# United or Divided We Stand? Perspectives on the EU's Challenges

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# UACES Student Forum

"United or Divided We Stand – Perspective on EU Challenges"

# A United Interest?

## Does the Court's approach to public interest litigation a prevent a more united approach to environmental protection?

## Introduction

In 1996 Hans Micklitz wrote:

> "If it is right that public interest litigation concerns society as such and not only the parties to a conflict, then the question is how a non-(not yet) existent European state can be separated from a non-(not yet) existent European society. Or to take the question one step further: How can there be a "European" public interest without there being a European state and a European society?"[1]

What followed is a fascinating study into the forms and depth of integration that is needed to achieve certain specific interest. To Micklitz' opinion, we could only start discussing the 'public interest' when there was a level of political integration (following market and social integration). Only then would there be an overarching polity in which citizens could engage in a cross border fashion regarding their shared interests. In other words, until we have political communality, each and every one of us mere has a personal interest to defend. That does not mean that we cannot have similar private interest, that we want to defend collectively, but the interest is lacking in depth. Dare I say, it is lacking in quality.

With the evolution of the European Project since 1996 it can happily be concluded that a lot has changed.[2] Although it may not have taken place at the speed and fashion in which it was once hoped, the constitutional nature of the Treaties and the protection that they offer has only deepened.[3] The role of the citizen within European law has steadily grown from being an agent, whose rights were determined and protected through the third party acts of Member States and Institutions, to that of an actor who to an increasing extent can personally make use of European law to protect her

1 Hans-W Micklitz, 'The Interest In Public Interest Litigation' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation Before European Courts*, vol 2 (Nomos 1996).

2 For an insteresting and brief overview from the point of view of a former Advocate General, see: Francis G Jacobs, 'The Evolution of the European Legal Order' (2004) 41 Common Market Law Review 303; For an overview of the deepening of European integration, see this and preceeding editions of: PP Craig and G De Búrca, *The Evolution of EU Law* (2011).

3 As famously described by Weiler in: *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (Cambridge University Press 1999).

(European) rights. To paraphrase professor Micklitz, the EU has reached a point of social integration. However, further unification of *l'esprit publique* has come to a halt. Policy areas that clearly have the depth of being of true public interest, and that can easily be envisioned as cross-border, even having a unifying effect in themselves, have not evolved far beyond the situation sketched in 1996. We need only think of social and environmental policy to have a clear image of areas addressing union wide, societal problems that are still thought over in national arena's rather than the European one.

Although it is clear that the complexity of these policy areas of such a nature that it is impossible to state that their lack of integration can be pinpointed to one single actor, it is presented that the Court of Justice has in fact had a significant effect on the limitation of its formation. Due to its limited interpretation of the standing requirements such as they exist within the European system of judicial protection, it has since the inception of the European project been impossible for public interest causes to reach the Court. For a long time, this has been deemed to be a side effect of the manner in which the Treaty of Rome had an economic *raison d'etre*.[4] Indeed, given the original nature of Union and the fact that public interest litigation is equally limited in the member states,[5] the case against the Court's lack of integrationary judgments on this issue would merely be a philosophical one. However, this contribution aims to argue that where the Court has failed to play its customary role as a motor of integration for a unified defence of cross border public interest challenges, it has since the entry into force of the Lisbon Treaty in fact had a divisive effect on these efforts.

This contribution is structured in four parts. Firstly, it will briefly define the concept of public interest litigation. One of the reasons why the debate on this issue has lacked focus is the fact that it is a concept foreign to our shores, and often faultily imported from our American counterparts. Secondly, I will focus on the earlier case-law that has led to the debate on the relationship between the individual and the Court. It will be demonstrated how the nature of the European Economic Communities has shaped the system of judicial protection, limiting access to the Court for individuals and non-governmental organisations through the interpretation of the term 'individual concern'. The third section will offer an explanation of the reluctance of the Court to shoulder its responsibility and adapt its interpretation to align the deepening of the Union with the protection of the public interest. This section will introduce the concepts of four elements that shape each courts interpretative space. In the light of that explanation, the subsequent section will address the main point of this contribution, the Courts shift from stalwart resistor to agent of division. After significant changes in the constitutional make up of the Union after the entry into force of Lisbon, it was clear that the Court could address the problems faced by public interest litigation. However, a change to a more decentralized system of judicial protection seems illogical from the perspective of the goals that public interest litigation aims to achieve. The conclusion will briefly summarize the findings of this contribution and aims to focus on the question: what will be the effects of this divisive approach of the Court?

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4 For instance in: Clarence J Mann, *The Function of Judicial Decision in European Economic Integration* (Nijhoff 1972); As critiqued by Gormley in: 'Judicial Review: Advice for the Deaf' (2005) 29 Fordham Int'l LJ 655, 657.

5 Mariolina Eliantonio and others, 'Standing up for You Right(s) in Europe' (Directorate General For Internal Policies - Policy Department C: Citizens' Rights and Constitutional Affairs 2012) Study PE 462.478 <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL-JURI_ET(2012)462478_EN.pdf>.

