OPINION OF ADVOCATE GENERAL JACOBS
delivered on 10 July 2003 [1]

1. In this case, the Commission appeals against a judgment of the Court of First Instance [2] declaring admissible an application brought by Jégo-Quéré et Cie SA (hereafter 'Jégo-Quéré') under the fourth paragraph of Article 230 EC for the annulment of Articles 3(d) and 5 of Commission Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels. [3]

2. The fourth paragraph of Article 230 EC provides that:

'Any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

3. In order to show that it has the requisite standing to proceed with its application, Jégo-Quéré therefore needs to demonstrate among other things that the provisions of the regulation which it seeks to contest are of 'individual concern' to it.

4. The traditional interpretation of 'individual concern' is that laid down by the Court of Justice in *Plaumann* v *Commission* [4] whereby natural or legal persons may be regarded as individually concerned by a measure not addressed to them only if it affects their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

1 — Original language: English.

2 — Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365.

3 — OJ 2001 L 159, p. 4.

4 — Case 25/62 [1963] ECR 95, at p. 107 of the judgment.

5. The Court of First Instance found that Jégo-Quéré was unable to show individual concern according to the traditional interpretation, but concluded that the strictness of that interpretation meant that in some circumstances Community law would fail to guarantee to individuals access to an effective judicial remedy. It also considered that the traditional interpretation was not required by the wording of Article 230 EC. It therefore proposed a new reading of individual concern, whereby natural or legal persons would be individually concerned by a Community measure of general application which affected their legal position, in a manner which was both definite and immediate, by restricting their rights or by imposing obligations upon them. Applying its new interpretation to the present case, the Court of First Instance concluded that Jégo-Quéré was individually concerned and could therefore proceed with its application for annulment.

6. The Court of First Instance's reasoning must now be assessed in the light of the Court of Justice's subsequent judgment in *Unión de Pequeños Agricultores*, [5] which upheld the traditional interpretation of 'individual concern' as an unavoidable condition for standing under the fourth paragraph of Article 230 EC.

Legal and factual background

7. Article 15 of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system of fisheries and aquaculture, [6] as amended, empowers the Commission to take emergency measures when the conservation of fish stocks is threatened by serious and unexpected upheaval.

8. In December 2000 the Commission and the Council, having been alerted by the International Council for the Exploration of the Sea (ICES), noted the urgent need to establish a plan for the recovery of hake stocks.

9. Pursuant to its power under Article 15 of Regulation No 3760/92, the Commission

5 — Case C-50/00 P [2002] ECR I-6677.

6 — OJ 1992 L 389, p. 1.

adopted Regulation (EC) No 1162/2001 (hereinafter referred to as 'the regulation' or 'the contested regulation'). [7] The aim of the regulation was to reduce catches of juvenile hake. It applied to fishing vessels operating in the areas defined by it, and imposed upon them minimum mesh sizes, varying according to the areas concerned and the different net fishing techniques employed, irrespective of the type of fish which a given vessel sought to catch.

10. Jégo-Quéré's application for annulment relates to Articles 3(d) and 5 of the regulation (hereinafter referred to as the 'contested provisions'). Article 3(d) of the regulation prohibited the use of 'any demersal towed net to which a cod-end of mesh size less than 100 mm is attached by any means other than being sewn into that part of the net anterior to the cod-end'. Article 5 of the regulation specified the geographical areas to which the regulation applied and the precise prohibitions applicable to each area. As regards towed nets, the prohibitions applied to mesh sizes of between 55 and 99 mm; as regards fixed gear, they applied, depending on the zone concerned, to mesh sizes of less than 100 or 120 mm.

