PUBLIC INTEREST LITIGATION BEFORE THE EUROPEAN COURT OF JUSTICE

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ABSTRACT

This article explores the question of the role of associations before the European Court of Justice, especially in the context of actions for annulment, as currently regulated by Article 230 al. 4 EC. Although associational standing is in principle excluded under that provision, associations acting in the public interest may, under certain well-specified conditions, intervene before the Court of First Instance or the European Court of Justice, thus contributing – to the extent that these jurisdictions are competent – to the fully deliberative character of the judicial process, and ensuring that the Courts take into account the collective interests such associations seek to represent. Moreover, the current case-law of the European Courts considers that the right of certain organisations to be parties to administrative proceedings may justify according those organisations a right to file an action for the annulment of the act adopted on the basis of those proceedings, which may constitute an important incentive for the creation of associations and their active implication in the political or administrative decision-making process. By examining these different possibilities and how they relate to one another, this article contributes to our understanding of the prospects of public interest litigation before the European Court of Justice.

§1. INTRODUCTION

Three different kinds of arguments are traditionally put forward in favour of 'associational' or 'organisational' standing, implying the possibility for organisations to

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bring judicial proceedings for the safeguarding of the values that they seek to defend.[1] A first argument is based on the idea that certain illegal acts of the administration, or unconstitutional acts adopted by the legislator, risk being left unremedied if associations are not accorded *locus standi* in order to seek their judicial review.[2] This is the case, in particular, with respect to violations which concern large and diffuse interests, which no individual litigant would otherwise have an incentive to challenge, or where no individual litigant may even have standing to sue, in systems where the admissibility of the action is made conditional upon a demonstration that the interest is sufficiently 'individualized', i.e., specific to the individual applicant rather than common to an open category of persons of which the litigant is a member. We may call this the 'rule of law' rationale for the recognition of the *locus standi* of groups. It is this argument which has been predominant in the areas of environmental law and consumer law, precisely because of the diffuse character of the interests which these branches of law seek to protect.[3] Here, the objective of recognizing associational standing is to make it possible for organisations to act as 'private Attorneys General', to use the expression made famous by Judge Jerome Frank,[4] in order to contribute to the preservation of the rule of law: the absence of

1 The distinction between these different arguments is sometimes obfuscated in legal doctrine. A characteristic example is A. Cygan, 'Protecting the Interests of Civil Society in Community Decision-Making – the Limits of Article 230 EC' 52 *I.C.L.Q.* 995 (2003).

2 This was the main argument put forward in the *Greenpeace* litigation, perhaps the most important decision on the notion of public interest ever presented to the European Court of Justice; see Case T-585/93 *Greenpeace and Others v Commission* [1995] ECR II-2205 and, on appeal, Case 321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities*, [1995] ECR I-1651. In this case, the applicants unsuccessfully sought to challenge a decision by the European Comission to grant financial assistance from the European Regional Development Fund for the building of two power stations in the Canary Islands by a company that had not complied with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

3 This has been largely the focus of the debate of organisational standing under Article III of the United States Federal Constitution, restricting the jurisdiction of federal courts to decide 'cases and controversies' brought forward by litigants having a legal interest in the solution. See, e.g., C. Stone, 'Should Trees Have Standing – Towards Legal Rights for Natural Objects' 45 S. *Cal. L. Rev.* 450 (1972); C. Stone, 'Should Trees Have Standing Revisited: How Far Will Law and Morals Reach – A Pluralist Perspective' 59 *S. Cal. L. Rev.* 1 (1985-1986); C. Sunstein, 'What's Standing After *Lujan*? Of Citizen Suits, 'Injuries', and Article III' 91 *Mich. L. Rev.* 163 (1992). The restrictive approach adopted by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), has served to highlight the importance of this question. See also, for a broader perspective, K.E. Parker and R. Stone, 'Standing and Public Law Remedies' 78 *Columbia L. Rev.* 771 (1978); and, for a call upon courts to create remedies in order to ensure that deficient administrative performance is effectively sanctioned, the path-breaking article by R. Stewart and C. Sunstein, 'Public Programs and Private Rights' 95 *Harv. L. Rev.* 1193 (1982).

4 *Associated Industries, Inc. v. FCC*, 134 F.2d 694, 704 (2nd Cir. 1943). On this rationale, which also justifies a generous reading of the requirements of standing in order to authorize suits by public-minded citizens, for instance in the context of taxpayer suits, see L.L. Jaffe, 'Standing to Secure Judicial Review: Public Actions' 74 *Harv. L. Rev.* 1265 (1961); K. Davis, 'Standing to Challenge Governmental Action' 39 *Minn. L. Rev.* 353 (1955), 386-391; L. L. Jaffe, 'The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff' 116 *U. Pa. L. Rev.* 1033 (1968).

sufficiently directly and individually affected interests should not constitute an obstacle for the exercise of judicial review, as otherwise, the most widespread or diffuse violations (especially when they are hardly noticeable by individuals) would be the most immune from control by the judiciary.

A second argument in favor of associational standing focuses not on the contribution of this form of standing to the expansion of the scope of judicial review and the preservation of legality, but on the adjudicatory process itself. The argument here is that judicial reasoning should be based on a contextual understanding of the issues at stake, with the case to be decided on the exercise of deliberation and on a procedural form of rationality rather than on a substantive or formalistic approach to the requirements of the law.[5] The moment of adjudication should be an occasion for the 'revision of the normative histories that make political communities sources of contestable value and self-direction for their members'[6]: in its purest civic-republican formulation, the judicial decision will be legitimate to the extent that it is adequately informed and that it is the outcome of a truly deliberative process, in which all the relevant interests are represented and can bring before the judge their diverse perspectives. Let us call this the 'participatory-adjudicative' rationale for the improvement of the the legal standing of groups.

Finally, a third argument in favor of organisational standing is that it may serve to reinvigorate civil society organisations, and thus encourage their greater implication in the decision-making process, whether in administrative proceedings or in lawmaking.[7] This is the 'participatory-democracy' rationale for opening the gates of litigation to groups. By providing citizens concerned with the public interest with the tool of litigation as part of the panoply of means through which they may seek to impact on policy – and law-making, organisational standing might create an incentive for such public-minded citizens to form associations and invest in civic action. And it may also constitute an incentive for policy-makers and legislators to take into account better the arguments put forward by the organisations thus formed, in order to limit the risk that, confronted with their refusal to do so, civil society organisations will seek to challenge in court the administrative or legislative act adopted in the absence of significant consultation. According to this third argument, the recognition of associational standing would, thus, be valuable especially insofar as it serves as a leverage mechanism to promote

5 In defence of an approach to adjudication based on pratical reason, which they contrast with 'foundational' approaches, see D.A. Farber & Ph. P. Frickey, 'Practical Reason and the First Amendment' 34 *UCLA L. Rev.* 1615 (1986-1987), 1645-1648.

6 F. Michelman, 'Law's Republic' 97 *Yale L.J.* 1493 (1988) (concerning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

7 See in particular C. Harlow, 'Towards a Theory of Standing for the European Court of Justice' 12 *Yearbook of European Law* 213 (1992); and C. Harlow, 'Public Law and Popular Justice' 65 *Mod. L. Rev.* 1 (2002).

participatory democracy, or at least enhanced forms of implication of the civil society in the administrative and legislative processes.

