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***Locus Standi* of Representative Groups in the Shadow of Plaumann: Limitations and Possible Solutions**

Abstract. The purpose of this paper is to examine the state of the law in relation to the *locus standi* of representative groups at the Union level. The paper has a dual thematic task: the assessment of the degree in which representative groups and their standing to challenge the validity of legislative measures can be differentiated from the Plaumann criterion and the identification of strategies that can improve the chances of interest groups to challenge under Art. 230 EC. The thesis adopted in response states that regrettably the ECJ's interpretation of the requirement of individual concern has been applied to representative groups. After examining the jurisprudence in different areas and from the perspective of the arguments used by representative groups in order to bypass Plaumann, there does not seem to be any clear thematic or argumentative typology that influences the ECJ. The only important element that could make a difference is the existence of documented participation by the representative body that creates procedural rights. It is in this respect that the removal of the individual concern shadow can be achieved, namely through representative groups being effective at what they are designed to do: lobbying. Therefore, the key to strengthening the standing claim is enhanced and certified participation.

Keywords: locus standi, judicial review, representative groups, interest groups, participation, individual concern, environmental protection, effective judicial protection, action for annulment, Plaumann, UPA, European law, fundamental/human rights, legitimacy

1. Introduction

The cornerstone of every democratic polity is the adherence to the principle of the rule of law which entails the existence of legal mechanisms guaranteeing “not only that a court be able to deal with all the violations of legal rules but, in addition, that all injured parties be entitled to adjudication of their grievances”.¹

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¹ Scheingold, S.: *The Rule of Law in European Integration*. Connecticut, 1976. 41.

The redress of grievances is directly dependent on the existence of facilitative instruments for testing the procedural and substantive legality of measures adopted by the institutions of that legal order. An essential component of a system that provides for the challenge of measures is the capacity to bring actions (or *locus standi*) which acts as the gateway to judicial review proceedings.

In the context of the European Union (EU), the capacity of individuals to bring actions in order to challenge the validity of secondary Community law is formally guaranteed in Art. 230(4) EC. The assessment by commentators of the effectiveness of that provision in according standing to individual applicants,² places the European Court of Justice (ECJ) and the Court of First Instance (CFI) in an apologetic position.³ The critical perspective against the jurisprudence of the ECJ on Art. 230 (4) EC, can be synthesised in the argument that the Court construed the requirement of individual concern, the main admissibility requirement for actions brought by individual applicants for the annulment of Community acts, too restrictively.⁴ The criticism extends to the

² For a selection of accounts on standing see: Harding, C.: The Private Interest in Challenging Community Action. 5 (1980) *European Law Review*, 345; Harlow, C.: Towards a Theory of Access for the European Court of Justice. 12 (1992) *Yearbook of European Law*, 213; Craig, P.: Legality, Standing and Substantial Review in Community Law. 14 (1994) *Oxford Journal of Legal Studies*, 507; Rasmussen, H.: Why Is Article 173 Interpreted Against Private Plaintiffs? 5 (1980) *European Law Review*, 112; Arnall, A.: Private Applicants and the Action for Annulment under Article 173 of the EC Treaty. 32 (1995) *Common Market Law Review*. 7; Greaves, R.: *Locus Standi* under Article 173 EEC when Seeking Annulment of a Regulation. 11 (1986) *European Law Review*, 119; Neuwahl, N.: Article 173 Paragraph 4 EC: Past, Present and Possible Future. 21 (1996) *European Law Review*, 112; Arnall, A.: *The European Union and its Court of Justice*. Oxford, 1999. 21–69; Ward, A.: *Judicial Review and the Rights of Private Parties in EC Law*. Oxford, 2000. 202–287; Albors-Llorens, A.: *Private Parties in European Community Law. Challenging Community Measures*. Oxford, 1996.

³ See the critical analysis in Usher, J. A.: Direct and Individual Concern—an Effective Remedy or a Conventional Solution? 28 (2003) *European Law Review*, 575; Albors-Llorens, A.: The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat? 62 (2003) *Cambridge Law Journal*, 72; Craig, P.: Standing, Rights, and the Structure of Legal Argument. 9 (2003) *European Public Law*, 493; Ragolle, F.: Access to Justice for Private Applicants in the Community Legal Order: recent (r)evolutions. 28 (2003) *European Law Review*, 90; Biernat, E.: The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community. *Harvard Jean Monnet Working Section No. 12/03*, <http://www.jeanmonnetprogram.org/sections/03/031201.html>

⁴ Granger, M-P.: Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quééré et Cie SA v Commission and Union de Pequeños Agricultores v Council*. 66 (2003) *Modern Law Review*, 124.

point that the requirement of individual concern constitutes all but an intractable barrier for individual applicants to the extent that it transformed standing from a gateway to judicial review to a permanently close door.⁵ In addition, there is also a discrepancy with the jurisprudence of the Court in other fields where the ECJ demonstrated a bold willingness to develop important constitutional principles.⁶ The departure from the general strategy of expansion of the enforcement potential of European Community (EC) law when it came to standing, is surprising due to the fact that the Court seems to disregard the coexistence with the constitutional legal structures of the Member States that guaranty the existence of liberal legal mechanisms for challenging the validity of measures in their municipal systems.⁷

Unfortunately, the same restrictive approach has been applied to the standing of representative groups, irrespective of the fact that the Union has recently placed its emphasis on the promotion of participation of citizens in the decision-making process,⁸ thus resulting to an inconsistency between policy goals of the EU and the approach of the ECJ to standing.⁹ The idea of enhancing participation

⁵ For similar views see: Enchelmaier, S.: No-One Slips Through the Net? Latest Developments, And Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC. *Working Paper 3*, <<http://www.competitionlaw.ox.ac.uk/iecl/pdfs/working3enchelmaier.pdf>>, 2; Kombos, C.: The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution? *European Integration online Papers (EIoP)* 9 (2005) <<http://eiop.or.at/eiop/pdf/2005-017.pdf>>, 1.

⁶ E.g. the development of State liability: Pekka, A.: Twelve Years of *Francovich* in the European Court of Justice: A Survey of the Case-law on the Interpretation of the Three Conditions of Liability. In: Moreira de Sousa, S.–Heusel, W. (eds.): *Enforcing Community law from Francovich to Köbler*: Twelve Years of the State Liability Principle. Cologne, 2004. 59.; Arnall, A.: Rights and Remedies: Restraint or Activism? In: Lonbay, J.–Biondi, A. (eds.): *Remedies for Breach of EC Law*. Sussex, 1997. 15.; Barav, A.: State Liability in Damages for Breach of Community Law in the National Courts. In: Barav, A.–Wyatt D. A. (eds.): *Yearbook of European Law 1996*. Oxford, 1997. 87.

⁷ For the liberal stand of Member States on standing see, e.g., German law: *Bundesverwaltungsgericht 1.12.82 BverwGE 66, 307 (crab-fishermen case)*; Italian law: *TAR Lazio, 20. 1. 95, No 62 Foro Italiano 1995 II-460*; Belgian law: *Conseil d'État, Ville de Liège et Heze, 20. 9. 91, No 37.676*; French law: *Conseil d'État, 24. 6. 91, Soc Côte d'Azur, Lebon, 1110*.

⁸ *Commission's White Paper on European Governance*, COM (2001) 428 *European Governance-A White Paper*, 27 July 2001; *Laeken Declaration on the Future of Europe*, December 2001, available <<http://www.euconvention.be/static/LaekenDeclaration.asp>>. For analysis see Armstrong, K.: Rediscovering Civil Society: The European Union and the White Paper on Governance. 8 (2002) *European Law Journal*, 102.

⁹ Cygan, A.: Protecting the Interests of Civil Society in Community Decision-Making—The Limits of Article 230 EC, 52 (2003) *International Comparative Law Quarterly*, 995.

has inherent links with the operation of representative groups that exercise considerable influence at the pre-legislative level through the medium of lobbying practices.¹⁰ The Commission's White Paper on European Governance¹¹ has, according to Curtin, accepted the significant role of representative groups in terms of their "dedication to the disinterested search for the public interest in society".¹² By a logical expansion of the preceding reasoning, it can be argued that there is no compelling reason for limiting the quest for promotion of the public interest to the drafting stage of legislation. Cygan has supported this approach by suggesting that "representation and protection of citizens' interests requires *ex post* judicial protection in circumstances where the legislative measure breaches fundamental rights or if its application infringes principles of procedural propriety".¹³ Therefore, it would be paradoxical to insist on the functional and democratic utility of representative groups, while simultaneously denying any effective standing rights for challenging legislative measures. Needless to say, that paradox has become the norm in the sphere of EU law.

As a corollary, the purpose of this paper is twofold: to offer a descriptive analysis of the development and state of the law in relation to *locus standi* of individuals and representative groups and to examine the possible alternatives that could be utilized for sidestepping the hurdles created by the jurisprudence of the ECJ and CFI in relation to representative groups. The working hypothesis applied states that the state of the law is unduly restrictive and economically unrealistic and is likely to remain such because of the recent rulings of the ECJ that were effectively reaffirmed and codified by the Draft Treaty Establishing a Constitution for Europe.¹⁴ The alternatives that could be used include the

¹⁰ On the role of interest groups see: Mazey, S.–Richardson, J.: Interest Groups and the Brussels Bureaucracy. In: Hayward, J.–Menon, A. (eds.): *Governing Europe*. Oxford, 2003. 208.; Bouwen, P.: Corporate Lobbying in the EU: the Logic of Access. 9 (2002) *Journal of European Public Policy*, 365; Eising, R.: Interest Groups and the European Union. In: Cini, M. (eds.): *European Union Politics*. Oxford, 2003. 192.