11. The regulation was of limited duration and remained in force only until 1 March 2002. Prohibitions substantially similar to those which it contained have subsequently been enacted in Commission Regulation No 494/2002 of 19 March 2002 establishing additional technical measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e. [8]

12. Jégo-Quéré is a fishing company established in France which operates on a regular basis in the waters south of Ireland in ICES sub-area VII, one of the areas to which the regulation applies. It fishes mainly for whiting, which represents, on average, 67.3% of its catches. It owns four vessels over 30 metres in length and uses nets having a mesh of 80 mm.

Procedure before the Court of First Instance and the contested judgment

13. On 2 August 2001, Jégo-Quéré brought proceedings before the Court of

7 — Cited in note 3 above.

8 — OJ 2002 L 77, p. 8.

First Instance for annulment of Articles 3(d) and 5 of the contested regulation. The Commission responded by raising an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. By its judgment, the Court of First Instance dismissed the Commission's objection and made an order for the action to proceed.

14. The Court of First Instance held, first, that the contested provisions were, by their nature, of general application, being addressed in abstract terms to undefined classes of persons and applying to objectively determined situations. [9] However, it concluded, on the basis of settled case-law, that they could none the less form the subject of an application for annulment under Article 230 EC provided that they could be shown to be of direct and individual concern to Jégo-Quéré. [10]

15. The Court of First Instance found the criterion of direct concern to be fulfilled in the present case, [11] but concluded that Jégo-Quéré could not be regarded as individually concerned on the basis of the criteria hitherto established by Community case-law. [12]

16. It began by recalling the traditional interpretation of individual concern, laid down by the Court of Justice in *Plaumann* v *Commission*, [13] whereby natural or legal persons will be regarded as individually concerned by a measure not addressed to them if it affects their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee. [14]

17. Applying that traditional interpretation to the present case, the Court of First Instance noted that the contested regulation affected Jégo-Quéré only in its objective capacity as a fishing company operating by a certain method and in a certain area, in the same way as any other economic operator actually or potentially in the same situation. [15] Nor were there any particular circumstances which would impose upon

9 — Paragraph 23 of the judgment.
10 — Paragraph 25 of the judgment.
11 — Paragraph 26 of the judgment.
12 — Paragraph 38 of the judgment.
13 — Cited in note 4, at p.107 of the judgment.
14 — At paragraph 27 of the judgment.
15 — At paragraph 30 of the judgment.

the Commission a special duty to take account of Jégo-Quéré's particular situation when adopting the contested regulation. [16]

18. The Court of First Instance then turned to consider Jégo-Quéré's argument that, were its action to be dismissed as inadmissible, it would be denied any legal remedy enabling it to challenge the legality of the contested measure.

19. As the Court of First Instance noted, [17] according to settled case-law, Community law enshrines the right to an effective remedy before a court of competent jurisdiction, a right based on the constitutional traditions common to the Member States and on Articles 6 and 13 of the European Convention on Human Rights, and reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000. [18]

20. In order to determine whether an applicant might indeed be deprived of the right to an effective remedy if unable to pursue an application for annulment pursuant to the fourth paragraph of Article 230 EC, the Court of First Instance examined the adequacy of two alternative methods of proceeding.

21. First, it considered the possibility of proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC. It noted that, in a case such as that before it, there are no implementing measures capable of forming the basis of an action before national courts. In its view, the fact that an individual might be able to bring the validity of a Community measure before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him would not constitute an adequate means of obtaining judicial protection: individuals cannot be required to breach the law in order to gain access to justice. [19]

22. Secondly, the Court of First Instance considered whether an action for damages based on the non-contractual liability of the Community, as provided for in Article 235 EC and the second paragraph of Article 288 EC, would constitute an adequate alterna-

16 — Paragraphs 31 to 37 of the judgment.
17 — Paragraphs 41 and 42 of the judgment.
18 — OJ 2000 C 364, p. 1.
19 — Paragraph 45 of the judgment.

tive to an application for annulment. It concluded that such a procedural route:

