Op-Ed

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"Will the Doorkeeper Become More Accommodating Towards Actions for Annulment? AG Emiliou's Opinion in Nicoventures Trading and Others (C-731/23 P)"

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Referring to Franz Kafka's famous depiction of the doorkeeper in *Before the Law*, which became a paradigmatic image of an inaccessible judicial system, Advocate General Emiliou's Opinion in *Nicoventures Trading and Others* (C-731/23 P, Opinion) examines whether, and to what extent, the possibility of *locus standi* under Article 263(4) TFEU should be expanded.

As is well-known, since the landmark *Plaumann* case (Case 25-62) of 1963, the Court of Justice has ardently opposed a relaxation of the admissibility requirements for actions for annulment. Is now, more than 60 years later, the time ripe for a reconsideration of the *Plaumann* case law? According to AG Emiliou, the answer is yes: in his seminal Opinion in *Nicoventures Trading and Others*, he proposes to revisit the 'individual concern' requirement and to adopt a broader interpretation thereof, without abandoning the basic tenets of the *Plaumann* test.

This Opinion deserves particular attention, first and foremost because it represents a valuable attempt to address one of the most pressing and often criticised issues in EU law, *id est* the difficulty for individuals to directly challenge the validity of EU acts.

Second, as the proposals advanced by AG Emiliou are not as far-reaching as the ones put forward by AG Jacobs in *UPA* (C-50/00 P) or by the General Court in *Jégo-Quéré* (T-177/01), they may also stand a greater chance of being followed by the Court. AG Emiliou does not call for a fundamental change of the case law on 'individual concern', but rather invites the Court to smoothly develop its jurisprudence under Article 263(4) TFEU according to the current challenges in the field of fundamental rights protection.

Third, this Opinion offers a detailed, almost manual-like exposition of a key area of the EU system of judicial protection and presents a highly instructive systematisation of the most

relevant case law in this field, making it of notable didactic value as well.

As a summary of the case has already been published on EU Law Live, this Op-Ed will focus on the proposals presented by AG Emiliou concerning the *Plaumann* test.

I. About *Plaumann*

AG Emiliou provides, first of all, an overview of the *Plaumann* case law as it has been applied to date. As is well-known, according to the *Plaumann* test, a natural or legal person, which is not the addressee of the contested measure, is individually concerned by that measure if it 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 those factors distinguishes them individually just as in the case of the addressees'. Thus, a person does not have to be the sole one affected by the contested act to be regarded as individually concerned. Individual concern might, for example, also be established where a measure affects a group of persons who are identified or identifiable when that measure was adopted, by reason of criteria specific to the members of the group. Those persons might be individually concerned inasmuch as they form part of a limited class of persons affected ('closed-group test').

Determining when an individual is to be considered individually concerned by a measure on the basis of the closed-group test regularly gives rise to enormous difficulties, especially where the contested measure is of general application. Just the fact that it is possible to establish the number or identity of those affected by a measure is, for example, not sufficient to show individual concern. Also, the fact that a contested act only applies to a small number of individuals is not decisive. AG Emiliou seeks to shed light on the application of the closed-group test by observing that, in his view, the Court has recognised the individual concern requirement as fulfilled in four situations: where an EU act might have '(i) failed to take into account the position of the applicant; (ii) infringed a substantive right of the applicant; (iii) infringed a procedural right of the applicant; and (iv) produced significant adverse effects on a legitimate interest of the applicant' (point 28). Should the Court seize the opportunity offered by the case *Nicoventures Trading and Others* to clarify that a contested act, even if of general application, may be directly challenged in these situations, it would significantly enhance legal certainty within the EU system of judicial protection.

II. Why, According to AG Emiliou, the *Plaumann* Test Should Not Be Abandoned

As AG Emiliou points out, much criticism has been voiced against the *Plaumann* formula – criticism which, however, often relates to the restrictive effect of the case law under *Plaumann* and is, thus, 'outcome driven'. Commentators argued, for example, that individuals and associations are precluded from acting in the public interest to challenge measures that affect a broader group of people. Furthermore, it has been criticised that the *Plaumann* case law lacks clarity, resulting in a fragmented and casuistic approach to the individual concern requirement.

