Mr. Chairman,

Dual level review mechanisms

From the point of view of an individual, rights conferred by a legal system are only effective and substantive if there are effective remedies available if those rights are infringed. In some instances, those remedies may be pre-emptive; but in most instances, they seek to deal with infringements of rights, or damage to interests, which have taken place.

European Community law and European Union law have a most interesting approach to remedies, on the one hand developing them on the bare basis of the Treaties at the level of the centralised Community judiciary – the Court of Justice and the Court of First Instance – and, on the other hand, through the intervention of those bodies, insisting that remedies be developed at the level of the decentralised Community judiciary – the national courts. In that latter aspect the autonomy of the national legal systems has been respected, accepting diversity of approaches, but that autonomy is, celebratedly, far from unfettered.

Central to the success of the Community system of remedies is the mechanism of references for a preliminary ruling established by Article 234 EC (ex 177 EC). In many ways, this mechanism is the jewel in the Crown of the Community system. That great Community lawyer Gerhard Bebr put it thus:

"The inconspicuous provision of Article [234], under which the Court rendered some of its most spectacular rulings, is of great, dynamic nature, offering unexpected possibilities for the development of Community law. With great imagination and determination, the Court has boldly seized and exploited them. Without Article [234] and its imaginative use by the Court, the Community legal order would have most likely assumed an entirely different character. Very likely it would have gradually degenerated into a mere traditional international legal order."
litigants. Docket control at the level of the decentralised judges of Community law has its risks. Nevertheless, the mechanism of references for preliminary rulings has, in the words of Lord Slynn of Hadley, created ‘a remarkable relationship of comity between national courts and the Court of Justice.’ The Court of Justice has always taken steps to emphasise that the national courts and it have a joint role in ensuring that Community law is upheld: the Court of Justice is there more as a concerned godfather than as a sergeant-major.

The reference for a preliminary ruling is designed to ensure the uniform interpretation and application of Community law throughout the whole Community. From the point of view of individuals, the mechanism facilitates the one-man lobby seeking to enforce his rights, although it will obviously not facilitate a challenge to Community legislation out of time by a person who had standing to mount a challenge but failed to do so: otherwise individuals would have endless opportunities for pure mischief-making. However, a core feature of the mechanism is that it is available throughout the Community, under the same conditions. As long as a litigant can persuade a national court to refer, the conditions for access to the Court of Justice apply equally throughout the Community.

**From pillar to post?**

There are two competing sets of interests here from the view of a proper and effective system of administration of justice and its development. On the one hand the essential objective of the mechanism and the successful relationship between the Court of Justice and national courts, as well as the principle of equal treatment of citizens of the Union and other (economic) actors, would suggest that in further European fields of integration and cooperation the preliminary ruling mechanism of the Community Treaties should be used, in order to ensure consistency and equality. On the other hand, national (and even Community) administrations tend to find too easy recourse to a judicial forum decidedly inconvenient, particularly when the judicial forum may well analyse a situation in the light of the dynamics of the framework concerned. They not infrequently perceive the record of the Court of Justice as being pro-Community, the institution as having perhaps a certain idea about Europe, going far beyond what legislators and governments think their own intention was. Administrations start to speak about not trusting the Court; about wanting to keep its nose out of intergovernmental activities outside the Community pillar. In relation to various conventions, the Community model of references has not been adopted without adaptations. Perhaps, then, it is not wholly surprising that, in relation to the architecture of the European Union, the Treaty of Amsterdam, true to its colander configuration, has produced an immaculate misconception. It betrays the very foundation of the pearl of the Union itself: the concept of citizenship. This is the first architectural malfunction which this paper addresses.

It is true that before Amsterdam the Court’s nose was kept very firmly out of the third pillar of the Union save where specific conventions conferred jurisdiction upon it. The Court was and is still kept at arm’s length in relation to the second pillar. In policy terms, that is probably unsurprising. However, the lack of general jurisdiction in relation to the third pillar did not, of course, prevent the Court from examining the legal basis of a Joint Action under the Third Pillar on airport transit visas to see whether it encroached upon
the powers conferred by the EC Treaty on the Community.\textsuperscript{17}

In the Third Pillar, the Court now has a limited but potentially extremely interesting role. A number of matters are excluded: the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State, and the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security.\textsuperscript{18} The Court of Justice can however review the legality of framework decisions and decisions at the instance of a Member State or the Commission, but not at the instance of the European Parliament,\textsuperscript{19} nor at the instance of private parties. The latter exclusion is logical given that both framework decisions and decisions are normative acts, which are expressly stated not to be directly effective.\textsuperscript{20} However, the exclusion of review by the Parliament is less logical, given that it has to be consulted on those acts.\textsuperscript{21} It may be that a measure as adopted is so radically different from the proposal on which the Parliament was consulted, that a failure to reconsult amounts to an infringement of Parliament’s prerogatives. In relation to the obligation to consult under the EC Treaty, the Court has indeed found that a radical change obliges reconsultation.\textsuperscript{22} The Court might perhaps be minded in the future to act in the way in which it finally acted when there was no EC Treaty-based protection of the Parliament’s prerogatives, and permit the Parliament to launch a challenge in such circumstances.\textsuperscript{23} The Court also has a special dispute resolution role under Article 35(7) EU.\textsuperscript{24} It may also, finally, give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation (but not the validity) of conventions adopted under the third pillar, and on the validity and interpretation of measures implementing them.\textsuperscript{25}

The key malfunction, apart from the lack of a possibility of judicial review of the conventions themselves, and the standing issues already mentioned, is the \textit{à la carte} operation of jurisdiction in relation to references for a preliminary ruling. Not only do the Member States have the option of preventing their courts from making references under Article 35(1) EU, they also have the choice of whether to permit any court or tribunal to make a reference, or only a court or tribunal against whose decisions there is no judicial remedy. On ratification of the Treaty of Amsterdam, Spain adopted the more restrictive course of action; Belgium, Germany, Greece, Italy, Luxembourg, The Netherlands, Austria, Portugal, Finland, and Sweden took the wider option.\textsuperscript{26} This means that the courts of the United Kingdom, Ireland, Denmark, and France cannot yet make third pillar references.