'... does not, in a case such as the present, provide a solution that satisfactorily protects the interests of the individual affected. Such an action cannot result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal. Given that it presupposes that damage has been directly occasioned by the application of the measure in issue, such an action is subject to criteria of admissibility and substance which are different from those governing actions for annulment, and does not therefore place the Community judicature in a position whereby it can carry out the comprehensive judicial review which it is its task to perform. In particular, where a measure of general application, such as the provisions contested in the present case, is challenged in the context of such an action, the review carried out by the Community judicature does not cover all the factors which may affect the legality of that measure, being limited instead to the censuring of sufficiently serious infringements of rules of law intended to confer rights on individuals (see Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 to 43; Case T-155/99 Dieckmann & Hansen v *Commission* [2001] ECR II-3143, paragraphs 42 and 43; see also, as regards an insufficiently serious infringement, Joined Cases C-104/89 and C-37/90 Mulder and Others v Council and Commission [1992] ECR I-3061, paragraphs 18 and 19, and, for a case in which the rule invoked was not intended to confer rights on individuals, paragraph 43 of the judgment of 6 December 2001 in Case T-196/99 Area Cova and Others v Council and Commission [2001] ECR II-3597).' [20]

23. The Court of First Instance therefore concluded that neither the procedure provided for in Article 234 EC nor that laid down by Article 235 and the second paragraph of Article 288 EC is sufficient to guarantee to persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation. [21]

24. Whilst it accepted that such a circumstance could not constitute authority for changing the system of judicial remedies and procedures established by the Treaty, it considered there to be no compelling reason to adopt the strict traditional interpretation of individual concern. [22] It therefore proposed instead a new interpretation whereby a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question 'affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him', regardless of the number and position of other persons who are or may be likewise affected. [23]

20 — Paragraph 46 of the judgment.
21 — Paragraph 47 of the judgment.
22 — Paragraphs 48 and 49 of the judgment.
23 — Paragraph 51 of the judgment.

25. On that basis, the Court of First Instance held that the contested regulation was of individual concern to Jégo-Quéré given that it laid down detailed obligations governing the mesh size of the nets which Jégo-Quéré was entitled to use.[24] The Court of First Instance therefore dismissed the Commission's objection of inadmissibility and ordered that the proceedings should continue on the substance.

The appeal

26. In the present case, the Commission asks the Court of Justice to set aside the judgment of the Court of First Instance and to declare the action for annulment of the contested regulation inadmissible or, in the alternative, refer the matter back to the Court of First Instance. Jégo-Quéré asks the Court to declare the appeal inadmissible in so far as it was commenced out of time; or alternatively, to reject the appeal as unfounded and to confirm the judgment of the Court of First Instance. It also advances its own cross-appeal, asking the Court to set aside the contested judgment in so far as it holds that Jégo-Quéré is not individually concerned within the meaning of the fourth paragraph of Article 230 as traditionally interpreted in the Community case-law.

24 — Paragraphs 52 and 53 of the judgment.

Admissibility of the appeal

27. As a preliminary point, Jégo-Quéré submits that the appeal should be dismissed as inadmissible. It asserts that the Commission gives no indication of the date on which the judgment was notified to the Commission, as required by Article 112(2) of the Rules of Procedure of the Court of Justice. Accordingly, and in the absence of proof to the contrary, Jégo-Quéré questions whether the appeal was indeed lodged within two months following the notification of the judgment.

28. The Commission has appended to its appeal the judgment of the Court of First Instance together with the letter which accompanied it from the Registrar of the Court of First Instance. That letter bears a stamp indicating that the letter was received on 8 May 2002. The Commission's appeal is dated 17 July 2002.

29. It therefore appears both that the Commission provided an indication in its appeal of the date on which it was notified of the contested judgment and that it lodged its appeal within the time limit laid down by what was then Article 49 of the Statute of the Court read together with Articles 80 and 81 of the Court's Rules of Procedure.

