Facilitating Private Applicants' Access to the European Courts ? On the Possible Impact of the CFI's Ruling in *Jégo-Quéré*

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I. Introduction (*)

[1] On May 3rd, 2002 the Court of First Instance (CFI) issued its ruling in the case *Jégo-Quéré*.(1) According to its press release published at the same day, the CFI had undergone the task to "redefine the rules governing individual access to the Community courts" recognizing, thus, "the need to ensure effective protection of legal rights for European citizens and businesses."(2)

[2] Most journalists concluded from this that the CFI took a "revolutionary step"(3) which will "allow all concerned citizens to challenge directives before the European Courts"(4) as it had in fact introduced "an European constitutional complaint procedure (*Verfassungsbeschwerde*)".(5) Only *Agence Europe* mentioned carefully, and without further explanation, that the judgment could also be considered as a "coup de force" or even a "coup de publicité".(6)

[3] In the following, we will briefly summarise the Court's case law on standing of private applicants under EC law when challenging general normative acts (II), present the *Jégo-Quéré* judgment (III) and finally assess the possible impact of this judgment on the private applicants' standing before the European Courts (IV).

II. The limited access of private litigants to the European Courts

[4] Private applicants' *locus standi* before the ECJ has been, for many years now, a hotly debated issue, in particular as the Court's case law is widely considered as being too restrictive. (7)

1. No standing when challenging the legality of EC regulations and directives

[5] At the price of some oversimplification, one can summarise the Court's case law as follows. Private applicants are allowed to challenge individual or administrative measures of the Community which concern them *directly* and *individually*.(8) However, the Court does normally not recognise such a direct and individual concern when applicants seek to challenge general normative ("legislative") EC acts. (9)

[6] The Court has allowed individuals to challenge only some very specific categories of general normative acts, *e.g.* when the applicant has been named in a regulation or when the legislative act has been adopted with regard to particular individuals, as frequently happens in anti-dumping measures.(10) Thus, the applicant challenging a general legislative measure has standing only when he/she can successfully establish that the contested act does in fact constitute an individual measure.

[7] In spite of some judgments adopting a slightly more ‘liberal' stance on individuals' standing, (11) the Court has maintained its restrictive approach with regard to the interpretation of the notion of ‘*individual concern*' of Article 230 para. 4 EC which already dates back to the 1960s. When the incriminated measure ‘applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner' the Court does not recognise an individual concern – regardless of ‘the mere fact that it is possible to determine the number or even the identity of the producers' concerned by the general measure. (12)

[8] Historically, the Court's approach can be explained by the fact that the drafters of the EEC Treaty decided, under German influence, to endorse a more restrictive standard on *locus standi* than they had done in the preceding ECSC Treaty. (13) Moreover, such a restrictive approach allowed the Court both to filter incoming actions and to avoid the control of norms of discretionary nature, in particular in the sensible field of common agricultural policy.(14)

2. The dogmatic foundation of the Court's approach and its shortcomings or: Does the EC Treaty provide for a complete system of remedies?

[9] The Court has continuously justified its restrictive approach on standing of individuals by reference to what the Court coins the complete system of remedies created by the EC Treaty.

[10] Accordingly, no Community measure can escape judicial control as to its conformity with the Treaty as a measure may be controlled either through a direct action based on Article 230 para. 4 EC or through a preliminary procedure according to Article 234 EC. Thus, "the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures by the institutions".(15)

[11] Putting it simply, the Court argues as follows: a restrictive interpretation of Article 230 para. 4 EC does not create a real lacuna in judicial protection since individuals have the possibility to file actions against national application or implementation measures of EC before the national courts which have the obligation, according to Article 234 and the Court's *Foto Frost* case law,(16) to refer questions concerning the validity of EC acts to the ECJ.(17)

[12] Scholars have often been criticising the Court's approach.(18) Also one of its Advocate Generals has repeatedly invited the Court to reconsider its case law.(19) The main argument forwarded by the critics is that the Treaty's system of remedies is in fact not as complete as the Court suggests.