This paper explores the question of the role of associations before the European Court of Justice, especially in the context of actions for annulment, as currently regulated by Article 230 al. 4 EC. We will see that the current judicial attitude, which is to exclude associational standing in principle while providing for certain exceptions to that exclusion, does not make it possible for organisations – even when they would appear to be well qualified and representative at the European level – to adopt the position of 'private Attorneys General' and to transform themselves into 'privileged applicants' contributing by their actions to the preservation of legality in the Community legal order. On the other hand, such associations may under certain well-specified conditions intervene before the Court of First Instance or the European Court of Justice, thus contributing – to the extent that these jurisdictions are competent – to the fully deliberative character of the judicial process, and ensuring that the Court is made aware of all the implications of the case it is presented with, even those exceeding the situation of the applicant affected by the challenged act. Moreover, the linkage we may identify in the case-law of the European Court of Justice between the procedural rights of certain organisations to be parties to administrative proceedings on the one hand, and the right of those organisations to file an action for the annulment of the act adopted on the basis of those proceedings on the other, may constitute an important incentive for the creation of associations and their active involvement in the political or administrative decision-making process. Therefore, of the three arguments traditionally presented in favour of associational standing, only the first really has weight in our context, if it is to justify a liberalization of the rules of standing in order to authorize organisational standing in the filing of actions for annulment. The recognition of associational standing, in other terms, may be one way to overcome the difficulties entailed by the restrictive reading made by the European Court of Justice of the conditions imposed on the introduction of actions for annulment by private applicants. The current system, however, does offer certain avenues to associations seeking to act in the public interest. These associations may contribute to providing the judge with the diversity of perspectives required for a fully informed judgment to be adopted. The current system, further, contains incentives for associations to be set up and invest in the decisional processes. The prospects for the recognition of associational standing are today minimal or non-existent.[8] It is therefore even more important now to explore the existing alternatives.

8 Indeed, by enlarging the *locus standi* of individual applicants directly affected by the adoption of certain acts adopted by the Union, even of a general scope, the drafters of the Constitutional Treaty (OJ C 310 of 16.12.2004) had chosen another route than associational standing in order to ensure that the principle of the rule of law in the Union is (almost) fully respected. Article III-365 of the Treaty establishing a Constitution for Europe states that any natural or legal person may institute annulment 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*'.

In order to justify these claims, this article proceeds as follows. A second section shall recall the principle according to which associational standing is not recognized in the current case-law of the European Court of Justice. The third section distinguishes this question, which concerns the *quality* to act and the relationship between the organisation and the act it seeks to challenge, from that of the *capacity* of an organisation to bring an action before the European Court of Justice. The fourth section describes three exceptions to the rule according to which associational standing is not recognized in the context of actions for annulment before the Court of First Instance or, previously, the European Court of Justice. The fifth section then relates the existing case-law, developed essentially with regard to associations of undertakings, to the present status of civil society organisations in the decision-making process of the Union. The sixth section briefly examines whether, in the absence of the recognition of associational standing for the lodging of direct actions before the European Courts, the possibility for groups to intervene in proceedings before them might constitute a satisfactory alternative. The final section offers a brief conclusion.

§2. THE PRINCIPLE: THE EXCLUSION OF ASSOCIATIONAL STANDING IN ANNULMENT PROCEEDINGS

The judgment delivered on 14 December 1962 by the European Court of Justice in the joined Cases of *Confédération nationale des producteurs de fruits et de légumes and others v. Council of the European Economic Community*[9] is best remembered for its restrictive reading of the conditions under which a private applicant may seek the annulment of a Community act of a general nature, which anticipated the *Plaumann* case decided the following year.[10] The reading proposed by the Court of what was then Article 173 al. 2 of the EEC Treaty, and is now Article 230 al. 4 EC, has been criticized almost since the judgment was first delivered.[11] Despite the recognition by the European Court of Justice itself that the reading it felt complied to maintain may be overly restrictive of the right of

The extension of the *locus standi* of private applicants would have concerned therefore only non-legislative acts – regulations, not European laws –, among the acts which are considered directly applicable. On this constitutional debate, see E. Biernat, 'The *Locus Standi* of Private Applicants under article 230(4) EC and the Principle of Judicial Protection in the European Community' *Jean Monnet Working Paper* 12/03, NYU School of Law, 2003; J. Usher, 'Direct and Individual Concern – An Effective Remedy or a Conventional Solution?' 28 *E.L.Rev.* 599 (2003); and J. Köhler, *Judicial protection for individual applicants against European Regulations and Directives: general concepts and recent developments in the case-law of the Community courts and under the proposed Constitution for Europe*, http://www.law.kuleuven.ac.be/cals/llm/LLMPapers/Y0304/JuliaKoehler.pdf.

9 Joined Cases 16 and 17/62, [1962] ECR 471.

10 Case 25/62, *Plaumann v Commission* [1963] ECR 95.

11 See in the more recent doctrine, *inter alia*, A. Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty' 32 *C.M.L.Rev.* 7 (1995); N. Neuwahl, 'Article 173 paragraph 4 EC: Past, Present and Possible Future' 21 *E.L.Rev.* 17 (1996).

access to a court where the individual sought to protect his fundamental rights,[12] and despite the more recent finding by the Court of First Instance that it might conflict with the right to an effective judicial remedy proclaimed in Article 47 of the Charter of Fundamental Rights,[13] it will require a revision of the Treaty to overcome the most contested implication of that case-law – the prohibition it imposes on a private applicant to seek before the European judicature the annulment of a Community act, even where the adoption of that act directly affected the applicant and where no effective remedy is otherwise available.

It is the purpose of the present contribution to examine neither the nature of that problem nor, indeed, the adequacy of the answer which the Treaty establishing a Constitution for Europe had proposed.[14] The focus of this article, rather, is on another aspect of *Confédération nationale des producteurs de fruits et de légumes* that has been less frequently noticed. The Court considered in this judgment that the requirements set by the Treaty of Rome for the admissibility of actions for annulment by private persons would be too easily circumvented if, by grouping themselves in an association, producers – each of whom, individually, would not present the 'direct and individual interest' required for the recognition of their *locus standi* – could present the association they have formed together as having an interest in the preservation of the interests of all its members. 'One cannot accept the principle', said the Court, 'that an association, in its capacity as the representative of a category of businessmen, could be individually concerned by a measure affecting the general interests of that category'. It explained that

> Such a principle would result in the grouping, under the heading of a single legal person, of the interests properly attributed to the members of a category, who have been affected as individuals by genuine regulations, and would derogate from the system of the Treaty which allows applications for annulment by private individuals only of decisions which have been addressed to them or of acts which affect them in a similar manner.

12 Report of the Court of Justice on certain aspects of the application of the Treaty on the European Union, Luxembourg, May 1995, http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/

13 Case T-177/01, *Jégo-Quéré et Cie SA v. Commission* [2002] ECR II-2365. See also the Opinion of Advocate General Jacobs delivered prior to the judgment of the Court of First Instance in the case of *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, then pending before the European Court of Justice. The European Court of Justice has rejected the attempt of the Court of First Instance to relax the conditions of admissibility of actions for annulment lodged by private parties: see Case C-50/00, *Unión de Pequeños Agricultores v. Council of the Union, ECR [2002]* I-6677, at para. 41; and Case C-263/02 P, *Commission v. Jégo-Quéré & Cie SA*, Judgment of 1 April 2004, para. 34. On the significance of *UPA* and *Jégo-Quéré*, see D. Hanf, 'Facilitating Private Applicants' Access to European Courts? On the Possible Impact of the CFI's Ruling in Jégo-Quéré', *German L.J.*, vol. 3 nº 7, July 2002; and by the same author, 'Talking with the '*pouvoir constituant*' in Times of Constitutional Reform: The European Court of Justice on Private Applicants' Access to Justice', 10 *MJ* 3 (2003).

14 Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004, OJ C 310 of 16.12.2004, p. 1. See above note 8.

This case-law results in the exclusion of associational standing, understood as the standing of associations based on the social aims they seek to pursue, or the collective interests they have elected to speak for.[15] This article questions whether this exclusion still is justified, and whether it conflicts with the rise of civil society organisations in the current modes of governance within the European Union.

It may be useful, as a preliminary matter, to clearly distinguish the kind of interest seeking legal recognition in the particular context of *associational* standing from the interests invoked under other forms of standing. Article 230 EC in its current form, and the corresponding provision (Article III-365) in the Treaty establishing a Constitution for Europe, provide that either institutional actors or private applicants may seek the annulment of legal acts under the conditions they specify. Whether these actors may file an action for annulment because they are accorded an institutional role in the preservation of legality within the legal order of the Union[16], because it is considered that they have an institutional interest in ensuring the protection of their legal prerogatives[17], or when they are private applicants, because the act which they challenge is of 'direct and individual concern to him or her', or (in the Constitutional Treaty) constitutes 'a regulatory act which is of direct concern to him or her and does not entail implementing measures', the interests which lead to the recognition of a *jus standi* remain defined by the legal order of the Union. These interests are, in other terms, defined objectively and *ex ante*. They do not result from the choices made by the applicant; rather, they are imposed on the applicant – whether an institutional actor or an individual – 'from above', and quite independently of the wishes of the applicant him- or herself.

