* [1995] ECR II-2305.

22 Case T-96/92 *Comité central d'entreprise de la société générale des grandes sources a.o.* v *Commission* [1995] ECR II-1213.

23 Case T-12/93 *Comité central d'entreprise de la société anonyme Vittel a.o.* v *Commission* [1995] ECR II-1247.

Regulation which authorized a merger between Nestlé and Perrier. Although this was a case of a decision properly so-called which was addressed to the parties to a particular merger, the CFI held that the employees represented by the applicants could be treated as individually concerned by the decision because the Commission was under a duty pursuant to the Merger Regulation "to ascertain whether the concentration is liable to have consequences, even if only indirectly, for the position of the employees in the undertakings in question, such as to affect the levels or conditions of employment in the Community or a substantial part of it".

Although these cases might, at first sight, be thought to introduce a new element into the concept of *locus standi* under paragraph 4 and to create a new class of exceptions to a general rule, I think it is also possible to see them as merely the logical extension of an approach that has been adopted in the anti-dumping cases, competition cases and state aid cases over a considerable period.

As is well known, the Court has taken a far more flexible approach to the concept and to the requirements of the paragraph in competition cases. For example, twenty years ago in the *Metro SB-Großmärkte*[24] case, the Court regarded a complainant in a competition procedure under Regulation No 17/62 as satisfying the requirement of individual concern for the purpose of challenging a Commission decision addressed to another enterprise to the effect that no infringement of the competition rule had taken place. Metro had itself introduced the complaint under Regulation No 17/62 and was one of the undertakings excluded from the distribution system operated by the respondent. The rationale of the approach in the *Metro* case is that the law recognized the entitlement of Metro to introduce the complaint and once the Commission had decided to investigate it, Metro had a legitimate interest in the resulting decision.

[24] Case 26/76 *Metro SB-Großmärkte* v *Commission* (No 1) [1977] ECR 1875.

As complainant, it was effectively a party to the proceeding. But it is not the fact that the undertaking has been the complainant instigating the procedure which determines the matter. In the second *Metro* case in 1986[25], the investigation did not arise out of a complaint by that undertaking, although Metro had submitted observations during the course of the procedure. Nevertheless, it still had *locus standi*.

The importance of involvement in the procedure is evident from the fact that in many of the cases that have arisen out of state aid proceedings, *locus standi* to challenge a Commission decision has been recognized in favour of parties who have submitted observations or been consulted as "persons concerned". Although undertakings do not have the same formally recognized status accorded to them under the competition rules and Regulation No 17/62, the Court has recognized that where undertakings can complain or where they have been listened to as part of the investigation procedure under Article 93, they have a legitimate interest in the outcome of the procedure which is sufficient to give them *locus standi* to challenge the decision under paragraph 4.

But the application of this approach by analogy is not confined to circumstances where it is a provision of the Treaty or of internal legislation of the Community which recognizes the entitlement of the third party to be concerned in a procedure which leads to the making of the challenged decision. The *Antillean Rice Mills* case, for example, is based directly upon the approach which had been previously taken in the *Piraiki-Patraiki* case[26] which arose out of Article 130 of the Act of Accession of Greece to the Community. The provision in question entitled the Commission to take certain protective measures but, before so deciding, was obliged "in so far as the circumstances of the case permit, to inquire into the negative effects which

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[25] Case 75/84 *Metro SB-Großmärkte* v *Commission* (No 2) [1986] ECR 3021.

[26] Case 11/82 *Piraiki-Patraiki a.o.* v *Commission* [1985] ECR 207.

its decision might have on the economy (of the Member State concerned) as well as on the undertakings concerned". The applicants in the *Piraiki-Patraiki* case were recognized as having the necessary qualifications of *locus standi* because they were amongst "the undertakings concerned". Although there was no explicit right and no defined procedure for consultation of any identifiable undertakings or associations of undertakings, the mere fact that the legislation recognized an obligation on the part of the Commission to take their position into account was sufficient to satisfy the test.