¹¹ *Op. cit.*, note 8. Note that the relationship of the Commission with interest groups has a long history as evident from Commission of the European Communities, *An Open and Structured Dialogue Between the Commission and Special Interest Groups*, Brussels, 1992, CEC: SEC (92) 2272 final, 2 December 1992; Commission of the European Communities and Council of the European Communities, *Communication from the Commission on Promoting The Role of Voluntary Organisations and Foundations in Europe*, COM (97) 241 final. Luxembourg, Office for Official Publications of the European Communities, 1997.

¹² Curtin, D.: *Postnational Democracy: The European Union in Search of a Political Philosophy*. The Hague, 1997. 90.

¹³ Cygan: *op. cit.*, 995.

¹⁴ Available <http://europa.eu/constitution/futurum/constitution/index_en.htm>

agency analogy that refers to the collective challenging through pressure groups¹⁵ and the enhanced participation at the drafting level that would aim at creating procedural rights of challenge that would be enforceable on the basis of legitimate expectations. The preceding proposals apply primarily to representative groups but could function as the bridge for relaxing standing requirements in general or more realistically for expanding the scope of exceptions to *Plaumann*.

In terms of terminological completeness, it must be clarified that the denomination ‘representative groups’ is a generic term encompassing a plethora of different types of groups. Those cover a broad thematic spectrum ranging from pressure groups for specific interests (e.g. environmental groups), representative groups of sections of the economy (e.g. industrialists) and of workers (trade unions). The nature of each representative group impacts on the approach that the ECJ and the CFI adopt as will be shown *infra*, with the stringent approach reserved for environmental groups and for bodies that base their claims on fundamental human rights. At the other side of the continuum, there are those bodies that can establish participatory rights flowing from procedural grounds. The other term used by this paper is ‘surrogate actions’ that refers to actions that are intentionally brought by groups in instances where an individual applicant would fail due to the *Plaumann* criteria.

In structural terms, the paper is divided in three sections: the necessary sketching of the existing state of the law, the approach of the ECJ and the CFI towards different types of representative groups and the assessment of different strategies that could potentially reverse the unsatisfactory legal framework.

2. *Locus standi* under Art. 230 EC: the *Plaumann* shadow

Art. 230 EC establishes a trichotomy between different types of applicants seeking to challenge the validity of acts of the institutions, alas without distinguishing between forms of measures,¹⁶ thus covering both legislative and administrative acts of the Community institutions.¹⁷ Moreover, Art. 230 EC

¹⁵ For an excellent introductory analysis see Douglas-Scott, S.: *Constitutional Jurisprudence of the European Union*. London, 2002. 363–368.

¹⁶ Albors-Llorens, A.: *Private Parties in European Community Law. Challenging Community Measures*. Oxford, 1996. 4, 6.

¹⁷ *Ibid.*, 5. For the comparison with national systems see Fromont, M.: L’influence du Droit français et du Droit allemande sur les Conditions de Recevabilité du Recours en Annulation devant la Cour de Justice des Communautés Européennes. 2 (1966) *Revue Trimestrielle de Droit Européenne*, 47.

draws a rigid distinction between legal entities based on the identity of the applicant,¹⁸ therefore establishing a typological approach whereby there are privileged, semi-privileged and non-privileged applicants. These classes have in common only the general conditions of Art. 230 (1) EC, namely the act must be an act of an EC Institution¹⁹ that produces legal effects,²⁰ and the challenge must be brought within the two-month time limit.²¹ On this basis, Art. 230 EC adopts an approach of selective *actio popularis* in the sense privileged applicants have automatic standing to challenge measures adopted by the Institutions,²² while the semi-privileged class can take action against other institutions only for the purpose of protecting their prerogative powers.²³

¹⁸ Hartley, T.: *The Foundations of EC Law*. Oxford, 1998. 349–350.

¹⁹ Institutions whose acts are excluded by Art. 230 (1) are the European Council, COREPER and the Council when acting under intergovernmental powers: Case T-584/93, *Roujansky v. European Council*, [1994] European Court Reports, II-585; Case C-25/94, *Commission v. Council (FAO)*, [1996] European Court Reports, I-1469; Cases C-181, 248/91, *Parliament v. Council and Commission (Aid to Bangladesh)*, [1993] European Court Reports, I-3685.

²⁰ A relevant concept is to be found in the landmark decision in Case 22/70, *ERTA*, [1971] European Court Reports, 263: the list of acts that can be reviewed in Art. 249 EC is not exhaustive and other acts that are *sui generis* in nature can be reviewed, provided that they have legal effects. See also Case 60/81, *IBM v. Commission*, [1981] European Court Reports, 2639, Case T-3/93, *Air France v. Commission*, [1994] European Court Reports, II-121. See also the recent decision in Case C-131/03 P, *Reynolds Tobacco and Others v Commission*, Official Journal 2003 C124/10, delivered on 12th September 2006.

²¹ Starts from the moment that the measure in question is published or from the moment that the applicant is notified: Case 156/77, *Commission v Belgium*, [1978] European Court Reports, 1881; Cases 10 & 18/68, *Eridania v Commission*, [1969] European Court Reports, 459; Case C-195/91 P, *Bayer AG v Commission*, [1994] European Court Reports, I-5619.

²² Privileged applicants: Member States, Commission, Council and after the Treaty of Nice the European Parliament. On the gradual change to the standing rights of the EP see C-302/87, *European Parliament v. Council (Comitology)*, [1988] European Court Reports, 5615, Case C-70/88 *European Parliament v. Council (Chernobyl)*, [1990] European Court Reports, I-2041. For comment see Weiler, J.: *Pride and Prejudice—Parliament v. Council*. 14 (1989) *European Law Review*, 334.; Bebr, G.: *The Standing of the EP in the Community system of Legal Remedies: A Thorny Jurisprudential Development*. (1990) 10 *YBEL* 171.

²³ Semi-privileged: ECB and the Court of Auditors. See Craig, P.: *EMU, the European Central Bank and Judicial Review*. In: Beaumont–Walker (eds.): *Legal Framework of the Single Currency*. Oxford, 1999. 112.

Any natural or legal person can challenge the validity of a measure on the basis of Art. 230 (4) EC, provided that the measure is one described as within the scope of the provision and that the dual requirement of ‘direct and individual concern’ is satisfied. Direct concern is an unproblematic test of causation whereby the applicant needs to show that he is affected by the contested measure and that there is no discretionary implementing measure breaking the chain.²⁴ In terms of individual concern when challenging decisions addressed to a third party, it was held in the landmark decision in *Plaumann v. Commission*²⁵ that a claimant is individually concerned if the decision in question “affects them 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 individually”.²⁶ Therefore, the Court construed the individual concern requirement as a two-part test requiring that the claimant is *differentiated* from all other persons and that by reasons of those distinguishing features the claimant is *singled out* as the original addressee of the decision.

In *Plaumann* the application of the test to the specific facts made the test even more narrow and demanding and in effect created a third requirement. The Court ruled that the claimant is affected by the decision because he was an importer of clementines but could not be singled out in the same way as the original addressee as *in the future* any individual could enter in the practice of the specific commercial activity. It becomes therefore clear that the ECJ introduced an additional test in terms of the *singled out* requirement by requiring that the claimant has to satisfy the dual test not only at the present but also show that the same would apply in the future.

The ‘future element’ represents a constraint that renders the individual concern requirement almost impossible to satisfy since the Court starts from the premise that at any moment in the future any individual could decide and enter the specific commercial circle. Clearly, that is an argument that in effect ignores fundamental principles of economic activity according to which the entry into

²⁴ Case 62/70, *Bock v. Commission*, [1971] European Court Reports, 897.; Case 11/82, *Piraiki-Patraiki v. Commission*, [1985] European Court Reports, 207.; Case T-96/92, *Comité central d’entreprise de la Société générale des grande sources v. Commission*, [1995] European Court Reports, II-1213 and Case T-12/93, *Comité central d’entreprise de la Société anonyme Vittel v. Commission*, [1995] European Court Reports, II-1247. See Hartley: *op. cit.* 369–373; Craig, P.–De Búrca, G.: *EU Law. Text, Cases and Materials*. Oxford, 2003. 518–520.

²⁵ Case 25/62, *Plaumann v. Commission*, [1963] European Court Reports, 95.

²⁶ *Ibid.*, para. 107.

a market is not always open to anybody but is restricted by a plethora of factors. Those could include the strength of existing and established competitors, the growth potential of the market, the significance of established brands and a number of other factors that are beyond the scope of this work.²⁷

The restrictive nature of the *Plaumann* formula has been confirmed in numerous subsequent decisions that can be placed in two categories: (i) application of *Plaumann* leading to “economically unrealistic”²⁸ results, and (ii) ‘generous’ application in a retroactive context.²⁹ In terms of challenging regulations, Art. 230 (4) EC allows for the challenge of regulations that are in essence decisions and the relevant requirement is again that of direct and individual concern, with *Plaumann* supplemented in *Calpak*³⁰ and the test whether a regulation is of general application or specific application.³¹ Therefore, the economically unfounded and unrealistic approach of the ECJ in relation to the criteria applied in *Plaumann* has been applied in the context of regulations, regrettably reinforced with the additional requirement that the regulations have specific application.³² Once again, a limited exception applies for occasions where the factual background is placed in the past and the set of events was

²⁷ A good starting point for appreciating the economic unstableness of the “future” requirement is the seminal work by Porter, M.: How competitive forces shape strategy. 59 (1979) *Harvard Business Review*. In brief, there are 5 forces that influence a firm's competitive strategy. Four forces—the bargaining power of customers, the bargaining power of suppliers, the threat of new entrants, and the threat of substitute products—combine with other variables to influence a fifth force, the level of competition in an industry.

²⁸ Craig–De Búrca: *op. cit.*, 489. See for examples the decisions in Case 231/82, *Spijker Kwasten v. Commission*, [1983] European Court Reports, 2559.