30. Hence, I am of the view that the Commission's appeal is admissible.

Substance of the appeal

31. The Commission advances two pleas in law. The first alleges a breach by the Court of First Instance of its Rules of Procedure in failing to refer the present case to a plenary session. Article 14 of those rules provides that a case may be referred to the Court of First Instance sitting in plenary session 'whenever the legal difficulty or importance ... so specify'. The Commission asserts that the decision of the Court of First Instance in the present case to reverse the settled case-law of the Court of Justice was a matter of considerable legal difficulty and importance, and that the failure to refer the case to a plenary session therefore constituted a manifest error of appreciation on the part of the Court of First Instance.

32. The second plea advanced by the Commission alleges that the interpretation of individual concern adopted by the Court of First Instance in the present case is in breach of Community law. So wide is that interpretation, the Commission asserts, that it effectively suppresses the condition of individual concern altogether, and is therefore contrary to the express wording of the fourth paragraph of Article 230 EC. Moreover, in the Commission's view, the Court of First Instance was mistaken to conclude that the traditional interpretation of individual concern fails to guarantee the right to effective judicial protection. That right does not confer any general entitlement upon individuals to bring a direct action for annulment and is adequately protected in Community law given the possibility for individuals to challenge the validity of Community measures via Article 234 or Articles 235 and 288 EC. Lastly, the Commission speculates that a wider interpretation of individual concern might result in fewer indirect challenges being permitted to proceed via Article 234, by reason of the line of Community case-law beginning with *TWD Textilwerke Deggendorf*.[25]

33. As to the Commission's first plea, Jégo-Quéré submits that it must be rejected given that the Commission at no stage of the procedure before the Court of First Instance requested that Court to refer the case to a plenary session, despite the explicit reference to such a possibility in Article 51 of the Rules of Procedure of the Court of First Instance.

34. In response to the Commission's second plea, Jégo-Quéré asserts that, far from suppressing the requirement of individual concern, a broad and flexible interpretation of that notion is both consistent with the fourth paragraph of Article 230 and necessary in order to guarantee the right of individuals to an effective judicial remedy.

25 — Case C-188/92 [1994] ECR I-833.

35. Contrary to the Commission's submissions, Jégo-Quéré submits that the contested judgment does not misconstrue that right by confusing it with an entitlement to bring direct proceedings for an annulment. The judgment proceeds rather on the basis that a direct action is required to secure the right to an effective remedy only in circumstances where no adequate indirect means of challenge is available to individuals.

36. The Court of First Instance was in Jégo-Quéré's view correct to conclude, in a case such as the present where the contested measure takes the form of a regulation, that there exists no alternative procedure which would adequately protect an individual's right to an effective judicial remedy. In the absence of any implementing national measures which could be challenged, the only method whereby an individual could induce national proceedings would be by breaking the law and pleading the invalidity of the Community measure by way of defence.

37. Jégo-Quéré also rejects the Commission's argument that it could obtain a more appropriate remedy, given the short duration of the contested measure, by bringing an action for damages pursuant to Article 235 and the second paragraph of Article 288. Such an argument ignores the fact that the contested measure is merely one stage in an ongoing process of reform to the Common Fisheries Policy, involving the introduction of measures of longer or unlimited duration. As a consequence, Jégo-Quéré would be left with no choice but to bring fresh actions for damages on a periodic basis. It is, moreover, paradoxical to interpret the notion of individual concern restrictively on the basis that Articles 235 and 288 are available to individuals instead. Given that the Court of First Instance already has jurisdiction indirectly to review the legality of general measures in claims for damages at the suit of an unlimited class of individuals, it appears anomalous to insist on such strict standing rules in respect of a direct action for annulment.

38. It is necessary to consider the Commission's second plea in the context of the Court's judgment in *Unión de Pequeños Agricultores* [26] which was delivered after the Commission lodged its present appeal.