While AG Emiliou argues that a reconsideration of the *Plaumann* case law is feasible, desirable and timely, he does not adopt a vision similar to that advanced by AG Jacobs in *UPA* or by the General Court in *Jégo-Quéré*. The approach taken by AG Emiliou moves in quite a different direction: it is not about abandoning well-established judicial paths, but rather about adapting a judgment of 1963 to present-day challenges. AG Emiliou argues that the definitions devised by AG Jacobs and the General Court carry certain risks, as they depend on the interpretation of adjectives such as substantial, definite and immediate, which may lead to unpredictable and subjective decisions. Furthermore, he nurtures doubts as to whether these definitions are compatible with the origin, spirit and wording of Article 263(4) TFEU. By providing a textual, historical, and systematic analysis of Article 263(4) TFEU, AG Emilou seeks to show that the *Plaumann* test aligns more closely with the Treaty provisions than the alternative proposals. First of all, he puts emphasis on the term 'individual'. The larger the group of persons claiming to be affected by a measure, the more difficult it should be to regard them as individually concerned. Thus, he disagrees with the argument put forward by the General Court in *Jégo-Quéré* that 'the number and position of other persons who are likewise affected by the [challenged] measure, or who may be so, are of no relevance' (T-177/01, para. 51). He also reiterates arguments that the Court of Justice has advanced in the past in cases such as *UPA* (C-50/00), *Jégo-Quéré* (C-263/02) and *Inuit Tapiriit Kanatami* (C-583/11). For example, he argues that there is no indication that the drafters of the Treaty intend to modify the scope of the admissibility requirements outlined in Article 263(4) TFEU. Furthermore, he refers to the fact that the 'complete system of legal remedies and procedures' is based on both direct and indirect actions. According to AG Emiliou, 'it is not unreasonable that, in many cases, issues of validity of EU acts should first be brought before the national courts, which operate as a filter to decide whether those issues – being prima facie not frivolous – should be referred to the Court under Article 267 TFEU' (point 65). Thus, particular responsibility is to be attributed also to the national courts as the 'ordinary judges of EU law'.

This reasoning aligns with the approach taken by the Court of Justice in its case law and is also reflected in recent policy initiatives, in particular in the context of the reform of the Statute of the CJEU of 2024. While the Court continues to fine-tune the preliminary reference procedure, the action for annulment has not received similar attention directed at broadening access to the Court. Irrespective of whether a more far-reaching reform of the admissibility criteria for actions for annulment would be desirable – in the view of this Op-Ed's author, it clearly would – the proposal put forward by AG Emiliou is to be welcomed. It also remains compatible with the overall trajectory followed by the Court.

III. Plaumann 2.0

The *Plaumann* formula itself is not the object of criticism by the Advocate General. Instead, it is the case law based on the *Plaumann* test which, in his view, lacks clarity, is overly restrictive, and is incompatible with Article 263(4) TFEU. He puts forward three proposals and invites the Court to issue a landmark judgment that re-examines,

clarifies, and fine-tunes the application of the *Plaumann* case-law.

First, the Advocate General proposes that the Court systematise the case law on 'individual concern' in order to provide more clarity as to when this requirement is fulfilled. The Advocate General emphasises that he is not calling for an exhaustive list of all possible situations in which individual concern may be established, but rather for a systematisation that reflects the existing case law.

There is indeed a clear need for clarification of the *Plaumann* case law, as the EU jurisprudence has created a somewhat opaque picture of the *locus standi* rules under Article 263(4) TFEU, having applied different standards depending on the respective factual constellations. At the same time, however, expectations in this regard must be tempered, as the assessment of individual concern is inherently dependent on the specific circumstances of each case. Furthermore, while a systematisation may render judicial protection under Article 263(4) TFEU more transparent and enhance legal certainty, it arguably also bears the risk of halting the further development of the case law in this regard. The dynamic within the system of EU judicial protection and its adaptability to new changes could be significantly constrained.