²⁹ See for example Cases 106–107/63, *Toepfer v. Commission*, [1965] European Court Reports, 405, 411. “the membership of the class is fixed and ascertainable at the date of the adoption of the contested measure”. See also Case 11/82, *Piraiki–Patraiki v. Commission*, [1985] European Court Reports, 207.

³⁰ Cases 789–790/79, *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] European Court Reports, 1949.

³¹ *Ibid.*, para. 9. For criticism see Craig–De Búrca: *op. cit.*, 494; Craig, P.: Standing, Rights, and the Structure of Legal Argument. 9 (2003) *European Public Law*, 495.

³² Case 101/76, *KSH v. Commission*, [1977] European Court Reports, 797; Cases 103–9/78 *Beaufort v. Council and Commission*, [1979] European Court Reports, 17; Case 162/78, *Wagner v. Commission*, [1979] European Court Reports, 3467; Case 45/81, *Alexander Moksel Import-Export GmbH v. Commission*, [1982] European Court Reports, 1129; Cases 97, 99, 193 and 215/86, *Asteris AE and Greece v. Commission*, [1988] European Court Reports, 2181.

completed,³³ thus creating inconsistency through the weak technical dichotomy between the *Calpak* rule and the exception.³⁴

The inconsistency is strengthened by the development of subject matter exceptions where the Court has relaxed the standing requirements applying to challenges of regulations that are disguised decisions. The five subject matter areas are *de facto* exceptions to the restrictive interpretation of individual concern, as it is evident from the case law in the fields of anti-dumping,³⁵ state aid,³⁶ competition,³⁷ trademark rights³⁸ and instances where a democratic consideration is present.³⁹

As an interim conclusion, the approaches of the ECJ and the CFI in interpreting Art. 230 (4) EC and the requirement of individual concern have been extremely restrictive and narrow. The decision in *Plaumann* is highly problematic

³³ Case 100/74, *Societe CAM v. Commission* [1975] European Court Reports, 1393; Cases 41-44/70, *International Fruit Company BV v. Commission*, [1971] European Court Reports, 411.

³⁴ Cf. Case 138/79, *Roquette Frères v. Council*, [1980] European Court Reports, 3333; C-152/88, *Sofrimport Sarl v. Commission*, [1990] European Court Reports, I-2477 with Cases 789-790/79, *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] European Court Reports, 1949; Case 11/82, *Piraiki-Patraiki v. Commission*, [1985] European Court Reports, 207.

³⁵ Case 113/77, *NTN Toyo Bearing Co. v. Council and the Commission*, [1979] European Court Reports, 1185; Cases 239, 275/82 *Allied Corporation v. Commission*, [1984] ECR-1005; Case 264/82, *Timex Corporation v. Council and Commission*, [1985] European Court Reports, 849; C-358/89, *Extramet Industrie SA v. Council*, [1992] European Court Reports, I-3813. See the Opinion by AG Jacobs in *Extramet*, para. 33 where he states "Nor do I believe it is necessary, in order to reach a satisfactory conclusion, to make direct reference to the European Convention on Human Rights, on which Extramet places some reliance in these proceedings. The Convention and the laws of the Member States are, however, indirectly relevant in that they support the existence of a general principle of law, namely the right to an effective judicial remedy: see Case 222/84, *Johnston v. Chief Constable of the RUC*, [1986] European Court Reports, 1651; Case 222/86, *Unectef v. Heylens*, [1987] European Court Reports, 4097. In my view, Article 173 should be interpreted so as to give effect to that principle".

³⁶ Case 169/84, *COFAZ v. Commission*, [1984] European Court Reports, 391; Case C-198/91, *William Cock plc v. Commission*, [1993] European Court Reports, I-2486; Case 730/79, *Phillip Morris Holland BV v. Commission*, [1980] European Court Reports, 2671.

³⁷ Case 26/76, *Metro-SB-Großmärkte GmbH & Co KG v. Commission*, [1977] ECR 1875.

³⁸ Case C-309/89, *Codorniu SA v Council*, [1994] European Court Reports, I-1853.

³⁹ Case 294/83, *Partie Ecologiste 'Les Verts' v. Parliament*, [1986] ECR-1339. See Craig, P.: Democracy and Rule-making within the EC: An Empirical and Normative Assessment. 3 (1997) *European Law Journal* 105.

leading the subsequent case law to take the form of an anthology of examples of missed opportunities, economically unrealistic criteria, absurd outcomes and exceptions that are in reality further elaborations on and confirmations of the strictness of the tests. Unfortunately, those problematic parameters of individual concern for third parties were transplanted to challenges by representative groups.

3. Actions by representative groups and the Plaumann shadow

3.1. Representative groups, the symbiotic relation with the institutions and their constitutional role

The preceding section pictured the unduly restrictive and limited approach to standing that has been severely criticized⁴⁰ for its economic naivety and lack of protection for the individual. It is, therefore, interesting to examine whether the Court has adopted a different approach in relation to representative groups that bring actions on behalf of their membership. If the approach of the Courts is more liberal than that adopted for individual applicants, then there is an effective alternative circumventing the *Plaumann* test and its expansion in the jurisprudence. This is the rationale behind the agency analogy.

The agency analogy refers to the use of group actions as a medium for challenging the validity of measures where the individual applicant would normally fail due to the interpretation of the individual concern requirement in the case law.⁴¹ Therefore, the idea of surrogate actions could provide an effective alternative for bypassing the consistent restrictive approach of the ECJ and the CFI in relation standing under Art. 230 (4) EC. The main theme of this section is whether it is desirable and justifiable to have a two-tier approach reserved for representative groups and other private applicants.

One dimension of the debate perceives representative groups as having extraordinary opportunities to intervene and influence the nature, content and scope of legislative measures. The influencing power of representative groups has been described as symbiotic with the Commission,⁴² with the latter depending on representative groups for expert advice, technical expertise and for offering cross-national advocacy coalitions that are essential for the successful introduction

⁴⁰ See the thorough analysis by Enchelmaier, S.: *op. cit.*

⁴¹ For an influential account supporting a reversal of the case law see Usher, J.: *Judicial Review of Community Acts and the Private Litigant*. In: Campbell, A.–Voyatzki, M. (eds.): *Legal Reasoning and Judicial Interpretation of Community Law*. Trenton, 1996, 121.

⁴² Mazey–Richardson: *op. cit.*, 209.

of legislative proposals.⁴³ Consequently, such groups already have a disproportionately prominent role that generates influence impacting on the substance of legislative measures. Therefore, it seems unjust and democratically disproportionate for representative groups to have a special treatment reserved for them in the context of legal challenges.⁴⁴ Moreover, it has been argued⁴⁵ that associational standing is undesirable because it could be exploited by associations at the expense of the 'Hohfeldian claimant'.⁴⁶ Such type of claimant can be defined as the applicant that has a material claim correlative to a distinct obligation in another person or entity, while an interest group has an ideological claim.⁴⁷ Therefore, the argument is based on the subset of rules that Hohfeld identified in a legal system that have the functional task of regulating and directing the behaviour of the subjects of the system, namely individuals and associations, through prohibiting and stipulating what those agents are required by law to do. If an association takes advantage of the subset of rules that grants standing rights on the basis of a broad right to participation and at the same time the individuals with a concrete interest in challenging a measure are effectively excluded from doing so by the rules of the subsystem, then there is a legitimacy gap. In other words, the ideological right of associations to standing is placed at an equal level with the right of an individual to challenge where there is a vital interest at stake, or alternatively at a higher level if the individual is effectively denied of a standing right.⁴⁸

The problem is magnified by the fact that the ECJ has persistently applied the strict *Plaumann* criteria to actions brought by private applicants. The creation of an exception favoring representative groups would create an unnecessary and unjustified dichotomy that would be creating the assumption that the individual deserves and receives protection of a lower intensity.⁴⁹ The consequences for the legitimacy and authority of the Union's judicial architecture would be negative and undesirable, since a double-standard yardstick would be seen as applying. At a practical level, the objection is that a liberal approach to the standing of representative groups could result in the creation of the

⁴³ *Ibid.* 409–410, 415.

⁴⁴ Harlow, C.: Public Law and Popular Justice. 65 (2002) *Modern Law Review*, 13.

⁴⁵ Douglas-Scott: *op. cit.*, 367.

⁴⁶ Term used to describe the ideas expressed by Hohfeld, W. N.: *Fundamental Legal Conceptions as Applied to Judicial Reasoning* [ed: Cook, W. W., Yale University Press]. New Haven and London, 1919.

⁴⁷ Douglas-Scott: *op. cit.*, 367.

⁴⁸ Tushnet, M.: The Sociology of Article III: a Response to Professor Brilmayar. 93 (1983) *Harvard Law Review*, 698.

⁴⁹ Cygan: *op. cit.*, 996.

phenomenon of “busybodies or meddling organizations”.⁵⁰ As a corollary, the workload of the courts would increase, the legal certainty would be undermined as legislative measures would not be effective in practice until the time limit for challenge expires and the danger of test cases or delaying challenges from financially powerful bodies would be immanent.

On a different level, the creation of an exceptional class of private applicants in the form of representative groups could upset the delicate institutional balance. This is the case because according to Harlow⁵¹ judicial review could be substituted by political accountability in the sense that legal challenges are to be made possible against policy decisions. In other words, the representative groups’ function is not to second-guess informed policy decisions made under the complex legislative process when the result of their lobbying has proved to be unsuccessful. The democratic processes could, therefore, be bypassed with the practical consequence of placing the unelected judiciary at the difficult position of deciding cases that are in practice reviews of policy questions.

Finally, the argumentation against expanding standing rights for association groups includes a practical element that refers to the “repeat player phenomenon” and the “saga approach”, whereby associations initiate repeatedly challenges and apply a systematic attack approach on a specific policy.⁵² The consequence of the actions of such representative bodies would be the increase in the workload of the courts, while at the same time there seems to be an unjustified and disproportionate capitalization on the politically influential and expanding negotiating power of interest groups.