# Public Interest

For a term that is used so often, in both casual and academic usage, the concepts of 'public interest' and 'public interest litigation' are ill defined. Not unlike the remark of Justice Potter Stewart, we know it when we see it.[6] This has led to an interesting plethora of possibilities of what can be grouped under the heading. The book from which the Micklitz quote is taken is a prime example.[7] Although the book is a wonderful and diverse study on the nature of Public Interest Litigation (PIL) , a result from a seminal conference on the topic, but shows how each scholar perceives something of public interest within his or her own field. As one of the editors notes, the definition is drafted in a wide manner encompassing "[...] diffuse interests of a large number of people, such as in environmental protection, consumer protection, safety at work and anti-discrimination policies."[8] All of the contributions in the bundle make a clear statement: if anything, public interest litigation needs to be seen in a wide scope. By asserting the possibility of a public interest in all areas of European law, the Court can more easily award standing by making use of the doctrines it has developed for each of these specific areas. As such, Arnull saw the Court's approach in *Codorníu*[9] as an opportunity, as the Court of Justice and the Advocate-General took an approach to the standing criteria under, then, Article 173 EEC developed in relation to dumping cases and applied it in a case dealing with a trademark.[10] Gormley opined on the importance of the *AITEC* case[11] for the possibility for associations to be awarded standing, in this case in the field of state aid.[12] These are only two examples out of a body of work that comprises discussions of almost every field of European law imaginable at the time that illustrate at least part of the confusion.

That confusion can be found in the origins of term. Especially when it comes to standing, the authors above make use of the term 'public interest' that can be equated to 'the common good'. Within European law, there is of course a fondness for even more specific qualifications, be it 'consumer welfare', the good of the market or 'undistorted competition'.To specialists, all litigation that aims to ameliorate a particular problem within their fields can be seen as 'public interest litigation'. The reasoning is not as such wrong, but it is rather problematic when trying to grapple with issues which, for this contribution, will be called 'true public interest' cases. Under the conditions described above it is clear that there is a common law perspective at work that is of opinion that it should not matter who brings a case when a wrong can be settled.[13] However the fact

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6 *Nico Jacobellis v. Ohio* 378 U.S. 184 (1964) . I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth and Alberts*, that, under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. **But I know it when I see it**, and the motion picture involved in this case is not that. (emphasis edited)

7 Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation before European Courts* (Nomos 1996).

8 Norbert Reich, 'Public Interest Litigation Before European Jurisdictions' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation Before European Courts*, vol 2 (1st edn, Nomos 1996) 6.

9 Case C-309/89 Codorníu v Council [1994] ECR I-1853

10 Anthony Arnull, 'Challenging Community Acts - An Introduction' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation Before European Courts* (Nomos 1996) 46 It must be noted that, at least here, Arnull draws conclusions based on the phrasing of the A-G and Court of certain terms that could equally, or perhaps even more so, be interpreted as stating that this case dealt with a specific set of circumstances.

11 Cases T-447-449/03 *Associazione Italiana Tecnico Economica del Cemento et al. v. Commission* [1995] ECR II-1971

12 Laurence W Gormley, 'Public Interest Litigation and State Subsidies' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation Before European Courts*, vol 2 (Nomos 1996).

13 *R v Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Businesses Ltd [1981]*

that this gets placed in a public interest context probably finds its roots in the American origins of the term.

The American tradition, started by amongst others Justice Brandeis, was created with the intent to use the judicial system to achieve a form of justice,[14] now often called social justice. This tradition reached the peak of its influence with the civil rights movement in the sixties and seventies of the last century. Public interest litigation was therefore the continuation of a societal debate through judicial means. In the United States, these discussions ranged from, famously, discrimination[15] and labour relations[16] in the beginning of this practice to the rise of the LGBTQ rights campaign in the present day.[17] As Brandeis noted himself: “We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.' The great opportunity of the American bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.”[18]

In the American tradition public interest litigation was meant for the improvement of the people in their daily struggle against the monolithic institutions of government and corporation.[19] This, in part, explains the wide range of application it was given. Within the American definition of the public interest, anti-trust can be a means to improve on the plight of the worker, as both monopolistic enterprises and cut-throat competitive market lean towards exploitation. The position of the Supreme Court (SCotUS) as the authority on the Constitution enforces this system of legislation through litigation.[20] Through the vague wording of the Constitution SCotUS created for itself the role, not only as a keeper of a federal balance, but equally that of the guardian of the relationship between citizen and government since *Marbury v. Madison.* In that situation it was possible for the democratic dialogue tob be continued through litigation, coming to fruition in periods such that of the 'New Deal'.[21]

SCotUS later even extend its powers in *Brown* and subsequent civil rights cases,[22] but it has to be made clear that even in taking this approach it remained within the boundaries of Article III, Section 2, Clause 1 of the US Constitution.[23] SCotUS has consistently held that “[...] a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state and Article III case or controversy.”[24] Therefore, the

*UKHL 2* (UKHL (1981)).

14 This is the crux where legal theorists like Dworkin will clash with for instance Waldron. Dworkin would state that this is where judges try to “do the right thing”, whilst Waldron would say that this is an outcome-related reason, there is no reason to doubt a fault in other processes, but the applicant is hoping for a different result.

15 See for instance famous cases as Browder v. Gayle, 142 F. Supp. 707 (1956) and Brown v. Board of Education, 347 U.S. 483 (1954). Both of these cases have their roots in action by the civil rights movement.

