Kicking the ball into the Member States' field: the Court's response to *Jégo-Quéré* (Case C-50/00 P *Unión de Pequeños Agricultores*, Judgment of 25 July 2002)

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[1] On 25 July 2002, the Court rejected the proposals of AG Jacobs (1) and the CFI (2) to reconsider its traditional case law on private applicants' standing to challenge generally applicable EC acts according to Article 230 para. 4 EC. (3) This rejection hardly came as a surprise. (4) However, the Court's motivation for the 'restauration' of its traditional approach is interesting. In substance, the Court held that the Member States are responsible for both the existence and the elimination of *lacunae* in the EC system of judicial remedies.

A. The Problem: Challenging general normative EC acts which are directly applicable

[2] The Court's restrictive interpretation of Article 230 para. 4 EC does, in most cases, prevent individuals from bringing challenges to general normative ('legislative') EC acts directly before the European Courts. The dogmatic construction underlying the Court's approach is to consider that the EC Treaty itself provides for a complete system of judicial remedies which allows, in principle, the review all EC acts either through a direct action (Article 230 EC) or through the preliminary reference procedure (Article 234 EC).

[3] This construction contains several shortcomings, some of which can be considered as constituting real *lacunae* in the EC system of judicial protection. An important aspect is that diverting many applicants to the 'Article 234-track' amounts to a waste of time and money – as many cases will ultimately reach the European Courts in any event. However, the main problem lies in the fact that directly applicable, normative EC acts, which do not require a national implementation measure, can often neither be challenged directly before the European Courts nor indirectly before the national courts. In such cases, the individual seeking judicial review of the general measure can only make his way to the European Courts by 'provoking' an application measure (which will be, in most cases, a sanction).

B. The Proposal for Reform: AG Jacobs in *Unión de Pequeños Agricultores* and the CFI in Jégo-Quéré

[4] Given these shortcomings, which some, especially many observers in academia, consider to be contrary to the general principle of effective judicial protection, AG Jacobs and the CFI have recently pursed radical change in the Court's case law seeking to soften the strict interpretation of the notion of 'individual concern' contained in Article 230 para. 4 EC.

[5] Both have thus statedthat the only satisfactory solution would be to recognise that an applicant must be considered to be individually concerned by a Community measure in the sense of Article 230 para. 4 EC, where the measure has, or is liable to have, a substantial adverse effect on his interests.

[6] We have suggested that this proposal could only serve as an intermediate solution for a reform of the EC system of legal remedies. Moreover, we could state that the proposed solution went too far since a substantive lack of judicial protection could only be assumed in cases of directly applicable measures but not in the remaining cases in which EC acts are applied by Community or national authorities. (5)

C. The Rejection of the Reform Proposals by the Court in *Unión de Pequeños Agricultores*

[7] There are several political as well as dogmatic reasons that explain the Court's rejection of the pleas for a reform of its traditional case law on the standing of individuals before the European Courts. (6) In *Unión de Pequeños Agricultores*, the Court based its rejection of the reform proposals on one single argument: the limits of its own competences.

[8] According to the Court, the Member States are responsible for both the proper functioning of the present system established by the EC Treaty and - if necessary - the possible reform of this system.

[9] As to the reform of the system, the Court conceded that "it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles" but the Court further stated that "it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force." (7) This statement is not

surprising since the Court itself invited the Member States, in its contribution to the Intergovernmental Conference 1996/97, to consider a reform of Article 230 para. 4 EC.

[10] However, such a general reference to the limits the Court's jurisdiction would have been insufficient as a basis for the rejection of the proposals made by AG Jacobs and the CFI. The real point of the case was to evaluate whether or not the present system (and the related interpretation of this system by the Court) contains serious *lacunae* in terms of judicial protection as held by both AG Jacobs and the CFI (and many academic writers).