The choice of whether or not to accept the jurisdiction of the Court is appalling enough; the double choice simply compounds the felony. The result is very likely to lead to forum shopping in two respects. Firstly there will be attempts to situate a case in a Member State which has accepted jurisdiction, and, secondly, litigants will endeavour to look for a Member State which permits a preliminary ruling to be requested at an early stage in a dispute (avoiding the expense of fighting a case up to a level at which there is no further judicial remedy). National measures implementing framework decisions may well give rise to disputes before national courts, even though the framework decisions are not directly effective. The validity and interpretation of framework decisions and decisions will be issues on which the national courts will certainly need the
guidance of the Court of Justice. It is wholly incompatible with the necessary uniform interpretation, application, and implementation of such acts to permit structurally a situation to arise in which, say, the United Kingdom courts interpret those acts differently from other courts. The likelihood that the courts in the United Kingdom might adopt an interpretation at variance with that of the Court of Justice, assuming that the latter had already given a ruling, is somewhat attenuated by the provisions of section 3(1) of the European Communities Act 1972. Nevertheless, the scope for judicial disarray is manifest.

More serious than the danger of forum-shopping and as serious as the threat of disarray is, however, the objection that access to justice varies for citizens of the Union and others, depending on the attitude of the Member State in which they find themselves. From the point of view of a uniform concept of Union citizenship, this is simply disastrous, and in fact constitutes a fraud on the citizenry. Nearly 120 million citizens of the Union enjoy second-class access to justice in third pillar matters. So much for equality of citizenship!

Can the present state of affairs be justified simply as a reflection of the Court’s approach in the Community pillar of permitting the Member States procedural autonomy, subject to equal treatment of Community and domestic matters and the requirement that actions must not be made impossible or unduly difficult? Alternatively, is it simply a reflection of an essentially different approach to intergovernmental cooperation? It may well be thought that neither of these possibilities is a sufficient or even remotely acceptable justification for an appalling level of access to justice in an increasingly important area of Union activity. Certain Member States deny Union citizens and others access even to the most rudimentary level of protection afforded by Article 35(1) EU.

If the Union more correctly resembles a great cathedral than a Greek temple in its construction, the congregation assembled in this the common European home should consider a claim against the architects, or dumping them and redesigning the cathedral. The suggested design improvement is less radical, but immediate: remedy the defect without more ado, by expanding the jurisdiction of the Court. Governments must have confidence in the judicial fora that they have created, both at the centralised and decentralised levels. They should not seek to protect their work from scrutiny.

**Judicial review in Community law**

I now turn to perhaps rather more traditional ground, but I hope to indicate some areas in which judicial review in the more formal sense could do with some redesign and adaptation in order more satisfactorily to safeguard the interests of private individuals. Judicial review in Community law has been characterised by a number of features, which make it particularly prone to criticism on the ground of architectural malfunctions. Two of these features form the next courses in today’s feast. First, it is effectively impossible to challenge steps in proceedings leading up to Community acts during their course: litigants are left to challenge the act as such, *inter alia* on the basis of the procedural defects. Secondly, the criteria for admissibility of actions as interpreted by the Court are extremely narrow, and it can be argued that the Court has interpreted the Treaty text unduly narrowly.
The first of these is relatively self-explanatory. The absence of a possibility of obtaining immediate relief via a speedy procedure (within days) is a major weakness in the system of judicial review. While interim measures are available, there must first be a substantive action pending before the centralised Community judiciary, before an application for interim measures can be launched. It would be more advantageous, from the viewpoint of judicial protection, particularly in competition, state aid, anti-dumping cases and even in agricultural matters, if litigants were able to mount a challenge on procedural issues immediately, rather than having to await the final decision. Such an action could be dealt with expeditiously, under a special procedure within a couple of working days by the President of the Court of First Instance or another single judge, so as to avoid the mechanism becoming merely a filibustering technique in the hands of litigation lawyers. The objection will be that this could hold up proceedings (such as hearings in competition matters) in mid-flight. However, manifestly ill-founded, frivolous or vexatious applications could be penalised in costs. This approach may mean that the judge will look more over the administration’s shoulder, but it should result in more careful lawmakers and administration by the Community Institutions. If there is a real possibility that a particular action (a procedural decision leading up to the adoption of a Community act) may be annulled, and speedily, that risk will impinge upon the actions of decision-makers more immediately. The existing possibility of annulment only after a court action lasting some two years creates, on the one hand, considerable uncertainty over a long period and, on the other hand, is seen as a prospect which is less likely to have (political or legal) consequences for the decision-makers. If a decision is immediately open to challenge and the response is likely to be very speedy, more care is likely to be taken, as the effects are immediately felt. It is significant that in competition law, for instance, there have been very few instances in which the Commission has revisited anti-competitive conduct in cases in which a decision has been annulled for procedural rather than substantive reasons.