39. That case arose out of an application brought by an association of farmers, the Unión de Pequeños Agricultores ('UPA'), pursuant to the fourth paragraph of Article 230, for the annulment of Regulation (EC) No 1638/98 of 20 July 1998 amending the

26 — Cited in note 5.

common organisation of the olive oil market.[27] The Court of First Instance dismissed the application by reasoned order as manifestly inadmissible.[28] UPA appealed to the Court of Justice, arguing that the order infringed its right to effective judicial protection given that the regulation which it wished to challenge did not require any national implementing legislation which could, under Spanish law, give rise to national proceedings such as would allow a reference for preliminary ruling to be made.

40. Having heard the case in plenary session, the Court of Justice dismissed UPA's appeal and upheld the traditional interpretation of individual concern as laid down in *Plaumann*.[29] Whilst accepting that the requirement of individual concern 'must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually', the Court also stated that 'such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts'.[30]

41. In the light of the Court's judgment in *Unión de Pequeños Agricultores*, it seems clear that the Commission must succeed in its second plea, that the Court of First Instance erred in law when it departed from the traditional interpretation of individual concern. By finding Jégo-Quéré individually concerned on the basis of a new interpretation of that concept, after having concluded that individual concern was lacking under the test laid down in *Plaumann*, the Court of First Instance acted in breach of the fourth paragraph of Article 230.

42. Jégo-Quéré seeks to resist such a conclusion on the basis that in the present case, by contrast with *Unión de Pequeños Agricultores*, it is uncontested that Jégo-Quéré could bring its case before a national court only by infringing the law. Jégo-Quéré contends that such a possibility does not adequately protect its right to an effective judicial remedy. It also identifies other grounds for distinguishing *Unión de Pequeños Agricultores*, which I shall discuss in the context of its cross-appeal.

43. As I explained in my Opinion in *Unión de Pequeños Agricultores*, I find highly problematic the strict test of standing currently applicable under the fourth paragraph of Article 230. In my view, that test gives rise to a real risk that individuals will be denied any satisfactory means of challenging before a court of competent jurisdic-

27 — OJ 1998 L 210, p. 32.

28 — Case T-173/98 *Unión de Pequeños Agricultores (UPA)* v *Council* [1999] ECR II-3357.

29 — At paragraphs 36 and 37 of the judgment.

30 — At paragraph 44 of the judgment.

tion the validity of a generally applicable and self-implementing Community measure. It may prove impossible for such individuals to gain access to a national court (which in any event has no competence to rule on validity) [31] otherwise than by infringing the law in the expectation that criminal (or other enforcement) proceedings will then be brought against them when the national court may be persuaded to refer to the Court of Justice the issue of the validity of the measure. Besides the various practical disadvantages which may attend the making of a reference in the context of criminal proceedings, such a procedural avenue exposes the individuals in question to an intolerable burden of risk.

44. Nor do Article 235 and the second paragraph of Article 288 appear to me to supply an adequate alternative remedy. As the Court of First Instance stated in the present case, an action for damages does not allow the Community judicature to perform a comprehensive judicial review of all of the factors which may affect the legality of a Community measure. For such an action to proceed, it is necessary for the applicant to show a sufficiently serious infringement of rules of law intended to confer rights on individuals. The Commission is not, in my view, correct to state that in order to determine whether such an infringement has been shown, it will always be necessary for a Community Court to undertake an exhaustive investigation of the legality of the measure at issue.

45. However, it clearly follows from the Court's judgment in *Unión de Pequeños Agricultores* that the traditional interpretation of individual concern, because it is understood to flow from the Treaty itself, must be applied regardless of its consequences for the right to an effective judicial remedy. [32]

46. Such an outcome is to my mind unsatisfactory, but is the unavoidable consequence of the limitations which the current formulation of the fourth paragraph of Article 230 is considered by the Court to impose. As the Court made clear in *Unión de Pequeños Agricultores*, [33] necessary reforms to the Community system of judicial review are therefore dependent upon action by the Member States to amend that provision of the Treaty. In my

31 — Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20.