16 National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937)

17 United States v. Windsor, 570 U.S. 12 (2013) striking down the “Defence Against Marriage Act”, but of course also its famous predecessor Lawrence v. Texas, 539 U.S. 558 (2003) in which the illegality of sodomy was succesfully challenged.

18 Louis D Brandeis, ‘Opportunity in the Law, The’ (1905) 3 Commw. L. Rev. 22, 26.

19 As Brandeis put it eloquently: “For nearly a generation the leaders of the bar with few, exceptions have not only failed to take part in any constructive legislation deigned to solve in the interest of the people our great social, economic and industrial problems, they have failed likewise to oppose legislation prompted by selfish interests. They have often gone further in disregard of public interest.”

20 It is in fact, the only court created by Article 3 of the Constitution, with this explicit task of interpreting that document. All other courts are created by Congress.

21 See for instance: *United States v Butler*, 297 US 1 (1936), *Carter v Carter Coal Company*, 298 US 238 (1936), Morehead v. New York 298 US 587 (1936)

22 *Supra* n.16

23 The so-called “Cases and Controversies Clause” which dictates the powers of the Supreme Court.

24 *Lujan v. Defenders of Wildlife*, 504 U.S.555 (1992)

success of civil rights groups lies in their success to claim an infringement of their constitutional rights because they could find, or in some cases created, a specific and individualised example. More generalised abstract rights have not been successfully defended. The reason why the United States has been lauded in earlier days for the involvement of public interest litigation in environmental situations has been due to the fact that it has been one of the first to incorporate explicit grounds for standing in environmental legislation.[25] However, that did not mean that the judicial landscape shifted in favour of organisations with the common good in mind. In 1972 in *Sierra Club v Morton* the Supreme Court reasoned that an NGO could not be awarded standing if they could prove an actual individualised harm to itself or one of its members.[26]

Public interest litigation in its American context is therefore in a European context more exemplified by the *Defrenne* case, than by the examples mentioned.[27] A lawyer who sacrifices time and knowledge for the public good, combined with a case of rights infringement that can be limited to the scale of the individual.[28] It is this individualisation that makes it clear that where there similar circumstances in the European legal order, this would not create a problem as that would fall under the classification of 'individual concern'. Public interest litigation should neither be seen as the arbitrary possibility to further a debate on policy without a clear violation of a right.[29] Therefore it is proposed that for the current discussion, and the situation that is actually problematic in a European context, the public interest should be defined as those rights that are not individualisable. Those rights that are individualisable can when bundled be seen as collective interest.

# The special interest of public interest

Given the definition stated in the preceding section, we can see the problem that arises in the light of the standing regime envisaged by the Treaty. The article governing judicial review of acts of the Union and its institutions has been notoriously strict in allowing natural or legal persons access to the court when they are not the addressees of the contested act. Where this is difficult for natural or legal persons to be granted standing in Luxembourg, it will be demonstrated that it is impossible for those who seek to defend a public interest.

The problem in European law lies with the interpretation of Article 263 TFEU and its earlier incarnations.[30] Although the power of the Court to review acts of the Union is sweeping in scope, the precise extent of this power depends on the class of applicants. It is clear from the wording of the current Article that there are three categories of applicants;[31] the privileged in the form of Council, Commission, Parliament and Member States that can ask for the review of every measure, no matter whether it affects them or not;[32] semi-privileged applicants are the European Central Bank

25 Clean Water Act 33 U.S.C. para 1365, giving every citizen the possibility to commence civil suit for instance when the Administrator has failed to fulfil his duties. Clean Air Act 42 U.S.C. para 7604 makes use of the same wording.
26 *Sierra Club v. Morton*, 405 U.S. 727 (1972)
27 *Supra* n. 7
28 Int the case of Defrenne, Eliane Vogel Polsky actively sought out a ‘victim’ of gender discrimination because she believed it would be possible to rely on European Law directly before the Belgian Tribunal de Travaux and Conseil d’Etat. It is a prime example of strategic litigation where the Federal law of higher order is used in a direct manner to circumvent or dismiss the lower laws of the federation’s members. For a full account, see: Catherine Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996).
29 Apparently the intent of a number contributors in: Micklitz and Reich (n 7).
30 Article 173 EEC and Article 230 EC.
31 Four if one were to make a divide in the category based on whether one were dealing with an regulatory act or not.
32 This includes legislative acts.

Committee of the Regions and the Court of Auditors that are only allowed to request the review of acts that affect their prerogatives; finally, natural and legal persons as addressees of an act or when directly and individually concerned by said act.[33]

There has been a long tradition of criticising the Court for its interpretation of the standing criteria relating to this last category of applicants.[34] It is this category of applicants, encompassing citizens, companies and NGOs to name a few examples, that has the most limited capabilities both regarding the acts they can have reviewed and the hurdles they need to cross to actually be granted standing before the Court. Although the criticism from both Advocates General[35] and Academia has been strong, the problem still remains with the Court's interpretation of the term 'individual concern' that stems from the now infamous *Plaumann* ruling, dating from 1963.