It is in fact the second malfunction that is perhaps the most fruitful candidate for reform: admissibility criteria in relation to actions for annulment. That admissibility criteria are not written in stone is already evident and has been confirmed by the Treaty of Nice. While it is not unnatural that the Community legal system should discourage mere busybodies, it seems inappropriate in particular that public interest litigation should not be subject to more generous considerations. In addition to dealing with various specific proposals on public interest litigation, this occasion is also a useful platform to discuss, albeit briefly, a proposal advanced by Norbert Reich in relation to challenges on fundamental rights grounds to Community acts. First, I set the scene.

Why is there a problem?

Much of Community administrative law has been developed in the agricultural sector, the most highly developed of the Community’s common policies. It is thus not surprising that the Court of Justice has shown particular caution in its approach to *locus standi* in general. Gerhard Bebr well explained the purpose of the annulment actions brought by private parties: it serves not only to ensure a legal exercise of Community powers but also to protect interests of private parties against the illegal use of those powers. The difference between the conditions affecting privileged (and even semi-privileged) litigants under objective control on the one hand, and the conditions under
which private parties may bring an action for annulment and the acts against which they may bring such actions is, he argued, due to two basic considerations. First, the drafters of the EC Treaty sought to limit, if not to exclude, annulment actions brought by private parties against normative acts of the Community Institutions; secondly they sought to exclude a possible *actio popularis*. Clearly, neither the framers of the Treaty, nor the Court of Justice was going to contemplate the torpedoing of normative acts of the Community administration at the instance of any economic actor in the Community.

The expression ‘individual concern’ in Article 234 EC (ex 173) has usually been interpreted in such a narrow manner as to exclude most economic operators or other actors affected by a Community act. Outside particular specialised areas, the success rate has been very low indeed. It is true, though, that on occasions the Court’s reasoning has been positively Houdini-like in order to be pleased to conclude that a particular litigant fits into the judicial straight-jacket which the celebrated *Plaumann* criteria have become. This approach resembles nothing less than pulling an equitable rabbit out of the proverbial hat, making even the yardstick of the length of the present Lord Chancellor’s foot appear conceptually certain.

The slightly more flexible approach that the Court has appeared to follow in relation to actions against anti-dumping regulations has not percolated into a more general reappraisal of the *Plaumann* formula in respect of regulations, nor does it as yet seem to herald any general revisitation of the Court's seemingly hybrid approach to the question how a regulation can at the same time be of general normative application and of direct and individual concern to certain persons.

In *Case C-309/89 Codorniu SA v. Council* the Court of Justice with ostensibly little difficulty accepted that the proprietor of a registered trade mark who was prevented from continuing to use that mark by a Council regulation was individually concerned within the *Plaumann* formula. I say ostensibly because the case was lodged in October 1989, Advocate General Lenz gave his Opinion in October 1992, and the judgment was not handed down until May 1994. That would seem to indicate somewhat lengthy judicial deliberations, but their tenor or even baggage is distinctly absent from the judgment. The Court did not discuss the question whether Codorniu was directly concerned, presumably on the ground that there was no element of discretion involved in the contested regulation, and direct concern was thus evident. It may be that the Court really concluded that the facts in Codorniu were directly comparable with those in Cases 106 and 107/63 *Alfred Toepfer Co. et al. v. Commission* (which concerned a decision) and that the applicant was part of an already certain closed class of persons whose interests would be adversely affected at the time the regulation concerned was adopted. On the other hand, it may be that it simply silently, without attribution, followed the approach of Advocate General Lenz. He drew parallels with the *Extramet* situation from the anti-dumping case-law, noting that Codorniu was the largest producer of the type of sparkling wine involved; its economic activity was largely dependent on business transactions adversely affected by the contested regulation, and that this activity was severely affected by that regulation. Arnall has correctly described the reasoning in Codorniu as ‘terse, in places even incoherent.

In *Greenpeace*, both the Court of First Instance and the Court of
Justice made it clear that the traditional hostile stance to standing for persons other than the addressees of an act would be maintained. Thus where

‘the specific situation of the applicant was not taken into consideration in the adoption of an act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act. The same applies to associations which claim to have locus standi on the basis of the fact that persons whom they represent are individually concerned.’

The Court observed that it was the national decision to build the power stations, which was liable to affect the environmental rights concerned, not the Community decision to grant ERDF assistance for the building of the power stations. This really amounts to an argument of forum non conveniens: that attempts to block the construction of power stations belong in the national courts. On the other hand, it is possible to analyse this approach as being disingenuous in practical terms, as it ignores the question whether the power stations would have been built at all without Community funding. It also means that there was no possibility at all of challenging the Commission’s assessment of the desirability and impact of the project. Against that, it may of course be objected that it is not for the Commission to re-undertake a substantive examination of all projects and their implications; it is rather for the Commission to see whether the conditions for the grant of assistance are satisfied.

Despite the clear sympathy in Greenpeace of Advocate General Cosmas for the importance of environmental protection, he too was concerned about the consequences of relaxing the criteria of admissibility.

‘[A] relaxation to the extent sought, of the criteria of admissibility could be abused and lead to aberrant consequences. Natural persons without locus standi … could circumvent [the procedural impediment of direct and individual concern] by setting up an environmental association. Moreover, while the number of natural persons, that is to say citizens of the European union, however high it may be, none the less remains limited, the number of environmental associations capable of being created is, at least in theory, infinite. But, even if that obstacle could be overcome, for example by conferring locus standi only on associations constituted prior to the adoption of the contested measure, account would have to be taken of the fact that, within the European Union, the number of legal persons which have as their object the protection and conservation of the environment is today particularly high. If the Court were ultimately to follow the proposal of the appellant associations, in future every measure of a Community institution concerning the environment or having an impact on it could be expected, on each occasion, to form the subject-matter of proceedings brought by a plethora of environmental associations.’