The opposite line of reasoning counters the latter point by pointing to the fact that judicial review is not isolated from the policy level and the judges have arguably the sensitivity of restraint in areas of pure policy determinations. Moreover, it is practically intricate to distinguish between administrative decisions and policy decisions, with the example of the *Greenpeace* case⁵³ proving the point. There, the issue was the funding of a power station that was on the face of the record in breach of the environmental safeguards provided under EU law. At which point does the policy element end and the administrative element begin? Or, can it be argued that the issue is purely a policy matter or alternatively solely an administrative propriety topic? Solving the Gordian

⁵⁰ *Ibid.*

⁵¹ Harlow: Public Law and Popular Justice. *op. cit.*, 13.; Harlow, C.: Towards a Theory of Access for the ECJ. 12 (1992) *Yearbook of European Law*, 213.

⁵² Harding: *op. cit.*, 116.

⁵³ Case T-585/93, *Greenpeace v Commission*, [1995] European Court Reports, II-2205.

knot of demarcation must be entrusted to the judiciary otherwise judicial review would be *ab initio* externally limited.

On a different point, the argument about placing representative groups higher than individuals in terms of standing must be approached with the pragmatic factor of an overly restrictive approach to standing of private applicants in mind. Therefore, the main issue is whether it is productive to maintain a legal lacuna in standing on the basis of a theoretically valid principle of equal treatment. It is submitted that the persistent unwillingness of the ECJ to reform the *Plaumann* criteria as was reaffirmed in the *UPA*⁵⁴ and *Jègo-Quèrè*⁵⁵ decisions and by Art. III-365 DTC⁵⁶ creates a pragmatically persuasive reason for relaxing standing requirements at any given opportunity through the creation of exceptions. The outcome is not ideal but is preferable than a stagnated *cu-de-sac*.

In relation to the workload concern,⁵⁷ it can be argued that the experience of national legal orders with a liberal approach to the standing of representative groups has not shown any increase in the workload of the national courts.⁵⁸ At the same time, the busybody phenomenon can be preempted since there is no argument supporting an *actio popularis* for representative groups, but a balanced test that distinguishes between representative groups with a genuine interest and those bodies that have a diametrically opposite agenda. The experience of national legal orders and the United Kingdom in specific that is analysed *infra*, points to the existence of such solutions.

As an interim conclusion, there are reasons of principle against the creation of a dual approach to standing of representative groups and individual applicants, but those arguments have to be approached in a holistic manner that takes into account the pragmatic limitations to standing and the need to create exceptions to the application of the *Plaumann* criteria until a new trend is created.

⁵⁴ Case C-50/2000 P, *Union de Pequenos Agricultores v. Council* [2002] European Court Reports, I-6677 (hereafter “UPA”).

⁵⁵ Case C-263/02 P, *Commission v Jègo-Quèrè* [2004] CMLR 12 (hereafter “*Jègo-Quèrè Appeal*”).

⁵⁶ For analysis see Kombos, C.: The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution? *European Integration online Papers (EIoP)* Vol. 9 (2005) N° 17, <<http://eiop.or.at/eiop/pdf/2005-017.pdf>>, 14–16; Varju, M.: The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention. (2004) 10 (1) *European Public Law* 42.

⁵⁷ As expressed by the CFI in Case T-585/93, *Greenpeace v Commission*, [1995] European Court Reports, II-2205, 2230–2232.

⁵⁸ Conclusion reached by Cygan: *op. cit.*, 1000.

3.2. Representative groups and standing: the ECJ and the English approach compared

The jurisprudence of the ECJ is very restrictive towards representative groups and the Court has persistently refused to create an exception to the *Plaumann* approach when a representative group has sought to challenge under Art. 230 (4) EC.⁵⁹ Accordingly, the position has been summarized by the CFI in *Associazione Nazionale Bieticoltori v. Council*⁶⁰ where it was held that interest bodies are able to bring actions under Art. 230 (4) EC when: a legal provision expressly grants procedural powers to trade associations;⁶¹ the members of the association would have been able to bring individual actions as a result of being directly and individually concerned;⁶² the associations negotiating position has been affected by the challenged legislative measure, thus attributing to the association direct and individual concern as an entity.⁶³

This is partly surprising because groups have evolved to be a highly active and integral part of the legislative process and have been perceived as a remedial tool for the representative/democratic deficit of the Union.⁶⁴ Moreover, there is a comparative paradox in the sense that the development of the state of the law in Member States reflects a favorable disposition towards standing in general⁶⁵ and surrogate groups especially when those groups seek to initiate judicial review actions.⁶⁶

⁵⁹ See Cases 16,17/62, *Confédération Nationale des fruits et Producteurs des fruits et Légumes v Council*, [1962] European Court Reports, 471. See also Cygan: *op. cit.*, 1003–1005.

⁶⁰ Case T-38/98, *Associazione Nazionale Bieticoltori v. Council*, [1998] European Court Reports, II-4191, para. 25.

⁶¹ Case 191/82 *Fediol v Commission*, [1983] European Court Reports, 2913, paragraphs 28 to 30; Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme de Vittel and Others v Commission*, [1995] European Court Reports, II-1247, paras. 39–42

⁶² Joined Cases T-447/93, T-448/93 and T-449/93, *AITEC and Others v Commission*, [1995] European Court Reports, II-1971, para. 62.

⁶³ Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] European Court Reports, 219, paras. 21–24; Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens and Others v Commission* [1995] European Court Reports, II-2941, para. 64.

⁶⁴ Sudbery, I.: Bridging the Legitimacy Gap in the EU: Can Civil Society Help to Bring the Union Closer to its Citizens. 26 (2003) *Collegium*, 75.

⁶⁵ Conclusion reached by Cygan: *op. cit.*, 997.

⁶⁶ For the liberal stand of Member States on standing see, e.g., German law: *Bundesverwaltungsgericht 1.12.82 BverwGE 66, 307 (crab-fishermen case)*; Italian law: *TAR Lazio, 20.1.95, No 62 Foro Italiano 1995 II-460*; Belgian law: *Conseil d'État, Ville de Liège et*

In the English context, the modern origins of granting standing to surrogate groups can be found in the *Greenpeace (No.2)*⁶⁷ ruling, where Greenpeace sought to challenge a decision by the Inspectorate of Pollution (HMIP) that granted a variation in the license of BNFL, a company reprocessing nuclear waste, enabling the company to expand its operations in its plant in Cumbria. HMIP argued that Greenpeace had no standing as it could not show sufficient interest in the decision made, but the judgment by Otton J rejected that argument and held that a representative action could be brought by Greenpeace because there was a geographical proximity element. In other words, the deciding factor was the existence of 2,500 members of Greenpeace in the Cumbria area, thus establishing a sufficient interest in the decision that extended the license to processing of nuclear waste.⁶⁸

In contrast to the pragmatic approach of Otton J in *Greenpeace (No.2)*, the *Pergau Dam*⁶⁹ decision represents an expansion in the sense that a more theoretically holistic and constitutionally sound reasoning was deployed for justifying the granting of standing to representative groups. The issue was the legality of a decision to use funds from the overseas aid budget for financing the building of the Pergau dam in Malaysia. The World Development Movement (WDM), an organization concerned with the distribution of aid, challenged the decision on the basis that the project was not going to be beneficial for the Malaysian economy and did not represent good value for the British taxpayer. The legal basis for the action was the failure of the Foreign Secretary to adhere to the provisions of the Overseas Development and Cooperation Act 1980 that enabled the financing subject to the existence of a purpose of promoting the development or maintaining the economy of an overseas country. Moreover, section 1 of the preceding Act limited funding to situations that it was of an economically sound nature.⁷⁰

Heze, 20.9.91, No 37.676; French law: *Conseil d'État*, 24.6.91, *Soc Côte d'Azur, Lebon*, 1110.

⁶⁷ *R v Inspectorate of Pollution and another, Ex parte Greenpeace Ltd (No.2)*, [1994] 4 All ER 329.

⁶⁸ Analysis by Harlow: *Public Law and Popular Justice. op. cit.* 4 *et seq.*; Cygan: *op. cit.*, 998–1000.

⁶⁹ *R v Secretary of State for Foreign Affairs Ex parte World Development Movement Ltd*, [1995] 1 All Englis Reports, 611.

⁷⁰ Section 1 of the Overseas Development and Cooperation Act 1980: “The Secretary of State has the power, for the purposes of promoting the development or maintaining the economy of a country or territory outside the United Kingdom, to furnish any person or body with financial or technical assistance”.

The judgment by Rose LJ concentrated on the constitutionally focal position of judicial review in a legal system and the essential function of judicial review as the guarantor of effective accountability of governmental agencies that includes both substantive and procedural fairness in decision-making processes.⁷¹ Therefore, the fact that the action by the WDM was the only available legal challenge to the executive action in this instance was a relevant and significant consideration in ensuring that effective governmental accountability required under the constitutional rule.⁷² The existence of technical legalistic requirements that could prevent access to a court in circumstances where no other legal action was possible,⁷³ was discarded by Rose LJ in the exact way that Lord Diplock regarded such obstacles as grave legal lacunae in a dissenting judgment in the *ex parte Federation of Small Businesses* case.⁷⁴ Moreover, Rose LJ held that the specific characteristics of the pressure group were such that distinguished it from meddlesome busybodies, since WDM had showed in the past an active and constructive involvement in the distribution of aid.⁷⁵ The lack of an impact on the membership of WDM akin to that present in the *Greenpeace (No.2)* case was not a determinant factor because of the interests of accountability, the absence of other potential challengers and the evident expertise and prominent role of the organization in the field of development aid.⁷⁶

It is, therefore, apparent that there is a favorable approach towards interest groups in the English context that is not adopting an *actio popularis* yardstick, but which is distinguishing between groups that have a contribution to make in the effectiveness of the process of judicial review. Therefore, the argument that a 'repeat player' could take advantage of a more liberal approach to the standing of surrogate groups to initiate actions that range from test cases to time wasting, delaying actions, can be rejected as simplistic. Moreover, the possibility of creating a system that would encourage the 'saga strategy' is again remote because each case is examined individually and the decision

⁷¹ *R v Secretary of State for Foreign Affairs Ex parte World Development Movement Ltd*, [1995] 1 All ER 611, 619. For analysis see Tomkins, A.: Judges Dam(n) the Government. 7 (1996–1997) *Kings College Law Journal* 91; Harlow: Public Law and Popular Justice. *op. cit.*, 4 *et seq*; Cygan: *op. cit.*, 998–1000.