[13] In fact, there appear to be several *lacunae* in the system of judicial protection as defined by the Court. There are situations in which the procedure for preliminary rulings laid down in Article 234 EC does not provide individuals judicial protection at all or only at a high (viz inacceptable) price.(20) The three most important arguments in this context are the following:
[14] *First*, one has to bear in mind that an Article 234 procedure requires a national implementation measure and is, thus, not available in those cases in which an individual seeks to challenge a directly applicable EC act which does not require implementation measures.(21) In such cases, the interested individual has only the possibility to provoke an infringement against the directly applicable act which may then allow him to challenge the enforcement measure or sanction imposed either by the Community or by a Member State administration.
[15] *Second*, forcing private litigants to pass through the national courts in order to have access to the European Courts may prove to be extremely costly - both with regard to time and money.
[16] *Third*, the procedure under Article 234 makes private applicants' access to the European Courts to a large degree dependent upon the national courts' willingness to make use of this procedure.
[17] In sum, there is some evidence to conclude that the Court's restrictive approach towards individuals' standing under Article 230 para. 4 EC reduces in determined situations the citizens' access to justice. It has been observed that that this may well be contrary to the general principle of access to justice as laid down in Article 6 of the ECHR (22) and formulated by the Court itself in *Les Verts*.(23)

II. The CFI's judgment *Jégo-Quéré*
[18] Jégo-Quéré is a French fishing company operating in the waters south of Ireland. It is the only company doing so on a regular basis with fishing boats over 30 meters in length which use nets of a mesh of 80mm. A new EC regulation banned the use of such nets in boats over 30 meters in length. Jégo-Quéré sought to challenge this regulation.
[19] In its judgment, the CFI analysed, first, whether or not Jégo-Quéré has standing to seek annulment of the regulation in accordance to the Court's established case law. It held that although the applicant was directly concerned he could not be considered to be individually concerned since the disputed regulation affected him only in the context of the specific factual situation. As none of the narrowly defined exceptions applied to this case, the CFI concluded that Jégo-Quéré had no standing according to the traditional interpretation of Article 230 para. 4 EC.(24)
[20] In a second, arguably "revolutionary" step the CFI considered whether or not this traditional interpretation impeded in fact the applicant from submitting the disputed regulation to judicial control at all. It justified such an examination by reference to the Court's statement in Les Verts according to which access to justice is a constituting element of the EC as a Community governed by the rule of law.(25)
[21] The CFI considered, after closer examination, that the two alternative legal remedies available under the EC Treaty do not offer a satisfactory alternative to direct action under Article 230 EC. The first alternative road, proceedings on non-contractual liability according to Articles 235 and 288 EC, was to be rightly discarded as they are tied to very particular admissibility requirements and do not allow for the judge to eliminate the challenged act when found illegal.(26) More interesting is the CFI's assessment of the second alternative, Article 234 EC. It notes that in cases of directly applicable EC acts (as the disputed provisions in *Jégo-Quéré*) this road can only be used if the applicant is addressee of a national enforcement measure. However, this requires individuals to breach the law in order to gain access to justice – a "solution" which the CFI rejects (27) with reference to the conclusions of AG Jacobs in a still pending case.(28)
[22] The CFI concludes that the traditional restrictive interpretation of Article 230 para. 4 EC does in fact not provide for a system of effective judicial protection as required by the Court in its Les Verts-judgment and that this result calls for reconsideration of this restrictive interpretation.(29)
[23] Without further explanation, the CFI proposes its new interpretation of "individual concern" according to which any individual should be considered as being individually concerned by a general normative EC act which concerns him directly and which has a substantial and actual adverse effect on his legal situation, regardless the number and the situation of other persons which might be affected by the challenged act.(30)

III. A Revolution Waiting for Restauration?
[24] As to the possible impact of the CFI's judgment in *Jégo-Quéré*, one should distinguish the new interpretation of "individual concern" proposed by the CFI, on the one hand, and its chances to "survive" the review to be exercised by the Court, on the other.