By way of contrast, the kind of 'collective' interest seeking legal recognition in the context of *associational* standing is defined by the exercise private persons make of their freedom of association. These private persons may be natural or, as in *Confédération nationale des producteurs de fruits et de légumes*, legal persons. They form an association and they choose, using this association as an instrument, to pursue certain goals. Through the medium of the association, they act as self-appointed spokespersons for the

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15 For early confirmations, see Case 175/78, *Union syndicale-Service public européen, Massa and Kortner v. Council*, [1974] ECR 917; Case 18/74, *Syndicat général du personnel des organismes européens v. Commission*, [1974] ECR 933; Case 72/74, *Union syndicale-Service public européen and others v. Council*, [1975] ECR 401; and the order of the European Court of Justice in Case 60/79, *Fédération nationale des producteurs de vins de table et vins de pays v. Commission*, [1979] ECR 2429 (order of 11 July 1979). The two judgments of 8 October 1974 mention Article 173 al. 2 of the EEC Treaty only in *obiter dicta*, as the provisions applicable to those proceedings were Article 179 of the EEC Treaty and Articles 90 and 91 of the Statute of the European civil servants.

16 The Member States, the European Parliament, the Council of Ministers or the Commission, may seek the judicial review of any act of the Union, under Article III-365 al. 2 of the Treaty establishing a Constitution for Europe. This competence has been accorded the European Parliament since the Treaty of Nice entered into force on February 1, 2003.

17 Under Article III-365 al. 3 of the Treaty establishing a Constitution for Europe, the Court of Auditors, the European Central Bank and the Committee of the Regions may seek the judicial review of acts adopted by the Union or its institutions for the purpose of protecting their prerogatives.

interests they seek to defend. These interests are defined subjectively, and they seek to be recognized, *post hoc*, by the judge. This makes for the subversive character of associational standing, in the positive sense that it may surprise expectations and it presents a character of impredictability: when the 'collective interest' is invoked as a basis for legal standing (*locus standi*), the powers of the judge are not defined by the legal order itself which confers jurisdiction upon the action; instead, these powers are defined – and they may be expanded – by private initiative, simply because of the identification of certain aims by the group of persons whose objective it is to pursue their realisation. The refusal of the European Court of Justice to recognize and give effect to 'collective' interests thus defined is a refusal to be thus subverted, and to allow the balance of powers between the judge and other powers transformed by the private initiative of zealous citizens. Instead, the legal recognition of the collective interest (and of associational standing) would make it possible for groups to act as private attorneys-general – taking it upon themselves to ensure the preservation of legality, however artificial the connection of the collective interest with the individual interests of either the members of the group or of the group itself may be.

The principle is, therefore, that an association representing a category of persons may not present as its own individual interest, those of the collectivity of its members joining their forces in order to pursue certain goals. Neither may an association present as its individual interest the preservation of legality, even where the alleged violation adversely impacts upon the social objective it seeks to pursue through its activities. Groups are treated just the way individuals are. They may no more pretend to define what their interests are than individuals may pretend that they are affected, say, by pollution occuring away from their neighbourhood because they are nature-lovers or because, as active citizens, they are concerned that the environment is being damaged. There are three exceptions, however, to the principle thus stated. It is by examining these exceptions that we will be able to appreciate whether the approach of the European Court of Justice to associational standing – a dismissive approach, to put it mildly – is in tension with the current tendency to improve the participation of civil society organisations in decision-making processes within the European Union.

§3. THE CAPACITY OF A GROUP TO BRING A LEGAL ACTION

In presenting these exceptions and in locating them within the broader debate concerning the improved participation of civil society organisations in European governance, I will use indifferently the terms of 'group', 'association', or 'organisation', without distinguishing between them. Generally, the expression 'group' would refer to a less structured collectivity of persons than would the other two expressions; and the notion of 'association' clearly suggests the idea of a legal personality being attached to the group, whilst 'organisation', although suggesting the idea of a structured whole, does not necessarily imply a distinct legal personality. Although these connotations matter, I chose to use these expressions as synonyms in this paper partly to simplify style, and partly because the capacity of the 'group' to bring an action in annulment before the Court of First Instance will not depend on that group being accorded legal personality by the national legal order from which it originates. All that is required in the case-law of the European Court of Justice is that the group thus formed is endowed with 'the necessary independence to act as a responsible body in legal matters', under its rules and constitutional structure.[18] As noted by Advocate General Trabucchi in his opinion preceding the *General Union of Personnel of European Organizations v Commission of the European Communities* judgment of 8 October 1974, the rule is justified by the fact that the conditions of admissibility of actions for annulment brought before the European Court of Justice should be defined autonomously, rather than be made dependent on the attribution of legal personality by the national legal orders. What matters is, in other terms, the 'reality' of the organisation, i.e., that it is sufficiently autonomous in fact; it is irrelevant that it is not recognized as a legal person under the national order from which it emanates.[19]

An inquiry into the national law will only be required where the action for annulment appears to be lodged by entities that are an extension of the State, as they fulfil missions which are attributed to them by the public authorities: the reference to national law will then be necessary in order to determine whether the entity has indeed the autonomy and responsibility required to have the capacity to bring proceedings before the European Court.[20] A reference to national law may also be justified in order to identify the organisations that are most representative in the national legal order, for instance where the Court seeks to determine which workers' organisations have an interest in a decision of the Commission relating to a concentration of undertakings.[21] However, it is doubtful

18 Case 18/74, *General Union of Personnel of European Organizations v Commission of the European Communities* [1974] ECR 933, para. 7.

19 In this respect, the European Court of Justice follows the attitude of national jurisdictions, which adhere to the thesis of the 'reality' of the legal person, accepting that actions be brought by entities which are not formally endowed with the legal personality but present the required autonomy in fact: see, e.g., the leading decision of the French Court of Cassation: Cass. fr., 28 January 1954, J.C.P., 1954, II, 7978, concl. Lemoine.

20 See, eg, Case 282/85, *Comité de développement et de promotion du textile et de l'habillement (DEFI) v Commission of the European Communities*, [1986] ECR 2469 (where the Court dismissed the action for annulment brought by a structure created to ensure the distribution of a State aid to French producers, noting that 'the tasks described in the legislation were entrusted to DEFI [Comité de développement et de promotion du textile et de l'habillement] by the French government and that under that legislation the French government undeniably has the power to determine DEFI's management and policies and hence also to define the interests which that organisation is to protect. Thus DEFI has not shown in what way the interests which it describes as peculiar to itself are distinct from the French State's interest in the modernization and restructuring of a broad sector of the national economy' (para. 18)). For another example, see Case C-298/89, *Government of Gibraltar v. Council*, [1993] ECR I-3605.

21 See Case T-12/93, *Comité central d'entreprise de la société anonyme Vittel and Others v. Commission*, [1995] ECR II-1247 ('it is for the Member States to define which organizations are competent to represent the collective interests of employees and to determine their rights and prerogatives, subject to the adoption of harmonization measures': para. 45).

even in this case whether the identification under national law of the 'most representative organisations' will be in all respects decisive: where it would appear that an organisation manifestly representative of a large number of workers from the concerned undertakings has been excluded from the consultative procedures within the Member State, the Court would probably nevertheless accept that this organisation may file proceedings requesting the annulment of the decision adopted by the Commission on the proposed concentration.

§4. THE EXCEPTIONS

Even where it has the capacity to file proceedings before the Court of First Instance, having the required autonomy and internal decision-making procedures which make it possible for the organisation to participate in the legal process, and where it would have an interest in the proceedings and have the capacity to consider the social aims it pursues and the impact the challenged act may have on the fulfilment of those aims, the organisation will only be considered to have the quality[22] to file an action in annulment in certain well-defined circumstances.[23] The three exceptions to the exclusion of associational standing in the context of direct actions for annulment under Article 230 al. 4 EC are the following.