⁷² *Ibid.*, 620.

⁷³ *Ibid.*, 619.

⁷⁴ *IRC v National Federation of Self-Employed and Small Businesses Ltd*, [1982] 2 AC 617, 620.

⁷⁵ *R v Secretary of State for Foreign Affairs Ex parte World Development Movement Ltd*, [1995] 1 All ER 611, 620.

⁷⁶ *Ibid.*

whether an interest group has standing in the specific case depends on a combination of tests that seek to establish the existence of a genuine interest.⁷⁷

The problem created is the formation of a dichotomy of approaches to the standing of interests groups, with national courts and the ECJ adopting diametrically opposed methodologies and rationales. The national courts favor a structured and liberal stand that aims at the improvement of the effectiveness of the process of judicial review and of its purposes, while at the same time appreciating the increased participatory role of interest groups in modern society. On the other hand, the ECJ adopts a rigid approach founded on the perception that there can be no distinction between individual applicants and interests groups in terms of standing, thus applying the *Plaumann* criteria to surrogate actions. As a corollary, the extremely narrow and restrictive tests applicable to the actions of annulment under the ECJ's interpretation of Art. 230 (4) EC are applied to the actions by interest groups, on the basis that individual concern must be proved in accordance with *Plaumann*. The dichotomy of approach leads to the application of double standards and inconsistency, with national courts granting standing to interest groups that challenge national legislation for incompatibility with Community law, while the same group would not have standing to challenge a Community legislative measure. In *R v. S.S. for Employment, ex part EOC*⁷⁸ it was held that the Equal Opportunities Commission had standing to challenge the compatibility of an Act of Parliament with Art. 141 EC, which contrasts with the persistent denial of standing to pressure groups by the ECJ that is represented in the *Po Delta* judgment.⁷⁹

3.3. Representative groups in the environmental context

In the *Po Delta* case the CFI⁸⁰ this time and later the ECJ⁸¹ on appeal rejected the application of agriculturists and other affiliated associations seeking to challenge a Decision approving an EU funded plan for the environmental protection of their local area. The CFI concluded that the applicants were not in any way differentiated from the other residents of the area, because the

⁷⁷ See Harding: *op. cit.*, 116.

⁷⁸ *R v. S.S. for Employment, ex part EOC*, 2 [1994] Weekly Law Reports, 409.

⁷⁹ *Infra*.

⁸⁰ Case T-117/94, *Associazione Agricoltori della provincial di Rovigo et al. v. Commission (Po Delta)*, [1995] European Court Reports, II-455.

⁸¹ On Appeal the ECJ confirmed: Case C-142/95 P, *Associazione Agricoltori della provincial di Rovigo et al. v. Commission (Po Delta)*, [1996] European Court Reports, I-6669.

effect of the plan on the agriculturists would have been the same with the effect on any other citizens living in the area. More significantly, it was stated that “it cannot be accepted as a principle that an association, in its capacity as the representative of a category of traders, is individually concerned by a measure affecting the general interests of that category”.⁸² Therefore, an association/interest group was equated with individual applicants and no special status was given to the association in terms of the *Plaumann* requirements.

In an analogous ruling, in *Danielson v. Commission*⁸³ an application for interim measures brought by residents of Tahiti in relation to nuclear tests undertaken by France was found to be inadmissible under Art. 34 EURATOM. The fact that they could show the possibility or likelihood of serious physical or economic harm⁸⁴ was not enough for establishing individual concern as they applicants were not in any way differed from the residents of the island as a whole.⁸⁵ In more detail, it was held that “even the assumption that the applicants might suffer personal damage linked to the alleged harmful effects of the nuclear tests in question on the environment or on the health of the general public, that circumstance alone would not be sufficient to distinguish them individually in the same way as a person to whom the contested decision is addressed”.⁸⁶ The factual circumstances of the case and the unequivocal rejection of the claim of the applicants, irrespective of the logical argument that there is an actual threat to the health of the residents, has triggered negative criticisms of the strictness of the approach of the CFI.⁸⁷

The landmark *Greenpeace*⁸⁸ decision is representative of the approach of the Court and a brief description of the factual background is necessary in

⁸² *Po Delta*, *op. cit.*, note 80, 466.

⁸³ Case T-461/93, *Danielson v Commission*, [1995] European Court Reports, II-3051.

⁸⁴ *Ibid.*, para. 69.

⁸⁵ *Ibid.*, para. 70.

⁸⁶ *Ibid.*, para. 71.

⁸⁷ See Betlem, G.: Being ‘Directly and Individually Concerned’, the *Schutznorm* Doctrine and *Francovich* Liability. In: Reich, N.–Micklitz, H. (eds.): *Public Interest Litigation Before European Courts*. Baden-Baden, 1996. 319.

⁸⁸ Case C-321/95 P, *Stichting Greenpeace Council v Commission*, [1998] European Court Reports, I-1651 (hereafter referred to as the ‘Greenpeace Appeal’). For the Opinion of AG Cosmas the same reference applies and for the CFI’s ruling see Case T-585/93, *Greenpeace and others v Commission*, [1995] European Court Reports, II-2205 (hereafter referred to as ‘Greenpeace’). For an excellent analysis see Torrens, D.: *Locus Standi* for Environmental Associations under EC law-Greenpeace-A Missed Opportunity for the ECJ. 8 [1999] *Reciel* 336.

order to present the standard type situation when a surrogate organization brings an action for annulment.

Three environmentalist groups and local residents of the Canary Islands challenged the legality of a bundle of Commission Decisions that granted aid from the European Regional Development Fund (ERDF) in order to contribute to the construction of two power stations. The allocation of funds from the ERDF is governed by Art. 7 of Regulation 2052/88⁸⁹ that requires that the distribution of funds complies with the purposes and provisions of the EU legal order, including environmental protection. Conformity with the preceding provision is ensured through the requirement that an Environmental Impact Assessment (EIA) should be carried out, but such an assessment was not commissioned. Subsequently, the first of four installments was paid to the Spanish Government in 1993, thus triggering the challenge by Greenpeace before a Spanish court, with the purpose of declaring the payment to be illegal and stopping further payments. The action was unsuccessful because the doctrine of *Foto-Frost*⁹⁰ prevents national courts from declaring a Community act invalid, but it is interesting to note that the Greenpeace's action was dismissed not because of lack of standing but due to the nature of the measure that was challenged and the limitations imposed by the ECJ in *Foto-Frost*. On this point, AG Cosmas in his Opinion stated that "I do not see in what way the issue of the legality of that decision could be raised in the context of national proceedings. Those proceedings can concern only the lawfulness of the administrative authorizations granted for construction of the electricity-generating power stations, or of the environmental impact assessment".⁹¹

The next step for Greenpeace was to initiate action before the CFI on the basis that the provisions of the Environmental Impact Directive⁹² were not complied with prior to the payment of the first installment, because there was no Environmental Impact Assessment carried out.⁹³ Greenpeace also raised the point that it had raised this failure in communications to the Commission both prior and after the payment of the installment.⁹⁴ The applicants argued that the CFI must adopt a liberal approach to standing in the present case

⁸⁹ Official Journal L 185, 15. 7. 1988. 9.

⁹⁰ Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, [1987] ECR-4199.

⁹¹ Case C-321/95 P, *Stichting Greenpeace Council v Commission*, [1998] European Court Reports, I-1651, Opinion, para. 74.

⁹² Directive 85/337/EEC, 27 June 1985, Official Journal 1985, L 175/40.

⁹³ Case T-585/93, *Greenpeace and others v Commission*, [1995] European Court Reports, II-2205, para. 25.

⁹⁴ *Ibid.*, paras. 10, 13.

because their interest is in the protection of the environment and not of an economic nature.⁹⁵ Moreover, the applicants stated that the membership of the association were individually concerned, thus creating a logical need to allow the association to represent their interests.⁹⁶ Alternatively, the applicants claimed that their focused and coordinated involvement during the stage of legal control differentiated them from other potential applicants.⁹⁷

The CFI dismissed the application based on the lack of individual concern⁹⁸ in accordance with *Plaumann* as manifested in the failure of the applicants to show that they were different from all other individuals resident or working in the area and their inability to form a closed category in line with the *Calpak* test.⁹⁹ The appeal to the ECJ was the only option left for Greenpeace and the local residents seeking to challenge the decision.

Before examining the judgment of the ECJ, it must be clarified that the findings of the Court were expressed in an unusually laconic manner whereby only eight short paragraphs were devoted to the examination of the arguments of the applicants. The ECJ, relied on the CFI's judgment, thus it can be argued that the ECJ endorsed the arguments of the CFI which requires reference to both judgments in order to fully appreciate the reasoning applied.

The main argument of the applicants was that their communications to the Commission in terms of the lack of an Environmental Impact Study amounted to rights of participation that form procedural rights.¹⁰⁰ The ECJ rejected the argument by highlighting the fact that the participation of Greenpeace was voluntary, unsolicited and not part of the formal consultation process.¹⁰¹ There was no invitation to Greenpeace to participate in the process of consultation, nor was there a request by the Commission to provide evidence and expert opinion that would have placed the organization within the contemplation of the decision-maker.¹⁰² In the absence of a formal element that would create

⁹⁵ *Ibid.*, para. 32.

