

**CONV 45/02**

**CONTRIB 25**

**BEGELEIDENDE NOTA**

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van: het secretariaat

aan: de Conventie

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Betreft: Bijdrage van de heer Hannes Farnleitner, lid van de Conventie

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De secretaris-generaal van de Conventie heeft van de heer Hubert Hannes Farnleitner, lid van de Conventie, de bijdrage ontvangen die in bijlage dezes staat.

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## **Facilitating individual actions before the European Court of Justice and the Court of First Instance**

Contribution from Mr. Hannes Farnleitner

Member of the Convention

The present paper aims to draw the Convention's attention to a problem arising in connection with the institution of proceedings before the EC Courts (European Court of Justice and Court of First Instance) by individuals (natural and legal persons). The effects of the present provisions on this matter contribute to the feeling that EU decision-making bodies are rather remote from the citizens. As will be argued hereafter, these negative effects could be avoided rather easily, thus contributing to bring the European Community closer to its citizens and making it more transparent.

### **1. Current Community law**

The problem at issue arises in particular in connection with proceedings for annulment under Article 230 of the EC Treaty. According to this provision, the Court (the Court of Justice or the Court of First Instance in case of actions introduced by natural and legal persons) shall review the legality of acts adopted by the Community institutions. For this purpose, it has jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating their application, or misuse of powers.

Actions may in general be introduced by the Member States, the Council, the Commission as well as, for the purpose of protecting their prerogatives, by the European Parliament, the Court of Auditors and the European Central Bank.

Natural or legal persons may only institute proceedings against decisions which (although in the form of a regulation or decision addressed to another person) are of direct and individual concern to them. This basically means that legal acts of a general nature (in particular regulations) cannot be challenged by individuals unless they are directly and individually concerned.

According to the ECJ and the Court of First Instance a person is considered to be directly concerned if the Community legal act does not need to be implemented by the member state for it to affect the individual, or else if the leeway left to the member state implementing the legal act in question does not allow for more than a merely technical implementation.

According to the case-law of the ECJ and the Court of First Instance, persons are individually concerned by a Community measure, even if they are not their addressees, if the contested measure affects them on account of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons, thereby distinguishing them individually in the same way as persons to whom an individual legal act (in particular a decision) is addressed. In practice the latter criterion leads to a situation where proceedings brought by

individuals against general legal acts are in many cases not admitted because the individual, while being directly concerned is not individually affected. A few examples of ECJ case-law which clearly show the effects of the existing provisions as detrimental to the concept of legal protection are listed at annex.

In its paper submitted to the IGC preparing the Treaty of Amsterdam, the ECJ itself raised the question whether the current law is “sufficient to grant [individuals] effective legal protection against possible violations of fundamental rights due to the legislation of Community institutions”.

The only way to solve the present problem in an unequivocal manner is by way of amending the Treaties. In this context it should be recalled that in a recent final motion (Rs. C-50/00 P) Attorney General Jacobs recommended to review the current case-law on the question of “individual concern”.

## **2. Possible solution**

The access of individuals to legal protection under Community law could be improved by deleting the words “and individual” in Article 230 para. 4 of the EC Treaty. The sentence would thus read as follows: *“Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct concern to the former.*

This would allow proceedings for annulment to be introduced by natural or legal persons against legal measures taken by the Community in cases where they are “directly” but not “individually” affected by such measures.

## **3. Framework conditions – possible effects**

This proposal might give rise to the objection that it could trigger numerous court cases filed by individuals against Community legal acts of a general nature, thus paralysing the already overburdened EC-judiciary. However, the EC judiciary would still have to decide whether all the other conditions of admissibility are fulfilled (in particular the issue of “direct concern”). The Austrian constitution provides for the possibility of individuals bringing complaints before the Constitutional Court by. The Austrian experience shows that the judiciary still has sufficient possibilities to “filter” cases. Attorney General Jacobs in his above-mentioned final motion, expressly states that he does not share the concern of seeing the number of actions rise to an unmanageable extent . He also refers to a possible solutions offered by procedural law.

Others might argue that extending the possibilities of individuals filing actions against EC legal acts within the framework of the existing Community law might lead to a situation whereby many proceedings for annulment against general acts of Community law would have to be filed with the Court of First Instance rather than with the ECJ. However, the Treaty of Nice already provides for this possibility with regard to preliminary rulings – cases of primary significance with regard to a uniform interpretation of Community law. The ECJ will thus no longer be the only institution to decide on requests for preliminary rulings (Article 225 para. 3 of the EC Treaty as amended by the Treaty of Nice).

Case-law relating to a lack of individual concern in the sense of Article 230 para. 4 of the EC Treaty; a few examples

1. Court of First Instance, 9 August 1995, Greenpeace and Others/Commission, T-585/93, Coll. 1995, II-2205; confirmed by the ECJ, 2 April 1998, C-321/95 P, Coll. I-1651

Environmental protection – protection of neighbours; action for annulment against a decision addressed to Spain granting financial assistance by the European Regional Development Fund (ERDF) for the construction of two electric power stations on the Canary Islands; the applicants are on the one hand individuals who stress their position as residents in the area, fishermen or persons living on tourism, concerned about the preservation of the Canary Islands environment, and Greenpeace and other environmentalist groups on the other hand. According to established case law, the Court of First Instance, supported by the Court of Justice, ruled that the individuals are a group of persons described in a general and abstract manner; filing an application with the Commission, in the absence of any specific procedural rights, does not individualize them in the sense of Article 230 para. 4 of the EC Treaty (cf. in particular marginal nos. 54 to 57). As regards the actions filed by Greenpeace and other environmentalist groups, the Court of First Instance, referring again to its constant case-law, ruled that these associations may not institute proceedings given that their members (like the first category of applicants) are not entitled to do so either (cf. marginal nos. 59 to 63).

2. Court of First Instance, 22 February 2000, ACAV and Others/Council, T-138/98, Coll. 2000, II-341 (final)

Fisheries; action for annulment against a Council regulation defining the length of drift-nets for the preservation of fishery resources; one example of the Court's constant case-law stating that a measure allowing for exact identification of the persons to whom a measure applies by no means implies that these persons are individualised in the sense of Article 230 para. 4 of the EC Treaty (cf. marginal no. 64); the fact that the contested regulation may have serious economic implications for the applicants' activity, does, however, not individualise them according to the Court's constant-case law (cf. marginal no. 66).

3. Court of First Instance, 7 February 2001, Sociedade Agrícola dos Arinhos and Others/Commission, T-38/99 through T-50/99, not yet published in the Collection (final)

Concerns a decision by the Commission addressed to Portugal prohibiting the export of Portuguese fighting bulls to Spain and France as a protective measure against bovine spongiform encephalopathy; the applicants, breeders and exporters of bovine animals, are affected merely as part of a category of persons defined in abstract terms, viz. all persons exercising the same economic activity (cf. in particular marginal nos. 37 to 44).

4. Court of First Instance, 21 March 2001, Hamburger Hafen- und Lagerhaus and Others/Commission, T-69/96, not yet published in the Collection (final)

State aid; proceeding for annulment against a decision by the Commission granting State aid by the Netherlands to a company which is a competitor of the applicants; according to existing case-law on State aids a competitor may in such a case file an action (and is thus individually concerned) if he can demonstrate that his interests might be affected by the aid and that his individual competitive position on the market is affected by it. The applicants failed to do so in the case at issue (cf. in particular marginal nos. 34 to 50). The applicants' submission that the legal action in question is the only legal remedy available to them, did not change the situation (cf. marginal no. 51).

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