In that case, a clementine importer from Germany requested the review of a Commission decision which denied the German state the possibility to apply a more advantageous tariff for citrus-fruit. The Court ruled that Plaumann & Co was not individually concerned by the decision addressed to the State.[36] For an applicant to be individually concerned, so the Court concluded, a party must show that he was affected:

> "[…]by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them

33 It goes beyond the scope of this article to go into the nature of the acts that can be requested to be reviewed by natural and legal persons, although the Article specifically mentions "[...]an act addressed to that person or which is of direct and individual concern to them", thereby no longer making use of the earlier specifications of decisions or decisions in the form of a regulation. Technically this means that all acts, including legislative acts can be demanded to be reviewed by the Court by natural or legal persons, however clearly this would be difficult to reconcile with the direct and individual concern requirements. The Article is in its current incarnation in line with the case-law, which clearly did not put to much stake in the nature of an act once the aforementioned requirements were met.

34 Robert Kovar, 'Le droit des personnes privées à obtenir devant la Cour des Communautés le respect par les Etats membres du droit communautaire' (1966) 12 Annuaire Français de Droit International 509; Ami Barav, 'Direct and Individual Concern : An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) 11 Common Market Law Review 191; Eric Stein and G Joseph Vining, 'Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context' (1976) 70 Am. J. Int'l L. 219; H Rasmussen, 'Why Is Article 173 Interpreted against Private Plaintiffs?' (1980) 5 European Law Review 112; Gerhard Bebr, *Development of Judicial Control of the European Communities* (Martinus Nijhoff 1981); Hans-Wolfram Daig, *Nichtigkeits- Und Untätigkeitsklagen Im Recht Der Europäischen Gemeinschaften: Unter Besonderer Berücksichtigung Der Rechtsprechung Des Gerichtshofs Der Europäischen Gemeinschaften Und Der Schlussanträge Der Generalanwälte* (Nomos 1985); Achim von Winterfeld, 'Möglichkeiten Der Verbesserung Des Individuellen Rechtsschutzes Im Europäischen Gemeinschaftsrecht' [1988] Neue Juristische Wochenschrift 1409; Anthony Arnull, 'Private Applicants And The Action For Annulment Under Article 173 Of The EC Treaty' (1995) 32 Common Market Law Review 7; Paul Craig, 'Legality, Standing and Substantive Review in Community Law' (1994) 14 Oxford Journal of Legal Studies 507; Anthony Arnull, 'Private Applicants and the Action for Annulment since Codorniu' (2001) 38 Common Market Law Review 7; Gormley (n 4); Takis Tridimas and Sara Poli, 'Locus Standi of Individuals under Article 230(4): The Return of Euridice?', *Making European Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice* (Edward Elgar Publishing Ltd 2008); Francis Jacobs, 'Access by Individuals to Judicial Review in EU Law - Still an Issue of Concern?', *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (1st edn, DJOF Publishing 2010); Albertina Albors-Llorens, 'Remedies Against The EU Institutions After Lisbon: An Era Of Opportunity?' (2012) 71 The Cambridge Law Journal 507.

35 For instance the opinion of A-G Lagrange in Joined Cases 16 and 17/62 *Producteurs de Fruits v Council* [1962] ECR 471 "Such is the system that the jurist, for his part, might find unsatisfactory, but which the Court is bound to apply. This is not the place to justify the system. One might observe only that it is coherent and that serious arguments can be put forward to justify it."

36 It did not go into the question of the importer being directly concerned because, the Court reasoned, if the applicant wasn't individually concerned a further investigation would not be necessary as the demands of direct and individual concern are cumulative.

individually just as in the case of the person addressed."[37]

Over the years the Court has seen fit to elaborate on what could differentiate an applicant to such an extent that he could be found to be individually concerned. Yet most of these clarifications have only focussed on the rights of specific economic actors that are affected by those areas of European law that have had the greatest impact. Problematic situations regarding dumping,[38] state-aid[39] and competition case have been resolved through the doctrine of procedural rights.[40] However, the problem for public interest litigation is painfully clear. The whole concept of *locus standi* in European law is based on the fact that there is something particular that is so specific as to affect only a very limited group. This is logical from an economic perspective, where the integration of the single market affects entire sectors and it is expedient that access to justice limited to only the most poignant cases,[41] but economic integration can have social and environmental effects that can not be restricted to a category of one.

The problem became painfully clear as the EEC expanded its competences into the field of environmental protection. The first case in which a NGO attempted to have the Court review an act by the Commission on environmental grounds was in the *Greenpeace* case.[42] It was equally the first case in which a NGO tried to pursue its statutory goals through litigation, rather than to enforce its procedural rights. In brief, the Commission had awarded a subsidy under the European Structural Fund for the construction of a coal fired power plant on the Canary Islands. It had done so, even though it had been made aware of the fact that the Environmental Impact Assessment (EIA) had not complied with the standards set by European law. A number of inhabitants of the islands, local environmental organisations and Greenpeace attempted to stop the construction of the power plant. They had initiated proceedings before the local administrative courts regarding the permits, but Greenpeace had also attempted to halt the project by defunding it. As such, it had sought a dialogue with the Commission on the issue and, when this dialogue failed to produce the wanted result, had started a case before the Court of First Instance in which it was joined by the aforementioned parties. Given the recent hope given by the Court in *Codorníu*,[43] the argument that the power plants would lead to the detriment of the living environment of the applicants could possibly be sufficient to be individually concerned. Greenpeace's specific argument regarding its standing was not only the fact that it had had a formal interaction with the Commission regarding its decision to grant the subsidy, but also that it had the statutory goal to ensure environmental protection and pursuing that goal in this concrete situation.[44]