This prospect, essentially confirming the point about managerial concerns which Arnall postulated originally in relation to the Court of First Instance’s judgment in Greenpeace, combined with the fact that Article 230 EC is clearly narrower than Article 33 ECSC, made it inevitable that the Court should resist invitations to engage in judicial creativity in this instance.

Arnall has rightly opined that ‘it seems wrong in principle that a
litigant’s right to invoke the jurisdiction of a court of law should depend on factors which are unrelated to the circumstances of his claim and which may vary with the passage of time.’ It might be thought that Community law is now sufficiently robust to permit more generous standing for private litigants than is presently possible because of the Court’s narrow interpretation of the words ‘direct and individual concern’. Arnulf’s proposed test ‘an act adversely affecting an applicant’s interests’ is indeed a possible reformulation of the meaning of the term ‘individual concern’ which could be adopted by the Court without a revision of the Treaty or even without stretching its existing language, although it might be more transparent to substitute that as a criterion instead of ‘individual concern’ in a Treaty amendment.

The obvious risk is of frivolous or vexatious claims. However, these can to a certain extent be deterred by the order as to costs. Furthermore, a streamlined procedure would enable the Court of First Instance or the Court of Justice as appropriate to dispatch mere mischief making and posturing speedily, to ensure that examination of serious issues is not delayed.

There are, however, some arguments, which can be raised against a wider interpretation of general standing for non-addressees without an amendment of the EC Treaty, and these are seldom clearly articulated. First, the wording of Article 230 EC is clearly less extensive than the wording of Article 33 ECSC: this reflects a conscious decision by the Member States as contracting parties to those two treaties that access to the Court for private individuals should be less extensive in the EC system. Secondly, the judicial architecture of the EC system is much less centralized than it is in the ECSC system: as I have noted above, EC system involves an allocation of tasks between the Community judiciary and national courts. In that context, the case-law of the Court of Justice has in relation to first and second generation problems created a framework within which judicial decisions are taken as close to the citizens as possible. This approach can be seen as being consistent with the wording of the second paragraph of Article 1 TEU (ex Article A). Finally, there is some strength in the view that a formula such as ‘an act adversely affecting an applicant’s interests’ risks undermining this judicial architecture by having a centralizing effect through opening the flood-gates for unrestrained appeals for annulment of decisions addressed to Member States, as well as of regulations and directives, particularly given that the interests of a great many persons may be adversely affected by myriad acts of the Community Institutions. This argument, which can also be raised against a revision of the EC Treaty along the lines resulting from Arnulf’s suggested criterion, also boils down to a managerial consideration, expressing similar concerns to those of Advocate general Cosmas, albeit a consideration dressed up more in architectural clothing.

It now seems clear that neither the Court of Justice nor the Court of First Instance is willing to heed calls for a relaxation of the Plaumann criteria, particularly in relation to public interest litigation, taking the view that it is up to the Member States in their role during an intergovernmental Conference, and only then, as Herren der Verträge, to liberalise standing requirements if they so wish. In the current political climate that view is understandable. However, I am less than convinced by the view that the EC Treaty itself prevents an adaptation of the Plauman test by the Court. There is no reason why the Court should stick to the straightjacket of Plauman: the Court has
always been willing to be creative with the Treaty provisions when it suited its purpose,\textsuperscript{50} while suddenly being strict when it found it convenient to be so.\textsuperscript{51} Being confined by the wording of the Treaty is to some extent a disingenuous argument: the Court itself has restricted the meaning of individual concern and has then been faced with the need to remove its self-imposed limitation in individual cases by unconvincing arguments. The Court is in any event perfectly capable of constructing the EC Treaty so as to permit it to do something other than that which is expressly provided for:\textsuperscript{52} it is certainly capable of curing architectural malfunctions, and politicians have not been slow to incorporate case-law into Treaty amendments in the past, so a nudge from the Court need not be something to be viewed with horror.

I fully accept that opening the floodgates to every busybody in sight would be unworkable, even though some national systems (such as the Dutch) seem to come close to that, but standing can be widened without issuing an invitation to all-comers. For the defence of the wider interest at least, the EC Treaty needs revision, so I have a suggestion for the masters of the Treaty. At the very least there needs to be a revision of present practice. Before turning to consider these, it may be useful to sketch the present law, with particular reference to public interest groups.

**Admissible interest groups**

I noted already that in some specific areas and circumstances, standing seems to be more generously viewed. In Cases T-481 & 484/93 Exporteurs in Levende Varkens et al. v. Commission,\textsuperscript{53} the Court of First Instance conveniently summarised earlier case law, finding that an association, which was not, the addressee of a measure would have standing in two circumstances. First, where it had a particular interest in acting, especially because its negotiating position was affected by the measure involved. Secondly, where, by bringing the action, it substituted itself for one or more of its members whom it represented, provided that those members were themselves in a position to bring an admissible action. In casu, the applicants were not found to satisfy this test as far as their actions for annulment were concerned. But associations which had ‘been active both in relation to the general policy on State aid and to specific aid projects in the textile sector in the interests of their members or of members of their members operating in the same sector as the recipient undertaking’ will have standing on the first limb of this test: their position as interlocutors of the Commission was affected by the contested decision. Mere attendance at meetings, without any clear negotiating role of more import will not, however, confer standing on an association.\textsuperscript{56} The second situation (substitution) may well occur when a trade association takes on board a complaint by one of its members who is a direct competitor of a recipient of State aid, or when an association has taken on board a complaint originally brought by a single undertaking, so that (as in anti-dumping cases) it becomes easier to present the complaint as being by or on behalf of Community industry.