32 — Paragraph 44 of the judgment.

33 — At paragraph 45 of the judgment.

opinion, there are powerful arguments in favour of introducing a more liberal standing requirement in respect of individuals seeking to challenge generally applicable Community measures in order to ensure that full judicial protection is in all circumstances guaranteed.

47. I am therefore of the opinion that as the law now stands the Commission's appeal must succeed on the strength of its second plea in law. In the light of that conclusion, it does not appear to me to be necessary to address the Commission's first plea, alleging a breach of the Rules of Procedure of the Court of First Instance.

The cross-appeal

48. There remains the issue whether, as Jégo-Quéré contends, the Court of First Instance was wrong to hold that Jégo-Quéré lacked individual concern within the traditional interpretation of that concept.

49. Jégo-Quéré asserts, contrary to the conclusion of the Court of First Instance, that the contested regulation is not in reality a measure of general application but is rather a bundle of individual decisions, by which Jégo-Quéré is directly and individually concerned, in the form of a regulation. Jégo-Quéré identifies a variety of exceptions provided for in the regulation which, it alleges, are adapted to meet the specific circumstances of various fishing companies operating in the areas to which the regulation applies. According to Jégo-Quéré, the various exceptions do not reflect objective differences and are not justified by the aim pursued by the regulation, which is to protect hake stocks.

50. It appears to me that the Court of First Instance correctly applied the test laid down in the case-law when it concluded that the contested provisions, given that they were addressed in abstract terms to undefined classes of persons and applicable to objectively determined situations, were of general application. [34]

51. Jégo-Quéré further points to two circumstances, in particular, which in its view differentiate it from all other persons affected by the contested regulation, and thereby render it individually concerned within the meaning of the fourth paragraph of Article 230.

34 — At paragraphs 23 and 24 of the contested judgment.

52. First, Jégo-Quéré asserts that it is the only operator which fishes for whiting in the Celtic Sea on a permanent basis with vessels exceeding 30 metres in length and which catches only negligible quantities of juvenile hake in the form of 'by-catch'.

53. However, even if Jégo-Quéré were to demonstrate that it is currently the only operator meeting the criteria which it specifies, it would still be affected by the contested regulation by reason of a commercial activity which other operators, fulfilling the same criteria, could potentially undertake. [35] As the Court of First Instance held, Jégo-Quéré was affected by the contested regulation only 'in the same way as any other economic operator actually or potentially in the same situation'. [36]

54. Secondly, Jégo-Quéré claims to be individually concerned in consequence of the fact that it was the only fishing company, prior to the adoption of the contested regulation, which proposed to the Commission a solution alternative to the imposition upon it of the contested provisions. That solution, whereby independent observers would verify that Jégo-Quéré's vessels did not catch hake, would successfully have accomplished the objective pursued by the regulation.

55. The representations which Jégo-Quéré made to the Commission prior to the adoption of the regulation could only operate to differentiate it in accordance with the case-law relating to individual concern if there were a rule in the applicable Community legislation which granted it some specific procedural guarantee. [37] As the Court of First Instance noted, such is not the case here. [38]

56. I cannot therefore agree with Jégo-Quéré that the contested measure is of individual concern to it according to the traditional interpretation of that concept, with the consequence that its cross-appeal must in my view fail and its action for annulment be declared inadmissible.

35 — See *Plaumann*, cited in note 4, at p. 107 of the judgment.

36 — At paragraph 30 of the contested judgment.

37 — See for example Case T-47/00 *Rica Foods* v *Commission* [2002] ECR II-113, paragraph 55.

38 — At paragraph 36 of the contested judgment.

Conclusion

57. I am thus of the opinion that the Court of Justice should:

(1) set aside the judgment of the Court of First Instance;

(2) declare the action for annulment inadmissible;

(3) order Jégo-Quéré to bear the costs, including those incurred before the Court of First Instance.