Both the CFI and the ECJ in its confirmation of the ruling by the CFI did not recognise this stretch in its standing requirements. In a ruling that until this day creates the hurdle for public

37 Case 25/62 *Plaumann et all* v *Commission* [1963] ECR 95
38 Case C-358/89 *Extramet Industries SA* v *Council* [1991] ECR I-2501
39 Case 169/84 *COFAZ* v *Commission* [1986] ECR 391
40 Case C-198/91 *William Cook plc* v *Commission* [1993] ECR I-2487
41 JH Jans and Hans Vedder, *European Environmental Law* (4th Revised edition, Europa Law Publishing,Netherlands 2012) 239.
42 Case T-585/93 *Stichting Greenpeace Council and Others* v *Commission* [1995] ECR II-2205, affirmed in appeal Case C-321/95 P *Stichting Greenpeace Council and Others* v *Commission* [1998] ECR I-1651
43 Case C-309/89 *Codorníu SA* v *Commission* [1994] ECR I-1853 In which the Court found that certain specific rights could lead to an individual concern. However, in *Codorníu* the court had to deal with a pre-EEC intellectual property right, making the case ill-suited for comparison.
44 Thereby emulating in part the American approach to standing for environmental interest organisations as was pioneered by *Sierra Club*.

interest litigants, the CFI stated a now oft repeated refrain. Associations will only be awarded standing as a result of all their members being individually concerned,[45] or where the association can show that it has been part of the procedure leading to the contested act.[46] As a result, neither Greenpeace, nor the two local associations, nor the inhabitants of the islands could claim to be affected by the decision by the Commission in a manner that distinguishes them from any other person within the reach of that directive.[47]

It has to be concluded that EU standing requirements are seemingly ill suited for the pursuance of public interest litigation.[48] Although it would be possible to see collective interest cases gaining a foothold on the Kirchberg, it is very difficult to see how for instance an environmental protection agency would be able to invoke rights going beyond the merely procedural. It seems that the Court wants to establish a very direct link, a closeness of relationship, between the act that needs to be scrutinized and the applicant. For personal and economic rights, it is clearly possible to limit that relationship to specific natural or legal persons. Yet environmental rights or social rights are not easily limited to a (legal) person.

# The Court's lack of interest

The debate was reinvigorated by the circumstances surrounding the *UPA* and *Jégo-Quéré* cases.[49] It was the opinion of Advocate General Jacobs that laid the blame for the difficulties of natural and legal persons to have their rights addressed firmly on the Court.[50] In the cases that have become famous rather due to the bickering amongst the courts than due to the subject matter, the Court of First Instance proposed a different reading of the term 'individual concern' than traditionally used by the ECJ, based on the A-G's proposals.[51] Although the particulars of the cases and the intra-institutional fight that ensued are not particularly relevant for the thesis put forward in this contribution, the episode did contribute one valuable element in the discussion. Jacobs had opened the discussion to a wider extent than the original critics had ever envisioned. The famous interplay between Stein & Vinning and Rasmussen on the Court's interpretation had largely focussed on interpretive theory and policy considerations of the Court.[52] Jacobs had now opened the floor to a wider discussion on justice and the role of the protection of fundamental rights within the scope of European law. The points he made in the *UPA* opinion have therefore found a wide adoption amongst authors who have taken his criticism as a starting point for the discussion on how the

45 For instance if an association was created to represent the collective interests of (unrelated) individuals in a class-action scenario.

46 As derived from procedure or agreement. Or by extension, where it should have been and it has initiated the case to defend its procedural rights.

47 It should be kept in mind that, as was remarked by the Court of First Instance, the relationship of the applicants to the decision regarding the subsidy addressed to the Spanish government was tenuous in contrast to their relationship to the administrative decision to build a power plant.

48 See for further cases: T-117/94 *Associazione Agricoltori della Provincia die Rovigo a.o.* v *Commission* [1995] ECR II-455, on appeal C-142/95 P *Associazione Agricoltori della Provincia die Rovigo a.o.* v *Commission* [1996] ECR I-6669; T-219/95 R *Marie-Thérèse Danielsson et al.* v *Commission* [1995] ECR II-3051

49 T-173/98 *Union de Pequenos Agricultores* v *Council* [1999] ECR II-3357, C-50/00 P *Union de Pequenos Agricultores* v *Council* [2002] ECR I-6677; T-177/01 *Jégo-Quéré et Cie SA* v *Commission* [2002] ECR II-2365, C 263/02 P *Commission* v *Jégo-Quéré et Cie SA* [2004] ECR I-3425

50 C-50/00 P *Union de Pequenos Agricultores* v *Council* [2002] ECR I-6681

51 *Ibid.* To quote Jacobs: “In my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.”

52 Stein and Vining (n 34); Rasmussen (n 34).

system of judicial review should interact with civil society.