1. The Interpretation Proposed by the CFI: A Revolutionary Step ?
[25] To a certain extent, one can indeed consider *Jégo-Quéré* as being a revolutionary step. The new interpretation proposed by the CFI appears to modify the traditional concept according to which acts to be reviewed under Article 230 para. 4 EC have to be in fact individual measures. According to the CFI, the European Courts should abandon their focus on the drafting and on the possible addressees of the EC act under review – a perspective which has too often proven to lead to rather unconvincing results. Instead, they should analyse, when assessing the individual concern of an applicant, the very applicant's situation under the contested act.
[26] This does, however, not amount to allow any applicant to challenge any EC act (the famous/infamous "

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Popularklage"). Even if the CFI's solution would be accepted by the Court, applicants will still have to demonstrate that the measure under review directly concerns them and that it affects their personal legal situation in a substantive and actual manner.
[27] The proposed interpretation will certainly help to overcome the worst inconsistencies of the traditional case law on the individuals' standing under Article 230 para. 4 EC and should, hence, be welcomed. In spite of this, one should not forget that the main underlying problem – regulating access to the European Courts in a comprehensible manner without further overburdening the Courts – has still to be resolved. The CFI's ruling in Jégo-Quéré has the merit of having recognised the problems of the traditional case law and of having proposed a way how to abandon it. However, it has done little as to a proper definition when an individual's legal situation is to be considered as substantially and actually affected by an EC act. Even if the facts of the case appeared to be relatively clear in this point, one would have expected some more developments in a ruling which doubtless introduces a revolutionary turn of the traditional case law.

2. The Prospects for Restauration
[28] Another question is to assess whether or not the Court will be ready to follow the CFI's proposals made in *Jégo-Quéré*. In fact, there are some political as well as dogmatic aspects which suggest that the Court will reject them. From a political point of view, one can observe the following: first, the CFI's proposal came not only as a surprise for the public but also for the judges of the Court;(31) second, the CFI used unusually "political" terms (32) when presenting its judgment to the public; third, it based its judgment to a large extent on the conclusions of an Advocate General in a case which is still pending and expected to be decided by the Court only this coming Autumn.(33) All this led some observers to conclude that the CFI either tried to position itself on the political arena (in the perspective of the reform process of the European constitution (34) or to pressure the Court into accepting the proposals of AG Jacobs. Less dramatically, a more moderate interpretation would read this "revolution" for one as a mere expression of the fact that one of the judges involved in *Jégo-Quéré*, a former solicitor, is a prominent critic of the Court's traditional approach towards Article 230 para. 4 EC or, also, more generally, as a reflection of the CFI's continuously grown self-esteem during the last years.
[29] Still, one may ask which interpretation the judges on the Court might give to the particular political circumstances of *Jégo-Quéré*. In any case, there are good – political and doctrinal – reasons which may lead the Court to reject the CFI's proposal.
[30] From a political point of view, the Court may consider that most dogmatic constructions aiming at filtering access to the courts lack stringency and that it may, hence, be better to continue with (and even to "improve") the present, imperfect but well-known approach – in particular as it may prove to be very work- and time-consuming to develop and clarify a new conception, doubtless through no less than myriads of judgments. The Court may neither be convinced of improving individuals' access to a jurisdiction suffering already some overload which will certainly increase as a result of the future constitutional reforms and the next enlargements. Finally, the Court could also consider this question as being an exclusively political one to be dealt with by the Convention and the next Intergovernmental Conference.(35)
[31] One may, however, also have both a minor and a major legal objection to the CFI's proposal in *Jégo-Quéré*. The first concerns the CFI's statement that deviating applicants to the national judge (procedure of Article 234 EC), requiring individuals in cases of directly applicable EC law to breach this law in order to gain access to justice, constitutes a violation of the ECHR and the general principle of access to justice. This statement is probably correct but one wonders why the CFI did not elaborate further on this crucial point in order to give it more weight.
[32] More important, however, seems to be the second objection concerning the relationship between the problem detected by the CFI (*denial of access to justice in cases of directly applicable EC acts*) and the remedy proposed (*abolishing the Court's case law on individual concern*). In fact, the remedy goes far further than what is necessary in order to resolve the problem, as it would have been sufficient to allow an exception for directly applicable EC acts which do not require national implementation measures.
[33] The CFI does not make a difference between claims against directly applicable measures (which cannot be brought before the national judge) and those against indirectly applicable measures (for which the Article 234 EC-procedure is available). This can be explained by its motivation to get rid of the whole traditional case law on individuals' access to the Court. However, it is very doubtful whether or not, in the latter cases, the principle of access to justice is at all violated. In short, one has to conclude that the CFI's conclusion (and "revolution") is only partly warranted by its own arguments developed in the judgment.
[34] The Court may, thus, choose to proceed to a *partial restauration* which would consist in "refining" its case law on standing of individuals by allowing applicants to challenge directly applicable EC acts – and to maintain, for the rest, its present conception regarding the individuals' access to the European Courts.