Second, AG Emiliou suggests refining the closed-group test and underlines that it should not be applied in an excessively restrictive manner. In particular, he criticises that in some cases the CJEU held that the number of persons forming the closed-group cannot be expanded after the adoption of the measure (see the case law cited by AG Emiliou in fn. 87 of his Opinion). It is to be welcomed that the Advocate General calls for abandoning this 'future element' requirement, which has stirred much controversy within the EU law community. According to the Advocate General, the consideration of this criterion results from a misapplication of the *Plaumann* case law and should not be considered when assessing the individual concern requirement. It is posited here that this proposed refinement is overdue and can be expected to be undertaken by the Court. A hypothetical future scenario, which is *ex natura* uncertain and speculative, cannot, and should not, be decisive for the evaluation of the individual concern requirement. Since the admissibility of an action for annulment must be assessed on the basis of the situation at the time when the application is lodged, the analysis of the *Plaumann* criteria must also be confined to the circumstances existing at that moment. Whether the number of operators in a certain sector could increase in the future should be irrelevant for establishing whether a person is presently individually concerned by the contested measure. The 'future element' grants excessive leeway in the application of the *Plaumann* test, as it is inherently vague, difficult to rebut, and opens the door to unpredictable outcomes.

Third, AG Emiliou asks the Court to apply the *Plaumann* case law equally to all types of applicants and in respect of all rights and interests affected. In particular, it should not be decisive whether the applicant's right or interest is of an economic nature or not, and non-profit entities should be treated in the same way as profit-making ones. It is argued here that this proposal also represents a valuable step towards a more objective handling of the *Plaumann* test. It acknowledges that the EU legal framework can

no longer mirror that of the European Economic Community of 1963, when economic issues constituted the lion's share of the Court's caseload.

Revisiting the *Plaumann* case law is, as persuasively stated by the Advocate General, feasible, desirable and timely. As his proposals do not bring about far-reaching changes to the system of EU judicial protection, they would not entail a significant increase in the workload of the Court. His approach would also *inter alia* strengthen the role of associations, which could facilitate the settlement of disputes involving key public interests. Assembling individual claims could, in turn, lead to a reduction in the caseload of the Court. Referring to the historical context in which *Plaumann* was conceived, the Advocate General moreover underscores that the EU legal system has undergone significant changes since 1963. *Plaumann* was rendered in an early stage of the development of EU law, when the protection of fundamental rights had not yet attained the importance it holds today. What was the appropriate approach for an organisation mainly focusing on economic issues may no longer be suitable for a legal order that is evolving more and more towards a human rights organisation. While the Court repeatedly stated that the right to effective judicial protection cannot change the system of judicial review enshrined in the Treaties (for example *Czech Republic* v. *Commission*, C-575/18 P, para. 52), it also emphasised that the provisions governing its jurisdiction must, as far as possible, be interpreted in light of that right. In recent judgments – such as, just to name some, *Associação Sindicaldos Juízes Portugueses* (C-64/16), *Consorzio Italian Management* (C-561/19), *KS and KD* (C-29/22), *Commission v Republic of Malta* (C-181/23) – the CJEU is venturing into new territories by increasingly expanding its own jurisdiction. It is posited here that the time has come to bring the standing requirements for individuals under Article 263(4) TFEU within the realm of this broader evolution.

IV. Rebalancing the 'Complete System of Judicial Remedies'

The restrictive interpretation of the notion of 'individual concern' followed by the Court since *Plaumann* is not mandated by the Treaties but arguably reflects one of several possible approaches chosen by the Court of Justice. Although the remark by the Court that it could not amend the letter of the Treaty is, as such, unobjectionable, there would have been (and there still is) room for a broader interpretation of Article 263(4) TFEU. A rebalancing of the EU system of judicial review towards a more open approach to direct actions constitutes a long-overdue endeavour which is essential for guaranteeing a 'complete system of judicial remedies and procedures'.

While the preliminary reference procedure has seen several notable developments in recent years aimed at enhancing its effectiveness, no comparable evolution has taken place regarding actions for annulment. In *Consorzio Italian Management*, for example, the Court of Justice further refined and clarified the *CILFIT* test by introducing an obligation of national courts of last instance to state reasons when they refuse to refer questions for a preliminary ruling to the CJEU;

and in *Kubera* (C-144/23), the Court of Justice further reinforced this obligation. In these cases, the Court's intention was certainly not to abandon the *CILFIT* criteria of 1982, but rather to enhance the effectiveness of the preliminary reference procedure by adapting those criteria to the needs of an evolving judicial system. What we are now waiting for – and what we can, realistically speaking, expect – is a pendant to the *Consorzio Italian Management* and *Kubera* cases, with a doorkeeper becoming more accommodating, this time in the context of actions for annulment. Will this be *Nicoventures Trading and Others*?

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