It is widely known how the ECJ rejected any innovation proffered by Advocate General or CFI. Yet it should be remarked that at a number of instances it has done so with the notable caveat that:

> "While 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, it is for the Member States [...] to reform the system currently in force."[53]

Furthermore, the Court keeps reiterating that to its opinion there exists a "complete system of legal remedies". Still, even confronted with the strong arguments of its Advocate General that revision is not necessary and that there are lacunae in the system, the Court does not move. Where it has been argued that this is the result of a clash of egos,[54] it is submitted that in fact the Court does not see the interpretative freedom to widen the scope of its standing criteria. Where the question has traditionally been why the Court interprets Article 263 against the individual,[55] the reverse of that question would be of a far greater interest. Why has the Court who has greatly improved the position of the individual in the European legal order not made use of its power to interpret Article 263 TFEU more favourably for said individual?

It is proposed that in all legal orders the most important element that defines the standing criteria is in essence the relationships that exist between the *trias politica* and the state. This is why the role of judicial review is of such an interest. More than any other single point of law it can tell the story of a state's DNA. See for example the long history of the French limitations to judicial review out of fear of the return of judge-made law, a trauma from the days of the *ancien regime*.[56] Or the German system of administrative law, based on the protection of the rights of the individual, a reaction to the dark days in the middle of the 20th century.[57] Each system outlines the relationship between the legislature, the executive, and the citizen. In each system the role of the judiciary describes the relative weight of each of these actors in relation to each other.

There are a number of elements that are affected by this relationship. The standing criteria, which is the main point of focus for the current contribution, are only one. Other that can be identified are the categories of acts that can be reviewed by a court and the quality, or depth so you will, of scrutiny that a court is able to subject an act to. There is a balance between these three elements. Generally speaking it is possible to conclude that those states with the most relaxed approach to standing requirements will have a more limited scope of acts that can be reviewed and a less in depth level of scrutiny. Compare for instance the liberal standing regime of the courts of England and Wales,[58] to the relatively strict criteria used before the German administrative courts.[59] In England, judicial deference limits courts in their possibilities for the review of acts by parliament

53 *UPA* see n.50 at para 45
54 Gormley (n 4).
55 Rasmussen (n 34).
56 Edwin Borchard, 'French Administrative Law' 133, 135; C Sumner Lobingier, 'Administrative Law and Droit Administratif: A Comparative Study with an Instructive Model' (1942) 91 University of Pennsylvania Law Review and American Law Register 36, 39.
57 Peter Bucher, *Der Verfassungskonvent auf Herrenchiemsee*, vol 2 (Harald Boldt Verlag 1981).
58 The Right Hon Lord Woolf, *De Smith's Judicial Review* (Sir Jeffrey Jowell and Andrew Le Sueur eds, 7th Revised edition edition, Sweet & Maxwell 2013).
59 Mahendra P Singh, *German Administrative Law in Common Law Perspective* (Springer 2001).

and, although the dogma has undergone changes due to for instance the Human Rights Act, *Wednesbury* unreasonableness awards the government a high level of protection from scrutiny. German courts have a stricter standing criterion, namely that of a personal right that needs to be invoked, however when that threshold is met a German court is able to review in certain cases even legislative acts. Similarly, German courts are in some situations empowered to reconsider the decision of the administration rather than being compelled to send it back to the original authority.

These relations are governed by more than merely the written law. They change, and in France,[60] Germany,[61] and England[62] the standing regime has changed with the passing of years. This has often happened without any formal changes to codified principles, but rather through the case law of the courts themselves. Yet what compels these courts to change a rule of such a fundamental nature? What makes them decide that they have the authority to do so at that point of change? Lastly, what restrains that authority?

It is proposed that we can describe the relationship that governs a (supreme)court's freedom of interpretation of the rules of standing on the basis of four elements.[63] These four elements describe the field of tension within which not only a court's interpretative space resides, but these elements equally indicate the relative weight of the actors within the *res publica.* These elements can be summarized as:

- The constitutional possibilities for legal challenges in a formal sense
- The existence and extent of a federal system within the state
- Guiding principles and ideals set out in constitution or other documents
- The existence of human rights in the constitutional order.

Were we to apply these elements to the Court of Justice of the EU, the interpretative space becomes clear, as does the Courts persistent limitation of the standing for not only individuals, but even more so for public interest litigation.

Although today many authors have hailed the success of the constitutional development of the European legal order, the earliest days of the project were fraught with idealogical difficulties. At the time of the drafting of the Treaty of Rome, the original ideal of a federal Europe was increasingly becoming a lost dream rather than a vision for the future. The result was a bare-bones framework that was decidedly of an economic nature. Even though the German delegation present at the negotiations pushed for a more federal approach, including a strong federal court, the institutional arrangements ended mostly in a system after the French system of administrative law, with only minor concessions.[64] Where in a federal context a supreme court has far reaching powers to preserve the boundaries and rights laid down by the agreements in the constitution, the system of the Treaty of Rome was distinctly silent. Indeed, it was the Court itself that would cut through this

60 Philippe Manin, 'The Nicolo Case of the Conseil D'Etat: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law Over, Subsequent National Statute Law' (1991) 28 Common Market Law Review 499.