Conclusion

In the thirty years or so since the *Plaumann* decision, therefore, it is possible to say, I think, that the jurisprudence of the European Court has moved, however gradually, a very considerable distance away from the apparently restrictive view which the earlier cases adopted. In the first place, the dual test of individual concern and the need to show that a regulation is a disguised decision has been considerably relaxed so that it is the element of individual concern which is now the dominant criterion. Secondly, in a relatively wide range of specific cases where the legislative regime itself recognizes the entitlement of private parties to involve themselves in the legislative or decision-making process, either as direct parties such as complainants in competition matters or as merely interested or concerned parties entitled to be heard, they will be recognized as having the necessary interest to challenge the resulting decision. Furthermore, even where there is no defined role for the third party in the procedure, if the legislative context is such as to require the institution to take the interests of those parties into account prior to making the decision, it is highly probable that the parties involved will be entitled to be heard by the Court under Article 173(4).

I recognize, of course, that this apparent evolution towards a

more liberal approach to admissibility under paragraph 4 does not meet with universal approval. From the point of view of the practising lawyers, the situation appears to be one of considerable uncertainty and they often find it extremely difficult to advise clients as to whether the particular circumstances of their case will successfully meet the criteria of admissibility. Very often, the criticism made is that the exceptional cases such as *Codorniu*, *Extramet* and *Piraiki-Patraiki* are the result of very special circumstances which are not capable of giving rise to a principle of general application.

As I have mentioned, some commentators, particularly those with the security of the legislative process at heart, fear that an opening up of the criteria of admissibility under Article 173 could have disastrous consequences for efficient public administration. Especially at Community level, many regulations and decisions are the result of compromise choices worked out with great difficulty either between the interests of Member States or the opposing interests of operators in the sector to which the legislation will apply. If private parties with their own ulterior motives for challenging the legislation have easy access to an action for annulment under Article 173, it is feared that the legislative process itself could be greatly damaged.

While it may well be true that there are special considerations that ought properly to be taken into account at this stage of the development of the European Community, it still seems to me that these fears about the opening up of flood-gates under Article 173 are misguided. After all, what we are discussing here is merely the criteria for admissibility of these claims under paragraph 4. Even when the claim is admissible, it cannot succeed unless the applicant can establish one of the grounds of invalidity laid down by the first paragraph. A decision on admissibility is no more than a decision that the Court will

listen to the claim which the applicant makes.

If the boast which the Community makes in the passage I quoted earlier from the decision in the *Les Verts* case is correct and worthwhile, then it is illogical to criticize any evolution of the jurisprudence which relaxes the criteria of paragraph 4. The essential message of that case is that the European Community is a community founded squarely on the rule of law. The purpose of the comprehensive system of judicial review provided for by the joint mechanism of Article 173 taken with Articles 184 and 177 is that it is repugnant to any constitution based upon the rule of law that any citizen should be subjected to unconstitutional legislation or unlawful decisions. If the law is invalid or the decision is illegal, then it ought to be set aside one way or another, and it is only of procedural significance whether that result is achieved through the mechanism of Article 173 or the mechanism of Article 184. If we are agreed as a matter of constitutional principle that invalid legislation and unlawful decisions should not be beyond challenge in a Community based upon the rule of law, then the question as to whether third parties should have *locus standi* under Article 173(4) should be determined by practical and procedural considerations and not treated as a question of immutable principle.

In conclusion, therefore, it is my view that the developments that have taken place in some of the case-law I have referred to bring the Community very close to the situation which has been achieved in many of the national jurisdictions. By this I mean that the criteria of admissibility as they are now understood in the case-law are sufficiently flexible to enable the European Courts to entertain serious challenges when brought by third parties who have a genuine interest in the outcome of the issue which is raised, while at the same time being sufficiently pragmatic to enable the Court in appropriate cases to decline jurisdiction if the applicant's interest is too remote or too mischievous or if the subject-matter of the challenge is more

clearly suited to the detailed investigation and assessment that can be conducted in a national court.

1.. [1994] ECR I-833. See also Case 20/65 *Collotti* v *Court of Justice* [1965] ECR 847.