A third situation in which associations will have standing was recalled by the Court of First Instance in Case T-122/96 Federazione Nazionale del Commercio Oleario (Federolio) v. Commission,\textsuperscript{58} namely when a legal provision expressly grants them a series of procedural rights. In this case, the measure concerned Community acts as a *lex specialis* in relation to Article 230 EC.
It is particularly important to note that even if national law confers on an applicant specific tasks and duties with capacity to bring actions before national courts, that will be insufficient on its own to confer standing at the Community level. Otherwise the admissibility of an action for annulment would no longer depend on the desire of the Community legislature to include certain traders and/or associations in the process of Community decision-making, but on the autonomous decision of national authorities based on national rather than on the Community interest.\footnote{59}

On the basis that it is at the Community level that standing in direct actions before the centralised Community judiciary must be regulated, the next question is how should this be done. In view of the difficulties in drafting a sufficiently tight general public interest litigation clause at Treaty level, it would be more efficient for the Community Institutions to adopt the legislative act solution. This could be done either by adopting a global public interest measure (most likely on the basis of a new provision to be inserted into the EC Treaty) or by tackling the question on a case-by-case basis, inserting specific standing provisions into Community legislation in more areas. Environmental protection is certainly the most obvious of these, although \textit{inter alia} the regulations on the Structural Funds and the Cohesion Fund could well be opened up to ensure at least as a very minimum consultation of public interest groups, and, more desirably, that such organisations could challenge the Commission’s assessment of the compatibility of projects with Community environmental law and policy. Given the high priority now accorded to the environment in the EC Treaty, there would be for the first time a clear opportunity to challenge such assessments. Indeed, the extraordinary situation that Community-level assessments have so far in effect been closed to challenge is itself a key justification for the introduction of some form of public interest litigation facility at Community level. When even national constitutional law requirements (such as courts not being allowed to suspend the operation of Acts of Parliament) cannot prevail against a challenge based on Community law, it is wholly unacceptable that the Commission’s assessments are so robustly protected.\footnote{60}

\textbf{Drafting a public interest provision}

In order to ensure that a global approach is followed, it seems most sensible to opt for an amendment of the EC Treaty, which empowers further specific action. Zuleeg\footnote{61} has proposed to add a new paragraph to Article 230 EC in the following terms:

‘By legislative act, associations or institutions pursuing a public interest may be entitled to institute proceedings for [the] purpose [of seeking the annulment of an act described in the first paragraph].’

In fact, though, Zuleeg’s suggestion is in substance nothing new: the Community legislature can and does grant standing (sometimes for limited purposes such as making representations or access to the non-confidential file) to associations or groups (such as representatives of consumers, as in anti-dumping matters).\footnote{62} Once this has been done, the Court clearly treats those persons as having standing (at the very least in relation to challenges concerning those purposes) as I have already observed.

Krämer\footnote{63} has proposed what in essence is a more developed draft:
‘Public interest groups may institute proceedings against acts mentioned in Article 173(1). The European Parliament and the Council shall determine the details of the procedure and in particular the conditions, which a group shall comply with in order to be considered to act in the public interest.’

However, he did not specify the actual decision-making procedure, which would apply, although the reference to the Parliament and the Council implies that he intended the co-decision procedure to apply.

I submit that the suggestions of Zuleeg and Krämer could be more felicitously drafted to bring them more into conformity with present Treaty drafting style. Accordingly, I would propose making the present fifth paragraph the sixth, and inserting a new fifth paragraph into Article 230 EC in the following terms:

‘The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, may adopt measures conferring upon the Court of Justice jurisdiction under the same conditions, in actions brought by public interest organisations. Such measures shall in particular specify the criteria which must be satisfied by such organisations in order to benefit from those measures.’

Clearly, the word ‘may’ could perhaps more usefully be replaced by ‘shall’. This proposal opts for the most democratic form of participation by the European Parliament in order that it may have the maximum influence on the establishment of the criteria to be satisfied. The Committee of the Regions and indeed the Court of Justice could be added as additional consultees.

Appropriate criteria

What criteria might be appropriate, in view of the fears so eloquently set out by Advocate General Cosmas? Certainly, operation at the Community level would appear to be a fundamental requirement. The obvious objection is that this would exclude all groups, which were established solely in one Member State. This could be overcome by closer liaison between Community-level and national level public interest organisations. Thus, a Community-level criterion need not actually exclude national or regional organisations, as their interests could effectively be represented by a Community-level organisation. In any event, if one single action is brought by several parties acting together (using one set of pleadings), only one of the parties needs to be admissible to carry the action. If at the very least organisations should be more than purely local in nature, and I suggest that Community-level operation would be the most efficient level to ensure that public interest litigation is not reduced to mere nimbymism.

An association should have legal personality and should have a non-profit or charitable status, or at the very least not be an organisation with economic or commercial objectives; it should also be financially transparent. It may even be thought that a public interest organisation should be democratically constituted, although this may prove difficult in practice, and is unlikely to form a realistic possibility. An association should be of a permanent nature, not merely established for an ad hoc short-term interest. Some suppleness in this permanence criterion might well be appropriate, although via judicious recourse to an already recognised organisation even shorter-term ad hoc organisations could be catered for without special provisions. In the environmental field, such an organisation
should be clearly established in the interest of the protection of the
environmental interest concerned (which might be general, or more
specific, such as water, air, land, birds, animals, or wetlands).