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Institut d'Etudes Politiques (Paris).

(1) Nyp, *see* http://curia.eu.int/en/jurisp/index.htm. [The case is now available on line at: http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=T+177%2F01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100; for a summary (in German), see also http://www.annonet.de/recht/aktuelles/eugh/02/05_cie.shtm; the case is also in EuZW (Europäische Zeitschrift für Wirtschaftsrecht), Vol.13, No. 13/2002, pp. 412-415 with an annotation by Thomas Lübbig. (The Editors, German Law Journal, 15 July 2002)]

(2) Court of Justice, Press and Information Division, Press Release No. 41/02 on Judgment of the Court of First Instance in Case T-177/01 *Jégo-Quéré et Cie/Commission* of 3 May 2002 (available at http://curia.eu.int/en/cp/aff/cp0241en.htm (last visited 29 May, 2002).

(3) *see* e.g. Financial Times, May 4th/May 5th 2002, at 3.

(4) Süddeutsche Zeitung, 6. Mai 2002: "Jeder Betroffene kann gegen europaweite Richtlinien klagen".

(5) Die Tageszeitung, 4. Mai 2002, at 2: "Faktisch wurde damit eine Art ‘europäischer Verfassungsbeschwerde' eingeführt."

(6) Agence Europe No. 8206 (May 6th/May 7th 2002), at 16: "… ce que certains appellent un coup de force du Tribunal, d'autres un coup de publicité."

(7) *see* e.g. A. Barav, ‘Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court', 11 (1974) CML Rev. 191 et seq.; H. Rasmussen, ‘Why is Article 173 Interpreted against Private Plaintiffs?', 5 (1980) ELRev. 112 et seq.; A. Arnull, ‘Private Applicants and the Action for Annulment under Article 173 of the EC Treaty', 32 (1995) CML Rev. 7 et seq.; D. Waelbroeck/A.-M. Verheyden, ‘Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires à la lumière du droit compare et de la Convention des droits de l'homme', (1995) Cahiers de droit européen, 399 et seq.; P. Craig/G. De Búrca, EU Law. Text, Cases and Materials (2nd Ed., OUP, Oxford 1998), 461 et seq.; C. Harlow, ‘Access to Justice as a Human Right: The European Convention and the European Union', in: P. Alston (ed.), The EU and Human Rights (OUP, Oxford 1999), 187 et seq.; B. De Witte, ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in: P. Alston (ed.), The EU and Human Rights (OUP, Oxford 1999), 859 et seq. – The Court's restrictive approach is defended by P. Nihoul, ‘La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale', 30 (1994) RTD eur. 171 et seq.

(8) *see* Article 230 (4) EC: "Any natural or legal person may … institute proceedings against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former." *see* also the book review on Bölhoff's focal study on the CFI by Timo Tohidipur, in this issue.

(9) The leading case is Case 25/62 *Plaumann* [1963] ECR 197 but *see* also Case 16/62 *Confédération nationale des producteurs de fruits et legumes* [1962] ECR 901 and Case 307/81 *Alusuisse* [1982] ECR 3463.

(10) For an overview on this case law *see e.g.* P. Nihoul, ‘La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale', 30 (1994) RTD eur. 171 et seq. and T.C. Hartley, *The Foundations of European Community Law* (4th ed., OUP, Oxford 1998) at 355 et seq.

(11) *see* Case C-309/89 *Codorniu* [1994] ECR I-1853, but also the Anti-dumping Case C-358/89 Extramet [1991] ECR I-2501 is often cited in this context..

(12) Quotation from Cases 789 and 790/79 *Calpak* [1980] ECR 1949 at 9, but *see* also the ‘post- *Codorniu'* Case T-472/93 *Campo Ebro* [1996] ECR II-421.