A. THE GROUP AS NEGOTIATOR

A first exception is that the group, whose institutional position as a negotiator has been affected by the act the annulment of which is sought, may be considered to be directly and individually concerned by that act. The introduction of this exception dates from the joined cases of *Kwekerij Gebroeders van der Kooy BV*[24], decided in 1988. In one of these cases, the applicant organisation (*Landbouwshap*) sought the annulment of a decision from the Commission prohibiting a State aid in the form of a preferential tariff for the supply of gas to horticultural producers. Relying on *Confédération nationale des producteurs de fruits et légumes*, the Commission considered that the action should be considered inadmissible, as the collective interest of the horticultural producers may not be seen as of 'individual' concern to an organisation representing them. This orthodox position had the support of Advocate General Gordon Slynn. The Court however

22 On the distinction between the existence of a legal 'interest' and the 'quality' to bring proceedings, as defined by the rules of the Treaty stipulating the conditions under which an action for annulment may be brought, see the Opinion of Advocate General W. van Gerven in the Case C-70/88, *European Parliament v. Council*, [1990] ECR I-2041, at pp. I-2058-2059.

23 See, eg, the Order adopted on 30 September 1997 by the Court of First Instance in the case of *Federolio*: Case T-122/96, *Federolio v. Commission* [1997] ECR II-1559.

24 Joined Cases 67, 68 and 70/85, *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities*, [1988] ECR 219.

disagreed. It considered that the contested decision affected the 'position as negotiator' of the *Landbouwschap*.[25] The Court noted that 'in that capacity the Landbouwschap has taken an active part in the procedure under Article 93(2) [of the EEC Treaty[26]] by submitting written comments to the Commission and by keeping in close contact with the responsible officials throughout the procedure' (para. 22). It added that 'the *Landbouwschap* is one of the parties to the contract which established the tariff disallowed by the Commission, and in that capacity is mentioned several times in [the challenged decision]. In that capacity it was also obliged, in order to give effect to the decision, to commence fresh tariff negotiations with Gasunie and to reach a new agreement'.[27]

The circumstances present in *Kwekerij Gebroeders van der Kooy BV* were rather exceptional, and the cautious language of the Court, which refused in its judgment to make explicit what the decisive factor was which implied that the decision to prohibit the State aid was of direct and individual concern to the *Landbouwschap*, made it difficult at the time to predict what the fate of that case-law would be. However, instead of being distinguished, this case-law was expanded in future cases. Indeed, it was extended to the situation where the organisation negotiating on behalf of a category of producers complained that the Commission had taken no action against what constituted allegedly a State aid prohibited by the EC Treaty, and was seeking the annulment of the decision of the Commission not to open proceedings. In *CIRFS*, the Court considered that the applicant organisation could validly claim to be directly and individually concerned by the refusal of the Commission to take action in such an instance, where the State aid benefited the competitors of its members[28]:

> CIRFS, an association whose membership consists of the main international manufacturers of synthetic fibres, has pursued, in the interest of those manufacturers, a number of actions connected with the policy of restructuring that sector. In particular, it has been the Commission's interlocutor with regard to the introduction of the discipline and its extension and adaptation. Furthermore, during the procedure prior to these proceedings, CIRFS actively pursued negotiations with the Commission, in particular by submitting written observations to it and by keeping in close contact with the responsible departments.

The Court concluded that the position of CIRFS in its capacity as negotiator of the discipline was affected by the contested decision. This implied that this association

25 Joined Cases 67, 68 and 70/85, para. 21.

26 This provision (now Article 88(2) EC) stipulates that, before deciding that a State aid is not compatible with the requirements of undistorted competition within the common market, the Commission must give notice to the parties concerned in order that they may submit their comments.

27 Joined Cases 67, 68 and 70/85, para. 23.

28 Case C-313/90, *Comité International de la Rayonne et des Fibres Synthétiques and others v Commission of the European Communities*, [1993] ECR I-1125 (para. 29).

should be considered as directly and individually concerned by the challenged act, passing the hurdle imposed by the EC Treaty for private applicants seeking the annulment of Community acts which are not decisions addressed to them.

B. THE GROUP AS A SUBSTITUTE FOR ITS MEMBERS

A second situation in which the organisation will be accorded a right to bring annulment proceedings as a representative of its members is, quite simply, where its members would have that right individually, but have chosen to act through the organisation. Here, the organisation substitutes itself for its members, whose action for annulment would have been admissible in any event. The standing recognized to the organisation does not result in extending the jurisdiction of the European judge. It constitutes nothing else really than a procedural device facilitating the treatment of claims which, if lodged individually by all the potential litigants, would have been less manageable.

In the joined cases of *AITEC and Others*[29], the Court of First Instance considered, thus, that Associazione Italiana Tecnico Economica del Cemento (AITEC), an Italian cement producers' association, could seek the annulment of the decision of the Commission authorizing an aid by the Greek government to a Greek cement producer. Although AITEC was defending the interests of the Italian cement industry as a whole, it had put forward the situation of three of its members, whose competitive position on the Italian market had been affected by the imports of Greek cement benefiting from the aid at issue, according to the Court, to an extent sufficient to consider that they were individually concerned within the meaning of Article 173 al. 3 of the EC Treaty (now Article 240 al. 4 EC): the Court recorgnized that in such circumstances, 'the collective action brought by the association presents procedural advantages, since it obviates the institution of numerous separate actions against the same decisions, whilst avoiding any risk of Article 173 of the Treaty being circumvented by means of such a collective action'.[30]

Such a procedural substitution of an organisation for its members nevertheless presupposes that the interests of those members, the protection of which strictly speaking is the real object of the litigation, are adequately represented by the organisation. Therefore the Court of First Instance requires that the organisation acts in accordance with its statutes in lodging the application (the statutes must specify that the association has among its objects to protect the economic interests of the sector), and that its representation of the interests of its members has not met with any objections.[31] This

29 Joined Cases T-447/93 and T-449/93, *Associazione Italiana Tecnico Economica del Cemento and Others v. Commission of the European Communities*, [1995] ECR II-1970.

30 Ibid., para. 60.

31 Ibid., para. 61-62.

verification ensures that the substitution of the organisation for its members respects the interests of those represented.

C. THE GROUP AS A PARTY TO ADMINISTRATIVE PROCEEDINGS

In *Metro v. Commission*, a case decided in 1977, the European Court of Justice decided that it is 'in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 [of the EEC Treaty, now Articles 81 and 82 EC]' to consider a company to be directly and individually concerned, as required then under Article 173 al. 2 of the EEC Treaty (now Article 230 al. 4 EC), where it had filed a complaint on the basis of Article 3(2), b), of Council Regulation n° 17/62 of 6 February 1962[32] alleging that a selective distribution system from which is was excluded was in violation of Articles 85 and 86 of the EEC Treaty, and where that request had not been complied with. The action for annulment, here, is brought to ensure judicial review of the validity of the decision of the Commission, and not simply in order to ensure the protection of the procedural rights of the applicant. Therefore, the case allows that in adopting secondary legislation in which it grants certain procedural rights of participation to interested parties[33], the European legislator in fact extends the right of private applicants to bring annulment proceedings – a remarkable result, since the conditions under which such proceedings may be brought are defined in primary law, by what is now Article 230 al. 4 EC.

As a result of *Metro*, insofar as associations of undertakings are recognized as interested parties in the context of the administrative procedure, which may lead the Commission to conclude that competitors of those undertakings have violated the provisions of the Treaty relating to competition, these associations may challenge, under Article 230 al. 4 EC, the decision by the Commission not to take action against the alleged violation.[34] What *Metro* illustrates in the area of competition law[35] also may occur, *mutatis mutandis*, in the areas of anti-dumping measures adopted by the Community

32 OJ 13, 21.2.1962, 204/62. This Regulation has been modified since on a number of occasions, lastly by Regulation (EC) N° 1216/1999 (OJ L 148, 15.6.1999, 5). It has now been repealed with the exception of Article 8(3) (Article 43 of Council Regulation (EC) N° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, 1).

33 See generally K. Lenaerts and L. Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process', 34 *C.M.L.Rev.* 531 (1997).