⁹⁶ *Ibid.*, para. 37.

⁹⁷ *Ibid.*, para. 39.

⁹⁸ *Ibid.*, paras. 54–62.

⁹⁹ Cases 789–790/79, *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] European Court Reports, 1949.

¹⁰⁰ Case C-321/95 P, *Stichting Greenpeace Council v Commission*, [1998] European Court Reports, I-1651, para. 25.

¹⁰¹ *Ibid.*, paras. 28–29. In *Greenpeace*, *op. cit.*, note 88, the CFI reached that conclusion in paras. 61–63.

¹⁰² *Stichting Greenpeace*, *op. cit.*, note 100, paras. 28–29. In *Greenpeace*, *op. cit.*, note 88, the CFI reached that conclusion in paras. 61–63.

participation rights, Greenpeace was not differentiated and singled out from the wider public in a manner that would grant standing.

Greenpeace's second argument stated that the Environmental Impact Directive's preamble sets as the purpose of the measure the protection of the public concerned,¹⁰³ thus outlining the creation of a closed group of applicants that possessed procedural rights of participation. The ECJ rejected the argument on the basis that the directive's purpose was too vague and could not be construed as creating a closed class of applicants that could have participation rights by virtue of their interest in environmental matters.¹⁰⁴ A directive is a general legislative measure that differs significantly to a decision and a failure under a decision to follow certain procedural requirements could create a closed class, whereas it is incoherent to have a closed class formed from a general legislative measure like a directive.¹⁰⁵

Greenpeace made a third related argument contending that the right to environmental protection ensured through environmental policies could never form a closed class since by definition such interests are communal and of such paramount importance that warrants the granting of standing for their protection.¹⁰⁶ The ECJ repeated its earlier point, namely that the applicants lacked individual concern as defined in *Plaumann* and could not be distinguished and singled out from any other resident, worker or tourist.¹⁰⁷

The decision is myopic and reflective of an inability to adjust to the demands created by the persistent reliance on *Plaumann*.¹⁰⁸ The overall effect is that the Courts remained within the spirit of their interpretation of individual concern and the pre-existing restrictive jurisprudence, which can be seen as an attempt to avoid criticisms for applying double standards in favour of pressure groups. In response, it can be argued that interest groups are more powerful and organised than individual applicants therefore it would be easier for those associations to meet the individual concern requirements. Moreover, a different approach would have created a paradox where an individual was offered weaker

¹⁰³ *Stichting Greenpeace, op. cit.*, note 100, para. 22. In *Greenpeace, op. cit.*, note 88, the CFI reached that conclusion in para. 56.

¹⁰⁴ *Stichting Greenpeace, op. cit.*, note 100, paras. 29–31.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, para. 25.

¹⁰⁷ *Stichting Greenpeace, op. cit.*, note 100, paras. 27–28. In *Greenpeace, op. cit.*, note 88, the CFI reached that conclusion in para. 55.

¹⁰⁸ For criticism see Torrens: *op. cit.*, Cygan: *op. cit.*, 1002–1008; Reid, E.: *Judicial Review and the Protection of Non-Commercial Interests in the European Community*. (2001) 1 *Web Journal of Current Legal Issues*, <<http://webjcli.ncl.ac.uk/2000/issue1/reid1.html>>.

protection than organised groups, thus triggering criticism for expanding the liberal approach to individual applicants.

Nonetheless, the preceding line of reasoning must be approached with scepticism since the wider context of the strict approach to standing for individual applicants needs to be considered as a relevant factor requiring the relaxation of rules applying to interest groups in order to address certain of the deficiencies of the system. Unfortunately, yet understandably as the author argued elsewhere,¹⁰⁹ the ECJ refused to alter its position in the most important interest group case that came before it.

The *UPA* case¹¹⁰ represented for some an opportunity to reform the unduly problematic *Plaumann* test and to set the criteria for standing in general and for interest groups in specific on a completely new foundation.¹¹¹ The case concerned UPA, a major Spanish trade association that represents the interests of Spanish farmers, that sought review of a Council Regulation concerning olive oil production aid and price caps. The ECJ stated in unequivocal terms that “a natural or legal person does not, *under any circumstances*, have standing”¹¹² if the *Plaumann* conditions are not met, thus directly rejecting the option to create an exception. The ECJ placed the burden on the national courts by requiring them to ensure access to effective judicial protection through establishing an appropriate system of legal remedies and procedures. The duty under Art. 10 EC required, according to the ECJ,¹¹³ that the national courts should facilitate as far as possible access to a court when there is a claim of invalidity, by construing national rules accordingly. Therefore, the ECJ explained that the system of remedies is complete at the Union level and that the alternatives to Art. 230 EC are effective, with the obligation to ensure access resting with national courts.¹¹⁴ The decision was reaffirmed in *Jégo-*

¹⁰⁹ Kombos: *op. cit.*

¹¹⁰ Case C-50/2000 P, *Union de Pequeños Agricultores v. Council* [2002] European Court Reports, I-6677.

¹¹¹ Granger, M-P.: Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quére et Cie SA v Commission and Union de Pequeños Agricultores v Council*. (2003) *Modern Law Review*, 124; Albors-Llorens, A.: The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat? 62 (2003) *Cambridge Law Journal*, 72.; Craig, P.: Standing, Rights, and the Structure of Legal Argument. 9 (2003) *European Public Law*, 493.; Ragolle, F.: Access to Justice for Private Applicants in the Community Legal Order: recent (r)evolutions. 28 (2003) *European Law Review*, 90.

¹¹² UPA, *op.cit.*, note 110, para. 37, emphasis added.

¹¹³ *Ibid.* note 110, para. 40–42.

¹¹⁴ *Ibid.* note 110, para. 40–42.

Quèrè,¹¹⁵ a case that has no interest group element, and in this respect analogous to the *UPA* judgment where the standing of the trade association was considered in conjunction and inseparably from the general standing issue for individual applicants. Therefore, the *UPA* case focused solely on the standing according to *Plaumann* and made no reference to the distinct class of challenges by interest groups, thus falling outside the scope of this paper. It is suffice to say that the *UPA* case reaffirmed the approach of the ECJ that perceives interest groups and individual applicants as a unit under the umbrella of *Plaumann*.

In conclusion, the restrictive approach to standing of individual applicants seeking to challenge legislative measures at the Union level has provided the skeleton for the development of an equally restrictive jurisprudence in relation to interest groups. The agency analogy has been excluded by the ECJ and can not provide an effective alternative for circumventing the standing hurdles resulting from the *Plaumann* formula. However, it is submitted that the study of the case law relevant to interest groups offers an insight into ways in which such groups could create the conditions that would enable them to show the existence of individual concern and those conditions refer mainly to the creation of procedural rights expressly mentioned in and forming part of the legislative framework.

In other words, the existence of procedural rights ranging from participation to consultation would trigger a legitimate expectation that is essentially procedural and which would provide the foundation for the obtainment of individual concern. Representative groups can ensure the right to challenge legislative enactments through the medium of creating the conditions for influencing decision making bodies, which is in effect their driving goal. Whether the expansion of effective and efficient influencing for the attainment of a status of individual concern is the theoretically appropriate and principled manner for ensuring access to judicial review, is a completely different issue that would not be removed until the approach to standing is altered. What is more practical is the examination of the possibility of having a different judicial approach based on the type of claim and the area that the legislative action regulates. In other words, is there a typological approach in relation to representative groups that creates layers of standing rights? If the question is affirmatively answered, one must examine the input of that typology in the quest for finding effective ways to circumvent standing restrictions for representative groups and subsequently individual applicants. The employment context offers an interesting paradigm reflecting such factors.

¹¹⁵ Case C-263/02 P, *Commission v Jègo-Quèrè* [2004] CMLR 12.

4. Representative groups in the sunshine and away from the *Plaumann* shadow: Lessons from the employment context

The Union's interest in promoting employment is entrenched in the Treaty and in secondary legislation, epitomised in Art. 2 EC that refers, *inter alia*, to the promotion of a high level of employment and social protection. At a functional level, the promotion of employment is performed at two interrelated levels. First, the gradual development of legislative initiatives¹¹⁶ and secondly, the development of the "flanking policies"¹¹⁷ that refer to the use of structural instruments that aid the restructuring and repositioning of the economic organisation of Member States.¹¹⁸ The role of the European Social Fund (ESF) has been integral in financing the initiatives of the Union aiming to supplement national policies that address matters of employment. The management and general use of the ESF is regulated by Council Regulations¹¹⁹ and is subject to judicial review, thus safeguarding the legitimacy, accountability and financial control of institutional action.¹²⁰ It is at this stage that Art. 230 EC becomes relevant and it is interesting to examine the approach of the Courts within an area like employment that has three specific characteristics.

Firstly, the allocation of funds from the ESF is primarily a political and economic decision founded on considerations of employment policy and long-term economic strategic organisation. Secondly, the use of the ESF exists in parallel and supplements national policies because employment and social policies remain within the ambit of national competence,¹²¹ thus in pragmatic terms the application of the ESF is the corollary of complex political compromise.¹²² Thirdly, there are always economic actors with a substantial

¹¹⁶ See for example Council Regulation 99/1260/EC, laying down general provisions concerning the Structural Funds (Official Journal 1999, L 161/1) and Council Regulation 99/1784/EC concerning the European Social Fund (Official Journal 1999, L 213/5).

¹¹⁷ Szyszczak, E.: *EC Labour Law*. 2000. 159.

¹¹⁸ See the excellent analysis by Skiadas, D.: *Judicial Review of the Management of Assistance Provided by the European Social Fund for the promotion of Employment*. 6 (2002) *European Integration online Papers (EIoP)*, <<http://eiop.or.at/eiop/texte/2002-001a.htm>>, 1.