These criteria would be more likely to embrace activist organisations
than business-related ‘pseudo’-organisations’ the However, in view of
the difficulties in drafting a sufficiently tight general public interest
litigation clause at Treaty level, it would be more efficient for the
Community Institutions to adopt the legislative act solution. This
could be done either by adopting a global public interest measure
(most likely on the basis of a new provision to be inserted into the EC
Treaty) or by tackling the question on a case-by-case basis, inserting
specific standing provisions into Community legislation in more
areas. Environmental protection is certainly the most obvious of
these, although inter alia the regulations on the Structural Funds and
the Cohesion Fund could well be opened up to ensure at least as a
very minimum consultation of public interest groups, and, more
desirably, that such organisations could challenge the Commission’s
assessment of the compatibility of projects with Community
environmental law and policy. Given the high priority now accorded
to the environment in the EC Treaty, there would be for the first time
a clear opportunity to challenge such assessments. Indeed, the
extraordinary situation that Community-level assessments have so far
in effect been closed to challenge is itself a key justification for the
introduction of some form of public interest litigation facility at
Community level. When even national constitutional law
requirements (such as courts not being allowed to suspend the
operation of Acts of Parliament) cannot prevail against a challenge
based on Community law, it is wholly unacceptable that the
Commission’s assessments are so robustly protected.67 whatever,
which may be little more than the local cosy cartel, or mere lobby
groups pleading for special interests. Thus, an apparently objective
body funded by, say, the tobacco industry or the drinks industry
would fall outside such criteria, as would organisations for the
promotion of regional economic interests or for the promotion of a
particular branch of commerce or industry. On the other hand, such
bodies could be given standing in more limited fields of specific
interest in individual Community acts, and, as I have demonstrated,
trade organisations already have standing in appropriate
circumstances in various fields.

A register of organisations satisfying the prescribed criteria could be
maintained by the Community Institutions. (Perhaps by the Registrar
of the Court of Justice or by the Secretary-General of the European
Parliament, so that the Commission is not involved in registration
decisions.) Organisations would have to register and renew
registration periodically. The onus would be thus on organisations
which claimed to fulfil the criteria laid down to make themselves
known. Given that organisations may need to seek to register
themselves quickly (particularly if they are new organisations set up
on a permanent basis but responding to new or threatened
developments, or if ad hoc organisations were also to be allowed to
bring proceedings) registration should be deemed to be granted unless
opposed or refused within one month.68 The Commission or the
Council should have the right to oppose registration, in which case
the body responsible for registration would have to take a decision
within one further month. Refusal to register (whether within one
month at the instance of the register-holder or as a result of a decision
after opposition) would be open to challenge before the Court of First
Instance (with further appeal in the usual manner), and the
Commission or the Council could appeal against registration to the Court of Justice. Applications for registration could be made at any time.

The register would be open to the public, which would have the advantage of encouraging transparency. It would also be possible to provide for registration in relation to specific areas of interest. This would also have the advantage of providing the Commission with a more specific ready-made list of obvious consultees even in the informal stages leading to the preparation of its proposals or other actions, as well as a clear list of interested persons acting in the ‘public interest’ who could, like individuals who satisfy the ‘direct and individual concern test, bring actions before the centralised Community courts. Once on the register, admissibility issues would become otiose as regards public interest organisations in individual cases. Re-registration requirements (say every five years) would ensure that lists were periodically pruned of inactive organisations, but such applications for re-registration could only be refused or opposed if there had been a manifest change in the activities or objectives of the organisation concerned.

The approach in Community legislation which presently make provision for involvement of ‘interested parties’ also leaves it up to associations or groups to make themselves and their interests known, so that the Community Institution concerned may itself decide what weight to attach to their submissions. Although the Community Institutions have not been unresponsive to calls to improve the position of interested parties (as the anti-dumping field makes plain), the experience of groups such as BEUC with this system has hitherto been less than wholly encouraging. Accordingly, my design suggestion takes the form of a more global approach to standing issues, using the vehicle of a Community decision, with registration decisions being taken by a person other than the Commission, and being open to review.

Privileged rights?

Finally, this is a useful occasion to draw to your attention the suggestion recently launched by Norbert Reich for a European Fundamental Right action. His proposal would have four conditions. (1) It would lie only against actions of the Institutions in relation to infringement of Article 6(2) TEU or infringement of rights guaranteed subjectively to individuals under other provisions of the Treaties. It would include collective rights, where they arise from primary Community law, such as collaboration by management and labour in Article 136 EC et seq., or the rights of organization of consumers under Article 153 EC. (2) It would lie exclusively before the Court of Justice. This would, though be a deviation from the current allocation of jurisdiction between that Court and the Court of First Instance in relation to action brought by private parties. (3) The applicant would have to show that he was directly concerned, but not that he was individually concerned. This, Reich points out, would bring directives within the ambit of measures open to challenge, albeit of course provided that the challenge was properly based. The challenge could be launched by those on whom obligations were imposed by virtue of the directive as well as those whom it benefited, in so far as they could demonstrate a proper legal interest to be protected. Associations would, he felt be directly concerned if Community
fundamental rights are conferred upon them, as Reich claimed to be the case in Articles 136 et seq. and 154 EC. The requirement of direct concern would, he argued, act as a brake on attempts to launch an actio popularis. He saw direct concern as being absent when, for example, a failure to undertake an environmental impact assessment of a proposal was to be laid at the door of a Member State rather than at that of the Commission.