34 See, e.g., Case T-114/92, *Bureau européen des médias et de l'industrie médicale (BEMIM) v. Commission of the European Communities*, [1995] ECR II-147. On this case, see St. Weatherwill, 'Public Interest Litigation in E.C. Competition Law', in H.-W. Micklitz & N. Reich (eds.), *Public Interest Litigation before European Courts* (Nomos, 1996), 172-174.

35 See now Council Regulation (EC) N° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1, esp. Art. 27 (relating to the hearings of the parties, complainants and others).

against imports from third countries,[36] or of concentration of undertakings.[37] Thus, in *Fediol*,[38] invoking Council Regulation (EEC) n° 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from non-EEC countries[39], one of the predecessors to Council Regulation (EC) n° 384/96 of 22 December 1995, the applicant association Fediol (Federation of EEC seed crushers and oil producers) had complained about the export-subsidizing practices of the Brazilian government, requesting the Commission to adopt protective measures. The Commission investigated the matter, entering into negotiations with Brazil, and finally informed Fediol that it was inappropriate to take action, as Brazil had removed most of the contested measures, as the economic impact of the remaining measures was negligible and as, moreover, the interests not only of European industry were to be taken into account, but those also of the consumers. When Fediol challenged that decision, the Commission objected that the action for its annulment should be declared inadmissible. The Court disagreed. Insofar as the applicable Regulation accorded Fediol a right to bring a complaint before the Commission against alleged dumpings, said the Court, it is

> ... in the spirit of the principles which lie behind Articles 164 and 173 of the [EEC] Treaty [now Articles 220 EC and 230 EC, as amended by the Nice Treaty], [that] complainants have the right to avail themselves, with regard both to the assessment of the facts and to the adoption of the protective measures provided for by the Regulation, of a review by the Court appropriate to the nature of the powers reserved to the Community institutions on the subject.
>
> It follows that complainants may not be refused the right to put before the Court any matters which would facilitate a review as to whether the Commission has observed the procedural guarantees granted to the complainants by Regulation n° 3017/79 and whether or not it has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise

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36 Council Regulation (EC) n° 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ L 56, 6.3.1996, as last amended by Regulation (EC) No 461/2004 (OJ L 77, 13.3.2004, 12).

37 As it would also in the context of concentrations of undertakings: see Council Regulation (EEC) n° 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395 of 30.12.1989, with republication including corrigenda in OJ L 257 of 21.9.1990, 13. See Art. 18 on the hearing of parties and third persons.

38 Case 191/82, *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v Commission of the European Communities*, [1983] ECR 2913.

39 Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ L 339 of 31.12.1979, 1 (corrigenda to this Regulation were published in the OJ L 62 of 7.3.1980, 40 and 41, and in OJ L 89 of 2.4.1980, 22). Article 5 of that Regulation provided that any natural or legal person injured or threatened by dumped or subsidized products imported from non-EEC countries could file a written complaint with the Commission.

> to a belief in the existence of subsidization or has based the reasons for its decision on considerations amounting to a misuse of powers. In that respect, the Court is required to exercise its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the aforementioned Regulation.[40]

Article 164 of the EEC Treaty, now Article 220 EC, provides that the European judicature 'shall ensure that in the interpretation and application of this Treaty the law is observed'. The Court derives from this very broad provision that the action brought by Fediol must be considered admissible: as the Regulation 'acknowledges that undertakings and associations or undertakings injured by subsidization practices on the part of non-member countries have a legitimate interest in the initiation of protective action by the Community', the Court considers that 'it must therefore be acknowledged that they have a right of action within the framework of the legal status which the Regulation confers upon them'.[41] The judgment of 4 October 1983 in effect says that once the European legislator has identified that certain actors have an interest in the adoption of a Community act, these actors should be accorded the power to contribute to the preservation of legality within the EC legal order, by bringing annulment proceedings against the decision not to adopt the act they request. As indicated by the reference to Article 220 EC, the reasoning is based less on the need to ensure the effective protection of the rights of the applicants, than on the need to ensure that no act adopted within the EC legal order will be immune from judicial review.

The Court summarizes its case-law creating this exception to the lack of recognition of associational standing by stating that 'Where a Regulation accords applicant undertakings procedural guarantees entitling them to request the Commission to find an infringement of Community rules, those undertakings should be able to institute proceedings in order to protect their legitimate interests'.[42] The reasoning has been applied also where complaints have been filed for State aids in alleged violation of the EC Treaty. As already mentioned,[43] Article 88(2) EC provides that, before deciding that a State aid is not compatible with the requirements of undistorted competition within the common market, the Commission must give notice to the parties concerned in order that they may submit their comments. The parties which filed such comments, especially where their complaints were at the origin of the investigations launched by the Commission, would be considered to be individually concerned by the decision finally adopted by the Commission at the close of that investigation, provided at least that the

40 Case 191/82, para. 29-30.

41 Case 191/82, para. 31.

42 Case 169/84, *Compagnie française de l'azote (Cofaz) SA and others v Commission of the European Communities*, [1986] ECR 391, para. 23.

43 See above, note 26.

position on the market of the applicant undertakings 'is significantly affected by the aid which is the subject of the contested decision'.[44]

This case-law may of course be relied upon by associations.[45] And the consequences are potentially far-reaching, because of the expansive reading the European judicature has on occasion made of this case-law. First, even where no procedural rights have been formally granted to certain parties in either the Treaty or in secondary legislation, but where the applicant in an action for annulment has taken an active part in the administrative procedure, for instance by filing the initial complaint, and seeks a judicial review of the decision closing the procedure, he may have a right to bring annulment proceedings in order to ensure that the obligation of the institutions to examine diligently and impartially the individual situation on which they are to take a decision will be complied with. This may arguably be derived from the general right of access to a court which the European Court of Justice has derived from Articles 6 and 13 of the European Convention on Human Rights and which Article 47 of the EU Charter of Fundamental Rights now mentions. In *max.mobil Telekommunikation Service GmbH* – incidentally, the first case where it cites the Charter adopted one year earlier – the Court of First Instance seemed to want to imply as much, where it concluded that the applicant company, which challenged the decision of the Commission not to commence infringement proceedings against Austria for violation of the combined provisions of Article 86 and Article 90(1) of the EC Treaty (now Article 82 EC and Article 86(1) EC, respectively), could seek the annulment of that decision.[46] Although this judgment has now been annulled by the European Court of Justice,[47] the reasoning of the Court of First Instance is noteworthy. Recalling that the Commission has a duty to undertake a diligent and impartial examination of the complaints it is presented with, the Court of First Instance considered (in para. 56) that

> in so far as the Commission is required to undertake such an examination, the fulfilment of that obligation must be amenable to judicial review. It is in the interests both of the sound administration of justice and of the proper application of the competition rules that natural or legal persons who request the Commission to find an infringement of those rules should be able, if their request is rejected either wholly or in part, to institute proceedings in order to protect their legitimate interests.

44 Case 169/84, *Compagnie française de l'azote (Cofaz) SA and others v Commission of the European Communities*, [1986] ECR 391, para. 25.

45 See, e.g., Case T-380/94, *Association internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle (AIUFFASS) and Apparel, Knitting & Textiles Alliance (AKT) v Commission of the European Communities*, [1996] ECR II-2169.

46 Case T-54/99, *max.mobil Telekommunikation Service GmbH v. Commission*, [2002] ECR II-213. See the annotation by M. Rantala, 2 *Eur. L. Rev.* 139 (2002).

47 Case C-141/02 P, *Commission c. T-Mobile Austria GmbH*, [2005] ECR I-1283 (judgment of 22 February 2005).

The Court of First Instance cited *Metro v. Commission* in support of this proposition, a judgment by the European Court of Justice which, as we have seen, already emphasized the objective function fulfilled by the action for annulment of Community acts: the power accorded private persons to seek the annulment of certain Community acts not only ensures that their rights will be protected when those acts may be said to be of individual and direct concern to them; it also ensures that the European judicature will be given the opportunity to exercise the role assigned to it by the Treaty, which Article 220 EC describes as being to ensure that 'in the interpretation and application of this Treaty the law is observed'. Although it may be spectacular, the reference to Article 47 of the Charter of Fundamental Rights was superfluous in the reasoning of the Court of First Instance: the right to seek judicial review is in reality derived from the right to have the institution examine diligently and impartially the individual situation brought to its attention, of which it is a corollary.