[11] It is interesting to note that the Court did not deny in plain terms the existence of such *lacunae*. Instead, the judges appear to consider the Member States responsible for avoiding them:
"[I]t is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty [now: Article 10 EC], national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the Courts the legality of any decision or other national measure relative to the application to them of a Community act of general application … ." (8)

[12] Finally, the Court also refuses to admit an exception to its restrictive interpretation of Article 230 para. 4 EC for those general EC measures with direct applicability and which, at least in principle, cannot be challenged by individuals before national courts. Again, the Court uses a 'limits of competence'argument: '[s]uch an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.' (9)

D. First Assessment and Perspectives

[13] One day after the publication of the Court's judgment it is still too early to draw far-reaching conclusions. In a first assessment one can state the following:

[14] As one could expect, the Court has rejected the far-reaching proposals of AG Jacobs and of the CFI, which were likely to create more problems than they proposed to resolve.(10) The Court has, moreover, refused to take the opportunity to 'refine' its case law on the standing of individuals by allowing applicants to challenge EC acts having direct applicability (which do not require Community or national implementation measures). This is regrettable as there are good reasons to consider that the Court's restrictive interpretation in such cases may indeed come close to a denial of effective judicial protection.

[15] The Court's statement, according to which it is not competent to relax the standing requirements of Article 230 para. 4 EC, excludes from the material scope of the Treaty any other interpretation except its own traditional – and unnecessarily restrictive – interpretation. Thus, this case law has been 'constitutionalised' by judicial *fiat* and any modification will have to take the burdensome path of the Treaty amendment procedure (Article 48 EU). One mayconclude that the judges are not willing to pick up the ball which,in 1996, they tossed into the Member States' field. The latter will have to find a political solution to this problem.

[16] However, the Court's developments regarding the possible *lacunae* in the EC system of judicial protection can be read as an indication that the Court may well be ready to use means of interpretation in order to fill in the gaps in the existing system of judicial remedies – but at the expense of the Member States.

[17] It is true that the Court refers, when stating the Member States' duty (deriving from the principle of sincere cooperation, Article 10 EC) to interpret and apply their national rules on rights of action in a way that individuals can challenge the legality of EC acts, to "decision[s] or other national measure[s] relative to an application to them of a Community act of general application". (11) However, the principle has been established that "it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection". (12) This will allow the Court to hold the Member States responsible for *lacunae* in such protection. If the Convention and the Member States will not reach to reform Article 230 para. 4 EC, the Court may, thus, be able to oblige the Member States - via Article 10 EC – to provide for rights of action in national law against directly applicable EC acts.

[18] In such a perspective, the Court's judgment in *Unión de Pequeños Agricultores* may perhaps prove to be the opposite of what it appears to be at first sight: not a preservation of a traditional interpretation at the expense of the individuals' judicial protection but '*un recul pour mieux sauter*'. In any case, the ball is again in the hands of the Member States.

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(1) See, Opinion in Case C-50/00 P *Unión de Pequeños Agricultores* [nyp], see http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=&datefs=&datefe=&nomusuel=&domaine=AGRI&mots=&resmax=100 .

(2) Case T-177/01 *Jégo-Quéré* [Judgment of 3 May 2002, nyp], see http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=T-177%2F01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100 .

(3) See, Case C-50/00 P *Unión de Pequeños Agricultores* [Judgment of 25 July 2002, nyp], see http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=&datefs=&datefe=&nomusuel=&domaine=AGRI&mots=&resmax=100 .

(4) See, D. Hanf, Facilitating Private Applicants' Access to the European Courts? On the Possible Impact of the CFI's Ruling in Jégo-Quéré, in: 3 German L.J. No. 7 (1 July 2002), available at: http://www.germanlawjournal.com/past_issues.php?id=166.

(5) See, for details D. Hanf (note 4) at 31-34.

(6) On these reasons see D. Hanf (note 4) at 28-33.

(7) Case C-50/00 P *Unión de Pequeños Agricultores* (note 3) at 45.

(8) Case C-50/00 P *Unión de Pequeños Agricultores* (note 3) at 41 and 42.

(9) Case C-50/00 P *Unión de Pequeños Agricultores* (note 3) at 43.

(10) See D. Hanf (note 4) at 30.

(11) Case C-50/00 P *Unión de Pequeños Agricultores* (note 3) at 42.

(12) Case C-50/00 P *Unión de Pequeños Agricultores* (note 3) at 41.