(4) Finally, Reich envisaged this action as being a subsidiary cause of action, only available when other avenues are not available or are no longer available. Reich sees this as being possible where a highest national court has refused to make a reference for a preliminary ruling.

Accordingly his suggestion is for an additional paragraph in Article 230 EC in the following terms:

‘If a natural or legal person claims that through the action of Institutions of the Community a Community legal act infringes Article 6 TEU or other rights guaranteed in the Treaties benefiting him, he may bring a European Fundamental Right action before the Court of Justice, provided that he is directly affected thereby and other means of recourse are not or are no longer available to him.’

This would be a wholly separate type of action from that previously envisaged, so much so that it probably would need to be put into a separate article rather than being grafted on to Article 230 (whether or not amended as I have suggested). The question arises, though, whether such a new form of action is necessary. It would offer a means of attacking acts not currently open to attack by individuals – such as regulations properly so-called and directives. But could this not be achieved more simply by opening the present fourth paragraph of Article 230 up to expand the type of acts against which individuals could bring proceedings, or simply by redefining the notion of individual concern in Article 230? Would it not be more effective simply to expand public interest litigation along the lines that I have suggested? Does Community case-law as it stands not take sufficient account of fundamental rights through the protection of rules of law relating to the application of the Treaty? One may, of course, discuss whether the rights cited by Reich as being conferred really are fundamental rights or rights of a more subjective or economic nature.

Concluding observations

Mr. Chairman,

I have tried to do two main things today. I have made some criticisms of the shortcomings of the present state of Union and Community law in part of the field of judicial review, and I have attempted to offer some indication of the way forward by way of possible solutions and a detailed discussion of the question of public interest litigation. I have also tried very briefly to draw your attention to Norbert Reich’s recent proposal, more with a view to giving his ideas an airing in England, than to suggesting that you take them on board. I hope that this lecture will have whetted your appetite to encourage you read more, and to reflect on whether the system of judicial review in the Community and the Union really is adequate.
1 Such as *quia timet* injunctions in English law.
5 Art. 234 EC sets up *‘a special field of judicial cooperation, which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision.’* (Case 16/65 *Firma C. Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877 at 886. See also Case 244/80 *Foglia v. Novello* [1981] ECR 3045 at 3062-3063 on the importance of each court having regard to the other’s responsibilities.
6 See Kapteyn & VerLoren van Themaat, above, note 3, 525.
7 Particularly where the Court has so completely dealt with an issue before it that the national judge is simply left with nothing more to do than act as if he or she were a mere functionary of the Court of Justice. See e.g. Case C-362/88 *GB-INNO-BM v. Confédération du Commerce Luxembourgeois* [1990] ECR I-667; Case C-312/89 *Union départementale des syndicats CGT de l’Aisne v. SIDEF Conforama et al.* [1991] ECR I-997; Case C-332/89 *Marchandise et al.* [1991] ECR I-1027, and Case C-126/91 *Schutzverein gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH* [1993] ECR I-2361.
9 Kapteyn & VerLoren van Themaat, above, note 3, 525.
13 Thus it reflects the desire to ensure equal access to judicial protection, in particular (but not only) against acts of the Community Institutions and against action by national administrations implementing those acts.
15 See e.g. the Protocol to the Judgments Convention (consolidated in O.J. 1998 C 27/28); see also O.J. 1998 C 221/19.
18 Art. 35(3) EU. But, by virtue of Art. 47 EU, this provision clearly cannot operate so as to prevent the Court reviewing the effectiveness of measures allegedly justified on public policy or public security grounds (Arts. 30, 39(3), 46(1), 296(1) and 297 EC).
19 Although on an argument that the measure should have been adopted under the Community pillar, there is no reason why the Parliament could not seek relief (arguing an infringement of its prerogatives), by analogy with Case C-170/96 *Commission v. Council* [1998] ECR I-2763 at 2788.
20 Art. 34(2)(b) and (c) EU.
21 In relation to framework decisions, decisions, and conventions, see Art. 39(1) EU.
In relation to acts adopted under Art. 34(2) EU, whenever a dispute between Member states on the interpretation or application of any such act cannot be settled by the Council within six months of its being referred to the Council by one of its members (not necessarily, therefore by one of the disputants). Further, also by virtue of Art. 35(7) EU, the Court has jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Art. 34(2)(d) EU.

Thus third pillar conventions no longer need to confer specific jurisdiction, it now follows directly from Art. 35(1) EU itself, assuming the necessary declaration has been made under Art. 35(2) EU.

O.J. 1999 L 114/5. Of those taking the wider option, all except Greece, Portugal, Finland and Sweden reserved the right to oblige their courts or tribunals against whose decisions there is no judicial remedy to make a reference, *ibid*.

Gormley, L.W., in O’Keeffe, D., & Twomey, P., above, note 16, 57.

Case 60/81 *International Business Machines Corporation v. Commission* [1981] ECR 2639 at 2652. The Court added, *ibid.*, that it ‘would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above (binding effects, capable of affecting an applicant’s interests by bringing about a distinct change in his or her legal position) but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case.’ See also Case T-64/89 *Automec v. Commission* [1990] ECR II-367 and Case T-56/92 *SFI v. Commission* [1992] ECR II-2479.