Second, the *exercise* of procedural rights afforded to the applicant in the administrative proceedings prior to the adoption of the Community act may not be required. Consider, by way of illustration, the role accorded workers' organisations in the context of concentrations of undertakings, and the consequences it produces in terms of their *locus standi* in annulment proceedings before the Court of Justice. After works councils of the undertakings concerned and a trade union (Fédération Générale Agroalimentaire-CFDT) had sought the annulment of the decision of the Commission under the applicable Regulation[48] to authorize a concentration resulting from the acquisition of Perrier by Nestlé provided certain conditions were fulfilled – including, among those conditions, the sale to a competitor by Vittel, a subsidiary of Nestlé, of the Pierval plant employing 119 workers – the Court of First Instance had to decide whether the applicant organisations had the standing required to challenge the contested decision, under Article 173 al. 2 EC Treaty.[49] For reasons on which the parties did not fully agree[50], the applicant organisations had not exercised the right which Article 18(4) of the Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings accorded them to make their views known to the Commission – a provision which, according to the Court, 'manifests an intention [of the European legislator] to ensure that the collective interests of those employees [of the undertakings concerned] are taken into consideration in the administrative procedure'.[51] The Court of

48 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, 1).

49 Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme Vittel and Comité d'Etablissement de Pierval and Fédération Générale Agroalimentaire v Commission of the European Communities*, [1995] ECR II-1247. See also, decided on the same day, Case T-96/92, *Comité Central d'Entreprise de la Société Générale des Grandes Sources and others v Commission of the European Communities*, [1995] ECR II-1213.

50 The Court of First Instance, however, considered that the challenged decision had not been adopted by the Commission in violation of the procedural rights recognized to the workers' representatives under Regulation n° 4064/89. See para. 61-64 of the Judgment of 27 April 1995.

51 Case T-12/93, para. 39.

First Instance considered that, by making individual mention of the recognized representatives of the employees of the undertakings which are the subject of the concentration, Regulation n° 4064/89 envisages them as 'a closed category clearly defined at the time of adoption of the decision, by expressly and specifically giving them the right to submit their observations in the administrative procedure',[52] thus differentiating them from all other persons potentially affected by the decision and implying that the decision may be considered of 'individual concern' to them.[53] The Court of First Instance refused to accept the argument of the Commission that the right of the applicant organisations to seek judicial review of its decision was conditional upon their participation in the administrative procedure, i.e., upon the exercise by these organisations of the procedural rights recognized to them by Article 18(4) of Regulation n° 4064/89.[54] Under the *Vittel* case-law therefore, the exercise of procedural rights on the one hand and the recognition by the European legislator of procedural rights on the other, may constitute alternative conditions – rather than conditions which would have to be fulfilled cumulatively – justifying the recognition of *locus standi* in the context of annulment proceedings.

§5. CIVIL SOCIETY ORGANISATIONS

These cases, the reader may be thinking, are far removed from the question of the role of civil society organisations before the European Court of Justice. But they are not. At a first level, most obviously, the case-law which has been mentioned may be relied upon by associations. This is true of associations of undertakings, as certain of the examples presented illustrate. But it may be true also of other associations, acting in the public interest or for the defense of the rights of their members who are not economic actors. For example, in what may be considered to be a relatively straightforward application of *Metro v. Commission*, the Court of First Instance decided that the European Consumers' Organisation (BEUC) and the National Consumer Council (NCC), representing United Kingdom consumers, could seek the annulment of the decision of the Commission not to launch an investigation into the agreement concluded between the association of car

52 Case T-12/93, para. 40.

53 Case T-12/93, para. 41.

54 Case T-12/93, para. 47 (stating that 'The Court has never held their participation in the procedure to be a necessary condition for acknowledging that the Commission's decision is of individual concern to those third persons'). The action for the annulment of the decision was declared inadmissible, however, because although the challenged decision was of 'individual' concern to the applicant organisations, they were not 'directly' concerned, in the absence of any automatic or inevitable impact of the transfer of Pierval on the individual employment contracts or the collective rights of the employees: indeed, at the material time, Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, 26), already ensured a protection of the acquired rights of the employees. This is, of course, purely incidental.

traders dominant in the United Kingdom and the Japan Automobile Manufacturers Association restricting the export of Japanese cars to the United Kingdom.[55] Considering that this agreement was contrary to Article 85(1) of the EEC Treaty and that the restrictions on access to the market resulting from the agreement constituted an abuse by the British association of a dominant position, contrary to Article 86 of the EEC Treaty, the BEUC and NCC filed a complaint with the Commission, on the basis of Article 3(2) of Regulation n° 17/62 of the Council of the EEC of 6 February 1962. The Court of First Instance agreed that the action for annulment was admissible, recalling that the European Court of Justice had

> consistently held that it is in the interests of the proper administration of justice and of the correct application of Articles 85 and 86 of the Treaty that natural or legal persons who are entitled to make a request pursuant to Article 3(2)(b) of Regulation No 17 should be able to institute proceedings in order to protect their legitimate interests if their request is not complied with either wholly or in part (judgment of the Court of Justice in Case 26/76 Metro v Commission [1977] ECR 1875, paragraph 13).

At a more fundamental level, however, what the cases presented in the previous section illustrate is that the rise of procedural consultation rights in the EU decision-making process may produce a trickle-down effect on access to the European Court of Justice by groups who are either consulted in that process, or should have been consulted but have been unjustiably denied this possibility. The potential for development of associational standing on this basis remains limited, however, as the Court has not affirmed the existence of a general right to be consulted for all persons interested in the adoption of a particular act.[56] The Court occasionally has considered that the Commission may be under an obligation to hear all parties concerned before the adoption of decisions, when they may possess information otherwise not in the hands of the Commission, or have expert knowledge which, as part of its general duty to examine carefully and impartially all the relevant aspects of the individual case, the Commission should consider.[57] But that

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55 Case T-37/92, *Bureau Européen des Unions des Consommateurs and National Consumer Council v Commission of the European Communities*, [1994] ECR II-385. Prior to this judgment delivered by the Court of First Instance on 18 May 1994, the legal commentators were divided as to the chances of success of such an action: c.f. C. Christianos, 'La recevabilité des actions de groupe devant la Cour de justice des Communautés européennes, in Th. Bourgoignie (ed.), *L'action collective et la défense des consommateurs* (Story-Scientia, 1992), 223-224 (in favour of such an admissibility), with L. Krämer, *La C.E.E. et la protection du consommateur* (Story-Scientia, 1988), 348 (expressing a more sceptical position).

56 See, in particular, Case C-170/89, *Bureau Européen des Unions de Consommateurs v Commission of the European Communities*, [1991] ECR I-5709. See the casenote by J. Hooijer, 31 *C.M.L. Rev.* 157 (1992).

57 Case 269/90, *Technische Universität München*, [1991] ECR I-5469. In *France-aviation v Commission of the European Communities* (Case T-346/94, [1995] ECR II-2841), the Court of First Instance did consider, on the basis of *Technische Universitaet Muenchen*, that 'it is not only the particularly technical nature of a case which is liable to give rise to a right on the part of the person concerned to be heard before the Commission, but the latter's power of appraisal in this connection' (para. 33), implying that where the

case-law would only apply, according to the Court of First Instance, where the decision *de facto* specifically concerns one particular trader, and in situations in which the characteristics of the matter in question are, by their nature, best known to the applicants.[58]

Neither should we expect an evolution of this situation in the future. Of course, as part of the intiatives adopted by the European Commission, since 2000 especially, in order to improve European governance,[59] the Commission announced its intention to 'improve the representativity of civil society organisations and structure and structure their debate with the institutions'.[60] It therefore adopted at the end of 2002 a communication defining the general principles and minimum standards for the consultation of interested parties by the Commission.[61] These general principles and minimum standards have been formulated however, rather than in a legally binding instrument, in a communication, precisely in order to avoid that 'a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties'.[62] The Commission considers that such an approach based on the recognition of a legal right to be consulted, which it calls 'over-legalistic', 'would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substance rather than concentrating on procedures'. It will therefore not be possible for any organisation

power of appraisal of the Commission is important, the right to be heard should proportionately gain in importance; moreover, such a right to be heard should be recognized where what is required from the Commission is 'a complex legal appraisal which could be effected only on the basis of all the relevant facts' (para. 36).