61 B Muller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law: Judgment of the Court of 12 May 2011 -- Case C-115/09 Trianel and Judgment of 8 March 2011 -- Case C-240/09 Lesoochranarske Zoskupenie' (2011) 23 Journal of Environmental Law 505.

62 Richard A Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR The Modern Law Review 859.

63 David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 The Modern Law Review 44.

64 *Dokumente Zum Europäischen Recht - Band 2: Justiz (bis 1957)* <http://www.springer.com/law/international/book/978-3-540-63498-0> accessed 8 October 2014.

Gordian knot in the famous *Van Gend en Loos* and *Costa v ENEL* cases.[65]

Given the nature of the fledgling EEC, it is not surprising that no mention was made of any grand overarching ideal in relation to human rights or the furtherance of peace in the world. Where the German preamble to the constitution speaks of Germany's obligation to maintain friendship with other people and secure the peace, the preamble to the Treaty of Rome only hopes that the sharing of resources will lead to peace. Human rights were deemed to be covered by the newly created European Convention on Human Rights and were deliberately left out of the Treaty text. The only rights that did find their place were such rights such as the right to equal pay.[66] It should be noted that these rights were mostly constructed to prevent any unfair competition between Member States, such as the use of women as low cost labour.

In this context, the role of the Court was extensively discussed. France, which had opposed the creation of a court since the days of the ECSC treaty, did not agree with the liberal interpretation the Court had given to standing under Article 33 ECSC. The fact that industry had such relatively easy access to the Court had never fit well with the French concept of the European project. Article 173 EEC was explicitly given a limited meaning as opposed to its ECSC counterpart.[67] The negotiating delegations were of the opinion that the opening of the standing requirements by the Court of Justice had gone too far.[68] A more limited approach was explicitly and carefully drafted to disallow to wide access to the Court of Justice. This is perhaps best reflected in the Spaak Report, which followed the Messina Conference as a further concretisation of the plans towards the EEC. In the report, whose focus was on the ways in which market integration could take place, the paragraph on the Court reads:

> La Cour, qui sera celIe de la C.E.C.A., sera chargée de statuer sur les plaintes concernant des violations du traité par les Etats ou les entreprises et sur les recours en annulation contre les décisions de la Commission européenne, sans avoir le pouvoir d'y substituer une décision nouvelle.[69]

There is explicitly no mention of judicial recourse for individuals and the powers of the Court are further limited to the fact that it cannot substitute a decision by the Commission through a ruling. The Court of Justice was, for all intents and purposes, increasingly an administrative court in the French tradition, with an explicit instruction not to travel the road it had gone down before.

When *Plaumann* came before the Court, it found its interpretative space severely limited. It could not interpret federal safeguards to such an extent that the clementine importer could be granted standing, nor could it invoke overarching policy principles or human rights that could be used to give a more encompassing reading of the text. Perhaps most importantly, the Court knew that the drafters had given a very specific meaning to the text of Article 173 EEC, which meant that normal clementine importers should not have easy access to the Court of Justice.

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65 Morten Rasmussen, ‘Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65’ (2012) 21 Contemporary European History 375.

66 Article 119 EEC: “Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.”

67 Ami Barav, ‘Direct and Individual Concern : An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court’ (1974) 11 Common Market Law Review 191, 191.

68 Anne Boerger-De Smedt, ‘Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome’ (2012) 21 Contemporary European History 339, 246.

69 *Rapport des Chefs de Delegation aux Ministres des Affaires Etrangeres*, 2 B p. 25 (Spaak Report)

## Interesting turn of events

Recently, a shift has taken place. It is the effect of the confluence of a number of developments. First and foremost, the entry into force of the Treaty of Lisbon, with the most significant change to the wording of Article 263 TFEU to date. Secondly, it is the effect of the Aarhus Convention and the manner in which it has been adopted into the European legal order.[70] Lastly, it is the result of the Court's own case law in relation to the procedural autonomy of the member states when their courts are faced with rights stemming from EU law invoked in a national situation.

The most obvious element to have changed is of course the manner in which the Treaty of Lisbon has added a new category of applicants. Although the article largely remains the same, the paragraph on the possibilities for natural and legal persons now reads:

> "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, *and against a regulatory act which is of direct concern to them and does not entail implementing measures.*"

This innovation was a result of the discussion circle at the Intergovernmental Conference for the Constitution for Europe. During the negotiations on a constitutional document for the European Union, a broad discussion took place on all elements of European law. Within the discussion circle on the future of the Court, the issue of standing was naturally discussed, but the solutions proffered differed widely.[71] The main problem seems to have been an agreement on what the actual problem was that needed to be resolved. On the one hand, there was a camp that in the line of Jacobs' comments wanted to see a far-reaching change of the fundamental underpinnings of the Article, some suggesting the need for a rights-based approach to judicial review. On the other hand, the narrow view of the problem dealt with the situation in *Jégo-Quéré*,[72] the one situation in which this camp was of opinion that an actual denial of justice may have taken place. The result was the creation of a clause that is difficult to see out of the context of the original idea behind the constitution. Under the constitution, the number and nature of European acts was supposed to be reduced and simplified. The concept of the 'regulatory act' would have created a category that was brought to light by *Jégo-Quéré,* an act by an institution that created an immediate real world effect without the intercession of another body. The mesh size of netting, chemical agents on lists, administrative acts that have a direct relationship with those affected by them. Although this seems a clear concept, the clear categorisation of acts did not transfer from the Constitution into the Treaty of Lisbon,[73] resulting in the necessity of interpretation by the Court on what a 'regulatory act' comprised of post Lisbon.