Neither the final annulment of the notorious PVC decisions in Case C-137/92 *Commission v. BASF AG et al.* [1994] ECR I-2629 nor the initial finding of non-existence by the Court of First Instance in Cases T-79/89 etc. *BASF et al. v. Commission* [1992] ECR II-315 seems to have produced any consequences for the officials involved.

See the revisiting of PVC in Dec. 94/599 (O.J. 1994 L 239/14), as to which, see Case T-305/94 *Limburgse Vinyl Maatschappij NV et al.* [1999] ECR II-931.

E.g. the Court’s conferment on the European Parliament of standing for the defence of its prerogatives, see Case 70/88 *European Parliament v. Council* [1990] ECR I-2041 (Chernobyl) prior to the amendment of the EC Treaty to that effect. See also the extension of semi-privileged applicant status to the European Central Bank and to the Court of Auditors.

Which will make the European Parliament a privileged applicant under Article 230 EC, meaning that its standing will no longer be restricted to the defence of its prerogatives. It may be expected that the principal effect of this change will be seen in challenges to delegated legislation enacted by the Commission in accordance with one of the comitology procedures.


Ibid. at 1715.

Krämer in Micklitz & Reich (eds.), *op. cit.*, above, note 39, 297 at 304-307 discusses the degree of evaluation undertaken and the various problems in ensuring genuine examination of compatibility with Community environmental law and policy. See also the discussion by Cosmas, Adv. Gen. in Case C-

44 Ibid. at 1693-1696.

45 Ibid. at 1699-1700.

46 Ibid.

47 As advocated by Arnull, A.M., ibid.

48 They also have been put, by way of balance, in Kapteyn & VerLoren van Themaat, above, note 3, 488, although an alert reader may well detect that the editor of that work had little sympathy for them.

49 It is true that Extramet and Cordorníu demonstrate that the Article 230 EC case-law is unsatisfactory in cases in which private parties have no possibility to seek redress in front of their national courts. This has since led to an earthquake in two shock waves in the Opinion of Jacobs, Adv. Gen. In C-50/00 P Unión de Pequeños Agricultores v. Council (Opinion delivered on March 21, 2002), and the judgment of the Court of First Instance in Case T-177/01 Jégo-Quéré et Cie SA v. Commission [2002] ECR I-nyr (judgment of 3 May 2002). Both of these were handed down well after this lecture was presented. I discuss them in my contribution to (2002) Cambridge Yearbook of European Legal Studies (forthcoming).

50 E.g. Art. 231 (ex 174) EC confers power on the Court to decide which effects of an annulled regulation shall be considered definitive, but the Court has interpreted it by analogy to give itself the same power in relation to directives: e.g. Case C-295/90 European Parliament v. Council [1992] ECR I-4193 at 4236-4237.

51 A comparison of the development of the concept of direct effect for directives with the refusal to accept horizontal direct effect off directives makes this very plain: see e.g. Case 9/70 Grad v. Finanzamt Traunstein [1970] ECR 825 at 838 and Case C-91/92 Faccini Dori v. Recreb Srl [1994] ECR I-3325 at 3356.


55 The earlier case law in the field of State aids is examined by Gormley, L.W., in Micklitz, H.-W. & Reich, N., above, note 39, 159-167.


57 See now Reg. 659/1999 (O.J. 1999 L 83/1), Arts. 1(h); 6, and 20.


59 Ibid. at 1581-1582.

60 Of course, the Council or a Member State could challenge them, but in reality, this does not happen, unless the addressee Member State is unhappy with conditions attached to a decision.

61 In Micklitz, H.-W. & Reich, N., (eds.), above, note 39, 444

62 See Reg. 384/96 (O.J. 1996 L 56/1, most recently amended by Reg. 905/98 (O.J. 1998 L 128/18)), Arts. 5(10); 6(6) and (7), and 21(1) and (2). See also Case T-256/97 Bureau Européen des Unions de Consommateurs (BEUC) v. Commission [2000] ECR II-101.


65 Clearly, the intention would be to exclude the sort of private ‘public interest’ organisations of the type referred to at the beginning of this contribution. However careful drafting will be necessary to ensure that fund-raising activities and campaigning activities would not in themselves jeopardise classification as a public interest organisation.

66 Benjamin Hartmann from Bonn reminded me of the desirability of including this criterion.

67 Of course, the Council or a Member State could challenge them, but in reality, this does not happen, unless the addressee Member State is unhappy with conditions attached to a decision.

68 Bearing in mind that the time limits for appeals in the Community system are tight, a short time limit would be appropriate for opposition or refusal.
Appeals could be expedited, being heard by a single judge: the appropriate procedural amendments would have to be made.

The Commission already maintains a Directory of Special Interest Groups, which is meant to be a working tool rather than a means of accreditation. It currently lists some 800 organizations in the electronic version (accessible through the Europa home page on the Secretariat General’s page). The Commission regards the directory as not restricting the access of Commission officials to interest groups but as increasing their awareness of the importance of consulting interest parties more systematically and as raising the profile of certain less well-known (and thus less frequently consulted) organizations. See, further, the Communication SEC (92) 2272 Final, An open and structured dialogue between the Commission and special interest groups (O.J. 1993 C 63/2). The Directory and the Communication are aimed at providing a framework within which lobbying is conducted, they thus serve a rather different function than the register for litigation purposes which is discussed in this contribution. See, further, Mazey, S. & Richardson, J.J., in Edwards, G. & Spence, D. (eds.), The European Commission (2nd. Ed., London, Cartermilll, 1997) 178.

As to the minimum standards to be applied in the relations between the Commission and interest groups, see the Communication, ibid., Annex II.