58 See, eg, Joined cases T-481/93 and T-484/93, *Vereniging van Exporteurs in Levende Varkens and others and Nederlandse Bond van Waaghouders van Levend Vee and others v Commission of the European Communities*, [1995] ECR II-2941, para. 56-59 (although the Court adds that in the case concerned, where at stake were emergency interim measures for the protection of the health of animals and humans, the need for a decision to be swiftly adopted seems irreconciliable with a broadening of the right to consultation).

59 See generally the White Paper on European Governance, COM(2001) 428 final, of 25.7.2001 (stating at 13 that the Commission should 'organise a systematic dialogue with European and national associations of regional and local government, while respecting national constitutional and administrative arrangements', in order to ensure that 'regional and local knowledge and conditions are taken into accoutn when developing policy proposals').

60 European Governance. A White Paper, 17.

61 Communication from the Commission, 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission', COM(2002) 704 final, of 11.12.2002. The communication defines 'consultations' as 'those processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission' (15-16); among the groups which, under these minimum standards, should be targeted for consultation, the communication mentions 'bodies which have stated objectives giving them a direct interest in the policy' (19).

62 Communication from the Commission, 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission', 10. See also 'Neither the general principles nor the minimum standards are legally binding' (15).

excluded from consultations in alleged violation of the standards the Commission set for itself to challenge this decision. Nor is there anything in the case-law relating to Article 230 al. 4 EC which would suggest that, in the absence of procedural rights granted to organisations, the sole fact that they may be consulted in the course of the adoption of a particular legislative proposal would justify that they are to be considered as directly and individually concerned by the instrument adopted at the outcome of that process. As to the reasoning in the *van der Kooy – CIRFS* line of cases, which created an exception to the exclusion of associational standing where the position of the organisation as negotiator for a sector was affected, it never applied beyond the adoption of decisions by the Commission at the end of administrative proceedings in the domain of State aids. The *Metro* case-law has developed in the context of competition law and anti-dumping proceedings, where complainants are accorded right to seek the annulment of the decision of the Commission rejecting their complaint by deciding not to institute proceedings. It would constitute a very bold, and probably unjustified, extension of this case-law to seek to transpose it to the adoption of all regulatory acts.

§6. INTERVENTION BEFORE THE EUROPEAN COURTS[63]

Of course, the filing of annulment proceedings does not constitute the only avenue through which associations may gain access to the European Court of Justice. Apart from the other forms of direct action which they may seek to use – none of which, however, creates a possibility for the 'collective interest' to emerge[64] – associations may rely on the possibility of intervening in the cases presented to the Court of First Instance or the Court of Justice.[65]

Already in the *Confédération nationale des producteurs de fruits et de légumes and others v. Council of the European Economic Community* case of 1962,[66] Advocate General

63 For a more detailed examination of this question, see O. De Schutter, 'Le tiers à l'instance devant la Cour de justice de l'Union européenne', in H. Ruiz Fabri and J.-M.Sorel, *Le tiers à l'instance devant les juridictions internationales* (Pedone, 2005).

64 By its very nature, the action which a private person may file before the Court of First Instance for failure to act in order to seek a finding that 'an institution of the Community has failed to address to that person any act other than a recommendation or an opinion' (Article 232 EC), although it may be relied upon by an association, will concern its individual interest to be addressed an act, and not the collective interest that association seeks to defend. The same applies to actions seeking compensation for damages where the extra-contractual liability of the institutions is engaged (Article 235 EC and Article 288 al. 2 EC). Finally, although the intervention of unions is frequent in the disputes arising between the Community and its servants (Article 236 EC), the nature of the claim precludes organisations from directly relying on this form of action.

65 Of course, organisations may also be parties to proceedings before national jurisdictions, in which case, if the national court decides to refer a question to the European Court of Justice under Article 234 EC, they will take part in the proceedings before the Court.This question is not addressed in this paper.

66 Joined Cases 16 and 17/62, [1962] ECR 471.

M. Lagrange had considered is his Opinion to the Court that the exclusion of associational standing in the context of annulment proceedings under what was then Article 173 of the EEC Treaty was compensated by the possibility for organisations to intervene in the proceedings before the Court, in the context of direct actions. The Court has also relied on this argument in later cases.[67] Of course, the validity of the argument will depend on what role we intend an enlarged access to justice of associations to fulfil. The possibility of intervention does not answer the concerns of those who believe that no act adopted by the institutions of the Union should be immune from effective judicial review, and that therefore, where no private person is concerned directly and individually and the privileged applicants (the Member States and the European Parliament in particular) have no incentive to seek that review, interested organisations should be accorded a right to do so. In that sense, the possibility of intervention may not be seen as compensating for the exclusion of associational standing in the context of actions for annulment. As we have seen however, other rationales also are put forward in favor of associational standing. If the purpose is to ensure that the judicial process includes all relevant perspectives, that it does not underestimate the weight of certain collective interests potentially distinct from both the interest of the Community or Union which it is the role of the Commission to defend, from the individual interest of the applicant in the context of annulment proceedings, the intervention by a representative organisation may be seen as an adequate alternative to the introduction by the organisation itself of an action for the annulment of an act of the Union. Even under this logic, however, the conditions of intervention may be seen as relatively restrictive. Under Article 40 al. 2 of the Statute of the Court of Justice of the European Communities,[68] the right to intervene

> shall be open to any other person [other than the Member States or the Institutions who are recognized a right to intervene under Article 40 al. 1 of the Statute] establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities.

In principle, groups representing certain collective interests may rely on this provision in order to ensure that these interests are taken into account by the European judicature. The request to intervene of an association of undertakings (it is with respect to this

[67] See, e.g., Case 175/78, *Union syndicale-Service public européen, Massa and Kortner v. Council,* [1974] ECR 917; Case 18/74, *Syndicat général du personnel des organismes européens v. Commission,* [1974] ECR 933.

[68] The same rule was previously formulated by Article 37 al. 2 of the Statute of the Court. In the following discussion, the Rules relating to intervention before the Court of First Instance of the European Communities shall not be addressed separately. Indeed, Article 53 of the Statute of the Court of Justice of the European Communities extends to the Court of First Instance the rules contained in Title III of the Statute. Moreover, Articles 115 and 116 of the Rules of Procedure of the Court of First Instance are almost identical in their wording to Rule 93 of the Rules of Procedure of the European Court of Justice. Therefore a separate treatment of intervention before both courts is not warranted.

situation that the European Court of Justice and the Court of First Instance have put forward these criteria) will in principle be granted where the association is considered sufficiently representative; where its statutes provide that it may act in the interests of its members; where the case may lead to the formulation of rules which will affect the sector as a whole which that association represents; and where, finally, the interests which the association seeks to represent risk being affected by the decision of the Court.[69] In exceptional cases, this right of intervention has been interpreted generously, as making it possible for certain representative organisations to file what may be called *amici curiae* briefs, even in the absence of an interest of their own or of their members in the result of the proceedings: the notion of collective interest, we may say, is therefore taken into account in the definition of which 'interest' must be established in order for an association to be authorized to intervene before the Court.[70] However, the formulation of Article 40 al. 2 of the Statute of the Court implies that no intervention may be envisaged in the context of preliminary rulings requested from a national court. Indeed, in the context of preliminary rulings, the Court is not requested to decide on a 'case'; it is asked, rather, to cooperate with the national jurisdiction in order to facilitate the correct application of European law. Nor will an intervention by organisations be possible in interinstitutional cases, as Article 40 al. 2 of the Statute excludes intervention by private

69 See R. Barents, *Procedures en procesvoering voor het Hof van Justitie en het Gerecht van eerste aanleg van de EG* (Kluwer, 2nd ed., 2002), 389-390. This author mentions in particular the following orders adopted by the Court of First Instance: Order of 8 December1993, Case T-87/92, *Kruidvat v. Commission of the E.C.*, ECR [1993] II-1369, 1375; Order of 23 March 1998, *Atlantic Container Lines v. Commission of the E.C.*, ECR [1998] II-589, para. 10.