¹¹⁹ Council Regulation 99/1260/EC, laying down general provisions concerning the Structural Funds (Official Journal 1999, L 161/1) and Council Regulation 99/1784/EC concerning the European Social Fund (Official Journal 1999, L 213/5).

¹²⁰ Hervey, T.: *European Social Law and Policy*. London, 1998. 39.

¹²¹ *Ibid.*, 4.

¹²² Tsakoglou, P.: *Social Policy*. In: Georgakopoulos, T.–Tsakalotos, E. (eds.): *Economic Policies of the European Union*. Athens, 1996. 205, 211.

interest in the allocation of resources from the ESF that are willing to challenge Community acts. From an economic perspective, the granting of aid, the continuation, the suspension and the readjustment of the size of financial input flowing from the ESF, represent a strong incentive to recipients and applicants for challenging measures that impact on their financial position.¹²³ It is within this framework that the judicial approach must be placed.

The approach of the ECJ and the CFI has been reflective of the preceding issues and is an illustration of economic pragmatism and judicial realism that contrasts with the broader jurisprudence that follows the dogmatic and problematic reasoning of *Plaumann*. The differences are numerous and are briefly examined in order to offer a complete picture of the judicial approach to challenges related to the ESF, before examining representative groups.

In the first place, the notion of a reviewable act has been broadly construed with the ESF context. The *ERTA*¹²⁴ judgment that established that reviewable acts include any act that produces legal effects has been applied broadly in the context of the ESF to include exclusively the legislative acts adopted by the Commission. Under the ESF, the national authorities cooperate with the Commission in the decision making process to the extent that “shared responsibility for the decisions of the Commission”¹²⁵ can be assumed. However, the ECJ held that the final responsibility rests with the Commission,¹²⁶ thus clarifying the identity of the body responsible for the legislative measure and excluding the delegation of legal responsibility to bodies that would fall outside the scope of Art. 230 EC.

¹²³ Neuwahl, N.: Article 173 paragraph 4 EC: Past, Present and Possible Future. 21 (1996) *European Law Review* 17, 18.

¹²⁴ Case 22/70, *ERTA*, [1971] European Court Reports, 263, paras. 48–55. See also Joined Cases C-8/66, C-9/66, C-10/66, C-11/66, *Cimenteries CBR Cementsbedrijven NV v. Commission of the European Communities*, [1967] European Court Reports, 75 (a letter is reviewable); C-106/96, *United Kingdom v. Commission of the European Communities (re Poverty 4)*, [1998] European Court Reports, I-2729 (a press release); C-57/95, *France v. Commission of the European Communities*, [1997] European Court Reports, I-1627 (a communication).

¹²⁵ Assumption rebutted by *Skiadas*: *op. cit.*, 3.

¹²⁶ See C-32/95, *Commission of the European Communities v. Lisrestal-Organizaçào Gestão de Restaurantes Colectivos Lda and Others*, [1996] European Court Reports, I-5373, para 29; Case T-271/94, *Eugenio Branco Lda v. Commission of the European Communities*, [1996] European Court Reports, II-749 para 39; Case T-151/95, *Instituto Europeu de Formação Profissional Lda (INEF) v. Commission of the European Communities*, [1997] European Court Reports, II-1541 para 36.

At the same time, the ECJ has balanced its approach by appreciating the distinct economic character of the operation of the ESF and as a corollary it has safeguarded the decision-making process that is purely advisory, expertise based and policy oriented. An example to that effect is the internal guidelines adopted by the Commission concerning the net financial corrections¹²⁷ whereby the Commission is empowered to suspend or reduce the assistance granted if irregularities are found on the basis of technical calculations provided by the internal guidelines. The challenge of the internal guidelines has been unsuccessful since the ECJ¹²⁸ found that the guidelines do not create rights or obligations for third parties and do not have produce legal effects. The same protective approach has been taken in relation to the reports and recommendations adopted by the anti-fraud bodies of the Union when examining the financial propriety in managing resources allocated from the ESF. The ECJ held that these reports are mere notifications to the national authorities and the Commission and produce no legal effects because it is the responsibility of the recipients of the reports to determine whether legal measures of recovering the resources should be taken.¹²⁹

The balanced approach of the ECJ that ensured the protection of advisory bodies entrusted with technical matters has not extended to situations where the challenge of a legislative measure is made difficult because of the practice adopted by the Commission. Normally, the Commission issues a decision under the regulations that provide the legislative framework for the ESF and sends a letter to the national authority as a matter of notification, but without the actual decision enclosed. The national authorities either write to the recipient of the ESF assistance and inform them about the decision of the Commission or forward the Commission's letter and the decision itself. Therefore, the recipients of ESF assistance rarely receive the actual decision of the Commission, thus any potential challenge will lack all the information about the decision and would by implication be incomplete. The ECJ has identified the procedural gap and provided the necessary protection to incomplete

¹²⁷ In the context of Art. 24 Council Regulation 88/2052/ EEC as amended by Council Regulation 93/2081/EEC.

¹²⁸ Case C-443/97, *Spain v Commission*, [2000] European Court Reports, I-2415, paras. 28–36.

¹²⁹ Case T-492/93, *Nutral SpA v Commission of the European Communities*, [1993] European Court Reports, II-1023 paras 26–29; Case C-476/93 P, *Nutral SpA v Commission of the European Communities*, [1995] European Court Reports, I-4125 paras 30–31.

challenges lacking information¹³⁰ provided that there is evidence of the existence of a decision.¹³¹

Finally, the more favourable approach of the ECJ in the context of the ESF is evident in the indirect expansion of the standing for privileged applicant to cover regional authorities involved in the operation of the ESF.¹³² Moreover, the ECJ held that the lack of challenge to the standing of local and regional authorities was an important factor that pre-empted the Court from examining the standing of such bodies on its own initiative.¹³³ Nonetheless, the Court stopped a step short from including local bodies as a matter of right in the class of privileged applicants by stating that the fact that the standing of regional bodies was intentionally not examined by the ECJ does not imply acknowledgment of the challenge was brought by a legal entity equivalent to a Member State.¹³⁴ Therefore, in the context of the ESF there is an effective, yet not formal, expansion of the privileged applicants' class to include regional bodies that "have a vital role to play in the articulation of cohesion and integration policies".¹³⁵

In relation to private applicants, the approach of the ECJ departs from the *Plaumann* reasoning of economic unrealistic results and unduly restrictive narrowing of standing rights. One possible explanation, though simplistic, is the fact that under the legislative framework regulating the operation of the ESF, the Commission uses decisions and not regulations, thus limiting the scope of application of the measure. In other words, there is practically no danger to have challenge to a regulation that if successful, it could grant standing rights to numerous applicants. At the same time, the exclusive use of decisions renders the identification of potential applicants predictable and the number of such applicants is *ab initio* limited to those parties that the decision singles out. Therefore, within the context of the ESF the *actio popularis* concern of the ECJ and the possibility of an open ended class of applicants being formed are

¹³⁰ C-157/90, *Infortec-Proyectos e Consultadoria Lda v Commission of the European Community*, [1992] European Court Reports, I-3525, para 14.

¹³¹ C-130/91, *ISAE/VP and Interdata v Commission*, [1992] European Court Reports, I-69, para 11).

¹³² *Skiadas: op. cit.*, 6.

¹³³ *Joined Cases C-62/87 and C-72/87, Exécutif régional Wallon and SA Glaverbel v Commission*, [1988] European Court Reports, 1573 para 8.

¹³⁴ C-95/97, *Région Wallone v Commission*, [1997] European Court Reports, I -1787 para 5. See similar conclusion in Besila Vika, E. and Papagiannis, D.: *Contemporary Competences of Local Government and European Integration*. Athens, 1996. 95–96.

¹³⁵ *Skiadas: op. cit.*, 6; Evans, A.: *The EU Structural Funds*. Oxford, 1999. 301.

excluded by the fact that the decisions are practically identifying and limiting the number of challengers.¹³⁶

The jurisprudence of the ECJ shows a consistency in granting standing to applicants that were third parties to the decision of the Commission, but who can be distinguished and singled out since they were identified expressly in the decision.¹³⁷ The direct and individual concern requirement is satisfied in this context in cases relating to the suspension and withdrawal of assistance¹³⁸ and to cases relating to the granting of assistance with the beneficiaries clearly named in the decision.¹³⁹ Moreover, the ECJ has shown a willingness to recognise in effect rights to legitimate expectations in situations where the Commission refuses to make a payment that it has previously undertaken to grant,¹⁴⁰ regardless of the fact that no decision granting the assistance exists. The CFI has applied this reasoning in the *Murgia Messapica* case¹⁴¹ where the applicant had previously applied for assistance and participated substantially in prolonged procedures for evaluation of their application by the Commission.

Therefore, there is a shift in the approach of the Courts within the context of the ESF, with an assumption in favour of granting standing and contra to the traditional *Plaumann* rationale, as evident from the case law in relation to competitors of the final recipient of assistance. The ECJ has ruled that such competitors may challenge the validity of the decision granting the assistance to another beneficiary if it can be established that the market position of the applicant has been significantly effected by the assistance granted.¹⁴² This generous approach must be qualified with reference to the condition that the competitor and the recipient are located in geographically proximity to each

¹³⁶ Skiadas: *op. cit.*, 7.

¹³⁷ Case C-291/89, *Interhotel v Commission*, [1991] European Court Reports, I-2257 para. 13; Case C-304/89, *Estabelecimentos Isidoro M. Oliveira SA v Commission*, [1991] European Court Reports, I-2283 para. 13.

¹³⁸ Case C-181/90, *Consorgan-Gestão de Empresas, Lda v Commission*, [1992] European Court Reports, I-3557 para. 12; Case C-189/90, *Cipeke-Comércio e Indústria de Papel Lda v Commission*, [1992] European Court Reports, I-3573 para. 12.