(13) On this and the influence of the stricter German approach *see* M. Fromont, ‘L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes', 3 (1966) RTD eur. 47 et seq.

(14) *see*, for a comprehensive discussion of the different policy arguments concerning standing of individuals, e.g. P. Craig/G. De Búrca, EU Law. Text, Cases and Materials (2nd ed., OUP, Oxford 1998), 479 et seq.

(15) Case 294/83 *Les Verts* [1986] ECR 1339.

(16) Case 314/85 *Foto-Frost* [1987] ECR 4199.

(17) This view is supported by P. Nihoul, ‘La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale', 30 (1994) RTD eur. 171 et seq. who argues that this form of ‘decentralised' judicial control is also in line with the principle of subsidiarity.

(18) *see* the authors cited, *supra*, note 7 (with the exception of P. Nihoul).

(19) AG Jacobs in Case C-358/89 *Extramet* [1991] ECR I-2501 and very recently in Case C-50/00 P *Union de Pequeños Agricultores/Council* [Opinion delivered on 21 March 2002, nyp].

(20) *see* on this e.g. D. Waelbroeck/A.-M. Verheyden, ‘Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires à la lumière du droit compare et de la Convention des droits de l'homme', (1995) Cahiers de droit européen, at 433 et seq.

(21) For an example *see* Art. 13 of the Television without Frontiers Directive cited by B. De Witte, ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in: P. Alston (ed.), The EU and Human Rights (OUP, Oxford 1999), at 876.

(22) This aspect is developed by D. Waelbroeck/A.-M. Verheyden, ‘Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires à la lumière du droit compare et de la Convention des droits de l'homme', (1995) Cahiers de droit européen, at 425 et seq.

(23) *see* Case 194/83 Les Verts [1986] ECR 1365 at 23.

(24) Case T-177/01 *Jégo-Quéré et Cie/Commission* at 27-38.

(25) The CFI underlines furthermore (*see* Case T-177/01 *Jégo-Quéré et Cie/Commission* at 41) that this principle is also based in the constitutional traditions common to the Union's Member States and in the ECHR (referring to Case 222/84 Johnson [1986] ECR 1651 at 18) and the its has been reaffirmed by the (legally not yet binding) Charter of Fundamental Rights of 7 December 2000.

(26) Case T-177/01 *Jégo-Quéré et Cie/Commission* at 46.

(27) Case T-177/01 *Jégo-Quéré et Cie/Commission* at 45.

(28) *see* Conclusions of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores/Council* at 43.

(29) Case T-177/01 *Jégo-Quéré et Cie/Commission* at 50.

(30) My translation. The (complete) original text reads as follows: "Au vu de ce qui précède, et afin d'assurer une protection juridictionnelle effective des particuliers, une personne physique ou morale doit être considérée comme individuellement concernée par une disposition communautaire de portée générale qui la concerne directement, si la disposition en question affecte, d'une manière certaine et actuelle, sa situation juridique en restreignant ses droits ou en lui imposant des obligations. Le nombre et la situation d'autres personnes également affectées par la disposition ou susceptibles de l'être ne sont pas, à cet égard, des considérations pertinentes.", Case T-177/01 *Jégo-Quéré et Cie/Commission* at 51.

(31) This is evidenced by the fact (reported by Agence Europe No. 8209 of 11 May 2002 at 15) that the CFI pronounced the judgment in an unexpected public hearing not foreseen in the Court's schedule and published on the same day a press release.

(32) "...recognise the need to ensure effective protection of legal rights for European citizens and businesses." *see* Court of Justice, Press and Information Division, Press Release No. 41/02 on Judgment of the Court of First Instance in Case T-177/01 *Jégo-Quéré et Cie/Commission* of 3 May 2002 (available at http://curia.eu.int/en/cp/aff/cp0241en.htm (last visited 29 May 2002).

(33) Conclusions of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores/Council*.

(34) *see*, the series of commentary and analysis of the Convention proceedings, in this Journal, starting in August 2002.

(35) The Court has invited the IGC 1996/97 to reconsider the question of the individuals' access to the Courts (*see* Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union [May 1995] at 11). The Member States did, however, not deal with the question – a behaviour which could be interpreted as approval of the Court's current approach to the matter.