70 See, e.g., the intervention of the Consultative committee of the Bar Associations of the European Community (CCBE – Commission consultative des barreaux européens), in Case 155/79, *AM & S v. Commission of the European Communities*, [1982] ECR 1575 (intervention in order to clarify, by a comparative study, the status of the privileged correspondence between a company and its legal counsel); even more remarkable has been the autorisation to intervention granted to the International Federation of Human Rights Leagues (FIDH) in the context of an appeal from a judgment of the Court of First Instance, in a case concerning the compatibility with the right to respect for private life of pre-employment medical examinations in the European public service: see Case C-404/92 P, *X v. Commission*, [1994] ECR I-4737. The authorisation to intervene, granted by an order of 19 July 1993 (unpublished), is all the more remarkable considering that the Belgian League of Human Rights had been denied the right to intervene in the proceedings before the Court of First Instance (Joined Cases T-121/89 and T-13/90, *X v Commission*, [1992] ECR II-2195 (judgment of 18 September 1992)), although the 'interest' it claimed in favour of its intervention was of the same nature as that put forward by the FIDH in the later cassation proceedings before the Court of Justice. The representativity of the FIDH – as demonstrated, according to the order of the President of the Court of Justice, by its consultative status with the United Nations and the Council of Europe – seems to have played a role, as well as the ability of the FIDH to offer the Court expert advice as to the requirements of Article 8 of the European Convention on Human Rights, in a situation where the implications of that provision were not, at the material time, fully clarified. The FIDH was thus placed in the typical position of a 'friend of the court', rather than in the position of that of a party having an interest in the proceedings because its rights or interests could be affected by the outcome of the case. Unprecedented at the time, with the exception perhaps of the role played by the CCBE in the *AM & S* case mentioned above, this use of the intervention procedure has not been replicated since, to the knowledge of the author.

parties 'in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities'. Moreover, under Article 40 al. 4 of the Statute, the application to intervene 'shall be limited to supporting the form of order sought by one of the parties'.[71] Therefore, it will not be sufficient for an organisation to demonstrate that it has an interest in the development of the case-law of the Court or the interpretation it will give to the rules it is called upon to apply: the 'interest' justifying a leave to intervene must be in the outcome of the case.[72]

The restricted possibilities of intervention in the context of referrals made by national jurisdictions to the Court of Justice are especially troublesome.[73] Under Article 23 al. 2 of the Statute of the Court, there is no room for intervention by private parties before the European Court of Justice in the context of preliminary rulings. As a result, it may be difficult in certain cases for the European Court of Justice to fully appraise whether the situation it is presented with by the referral is representative of the totality of situations arising under the contested national rule, an appreciation of the compatibility of which by the national jurisdiction requires an interpretation of Union law.[74] The absence of third-party interventions other than those enumerated under Article 23 al. 2 of the Statute in favour of the institutions or the Member States (or EEA Member States) deprives the Court from the competing perspectives those other parties could potentially bring to the picture it is given, thus raising the risk of the referral procedure being instrumentalized by inventive litigants, or even, in certain cases, as a result of a collusion between parties to the main proceedings which, although they may differ as to the outcome of the case pending before the national court, may have a common interest in the development in a particular direction of the case-law of the European Court.[75] Another difficulty is that the quality of the contradiction before the Court of Justice is made to depend on the relative openness of national juridictions to interested parties,

71 Article 93 of the Rules of Procedure provides that the application to intervene must identify 'the form of order sought, by one or more of the parties, in support of which the intervener is applying for leave to intervene'.

72 See, e.g., the Order of 15 November 1993, Case C-76/83, *Scaramuzza v. Commission*, [1993] ECR I-5715, para. 10.

73 The rules relating to referrals under Article 234 EC are applicable, *mutatis mutandis*, to referrals made under Article 35(1) of the EU Treaty or under Article 150 of the EAEC Treaty.

74 See C. Harlow, 'Towards a Theory of Access for the European Court of Justice' 12 *Y.E.L.* 213 (1992), 222.

75 See on this especially the debate launched by the *Foglia v. Novello* litigation (Case 104/79, *Foglia v. Novello*, ECR [1980] 745; and Case 244/80, *Foglia v. Novello*, ECR [1981] 3045). See A. Barav, 'Preliminary Censorship? The Judgment of the European Court in *Foglia v. Novello*', 5 *Eur. L. Rev.* 443 (1980); G. Bebr, 'The Existence of a Genuine Dispute: An Indispensable Precondition for the Jurisdiction of the Court under Article 177 EEC?' 17 *C.M.L.Rev.* 525 (1980); A. Tizzano, 'Litiges fictifs et compétence préjudicielle de la Cour de justice européenne' 3 *R.G.D.I.P.* 514 (1981); G. Bebr, 'The Possible Implications of *Foglia v. Novello II*' 19 *C.M.L.Rev.* 421 (1982); K. Lipstein, '*Foglia v. Novello* – Some Unexplored Aspects', in *Du droit international au droit de l'intégration. Liber amicorum Pierre Pescatore* (Nomos Verlagsgesellschaft, 1987), 373. The developments of this line of the case-law of the Court on the admissibility of referrals from national courts are too many to develop here: the reader is referred to O. De Schutter, *Fonction de juger et droits fondamentaux* (Bruylant, 1999), 800-833.

despite the many differences which may exist between the Member States concerning the possibilities of intervention before their courts – and, indeed, despite the differences which remain between national rules of procedure concerning the conditions required for litigants to have standing to sue.

§7. CONCLUSION

The overall picture is, it must be recognized, rather disappointing. The question of associational standing in the context of actions of annulment – the right for an organization to lodge proceedings against an act adopted by the institutions based on its interest in defending the value for which it was constituted – presents a certain analogy, in the way that it has been treated in the case-law, with the more classical question of the *locus standi* of private parties in general: since 1962, the European Court of Justice has erected a barrier in its case-law, which it since has found difficult to lower even where there might have been obvious reasons to do so, indeed, even where the Court itself seems to have recognized that such valid reasons may exist. The alternative open to associations – to intervene before the Court of Justice and the Court of First Instance on the basis of Article 40 of the Statute – hardly compensates for this; there is no possibility of intervention by organizations in the context of referrals to the Court of Justice for a preliminary ruling on questions of interpretation or validity of Union law; even the possibility of intervention by organizations in direct actions is limited – and indeed, it is fully excluded in institutional cases. The alternative of intervention moreover does not answer adequately the 'rule of law' argument favouring associational standing – i.e., even a relaxation of the conditions of intervention would not ensure that all the acts of Union will be subject to judicial review, even where no applicant may be said to be directly and individually affected and where the institutional actors have no interest in seeking to challenge the said act. Certain illegal acts of the administration, or unconstitutional acts adopted by the legislator, thus risk being left unremedied if associations are not recognized a *locus standi* in order to seek their judicial review. Where violations concern large and diffuse interests, which no individual litigant would otherwise be under an incentive to challenge, or where no individual litigant may even have standing to sue, in a system where the admissibility of the action is made conditional upon a demonstration that the interest is sufficiently 'individualized', i.e., specific to the individual applicant rather than common to an open category of persons of which the litigant is a member, the granting of standing to associations should be seen as a means to avoid the resulting impunity for the illegality of the acts adopted.

There is, nevertheless, one promising dimension to the case-law which has been discussed. It is in the link it establishes between the participation of certain interested organizations in the administrative procedures preceding the adoption of a Community act, and the admissibility of those organizations in the context of annulment proceedings against that act once it is adopted. Should this link be confirmed in the future, the development of consultative processes in law- and policy-making in the Union may influence further developments before the Court of First Instance and the Court of Justice, encouraging them to open their gates more broadly to associations in general, and to civil society organizations in particular. This article has emphasized that this link is still a fragile one, and that it is still to be seen more as a potential development in the future than as an *acquis* of European constitutionalism. Caution is required. But it does illustrate the interdependency of the progress of a decisional culture based on consultation and a transformation of the judicial function in order to make it more welcoming to collective interests. The future will tell how far along the route of associational standing the recognition of this interdependency will lead us.