¹³⁹ Case T-450/93, *Lisrestal-Organização Gestão de Restaurantes Colectivos Lda and Others v Commission*, [1994] European Court Reports, II-1177 paras. 45-46; Case T-85/94, *Eugénio Branco Lda v Commission*, [1995] European Court Reports, II-45 paras. 25-26.

¹⁴⁰ Case T-465/93, *Murgia Messapica v Commission*, [1994] European Court Reports, II-361.

¹⁴¹ *Ibid.*, para. 26.

¹⁴² Case C-169/84, *COFAZ v Commission*, [1986] European Court Reports, 391 para. 28; Joined Cases T-447/93, T-448/93, T-449/93 *Associazione Italiana Tecnico Economica del Cemento, British Cement Association, Titan Cement Company SA v. Commission*, [1995] European Court Reports, II-1971 paras 55-56, 80.

other¹⁴³ and the establishment by the competitor of an interest resulting from participation in the proceedings leading to the adopted decision.¹⁴⁴ Consequently, the approach of the Courts can be seen as departing from the strict formalistic conditions and more importantly from the spirit of *Plaumann*, but the marked difference has failed to filter to the standing of representative groups.

The general conditions for representative groups that apply in general apply in the field of employment law. Trade associations and interests groups within the framework of the ESF must show that a personal interest exists in the case that is distinct from those of the industrial policy of the Member State concerned¹⁴⁵ and that the general interest of the membership has been affected within the *Plaumann* meaning.¹⁴⁶ Alternatively, it would suffice to show that the membership could have brought an action challenging the decision,¹⁴⁷ and that procedural rights flowing from participation existed.¹⁴⁸

Before criticising the narrower approach to the standing of representative groups when compared to the more liberal stand towards applicants in the context of the ESF, it must be noted that the case law relating to representative groups within the ESF is extremely limited. The reason for this is the comparably greater possibility for successful individual challenges that results from the economically orthodox approach to challenges of measures in the context of the ESF. Moreover, there is the example of the *Murgia Messapica* case¹⁴⁹ where the applicants were a group of entrepreneurs set up to develop economic activities at the rural level, in the Italian Murgia Messapica region, and specifically to implement the Leader Programme launched by the Com-

¹⁴³ Joined Cases C-10/68, C-18/68, *Eridania v Commission*, [1969] European Court Reports, 459, 481.

¹⁴⁴ Case C-264/82, *Timex Corporation v. Council and Commission*, [1985] European Court Reports, 849, paras. 12-16; Case C-169/84, *COFAZ v Commission*, [1986] European Court Reports, 391, paras. 25-26.

¹⁴⁵ Case C-282/85, *Comité de Développement et de Promotion du Textile et de l'Habillement v. Commission*, [1986] European Court Reports, 2469 para 18.

¹⁴⁶ Joined Cases 16/62, 17/62, *Confédération Nationale des Producteurs de Fruits et Legumes v Council*, [1962] European Court Reports, 471, 479-480; Case T-117/94, *Associazione Agricoltori della Provincia di Rovino v Commission*, [1995] European Court Reports, II-455 paras. 27-28.

¹⁴⁷ Case T-197/95, *Sveriges Betodlares Centralförening and Sven Åke Henrikson v Commission*, [1996] European Court Reports, II-1283, para. 35.

¹⁴⁸ Case C-313/90, *CIRFS and others v Commission*, [1993] European Court Reports, I-1125 paras. 29-30; Joined Cases 67,68 and 70/85, *Kwekerij Gebroeders Van der Kooy BV and Others v. Commission*, [1988] European Court Reports, 219 paras. 20-24.

¹⁴⁹ Case T-465/93, *Murgia Messapica v Commission*, [1994] European Court Reports, II-361.

mission. The group is, therefore, not a representative group in terms of either offering representation for its membership or pursuing the promotion of certain broader interests, but is rather a collective body representing specific economic interests relating to the funding under a project. Nonetheless, the action was from a group and was approached by the CFI in a favourable way whereby standing rights were granted due to participation in the bilateral (Italian authorities and applicants) and tripartite (Italian authorities, applicants and Commission) discussions and assessments meetings for the proposal submitted by the applicants. Therefore, in this context the CFI was willing to grant standing on the basis of *Plaumann* for a group of entrepreneurs applying for funding under a project financed through the ESF, even if the proposal was initially selected but subject to numerous modifications proposed by the Commission, which were not undertaken by the applicants. The proposal was regarded as incomplete and substandard in the final assessment round, but the mere participation up to that stage was perceived by the CFI as creating procedural rights that satisfied the direct and individual concern requirement. Clearly, the judgment represents a significant shift from the broader approach to standing of both private applicants and representative groups and shows the way for a possible solution to the *Plaumann* problem. By placing the emphasis on participation, representative groups can ensure compliance with the *Plaumann* criteria since the ECJ and the CFI have shown a willingness to recognise procedural rights and a possible procedural legitimate expectation to challenge a legislative measure that has been adopted with the effective participation of the applicant. Therefore, representative groups could be granted standing rights under the present unsatisfactory legal system that is based on *Plaumann* and which influences the approach towards representative groups, if those groups manage to lobby there way into the legislative process. Enhanced participation and influencing the formation of the substance of legislative measures is the essential and core function of representative groups. It must now be used to target the procedural formation of legislative measures by ensuring that any input by representative groups becomes a formal part of the consultation and advisory processes, thus giving rise to procedural rights to participation. Therefore, the case law of the ECJ and the CFI leaves room for participation rights of representative groups that can be quite extensive as the *Murgia Messapica* case¹⁵⁰ shows and the representative groups can take advantage to bring surrogate actions on behalf of their members that would not otherwise be granted standing. The key is in the effective lobbying practices that have to target formal recognition of

¹⁵⁰ Case T-465/93, *Murgia Messapica v Commission*, [1994] European Court Reports, II-361.

their role in the legislative process. Representative groups can go round the standing problem by simply being effective at what they are doing, namely lobbying. Finally, the context within which a representative group operates plays an important role in whether standing would be granted as does the type of claim that the group makes before the Court. The case law has shown that the use of the human rights argument, whether in the form of effective judicial protection or a fundamental right like environmental protection being threatened by the challenged legislative measure, will not be successful by virtue of the paramount importance of human rights. What will make the difference is the existence of documented participation that creates procedural rights and which is not the result of the group's general activity in the field but part of the procedural requirement for the adoption of the measure, as the *Greenpeace* case showed. Moreover, the context of operation could be important, with cases brought within the contexts of state aid, competition, employment and social cohesion being favourably treated by the Courts, but this difficulty can be circumvented if the procedural rights are established in any context.¹⁵¹ Therefore, there is a typology of claims and contexts in relation to the standing of representative groups, but the main deciding factor as regards the granting of standing is the effective lobbying at the procedural level leading to documented participation triggering procedural rights. This solution bypasses typologies of claims and contexts and simplifies standing for representative groups, which can then use surrogate actions on behalf of their membership as a solution to the restrictive criteria of individual concern that effectively exclude individual challenges.

Epilogue

The issue of *locus standi* performs an instrumental function in the process of judicial review and should act as the gateway that would distinguish between claims that are artificial and fabricated and claims that have a substance. In the Union, the regulation of standing on the basis of the *Plaumann* criterion has proved an impossible hurdle for individual applicants seeking to challenge the validity of a legislative measure. This regrettable outcome has filtered through to the challenges brought by representative groups. Consequently, the possibility of partially redressing the shortcomings of *Plaumann* through the medium of representative groups and the agency analogy, has been preempted by the reflection of the restrictive tests for individual concern to actions brought by

¹⁵¹ See Torrens: *op. cit.*, Cygan: *op. cit.*

representative organizations. The ECJ's approach and the approaches of national courts towards representative groups and their right to initiate challenges are in state of divergence. The English legal system has managed to draw a dichotomy between fraudulent and unfounded claims that tend to reproduce litigation and aim to frustrate the formation and implementation of policies, from genuine and helpful challenges that fill in the gaps of accountability. The task is not simplistic, but it has proved to be beyond the ECJ that insists on the monolithic argument that there is a danger of creating a flood of cases that are unfounded and which take advantage of a liberal stand towards the standing of representative groups. The real concern of the ECJ seems to be the reluctance to create an exception to *Plaumann* that in effect grants broader rights to representative groups than individual applicants. This legitimacy concern has persistently influenced the ECJ to shed the shadow of *Plaumann* to the standing of interest groups. In the quest for a solution, this paper has examined the possibility of having a typology of claims and fields of activity that are treated more favorably by the ECJ. The conclusion reached states that the use by representative groups of arguments that are founded on human rights, like effective judicial protection and the protection of the environment, is not creating a positive framework that could facilitate the departure from the *Plaumann* yardstick. Moreover, there seem to be no strong thematic typology that is sympathetically treated by the ECJ since the exceptional relaxation of standing requirements for interest groups can not be identified in insulated areas. In this respect, even in the field of environmental protection the ECJ has refused to adopt a more liberal approach.

Therefore, there is no clear thematic or argumentative typology that can be identified in the approach of the Court, but there seems to be a uniting thread that connects most of the cases where the ECJ relaxed its approach: participation. It is submitted that the only way to create positive conditions for standing rights is for the representative groups to engage in effective lobbying practices that target formal recognition of their role in the legislative process. The differentiating factor in recognising standing rights by the ECJ is the existence of documented participation, continuous involvement in the specific area and engagement with the institutions during the drafting stage. These features trigger procedural rights and create a legitimate expectation to be part of the review of legality process. Put differently, the only way to take the standing of representative groups away from the shadow of *Plaumann*, is for interest groups to be effective at what they are doing, namely lobbying. Whether that type of light is bright enough to remove the shadow entirely, it remains to be seen but it can be state with certainty that any light is better than the *Plaumann* darkness.