While Lisbon was dawning at the horizon, the Union had committed itself to the obligations laid down by the Aarhus Convention. A ground breaking international agreement that seeks to help citizens in the enforcement of their environmental rights. As such, it is built on three 'pillars' that aim to facilitate this: the rights of access to information; access to decision making procedures; and access to justice. Whilst the first two pillars have been implemented with, arguably, relative ease,

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70 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* 38 ILM 517 (1999), as approved by the Union by way of Decision 2005/370/EEC OJ L-124

71 See the final report for the Intergovernmental Conference by Circle I: CONV 636/03

72 See *supra* n.51

73 Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010).

the third pillar has caused a lot of problems within the European system of judicial protection.[74]

These two changes bring about shifts in two of the four elements described. For one, a new categorisation of applicants for those who seek to review regulatory acts leads to a possibility for renewed interpretation. Secondly, the Aarhus Convention offers the Court the possibility to move their standing interpretation towards a more rights based approach of the requirements. Then there is a third development that equally affects the Courts interpretative space. Under the influence of the Court's case law on the possibility to invoke European rights before national courts, the standing criteria of the member states have steadily shifted from a classical normative system such as it existed in France at the time of the creation of the Treaty of Rome, to more rights based approach.[75] Although this effect on the procedural autonomy of the member states has been well documented,[76] in recent years the Court of Justice has even gone so far as to push the agenda of the Aarhus Convention through its interpretation of European law. Through its own action, the Court had effectively changed the constitutional values of the member states.

Within this tension, the Court needs to act. Where environmentalists would hope that the Court would embrace the Aarhus Convention as it has done regarding the Member States, it has acted quite contrarily. Since the entry into force of the Treaty of Lisbon, the Court has remained steadfast in its denial of access to justice to environmental NGOs. Where NGOs have tried to rely on the Aarhus Convention directly, it has stated that it is not possible to do so due to the nature of the Convention which is not sufficiently clear to rely on.[77] It has made use of the unclear situation of the term regulatory act to limit its interpretation to the strictest meaning possible.[78] Even the term 'direct concern', which was underdeveloped before Lisbon, has now been given a new lease on life.[79] Where in earlier cases that Court would not place to great an emphasis on the term, accepting a party to be directly concerned when the member state giving actual effect to the contested measure did not have any discretion in its application, now even the collection of fines or tariffs will mean that the applicant is not directly affected by the EU act. Where all signs would seem to point to the fact that the Court should finally create a unified polity for the protection of the public interest, it seems to do the exact opposite.

# Conclusion

The Court's divisive approach to the interpretation of *locus standi* is a result of the tension that has been created in its interpretative space. Although all of the four elements which have been described to shape this space have gone through significant changes, the result of the Treaty of Lisbon has

74 Regulation 1367/2006/EC OJ L-264

75 As illustrated in for instance Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommungenom dess marknämnd* [2009] ECR I-9967 and Case C-240/09 *Lesoochranárske zoskupenie VLK* v *Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255 in which the Court of Justice ordered far reaching changes to respectively Swedish and Slovak procedural law on standing requirements in order to conform with the relevant European regulation implementing the Aarhus Convention. In both cases the Court of Justice interprets the Regulation in the light of the purposes of the Convention, achieving a more judicial result than the Aarhus Convention Compliance Committee would be able to achieve.

76 JH Jans, S Prechal and RJGM Widdershoven (eds), *Europeanisation of Public Law: Second Edition* (2 edition, Europa Law Publishing 2015).

77 Case C-401/12 P *Council* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* and Case C-404/12 P *Council* v *Stichting Natuur en Milieu and Pesticide Action Network Europe*

78 Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*

79 Case T-312/14 *Federcoopesca v Commission*

been ambivalent in this regard. A solution was found in the creation of the category of regulatory acts, yet it is clear that the drafters did not want to see this solution applied to anything else but the mesh-size of fishnets.

A Court confronted with this amount of tension is limited in its options, whilst the problem of the judicial protection of the public interest remains. It is submitted that the Court has sought the solution in the construction of a decentralized system of judicial protection. Although it does not see the possibility to resolve the current problems it faces internally, it has continuously pushed for the changes needed in the member states to create the “complete system of legal remedies” that it has always envisioned. A strict interpretation concepts such as 'acts of general application' and 'direct concern' create impasses for NGOs in Luxembourg, but they also force member state courts to act as a filter. If an act is truly considered to be contrary to EU law, a lower court will be able to make a preliminary reference.

Although the choice may be understandable, it truly has a divisive effect. NGOs are a way through which citizens can unite in cross border issues. Especially issues such as the environment or socio-economic rights can foster a greater solidarity and unity. The fact that these challenges cannot be individualized now hinders this coming together and forces smaller, national NGOs to bring cases that might not be successful, whilst perhaps expanding a relatively greater amount of resources. Clearly, until the Treaty is changed one more there will be a hole in Micklitz' envisioned political unity.